1929

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Supreme Court of Canada

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1930

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

The Right Hon. Francis Alexander Anglin, C.J.C., P.C.
" " Lyman Poore Duff J., P.C.
" Pierre Basile Mignault J.
" Edmund Leslie Newcombe J., C.M.G.
" Thibaudeau Rinfret J.
" John Henderson Lamont J.
" Robert Smith J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Ernest Lapointe K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Lucien Cannon K.C.

94765—1½

ERRATA

IN

[1929] S.C.R.

P. 265, 16th line, " commentateurs " should be " commissaires."

P. 270, 18th line, " intervention " should be " interprétation."

ERRATA

IN

[1928] S.C.R.

P. 292, 10th line, " definitely " should be " definitively."

P. 296, 27th line, " policy " should be " polity."

MEMORANDUM

Footnote (p. 22) No. 3 should read "(1877) 2 C.P.D. 445."
Footnote (p. 36) No. 2 should read "(1883) 27 L.C.J. 214."
Footnote (p. 42) No. 3 should read "(1920) 50 D.L.R. 6."
Footnote (p. 166) No. 3 should read "(1921) 20 Ex. C.R. 119."
Reporter's Note, p. 69, should read "Appeal allowed."
This case is now reported in (1929) A.C. 269

MEMORANDUM

The name "A. R. McMaster" on page 137, should read "A. C. McMaster."

MEMORANDUM

NOTICE TO BINDER

The two pages hereto attached are reprints, to be substituted for pages 35 and 36 of 1929 S.C.R.

MEMORANDUM

On the thirtieth day of September, 1929, the Honourable Pierre Basile Mignault, Puisne Judge of the Supreme Court of Canada, retired from the bench, pursuant to section 9 of the *Supreme Court Act*, R.S.C., 1927, c. 35, he having attained the age of seventy-five years.

ERRATUM

Page 417, at the 41st line, the fourth from the bottom of the page, countries should be companies.

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.

Consolidated Mining and Smelting Co. of Canada v. *Murdoch* ([1929] S.C.R. 141). Leave to appeal granted, 24th October, 1929.

Fisheries Act, 1914, Reference re Certain Sections of the, ([1928] S.C.R. 457). Appeal dismissed, 15th October, 1929.

Georgia Construction Company v. *Pacific Great Eastern Railway Co.* ([1929] S.C.R. 630). Leave to appeal refused, 29th October, 1929.

King, His Majesty the, v. *Dominion Building Corporation* ([1928] S.C.R. 65). Appeal allowed with costs, 15th October, 1929.

"Persons", Reference re *Meaning of Word, in s. 24 of the B.N.A. Act* ([1929] S.C.R. 276). Appeal allowed, 18th October, 1929.

Valois v. *de Boucherville* (1929 S.C.R. 234). Leave to appeal refused with costs, 21st June, 1929.

Warré v. *Bertrand* ([1929] S.C.R. 303). Leave to appeal refused, 21st June, 1929.

A TABLE

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

UNITED STATES FIDELITY AND GUARANTY CO (DEFENDANT) . . . . . } APPELLANT;

AND

THE FRUIT AUCTION OF MONTREAL (PLAINTIFF) . . . . . } RESPONDENT.

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*May 11, 14..
*June 12.

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

Insurance—Fidelity or guarantee bond—Employer's declaration—Warranty—Representation—Material concealment—Statements by employer not mentioned in the policy—Arts. 2468, 2485, 2487, 2489, 2490, 2491 C.C.—R.S.Q. 1909, ss. 7027, 7028.

The respondent's action was brought to recover $7,035.29 on two policies or fidelity guarantee bonds issued in 1922 and renewed in 1923, by each of which the appellant undertook to indemnify the respondent up to $10,000 for any loss sustained as the result of any act of fraud or dishonesty on the part of two of its employees, the cashier and his assistant. At the time of the issuance of the policies and of their renewals, the respondent, through its secretary, declared, in answer to written questions put by the appellant, that these employees were not then in default, that all moneys or property in their control or custody had been accounted for, and that the means of ascertaining the correctness of their accounts would be, in the case of the cashier, their checking by auditors every month and, in the case of the assistant cashier, a daily accounting by him to the cashier. It was agreed that "the above answers (were) to be taken as conditions precedent and as the basis of the bond applied for or any renewal or continuation of the same." But these statements were not mentioned or set out in the policies or in the renewal certificates. At the time of the application for the policies and of their renewals, the assistant cashier was already a defaulter, but not to the knowledge of the respondent.

Held, that, in cases under the law of Quebec, where the insurance company denies its responsibility on the ground that some answer or statement was untrue or that some term or condition was not re-

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

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spected or observed by the insured, the first inquiry is whether such term, condition, answer or statement is set out in full on the face or back of the policy, and if it is, it must of course be given effect to; but if it is not, the term, condition, answer or statement cannot be regarded as a warranty or a condition precedent.

Held also, that the answers and statements of the respondent were not warranties or conditions precedent, but merely representations which fairly and reasonably interpreted according to the evidence, were substantially true and involved no material concealment. Moreover, these answers and statements, not being mentioned or even referred to in the policies, did not legally form part of the contract and could not affect or control the terms and conditions of the policies.

Judgment of the Court of King's Bench (Q.R. 45 K.B. 311) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Boyer J. and maintaining the respondent's action.

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

John Hackett K.C. for the appellant.

Eug. Lafleur K.C. and O. S. Tyndale K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—The action is based on two policies or fidelity guarantee bonds by each of which the appellant undertook to indemnify the respondent up to the sum of $10,000.00, by one: for any loss which the latter might sustain as a result of any act of fraud or dishonesty by Thomas James Cambridge, employed by the respondent as bookkeeper and cashier; and by the other: for any such loss sustained through the fraud or dishonesty of J. A. L. Cadieux, employed by it as assistant-cashier.

The two policies were issued on or about the 19th June, 1922 but, by their terms, they applied to the period of one year beginning on the 12th June, 1922 and, in May, 1923, both were renewed for another year from the 12th June, 1923.

The policy relating to Cadieux was lost, but it was admitted that it contained the same terms and conditions as the other.

(1) (1928) Q.R. 45 K.B. 311.

The policy relating to Cambridge, after reciting his name, description and employment, reads as follows:

Whereas, said employee has been required to furnish this bond.

Now, therefore, in consideration of a premium paid for the period from June 12, 1922, to June 12, 1923, at 12 o'clock noon, it is hereby agreed, that, subject to the conditions set forth in this bond, the UNITED STATES FIDELITY AND GUARANTEE COMPANY, a body corporate, hereinafter called the "surety," shall, within three months next after proof of loss as hereinafter set forth, reimburse the employed to the extent of ten thousand 00/100 dollars, and no further for all pecuniary loss sustained by the employer of money, securities or other personal property in the possession of the employee, or for the possession of which he is responsible, by any act or acts of fraud or dishonesty committed by the employee in the performance of the duties of the office or position in the service of said employer as aforementioned, and occurring during the continuance of this bond and discovered and notified to the surety within six (6) months after the expiration or cancellation of this bond, within six (6) months after the death, resignation or removal of the employee prior to the expiration or cancellation of this bond.

This bond is issued subject to the following conditions:

1. The employer shall give notice by registered letter addressed to the president of the surety at its home office, Baltimore, Maryland, promptly after becoming aware of any act which may be made the basis of a claim hereunder.

2. The employer shall, within ninety (90) days after date of said notice, file with the surety an itemized claim hereunder, duly sworn to, and if required the employer shall produce for investigation by the surety at the office of the employer, all books, vouchers and evidence which may be required by the surety.

3. There shall be no liability on this bond for any act or acts of fraud or dishonesty committed by the employee after the employer has knowledge of any act which may be made the basis of a claim hereunder.

4. This bond may be cancelled at any time if the surety shall so elect, by giving thirty (30) days' notice in writing to the employer and refunding the unearned premium upon the surrender of the bond, the cancellation to take effect at the expiration of said thirty days.

5. If any act of the employee causing a loss to the surety shall constitute a crime, the employer shall, at the expense of the surety, lend every assistance to bring the employee to justice.

6. No action of any kind or description shall be brought to recover any claim on this bond unless the same shall be commenced within a period of twelve (12) months next after the employer shall have filed the notice as provided in the first condition.

7. If the employer be a corporation, the knowledge of an officer or director thereof shall be the knowledge of the employer capable of giving rise to a claim under this bond.

8. On application this suretyship may be increased or decreased by the surety, provided the surety's aggregate liability under all its suretyship on said employee shall not exceed the largest bond or engagement on the employee.

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9. This bond may be continued from year to year by the payment of the annual premium to the surety and issuance by the surety of its continuation certificate, provided that the liability of the surety shall not exceed the amount above written, whether the loss shall occur during the term above named, or during any continuation thereof, or partly during said term and partly during said continuation.

10. It is agreed, that none of the foregoing conditions shall be deemed to have been waived by the surety unless the waiver be in writing over the signature of an officer of the surety as its home office, and notice to any agent of the surety shall not be binding upon the surety nor affect a waiver or change in this contract or any part of it.

In witness whereof, the said employee has hereunto set his hand and seal, and the said surety has caused this bond to be sealed with its corporate seal, signed by its president and duly attested by its assistant secretary this 19th day of June, 1922.

Signed, sealed and delivered by the said employee in the presence of

R. G. Walker, T. J. Cambridge, (Seal)
Employee.

Attest:

United States Fidelity and Guarantee Company,

John R. Bland,
President.

F. D. Knowles, Attorney in Fact.
(Seal of surety)

The above policy and the similar one concerning Cadieux were issued upon an application made in each case by the employee, whereupon The United States Fidelity and Guaranty Company, the appellant, wrote to The Fruit Auction of Montreal Limited, the respondent:

An application has been made to this company to issue a bond of security for Mr. ———— as (stating the employment) in your service, at Montreal, to the amount of $10,000. The company desires to have answers to the following questions, and the answers will be taken as the basis of the bond if issued.

The respondent answered the questions in writing and signed them together with the following declaration:

It is agreed that the above answers are to be taken as conditions precedent and as the basis of the said bond applied for, or any renewal or continuation of the same, or any other bond substituted in place thereof, except as specifically changed, that may be issued by the United States Fidelity and Guaranty Company to the undersigned, upon the person above named.

In May, 1923, when the policies were renewed and continued for another year beginning the 12th June, 1923, the appellant had written to both Cambridge and Cadieux the following letter:

We hereby notify you that the current premium of $50 on the above numbered bond, issued by this company on your behalf, for $10,000 to The

Fruit Auction of Montreal Ltd., will be due on the 12th day of June next.

The premium must be paid on or before the date of expiration and a continuation certificate secured, otherwise the bond will lapse.

Kindly have the certificate below filled in and signed by your employer and forward with the premium to Mr. F. O. Knowles, Montreal, Que., when the renewal receipt will be sent you.

The certificate therein referred to was as follows:

To the United States Fidelity and Guaranty Company:

This is to certify, that the books and accounts of (here the name and employment of Cambridge or Cadieux) were examined by us from time to time in the regular course of business and we found them correct in every respect, all moneys or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts, and he is not now in default.

He has performed his duties in an acceptable and satisfactory manner, and no change has occurred in the terms or conditions of his employment as specified by us when the bond was executed.

Exceptions: None.

Dated at Montreal, this 15th day of May, 1923.

The Fruit Auction of Montreal Limited

{Employer Corporate Body}

By Jas. R. Caldwell,
Secretary (Official capacity.)

(Seal)

If a corporation, affix corporate seal.

This notice must not be delivered as a continuation certificate.

This certificate was signed and returned by the respondent and the renewal receipts or continuation certificates were then issued by the company.

On the 16th January, 1924, certain entries in the respondent's bank books aroused the suspicions of the directors. The next day Cambridge and Cadieux admitted irregularities. A complete audit of the books was immediately started and, after many days of investigation, the loss sustained by the respondent was reported as $1,386.48 through the acts of Cambridge and $5,918.81 through the acts of Cadieux. The appellant would not admit its responsibility and consequently action was brought for the sum of $7,305.29, the total of the two amounts above mentioned.

The appellant was regularly notified in accordance with the policies. The respondent has proven a pecuniary loss of $7,305.29 through the acts of fraud or dishonesty committed by Cambridge and Cadieux in the performance of their duties during the currency of the policies. It is, there-

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fore, entitled to recover that sum from the appellant (save $892.87 abandoned at the trial), unless the appellant be right in its contentions now presently to be stated.

Among the questions asked from and answered by the respondent when the policies were issued were the following:

In the case of Cambridge:

11. To whom and how frequently will he account for his handling of funds and securities? To auditors monthly.

12. (*a*) What means will you use to ascertain whether his accounts are correct? Checking of all accounts by above.

(*b*) How frequently will they be examined? Monthly.

(*c*) If applicant is a salesman or collector, are statements rendered to customers in arrears, and at what periods?

(*d*) If applicant is an insurance agent, state period when reported settlements are required.

13. When were his accounts last examined? Month of May.

14. Were they at that time in every respect correct and proper securities and funds on hand to balance? Yes.

15. Is there now or has there been any shortage due you by applicant? No.

16. (*a*) Is he now in debt to you? No.

In the case of Cadieux:

11. To whom and how frequently will be account for his handling of funds and securities? Daily to cashier.

12. (*a*) What means will you use to ascertain whether his accounts are correct? Checking by cashier.

(*b*) How frequently will they be examined? Daily.

(*c*) If applicant is a salesman or collector, are statements rendered to customers in arrears, and at what periods?

(*d*) If applicant is an insurance agent, state period when reports and settlements are required.

13. When were his accounts last examined? June 10/22.

14. Were they at that time in every respect correct and proper securities and funds on hand to balance? Yes.

15. Is there now or has there been any shortage due you by applicant? No.

Statements to the same effect, it will be remembered, were also made in the certificates signed by the respondent when the policies were renewed.

The appellant now contends that these answers and statements were warranties and that in so far as they were affirmative as to facts they were untrue and misleading, in so far as they were promissory, they were not respected, observed or complied with by the respondent.

The Superior Court and the Court of King's Bench refused to regard these answers and statements as warranties

or conditions precedent. In their view, they were only representations. As they were held to have been made in good faith, as the facts were found to be substantially as represented and there was no material concealment, the action was accordingly maintained by both courts.

What we have now to consider is whether both courts have erred as to the nature and effect of the respondent's statements and certificates.

At the outset we think a clear distinction ought to be made—although not indicated in the judgments below—between the case of Cambridge and that of Cadieux.

The proofs of loss filed with the appellant in accordance with the policies were the result of the investigation made by the auditors immediately following the discovery of irregularities in the books of the two employees. These proofs contain itemized statements and form the basis of the claim against the appellant. The evidence at the trial was strictly confined to them and no evidence was offered of any other moneys misappropriated, stolen or embezzled. Their accuracy was conceded. They must, therefore, be taken to shew exactly the situation of Cambridge's and Cadieux' accounts as they stood when the respondent made its answers on the 12th day of June, 1922 or signed the certificates on the 15th day of May, 1923.

If we look at the proofs of loss in the case of Cambridge, we find that not only had he no shortage when the policy was issued in June, 1922, but he actually had an overage of $10.57. No cash was proven to have been received by Cambridge and not entered in the books, no moneys illegally withdrawn before the 15th June, 1923. A statement of I.O.U's of his for $526.30 is dated the 17th November, 1923. True it contains an enumeration of several I.O.U's, but for these no other date was proven. The date of the 17th November, 1923 was sufficient for the respondent's purpose to shew that the misappropriation occured during the continuance of the policy. If the appellant wished to connect the I.O.U's with the dates of the answers before the issue of the policy or of the certificate before the renewal, it was incumbent upon it to establish this connection. Not even an attempt was made to do so and the appellant was apparently content to accept the dates appearing in the proofs

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of loss and the exhibits thereto attached as accurate. Upon the evidence, Cambridge's accounts were correct both on the 12th of June, 1922 and on the 15th of May, 1923. There was then no shortage due by him and he was not indebted to the respondent on either of those dates. The result is that the appellant has utterly failed to make out a case against respondent, as regards Cambridge, on the ground of untruthfulness in the answers or in the statements of the certificate for renewal.

This does not however entirely dispose of Cambridge's case, because of the complaint that the so-called promissory warranties were not complied with. But it will be more convenient to discuss the nature and effect of these alleged warranties together with those invoked in Cadieux' case.

For that purpose, a few facts must be adverted to. In that respect, we adopt the findings of the trial judge, concurred in by the Court of King's Bench, and fully justified by the record.

At the time of the application for the policies as well as at the time of their renewal, Cadieux was already a defaulter. Before the application he had embezzled the sum of $892.87, and it was for that reason that at the trial the respondent agreed to reduce its claim by that amount. When the policy was renewed, Cadieux' shortage was considerably larger. The respondent, on the other hand, had no knowledge of this and only became aware of Cadieux' infidelity the day before the appellant was notified, while it realized the extent of such infidelity only after the investigation was completed.

Now the appellant points out that, in answer to its questions, the respondent, in June, 1922, had stated that, at that time, Cadieux' accounts were " in every respect correct and proper securities and funds on hand to balance," that there was not then nor had there been any shortage due by Cadieux and that he was not in debt to the respondent.

Likewise, in the certificates for renewal, it was stated that Cadieux' books were examined by the respondent in the regular course of business and were

found correct in every respect, all moneys or property in his control or custody being accounted for, with proper securities and funds on hand to balance his accounts and he is not now in default. He has performed his duties in an acceptable and satisfactory manner * * *.

The respondent further invoked the agreement

that the above answers (were) to be taken as conditions precedent and as the basis of the said bond applied for, or any renewal or continuation of the same,

and urged that notwithstanding the respondent's good faith, the falsity of its declarations had the effect of avoiding the contract.

According to the Civil Code of Quebec, the respondent was the insured under the policies now in question. Article 2468 C.C. reads as follows:

2468. Insurance is a contract whereby one party, called the insurer or underwriter, undertakes, for a valuable consideration, to indemnify the other, called the insured, or his representatives, against loss or liability from certain risks or perils to which the object of the insurance may be exposed, or from the happening of a certain event.

The employees, Cambridge and Cadieux, were the applicants. They are so referred to throughout the questions sent by the appellant to the respondent before the issue of the policies.

The respondent was

obliged to represent to the insurer fully and fairly every fact which shews the nature and extent of the risk, and which may prevent the undertaking of it, or affect the rate of a premium (Art. 2485 C.C.).

Misrepresentation or concealment either by error or design, of a fact of a nature to diminish the appreciation of the risk or change the object of it, is a cause of nullity. The contract may in such case be annulled although the loss has not in any degree arisen from the fact misrepresented or concealed (art. 2487 C.C.).

But

the obligation of the insured with respect to representation is satisfied when the fact is substantially as represented and there is no material concealment (Art. 2489 C.C.).

Two more articles of the Quebec Civil Code should be cited:

2490. Warranties and conditions are a part of the contract and must be true if affirmative, and if promissory must be complied with; otherwise the contract may be annulled notwithstanding the good faith of the insured.

They are either express or implied.

2491. An express warranty is a stipulation or condition expressed in the policy, or so referred to in it as to make part of the policy.

Implied warranties will be designated in the following chapters relating to different kinds of insurance.

The "different kinds of insurance * * * designated in the following chapters" are marine insurance, fire insurance and life insurance, bottomry and respondentia. There are under the Code, no implied warranties in fidelity bonds or policies such as we have here.

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These articles of the Code should be read together with the following "general provisions applicable to all companies or associations" in the Revised Statutes of Quebec, 1909, in force when the appellant issued the policies:

7027. When the subject matter of any insurance contract is property or an insurable interest within the limits of the province, or is in connection with a person domiciled or resident therein, any policy, certificate, interim receipt, or writing evidencing the contract shall, if signed, countersigned, issued or delivered in the province, or committed to the post office or to any carrier, messenger or agent, to be delivered or handed over to the assured, his representative or agent in the province, be deemed to evidence a contract made in the province, and the contract shall be construed according to the law of the province, and all moneys payable under the contract shall be paid at the office of the chief officer or agent of the company or association affecting the insurance in the province. This article shall have effect notwithstanding any agreement, condition or stipulation to the contrary.

7028. 1. Where an insurance contract made by any company or association, is evidenced by a written instrument, the company or association shall set out all the terms or conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso modifying or impairing the effect of any such contract made or renewed after the tenth day of February, 1909, shall be good and valid or admissible in evidence to the prejudice of the assured or beneficiary.

2. Nothing contained in this article shall exclude the proposal or application of the assured from being considered with the contract, and the court shall determine how far the insurer was induced to enter into the contract by any misrepresentation contained in the said application or proposal.

With Mr. Justice Greenshields in the Court of King's Bench, we apprehend that the solution of the present case must be found in the law above stated, however valuable and interesting may be the references made by counsel for both parties to the decided cases and the authorities in England or United States.

The policies now before us are contracts in favour and for the benefit of the Fruit Auction Company, although not signed by the latter.

Under the statute of Quebec, all terms and conditions had to be set out

in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition * * * (was) good or valid or *admissible in evidence* to the prejudice of the assured or beneficiary.

(See *Kiernan* v. *Metropolitan Life* (1). The "instrument"

(1) [1925] S.C.R. 600.

evidencing the contract referred to in sect. 7028 of the statute is undoubtly the policy and the renewal receipt. This is made still clearer by the provision in subsection 2 of 7028 that the proposal or application may be " considered with the contract."

Warranties, by force of arts. 2490 and 2491 C.C., in order to be " a part of the contract " must be " expressed in the policy, or so referred to in it as to make part of the policy."

In this case, we find set out in the policies or the renewal receipts neither the documents of the 12th June, 1922 containing the questions and answers with the declaration at the foot signed by the respondent, nor the certificates for renewal sent by the respondent on the 15th May, 1923. These answers and statements, these declarations and certificates of the respondent are nowhere mentioned or even referred to in the policies or renewals, nor is it therein anywhere expressed that they are to be taken as conditions precedent or warranties. They do not therefore legally form part of the contract and they do not affect or control the terms and conditions of the policy. In fact, " not having been set out in the policies," they are expressly declared by the statute not to be " good and valid " terms and conditions of the contracts and they were not even " admissible in evidence " against the respondent beneficiary.

The policy is above recited in full. In terms, it is declared subject to ten enumerated conditions, none of which is alleged to have been infringed. On the other hand, condition no. 3 specifically stipulates that

> there shall be no liability on this bond for any act or acts of fraud or dishonesty committed by the employee after the employer had knowledge of any act which may be made the basis of a claim hereunder.

The implication is that until knowledge is brought home to the employer, the liability of the insurance company remains unaffected.

As a result, the statements made by the respondent in its answers and certificates were neither warranties nor conditions precedent and they were no part of the terms and conditions of the contracts.

That is the fundamental distinction between this case and other cases where the answers and statements of the in-

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sured were incorporated in the policies or bonds, such as *The Harbour Commissioners of Montreal* v. *The Guarantee Company of North America* (1). In that case, the circumstances were so vastly different as to render the decision quite inapplicable to the present one. There was however this main distinction that the promises and conditions there held to have been disregarded by the insured, and for the non-fulfilment of which he was declared not entitled to recover, were stipulated in the policies themselves as express conditions upon which they were granted.

It is hardly necessary to point out that the judgment of this court in *The Dominion of Canada Guarantee and Accident Company, Limited* v. *The Housing Commission of the City of Halifax* (2), can have no bearing upon the present decision, based entirely upon the special statute and the Civil Code of Quebec. Perhaps it should be noted, however, that, in that case,

> it was recited in the policy that the Commission had made certain statements in writing to the company in (its) application

and these statements were expressed to be "material" and conditions precedent to the right of the employer to recover under the policy.

In cases under the law of Quebec, where the insurance company denies its responsibility on the ground that some answer or statement was untrue or that some term or condition was not respected or observed by the insured, the first inquiry is whether such term, condition, answer or statement is set out in full on the face or back of the policy and if it is, it must of course be given effect to; but if it is not, the term, condition, answer or statement cannot be regarded as a warranty or a condition precedent. All that remains for the Court, if such term, condition, answer or statement is contained in the proposal or application of the assured, is to determine how far it constituted a misrepresentation which induced the insurer to enter into the contract. The difference is that while the warranty of the existence of a fact must be literally true and it is no answer to say that (the) declaration was made in good faith and in ignorance of its untruth, while promissory warranties must be strictly

(1) (1893) 22 Can. S.C.R. 542. (2) [1927] S.C.R. 492.

complied with (C.C. 2490); with respect to representation, it is sufficient if the fact represented be substantially true and there be no material concealment.

These are matters for the court to determine, as the statute expressly states, and in each case therefore it becomes largely a question of ascertaining the true meaning and intent of the answers and statements made by the assured, in the light of the special circumstances and context.

We should now consider some judgments of this court such as: *Arnprior* v. *United States Fidelity* (1); *Railway Passengers Assurance Company* v. *Standard Life* (2), *London Guarantee & Accident Company* v. *City of Halifax* (3) and *Rural Municipality of Victory* v. *Saskatchewan Guarantee & Fidelity Company* (4) to which we have been referred by counsel. Each of these cases turned mainly upon the determination of the scope of the answers or statements of the assured and of their materiality in the assumption of the risks by the assurers.

The Corporation of the Town of Arnprior v. *The United States Fidelity and Guaranty* (1) was from the province of Ontario. This court had under consideration section 144 of the Ontario *Insurance Act* (R.S.O. 1897, c. 203) which was almost verbatim the same as s. 7028 R.S.Q. 1909. The principal point involved appears to have been whether the rule of law contained in the statute was inoperative unless it was itself "embodied by an express stipulation in the insurance policy." It was held that the Act did not

require the policy to state that any particular representation was material to the contract, its effect being only that no misrepresentation shall avoid the policy unless it is material.

There, by the terms of the bond itself, reference was made to the fact of the insured having delivered to the insurance company

a statement in writing setting forth the nature and character of the office or position to which the employee has been elected or appointed, the nature and character of his duties and responsibilities and the safeguards and checks to be used upon the employee in the discharge of the duties of said office or position, and other matters, which statement is made a part thereof.

(1) (1914) 51 Can. S.C.R. 94.
(2) (1921) 63 Can. S.C.R. 79.
(3) [1927] S.C.R. 165.
(4) [1928] S.C.R. 264.

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The assured was asked what means were used and would be used to ascertain whether the accounts of a tax collector were correct, the answer was: the "auditors examine the rolls and his vouchers from treasurer yearly." The auditors never had in fact examined a single collector's roll and never, in any succeeding year, was such examination made. Upon the evidence and the context of the questions, the majority of the court held that this was a material misrepresentation avoiding the policy.

So, in *Railway Passengers Assurance* v. *Standard Life* (1), the assured's answers were held to have been evasive, misleading and so framed as to give the impression that the employee's accounts were audited monthly, which they were not, and thus they did not "represent to the insurer fully and fairly every fact which shows the nature and extent of the risk" within the terms of art. 2485 C.C. The policy itself contained an agreement by the insured whereby the truth of its answers to the questions of the insurer was made the basis of the contract.

London Guarantee & Accident Co. v. *City of Halifax* (2) was another case of a tax collector. Several points were raised for consideration by the court, but one of them was the complaint of the insurance company respecting certain answers by the city to questions submitted with regard to the proposed guaranty, which answers, along with others, were to be taken as the basis of the contract. Newcombe J., writing for the majority of the court, reviewed the evidence at considerable length and with the greatest care, as a result of which he came to the conclusion that under all the circumstances, the answers complained of, when given a reasonable interpretation, could not be relied on to prevent recovery under the bond.

In *Municipality of Victory* v. *Saskatchewan Guarantee Fidelity Company*, (3) there was a jury trial. The jury found that the representations made by the assured were true. And, of course, the main inquiry was whether there was evidence on which the jury were entitled to find as they did. The conclusion, unanimously arrived at by the court, was that the verdict on that ground was justified, but this

(1) 63 Can. S.C.R. 79. (2) [1927] S.C.R. 165.
(3) [1928] S.C.R. 264.

conclusion was reached after full consideration of all the particular circumstances and after viewing the questions and answers as a whole, in the light of their fair and reasonable interpretation.

It should be added that, of the four judgments just referred to, only one, *Railway Passengers* v. *Standard Life* (1) came under the Quebec Code. When comparing them with the present case, due allowance must be made for the fact that the relevant law was different and that considerations which must bear upon our judgment here could not be made to apply there. In fact these previous decisions are now discussed only because counsel laid stress on their possible bearing in the present case.

The *Arnprior Case* (2) and the *Railway Passengers Case* (1) were decided against the assured. The *City of Halifax Case* (3) and the *Municipality of Victory Case* (4), on the contrary, were decided against the insurance company. This seems to indicate that, strictly speaking, no precedent can be found in any of them for the propositions propounded by the appellant. The question whether there was material misrepresentation is obviously one of fact, which the court must determine according to the peculiar features of each case.

Let us therefore examine the facts and circumstances with which we are confronted. The answers and statements which are made the basis of the appellant's complaint have already been recited. They are not in the application and the respondent was not the applicant. In the *Arnprior Case* (2), this fact was observed and two at least of the learned judges of this court held that this would preclude the case from being "brought within the literal terms" of the Ontario statute (which was the same as section 7028 R.S.Q.). We shall assume nevertheless that the document signed by the present respondent could properly be described as part of the "proposal" of the assured within the meaning of the statute.

The proof shews that the respondent had retained the services of a chartered accountant of many years' experi-

(1) 63 Can. S.C.R. 79.
(2) 51 Can. S.C.R. 94.
(3) [1927] S.C.R. 165.
(4) [1928] S.C.R. 264.

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ence. The books of Cambridge and Cadieux were audited by him monthly. His monthly reports were sent to the board of directors of the respondent in the following form:

> I have audited the books and accounts of your company including the cash vouchers for the operations of the month of * * * and I have found the whole correct. I herewith enclose you the following statements:
>
> 1. Trial balance.
> 2. Accounts receivable.
> 3. Accounts payable.
>
> Respectfully submitted,
>
> Yours truly,
>
> (Signed).

Then followed the monthly trial balance subscribed with the words: "Audited and verified" and signed by the accountant; and then the list of accounts receivable and payable initialed by him. By every one of these monthly reports the accounts were stated to be correct in every respect, except in a few minor points, which were immediately taken up by the directors and for which satisfactory explanations were promptly given. Not one of the reports gave the slightest indication of any ground for suspicion. In fact, the auditor himself suspected nothing until the discovery made by the directors at their meeting of the 16th January, 1924. As appeared at the trial, the auditing was not all it should have been. In fact, the auditor counted the cash on hand only about once a year. The appellant strongly relies on this and claims that accordingly the undertaking of the company to have Cambridge account monthly for the funds and securities he had on hand was not fulfilled.

But, what was the representation made by the respondent? What could the appellant fairly and reasonably understand by the answers the respondent made to its questions, if not that the respondent had engaged the services of a reputable accountant, that this accountant would audit the books of Cambridge and Cadieux monthly, and that, in the course of doing so, he would check the accounts and would be expected to perform all the ordinary duties of an auditor? The appellant was thus informed that the respondent would trust to its auditor for these purposes, and its answers implied nothing more. The appellant did not expect that the directors or the officers of the respondent

would check the work of their auditor and would review it to find out whether it had been properly carried out. They had the right to believe that it would be, and to assume that it was. Moreover, as stated by one of the expert accountants heard in this case, a review of the auditor's work was quite out of the question. It would not be apparent to anybody who looked at the books that they were not correct. This

would not appear unless one actually set himself down for an absolute investigation.

The insurance company never expected that such investigation would be made. It knew that the respondent, by its answer, meant nothing more than that it undertook to have an auditor, reputed to be competent, and to see that this auditor should make a monthly audit. This representation was fulfilled, and the respondent did its whole duty under its undertaking. The evidence of the experts is that the monthly reports which the directors got from the auditor

would imply that the cash had been examined and counted and (that) the cash stated to be found (was) on hand.

The words "audited and verified" would be understood to mean that the auditor had checked the cash and

it would be reasonable, on receiving this report, to think the cash had been checked.

The respondent did not undertake to go beyond that; its answers did not mean that it would; nor could the appellant reasonably interpret them as so meaning.

Likewise, when the respondent represented that Cadieux would account "daily to the cashier" and that "checking by the cashier" would be the means of ascertaining whether his accounts were correct, the fair meaning of this representation was that they would have a cashier under whom Cadieux would work and whose duty it would be to check up Cadieux. And so they had. Cambridge, the cashier, had been in their employ and they had known him for quite a while. He was a trusted employee. They had absolute confidence in him and up to that time had had no reason to doubt his fidelity. It would be the ordinary duty of any cashier to check the cash daily. The directors would naturally assume that he was doing his duty and they were entitled to rely upon that. The appellant could not reasonably understand that the answer now being considered meant anything else. The respondent did not guarantee

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the competency of the auditor nor the fidelity of the cashier. If the insurance company wished to secure such a warranty, under the law of Quebec it was incumbent upon it to have it expressed in the policy. But it may be that, in such a case, it would have found it difficult to get the risks.

These considerations apply to the other answers of the respondent and to the certificates for renewals. They do not go further than the information and honest belief of the officer who signed them. It had been indicated to the insurance company that the means to be adopted by the respondent to ascertain whether the accounts were correct would be the examination by the auditor and the checking by the cashier. The auditor was there and never reported anything incorrect; the cashier was there and never reported any irregularity. It was intended that, in its answers and in its statements in the certificates, the respondent should give to the appellant the information which it had from its auditor and from its cashier. Condition no. 7 of the policies stipulated that "the knowledge of the employer" was that of a director or an officer. The auditor, in this case, did not know any more than what he reported. If Cambridge knew more, he never disclosed it to an officer or a director of the respondent. He was not himself such an officer or director.

The insurance company knew that the answers and statements must be based on the information obtained from the auditor and the cashier. They were the only persons who could properly give such information and who were competent to give it. Information from any other employee or officer would not, under ordinary circumstances, be so dependable. In fact, the insurance company really agreed that the information should be obtained from these two men, and it might have had a ground of complaint if the information on which the answers and statements were based had been procured from any other source less likely to be reliable.

On the whole, the answers and statements of the respondent, under the relevant law and statute, were not warranties or conditions precedent, but merely representations. These representations, in the light of their fair and reasonable meaning, were substantially true and involved no

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concealment. The source from which the information conveyed, and which served as a basis for the documents signed by the respondent, would be procured was, or should have been, fully understood by the appellant company, and it must be held to have entered into the contracts and renewals with a complete appreciation of the scope and purport of the answers given and of the statements made by the respondent.

We would confirm the judgment of the trial judge unanimously upheld by the Court of King's Bench of Quebec. The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Foster, Place, Hackett, Mulvena, Hackett and Foster.*

Solicitors for the respondent: *Brown, Montgomery and McMichael.*

ARSENE MESSIER AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

HORTENSIUS BEIQUE (PLAINTIFF) ..... RESPONDENT.

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*May 9.
*June 12.

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

Transfer of shares—Certificate remaining with transferor—Consideration—Services rendered—Donation—Remuneratory donation—Amount transferred exceeding value of services—Nullity—Arts. 754, 776, 804, 806, 808 C.C.

The respondent is a broker dealing in bonds and industrial securities and for some years had business transactions with one P.D. by way of exchanging, selling or buying bonds for him. Some time before his death, P.D. signed a blank form generally known as a "Power of Attorney for transfer of bonds", thus transferring to the respondent 180 shares of a certain industrial company valued at $18,000; and, on the same date, the respondent "accepted the * * * shares (therein) mentioned and so transferred." P.D. retained possession of the certificate of shares until his death. The respondent then claimed, by an action in revendication, from the appellants, the testamentary execu-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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tors of the estate of P.D., the ownership and possession of the certificate. In his pleadings as well as in his testimony at the trial, the respondent alleged that he had attended to the business of P.D. for many years and had never been paid for his services; that in acknowledgment and in payment of the services thus rendered, P.D. made several wills in which he favoured the respondent but which were revoked owing to the influence of M., one of the appellants; that, in lieu of the legacies, P.D. had transferred the above shares to respondent, the whole transaction to be kept secret in order to avoid any intervention from M.; and that it was for that reason that P.D. did not hand over to the respondent the certificate of shares to be registered.

Held that the transfer of shares to the respondent fell within the category of remuneratory donations (*donations rémunératoires*), i.e., donations having for their object the compensation for services rendered by the donee to the donor. As the amount of the transfer to the respondent exceeded the value of the services rendered by him to P.D., the transfer was subject to the same formalities as those prescribed in the case of a gift *inter vivos*, which are of public order and prescribed by the code under pain of nullity. These formalities not having been fulfilled by the respondent, the gift must be declared null, reserving to the respondent any right he may have to make a claim for the value of his services.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Trahan J., and maintaining the respondent's action in revendication.

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

Eug. Lafleur K.C. and *P. St-Germain K.C.*, for the appellants.

Rod. Monty K.C., for the respondent.

The judgment of the court was delivered by

RINFRET J.—Le demandeur-intimé revendique à titre de propriétaire un certificat portant le numéro A112 pour cent quatre-vingts actions privilégiées du capital de la Compagnie de Ciment Nationale. Leur valeur nominale est de $100 chacune; et la preuve est à l'effet que, lors de l'institution de l'action, leur valeur totale était de $18,000.

La revendication de l'intimé s'appuie sur le document sous seing privé que voici:

Procuration pour transfert d'obligations

Je soussigné Pierre Dionne, d'Iberville, déclare avoir cédé contre valeur, et je transfère par les présentes à Hortensius Béique, de Chambly Bassin, les actions privilégiées suivantes de La National Ciment Compagnie, 180 actions privilégiées de $100 nos A112, au montant global de dix-huit mille dollars et enregistrées en mon nom dans les livres de la Compagnie de Ciment Nationale, et je, par les présentes, constitue et nomme irrévocablement comme mon procureur le fiduciaire de la Compagnie de Ciment Nationale, lequel j'autorise à faire et signer pour moi et en mon nom tous les actes nécessaires pour effectuer le transfert desdites actions privilégiées et au besoin se substituer une ou plusieurs personnes, avec les mêmes pouvoirs. Je ratifie et confirme d'avance tout ce que mondit procureur ou son délégué feront légalement en vertu des présentes.

En foi de quoi, j'ai signé à Iberville ce vingt-septième jour d'août 1925.

Pierre Dionne.

Le 27 août 1925.

Témoin:—J'accepte les actions privilégiées ci-dessus mentionnées et leur transfert.

Hortensius Béique.

En apparence, ce document implique une vente ou au moins une dation en paiement par Dionne à Béique. C'est ainsi que l'a vu la Cour du Banc du Roi; et, comme conséquence, elle a été amenée à décider que la revendication du certificat d'actions était justifiée.

Mais la Cour Supérieure avait envisagé la cause d'une façon différente. Béique est un courtier en obligations; et, à l'époque, il était l'agent d'une maison de finance qui faisait le commerce des actions et des obligations par ventes ou par échanges. Le juge de première instance a été d'avis que l'écrit dont il s'agit eût pu être traité comme une constitution de pouvoirs par Dionne en faveur de Béique pour lui permettre d'échanger les 180 actions privilégiées de la Compagnie de Ciment Nationale contre d'autres effets de corporations municipales ou de finance, de commerce ou d'industrie. Mais, d'après lui, la preuve démontrait que l'on était en présence d'une donation. Il l'a déclarée nulle parce qu'elle manquait des formalités essentielles.

C'est, suivant nous, dans ce dernier aspect de la cause qu'il nous faut chercher la solution qui nous est demandée. Nous n'avons pas à nous inquiéter de savoir ce qui serait arrivé si l'intimé s'en était tenu exclusivement au document que M. Dionne lui avait remis. Il ne s'en est pas tenu à cela, et il a lui-même placé le litige sur un autre terrain. Il a cru devoir déclarer la "valeur" qu'il avait donnée pour

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les actions privilégiées que M. Dionne lui a "transférées." Voici comment il s'en est expliqué d'abord dans sa réponse écrite:

3. Pendant plusieurs années il a vu aux affaires dudit feu Pierre Dionne, s'en est occupé régulièrement et n'a jamais été payé de ses services, a fait des transactions pour lui sans n'avoir jamais reçu de commissions, alors qu'il aurait eu le droit de s'en faire payer par lui, le consultant continuellement; en un mot, il était son homme de confiance;

4. En reconnaissance et en paiement des services rendus et de ce qu'il lui devait pour les causes et raisons mentionnées dans l'allégué ci-dessus, ledit feu Pierre Dionne a fait plusieurs testaments dans lesquels il a avantagé le demandeur, mais il les révoquait parce que, disait-il, le défendeur Messier, aussitôt qu'il apprenait qu'il avait fait des testaments, avait assez d'influence auprès de lui pour les lui faire révoquer; à la fin, fatigué de voir que ledit défendeur Messier avait connaissance de ses testaments et les lui faisait révoquer, ledit feu Pierre Dionne, au lieu d'avantager le demandeur dans son dernier testament, lui transporta les actions mentionnées dans * * * la déclaration en disant au demandeur qu'il n'y aurait que lui qui connaîtrait le transfert desdites actions qu'il lui faisait, et que, si d'autres en avaient connaissance, c'est que le demandeur en aura parlé, car personne autre que lui ne serait au courant de ce transfert avant sa mort; c'est pourquoi ledit feu Pierre Dionne n'a pas remis au demandeur ledit certificat N° A 112 pour lesdites actions, afin que le demandeur ne puisse en opérer l'enregistrement, tel enregistrement devant avoir pour effet de faire connaître ledit transfert audit défendeur Messier;

5. Ledit transfert a été donné en reconnaissance et en paiement des services rendus par le demandeur audit feu Pierre Dionne.

Puis, en réponse spéciale à l'objection des appelants que le prétendu transfert invoqué par l'intimé était absolument informe et insuffisant à sa face pour constituer une donation valable: qu'en outre il n'avait pas été enregistré au désir de la loi, ce qui rendait absolument nulle une donation mobilière de ce genre, l'intimé a admis que le transfert n'avait pas été enregistré, en ajoutant cependant qu'il n'avait pas besoin de l'être.

Au procès, voici comment Béique a relaté les circonstances qui avaient accompagné la remise du transfert par M. Dionne:

Voici, Monsieur Dionne m'avait dit qu'il me paierait tout mon travail que je faisais pour lui d'un seul montant, comme je viens de le dire, d'un seul coup, alors un jour il me dit qu'il m'avait placé sur son testament, alors quand j'ai vu que M. Dionne était disposé à me payer le travail que je ferais pour lui, j'ai laissé faire dans ce sens là, et un jour en 1925 Monsieur Dionne s'est plaint à moi qu'il ne pouvait plus faire de testament en ma faveur, ou qui m'avantagerait, sans qu'un nommé Messier le sache et vienne chez lui l'influencer pour me faire sortir de son testament, par des menaces, etc., il me dit je ne peux plus dormir c'est toujours à recommencer à tous les soirs, ça fait 7 à 10 fois que je change, il le sait, en parlant de Messier, il le sait toujours, et c'est tou-

jours à recommencer, là il me dit: "Je vais régler mes affaires avec vous, je vais vous enlever de sur mon testament, et je vais vous faire un transfert d'un montant pour régler ma dette envers vous," alors il m'a demandé là de lui préparer un document dans ce sens là, j'ai pris un blanc de papier pour préparer cela à sa demande, ça demandait peut-être quelqu'un de plus que moi en loi pour faire cela, mais enfin, en regardant mes papiers j'ai vu une formule de transfert que j'avais dans ma poche, et après lui avoir lu cette formule j'ai demandé à M. Dionne si c'était bien cela qu'il voulait faire transporter, il m'a dit c'est bien cela, je lui ai dit je vais me servir de ce blanc de transfert qui est déjà imprimé afin que vous puissiez relire votre volonté plus facilement, alors j'ai rempli le document, le blanc de transfert, et là Monsieur Dionne m'a dit: "De cette manière là il n'y aura que vous et moi qui allons le savoir. Comme cela je serai tranquille," il m'a dit "je vais signer ce transfert, et vous allez le garder, c'est votre paiement, dormez tranquille, vous serez payé, c'est votre paiement."

Il ressort donc de la réponse écrite et du témoignage de M. Béique que ce dernier n'était pas très sûr de recevoir une rémunération pour les services qu'il prétendait rendre à Dionne. Il est possible que, pour une raison ou pour une autre, Dionne ait éprouvé de la reconnaissance pour Béique que, dans quelques-uns de ses testaments successifs, il appelait son "aide et bienfaiteur". Il apprit à Béique qu'il l'avait "avantagé" dans son testament. C'est là que Béique vit, comme il le dit lui-même, "que M. Dionne était disposé à (lui) payer (son) travail". Mais il n'y avait jamais eu entre eux de convention de paiement.

Le 27 août 1925, il lui aurait dit:

Je vais régler mes affaires avec vous. Je vais vous enlever de sur mon testament et je vais vous faire un transfert d'un montant pour régler ma dette envers vous.

Cette déclaration que Béique met dans la bouche de M. Dionne ne cadre pas avec les faits, car, à cette date, Béique avait cessé de figurer comme légataire sur les testaments de M. Dionne depuis le 26 décembre 1924. Ce jour-là, M. Dionne fit un testament où Arsène Messier, l'un des appelants, est institué légataire universel, les deux appelants, sont nommés exécuteurs testamentaires, et l'intimé ne figure en aucune façon même à titre de légataire particulier.

Il ressort encore de la réponse écrite et du témoignage de Béique que le document qu'il invoque maintenant comme transfert des actions de la Compagnie de Ciment Nationale lui aurait été donné en reconnaissance de certains services et fut substitué aux libéralités testamentaires dont Dionne avait jugé à propos de le gratifier. Enfin, le transfert des actions devait rester secret jusqu'à la mort de Dionne.

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Il est très certain que jusque-là Béique n'avait jamais discuté avec Dionne la question de savoir s'il serait rémunéré pour ses services. Aucun compte ne fut jamais présenté. Aucun montant ne fut jamais mentionné. S'il fallait s'en rapporter aux nombreux testaments, l'on voit que Dionne lui-même n'avait aucune idée arrêtée sur le montant qu'il entendait donner à l'intimé. Le 3 septembre 1924, Béique avait un legs de $5,000 et il devenait légataire résiduaire et exécuteur testamentaire. Le 6 septembre 1924, il n'était plus rien et il n'avait aucun legs. Le 9 septembre 1924, il obtenait un legs particulier de $10,000 et il était nommé légataire résiduaire et exécuteur testamentaire conjointement avec Arsène Messier. Le 10 octobre 1924, son legs particulier était réduit à $5,000 et il cessait d'être légataire résiduaire. Le 31 octobre, il réapparaissait comme légataire résiduaire de la moitié des biens de Dionne conjointement avec ses héritiers légaux; et il redevenait co-exécuteur testamentaire avec Arsène Messier. Le 12 décembre 1924, il n'était plus légataire résiduaire que pour un quart; et, enfin, le 26 décembre 1924 il disparaissait complètement du testament comme exécuteur testamentaire, comme légataire universel et comme légataire particulier. Il n'y eut plus d'autres testaments jusqu'au 27 août 1925, date du transfert que Béique invoque maintenant.

De toutes ces circonstances volontairement expliquées par l'intimé lui-même, il résulte que la disposition dont il a été l'objet de la part de Dionne rentre dans la catégorie des donations rémunératoires.

Laurent (vol. 12, n° 333) les définit ainsi:

> 333. Les donations rémunératoires sont celles qui ont pour objet de récompenser les services rendus par le donataire au donateur.

Ces donations peuvent se diviser en trois classes:

1. Celles où les services ne sont pas appréciables en argent. Dans ce cas, la disposition est une véritable libéralité et elle est soumise aux règles ordinaires des donations;

2. Celles où la donation n'excède pas la valeur des services. C'est un contrat onéreux qui peut être valablement fait sans observer les formalités des donations;

3. Celles où la donation excède les services. Elle n'a pas pour but seulement de payer le donataire, mais aussi de

"témoigner par une libéralité la reconnaissance que le disposant ressent à raison de ces services". Elles sont soumises aux formalités prescrites pour les donations entrevifs. (Fuzier-Herman, Répertoire du Droit français, nos 3448 et suiv.).

Il s'ensuit que, dans chaque cas de donation rémunératoire, il y a lieu d'établir la proportion entre les services rendus et la gratification dont le donataire est l'objet. Sans doute on sera moins exigeant quant à la preuve de ces services et à l'appréciation de leur valeur. Il ne s'agira pas de requérir entre eux et la rémunération une équivalence exacte et précise. Mais, d'autre part, l'on ne saurait dire qu'il appartient exclusivement au donateur de fixer souverainement cette valeur au montant qu'il entend accorder au donataire, que sa décision est définitive et défend de chercher la véritable nature et le vrai caractère de la disposition.

Autrement (comme le dit Pothier (Bugnet, 3e éd. vol. 8, p. 380), il aurait été au pouvoir du notaire et des contractants d'éluder, quand ils voudraient, la disposition de l'ordonnance (N.B. Il parle ici de l'ordonnance de 1731, art. 20, qui porte que "même les donations rémunératoires doivent être insinuées; l'art. 806 C.C. est au même effet) en insérant dans l'acte une énonciation de services qui, par la suite, serait devenue de style, et aurait rendu la loi sans effet."

Sans doute, le donateur est libre de donner la somme qu'il veut; mais si elle est hors de proportion avec les services rendus, il ne fait plus un paiement, il fait une libéralité, et nous sommes alors en présence d'un acte de donation. Il ne peut déguiser sa libéralité sous la couleur d'un acte à titre onéreux et la soustraire par là aux prescriptions impératives du Code.

Il ne faut pas oublier, en effet, que sous le Code civil (art. 754) "on ne peut disposer de ses biens à titre gratuit que par donation faite entrevifs ou par testament"; et les dispositions du code qui imposent aux donations une forme spéciale sont d'ordre public et s'appliquent à peine de nullité (Art. 776 C.C.).

La Cour du Banc du Roi, dans la cause de *O'Meara* v. *Bennett* (1), signale l'attitude des tribunaux de la province de Québec qui, d'une manière générale,

si elle ne le déclare pas formellement, semble du moins indiquer que les donations devraient suivre les règles générales d'un acte notarié et d'un

(1) (1918) Q.R. 28 K.B. 332.

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enregistrement et que l'exception du second paragraphe de l'article 776, qui rend possible une dangereuse clandestinité, devrait être bien strictement interprétée.

Monsieur le juge Pelletier, qui fait cette remarque, ajoute:

L'esprit de notre loi, c'est que l'on doit disposer de ses biens par testament ou bien les laisser à ses héritiers légitimes en ne faisant pas de testament; et que, si on veut faire une donation entrevifs, on lui donnera l'authenticité et la publicité qui sont une protection nécessaire.

Et M. le juge Carroll, commentant l'article 808 du Code civil, dit:

Cet article contient une disposition de droit nouveau qui n'existe pas, ni dans l'ancien droit français, ni au Code Napoléon. Cet article décrète que les donations d'effets mobiliers sont exemptées de l'enregistrement, lorsqu'il y a tradition réelle et possession publique par le donataire.

En droit français, l'on n'exige, pour la validité de ces donations, que la tradition réelle seulement, tandis que notre droit a ajouté à cette condition de validité la possession publique par le donataire.

* * * * *

Je ne crois pas avoir besoin de définir ce que l'on doit entendre par possession publique; qu'il suffise de dire que la donation d'effets mobiliers pour être valable ne doit pas être clandestine et connue seulement du donateur et du donataire, comme dans ce cas-ci.

C'est à dessein que nous avons reproduit les passages qui précèdent pour démontrer jusqu'à quel point (sauf la question du don manuel qui ne se présente pas ici, puisqu'il n'y a pas eu tradition du certificat des actions) *O'Meara* v. *Bennett* (1), présente de l'analogie avec la cause qui nous occupe. Il n'est pas sans intérêt d'ajouter que cet arrêt fut approuvé par le Conseil Privé (2).

Le principe général de cette décision avait d'ailleurs été posé par le Comité judiciaire dès 1874 dans l'arrêt de *Richer* v. *Voyer* (3).

La différence entre les diverses classes de donations rémunératoires avait déjà été signalée par Pothier. Au volume 8 de l'édition Bugnet, n° 87, après avoir dit:

Il y avait peu lieu de douter que les donations rémunératoires, qui contiennent une énumération vague de services incertains, dussent être sujettes à l'insinuation * * *.

Il ajoute:

88. Il y aurait plus de difficulté à l'égard des donations qui seraient faites par récompense de services certains, et désignés par l'acte de donations. Néanmoins celles-ci sont aussi sujettes à l'insinuation, si les services, en récompense desquels la donation a été faite, quoique constants, sont des services qui ne sont pas appréciables à prix d'argent, et pour

(1) Q.R. 28 K.B. 332. (2) (1922) 1 A.C. 90.

(3) (1874) 5 R.L. 591; L.R. 5 P.C. 461.

lesquels le donataire n'aurait aucune action contre le donateur pour en être récompensé; car, quoiqu'une donation faite pour récompense de tels services, ne soit pas si parfaite que la donation simple, néanmoins c'est toujours vraiment une donation, puisque le donateur donne, sans qu'il soit besoin de donner. C'est ici, *liberalitas nullo jure cogente facta.*

Que si les services, en récompense desquels la donation a été faite, étaient constants et appréciables à prix d'argent, mais que le prix desdits services fût inférieur en valeur à la chose donnée, ce serait encore une donation, qui, faute d'insinuation, serait nulle, sauf au donataire d'exercer ses actions pour se faire payer du juste prix des services rendus par lui.

En l'espèce, il s'agit donc de décider, à la lumière des principes qui précèdent, si le transfert que Dionne a fait à Béique était un contrat à titre onéreux ou une libéralité en tout ou en partie. Cette décision ne peut dépendre évidemment—et c'est Pothier qui nous le rappelait plus haut—du nom dont les parties ont qualifié leur contrat, mais de la réalité du contrat qu'ils ont vraiment fait.

C'est là (nous dit Laurent (vol. 12, nº 336), une question de faits que les tribunaux décideront d'après les circonstances de la cause. Dans l'application, le juge est nécessairement influencé par les faits; les services sont-ils réels et méritent-ils une récompense, le juge cherchera à maintenir l'acte, alors même qu'il renfermerait un élément de libéralité; les services ne sont-ils pas établis, ou paraissent-ils suspects, le juge s'armera de la sévérité de la loi pour annuler la donation rémunératoire comme viciée en la forme.

C'est un principe reconnu par la Cour de cassation que le caractère rémunératoire d'une donation est laissé essentiellement à l'appréciation des juges du fonds (*Schauer* v. *Fortmann*) (1).

La Cour Supérieure a jugé qu'il ressortait

des circonstances révélées par la preuve que le demandeur est venu en possession de l'écrit sous seing privé (qui fait la base de son action) sans avoir fourni au dit Pierre Dionne bonne et valable considération.

Béique a entrepris de détailler les services qu'il prétend avoir rendus à Dionne. Il s'est surtout tenu dans les généralités. La description qu'il en a donnée fait plutôt penser à "l'énonciation vague de services incertains" dont parle Pothier. Les seules précisions qu'il ait fournies se rapportent à des transactions par lesquelles il a vendu à Dionne ou échangé pour lui des actions de compagnies industrielles ou des obligations de corporations municipales. Il agissait alors comme l'agent de la maison de finance qu'il représentait et il fut payé par cette maison; ou il agissait comme courtier pour son compte personnel, et il a perçu les commissions que les courtiers reçoivent d'ordinaire en pareils

(1) (1860) S. 62.1.599.

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cas. Dans ces derniers cas, il a même remis à Dionne la moitié de sa commission. A cet égard, on peut dire qu'il devait être très content d'avoir la clientèle de Dionne et que cela fut très avantageux pour lui.

En outre, Béique s'est occupé d'un procès intenté par Pierre Dionne pour faire annuler un acte de donation. Il paraît avoir fait certaines tentatives, qui ont d'ailleurs échoué, pour effectuer le règlement de ce procès. Ce sont là tous les services dont Béique parle dans son témoignage. Ce sont les seuls, en tout cas, dont il y ait au dossier la moindre preuve susceptible d'être appréciée par une cour de justice. Ils sont hors de toute proportion avec le montant des actions qui ont été données. Béique estime que ces actions représentent une somme de $18,000. Il y a donc eu libéralité et donation et nous croyons que le juge du procès a fait une juste appréciation des faits sous ce rapport. A tout événement, la preuve qu'il avait devant lui était certainement de tel ordre qu'il ne conviendrait pas à un tribunal d'appel d'en faire une interprétation différente.

Ce n'est pas d'ailleurs ce que la Cour du Banc du Roi a fait. Elle a pris la position qu'il ne lui appartenait pas de s'enquérir de la valeur des prétendus services rendus par Béique, et que c'était exclusivement l'affaire de Dionne. Cela était vrai du moment que Dionne voulait faire une libéralité; mais, dans ce cas, il était obligé d'adopter la forme exigée par la loi.

Nous partageons donc l'avis de la Cour Supérieure sur cette question. D'accord avec la doctrine, nous prenons le point de vue le plus favorable à l'intimé. Pour les besoins de la cause, nous supposerons qu'il ait rendu quelques services. Le juge du procès a jugé que le transfert était sans considération aucune. Sans peut-être aller aussi loin, nous ne trouvons rien au dossier qui nous permette d'éviter la conclusion que ce transfert excède énormément les services auxquels Béique a référé dans son témoignage. Dans ces circonstances, l'opinion la plus accréditée et que nous adoptons, c'est que le contrat est indivisible et constitue une donation pour le tout. Il est soumis tout entier aux formalités des donations (Laurent, tome 12, n° 337). Le contrat que l'intimé invoque n'est donc pas en la forme voulue (Art. 776 C.C.). De plus, il n'a pas été enregistré

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au bureau du domicile du donateur, à l'époque de la donation (Art. 804 C.C.). Il était nécessaire qu'il le fût; et les appelants avaient intérêt à invoquer ce défaut (Art. 806 C.C.).

Nous sommes d'avis de faire droit à l'appel et de rétablir le jugement de la Cour Supérieure avec dépens dans toutes les cours.

Mais, pour le cas où il y aurait une part de rémunération réelle dans la donation que nous déclarons nulle, nous croyons devoir suivre la marche indiquée par Pothier dans le passage que nous avons cité plus haut (vol. 8, n° 88). Nous allons réserver à l'intimé la faculté "d'exercer ses actions pour se faire payer du juste prix des services" qu'il a pu rendre, s'il y a lieu.

Appeal allowed with costs.

Solicitors for the appellants: *St. Germain, Guérin & Raymond.*

Solicitors for the respondent: *Monty, Duranleau, Angers & Monty.*

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*May 8.
*May 28.

ERNEST TREMBLAY (DEFENDANT).....APPELLANT;

AND

DAME AURORE GUAY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC (1)

Petitory action—House erected on land not owned by builder—Consent or knowledge of the owner—Possession—Good or bad faith—Sale of house by the sheriff and right of purchaser to keep it on land—Arts. 412, 417 C.C.

P. built a house on land owned by the respondent, his mother in law, to the knowledge and with the consent of the latter. A judgment creditor of P. subsequently brought both the house and the land under execution. Upon an opposition to the seizure filed by the respondent, judgment was rendered declaring the latter the owner of the land,

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

(1) *Reporter's Note.*—The appellant was granted leave to appeal to this court on the condition that he would pay to the respondent the costs of appeal in any event. 24th February, 1928.

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and P. the owner of the building. The house alone was sold by the sheriff and bought by the appellant who subsequently forced P. to vacate the premises. The respondent then brought an action asking that the appellant should be ordered to remove the building within a certain delay. The appellant contested this action, setting up his ownership of the house under the sheriff's deed. He further claimed that he was not bound to vacate the premises unless reimbursed his expenses. The trial judge decided that under these circumstances the appellant could keep the house on the respondent's land as long as it subsisted, but he gave the respondent the option to purchase the house for $1,800, the amount at which he valued it. This judgment was set aside by the Court of King's Bench which held that the appellant was a possessor in bad faith within the meaning of articles 412 and 417 C.C., but allowed him a delay of 15 days to remove the house, failing which removal the house would belong without compensation to the respondent. The appellant having appealed from this latter judgment.

Held, reversing the judgment of the Court of King's Bench (Q.R. 44 K.B. 536), that articles 412 and 417 C.C. have no application to this case, nor can the appellant be treated as a possessor in bad faith of the house. The appellant, on the contrary, being the owner of the house by virtue of the sheriff's deed and the judgment on the opposition, can, under all the circumstances, keep it on the respondent's land. The court, however, in view of the appellant's offer in his plea, granted the respondent a delay of six months to purchase the house from the appellant at the amount at which it was appraised by the trial judge.

APPEAL, by special leave, from a decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, d'Auteuil J. and maintaining the respondent's action.

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

L. E. Beaulieu K.C. and *B. Devlin* for the appellant.

E. Levesque for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—Il s'agit de l'appel d'un jugement de la Cour du Banc du Roi infirmant, le juge Dorion étant dissident, la décision de la Cour Supérieure siégeant dans le district de Chicoutimi, et présidée par le juge d'Auteuil. L'appelant a obtenu de cette cour la permission de porter sa cause devant nous, à la condition de s'engager à payer

(1) (1928) Q.R. 44 K.B. 536.

les frais de l'intimée dans cette cour, quel que soit le résultat de son appel.

La situation de fait qui a donné lieu au procès est la suivante.

Le nommé Hector Potvin est le gendre de l'intimée, Madame Vézina. Voulant se bâtir une résidence au village de la rivière du Moulin, il s'est abouché avec les propriétaires d'un terrain, et avant même d'avoir conclu avec eux une convention de vente, il a commencé sa maison par la construction des fondations en ciment. Or il s'était mépris sur l'emplacement que les propriétaires entendaient lui concéder, et ceux-ci refusèrent de lui consentir un titre. C'est alors que l'intimée, pour aider ses enfants, dit-elle, acheta le terrain où se trouvait la construction, et avec son plein consentement Potvin acheva à ses frais, ou du moins en s'endettant dans ce but, la maison dont il s'agit en cette cause. L'emplacement acheté par l'intimée mesure 50 pieds de largeur par une profondeur moyenne de 134 pieds, soit une superficie totale de 6,700 pieds. La maison construite par Potvin n'occupe qu'une partie de ce terrain, car le contrat de construction la décrit comme " un carré de 36 pieds par 27 mesure en dehors ". C'est l'appelant qui en a entrepris la construction pour Potvin lequel, lorsqu'elle fut achevée, s'y établit avec sa famille.

Après l'érection de la maison, un créancier de Potvin obtint un jugement contre ce dernier et fit saisir la maison et le terrain où elle se trouvait. Le procès-verbal de saisie fait voir qu'on a saisi tout le terrain acheté par l'intimée " avec les bâtisses dessus construites, circonstances et dépendances ".

Le shérif ayant donné des avis de vente de la propriété saisie, l'intimée fit opposition à la saisie et vente de cette propriété et son opposition fut contestée par le créancier saisissant qui, après avoir nié le titre de l'intimée, allégua que " si toutefois le terrain n'appartient pas au défendeur (Potvin), la bâtisse qui y est érigée lui appartient et que l'opposition est mal fondée au moins pour cette partie, la dite bâtisse ayant été construite par le défendeur avec des matériaux achetés par lui " (analyse de la contestation dans le jugement sur l'opposition).

Le litige engagé sur l'opposition de l'intimée fut terminé par un jugement du juge Tessier en date du 10 avril, 1924.

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Ce jugement déclare que l'opposante (l'intimée) a établi qu'elle est propriétaire du terrain sur lequel repose cette maison; que les bâtisses érigées sur ce terrain appartiennent au défendeur (Potvin); que les bâtisses sont susceptibles d'appartenir à un autre que le propriétaire du sol, et que la loi admet l'existence de la propriété des constructions séparée de la propriété du terrain sur lequel elles reposent; que l'opposition est bien fondée quant au terrain et ne l'est pas quant aux bâtisses. Par ces motifs, la cour

maintient l'opposition quant au terrain saisi, et maintient la contestation de la dite opposition quant aux bâtisses, circonstances et dépendances saisies, chaque partie devant supporter ses frais.

A la suite de ce jugement, le shérif vendit les bâtisses, et l'appelant s'en porta adjudicataire pour la somme de $901, se trouvant ainsi à tous les droits du défendeur Potvin (art. 780 C.P.C.).

Muni de son titre du shérif, l'appelant fit déguerpir Potvin de la maison, et c'est alors que l'intimée intenta contre lui la présente action par laquelle elle conclut à ce qu'elle soit déclarée propriétaire du terrain, et à ce que l'appelant soit condamné à déguerpir de ce terrain, d'enlever les bâtisses qui s'y trouvent et d'en abandonner la possession à l'intimée sous 15 jours de la signification du jugement à intervenir.

L'appelant se défend en alléguant que la maison fut construite par Potvin pour lui-même du consentement exprès et tacite de l'intimée et de son mari, et qu'il l'a possédée *animo domini* et l'a habitée seul avec sa famille, ne payant loyer à qui que ce soit. Il invoque la saisie, l'opposition de l'intimée et le jugement susdit du juge Tessier. Il allègue aussi qu'il a acheté la maison du shérif, met en fait que la maison a coûté $2,034.66, et il conclut à ce qu'il soit déclaré que cette maison lui appartient, à ce qu'il ne soit pas tenu de déguerpir avant d'être payé des améliorations, savoir $2,034.66, et à ce que l'action de l'intimée soit renvoyée avec dépens.

Sur la contestation ainsi engagée le juge d'Auteuil a rendu jugement déclarant l'intimée propriétaire du terrain, sujet au droit de l'appelant d'y maintenir la maison aussi longtemps qu'elle durera. Il a aussi donné acte de l'offre de l'appelant d'abandonner à l'intimée la propriété de la maison en par l'intimée en payant à l'appelant la valeur,

que l'honorable juge fixe à $1,800. C'est la même évaluation de la maison que nous trouvons dans le jugement du juge Tessier sur l'opposition de l'intimée, le savant juge évaluant le terrain de l'intimée à $700. L'appelant accepte cette évaluation de la maison, puisque, dans son factum, il nous demande de rétablir le jugement de la cour supérieure.

Le jugement de la Cour Supérieure fut infirmé par la cour du Banc du Roi qui renvoya la défense de l'appelant, accordant toutefois à ce dernier, suivant l'offre faite par l'intimée, la faculté d'enlever la maison du terrain de l'intimée sous quinze jours de la signification du jugement, la maison, faute de tel enlèvement, devant rester sans indemnité la propriété de l'intimée.

Il a paru utile de faire une rapide analyse de ces diverses procédures afin d'en dégager la question qui se présente pour solution. Cette question est de savoir si l'appelant peut garder sur le terrain de l'intimée la maison qu'il a achetée du shérif et qui indubitablement lui appartient.

La cour du Banc du Roi, pour repousser les prétentions de l'appelant, se base sur les articles 412 et 417 et suivants du Code civil, décidant que le défendeur, ainsi que Potvin son auteur, étaient des possesseurs de mauvaise foi.

Je ne puis accepter ce motif. Ces articles, à mon avis, ne sont pas applicables à l'espèce. Notamment l'appelant n'est pas un possesseur de mauvaise foi au sens de l'article 412 C.C. Le titre en vertu duquel il possède la maison est la vente du shérif faite conformément au jugement du juge Tessier. Le titre de Potvin à la propriété de la maison était l'autorisation de bâtir qu'il a obtenue de l'intimée, ainsi que la construction à ses dépens de cette maison. On ne peut dire que ces titres soient des titres vicieux. Ce sont, au contraire, des titres valables, et reconnus tels par le jugement sur l'opposition, susceptibles de conférer à celui qui en est investi un droit immobilier de la nature d'un droit de superficie. Voyez la définition du droit de superficie qui

consiste à avoir la propriété des édifices ou plantations reposant sur un terrain qui appartient à autrui. Fuzier-Herman, Répertoire, vo. Superficie, n° 1.

Les articles 412 et 417 C.C. sont hors de cause.

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Je puis sur ce point citer Baudry-Lacantinerie et Chauveau, Biens, n° 372:

> L'art. 555 statue en vue de constructions faites à l'insu du propriétaire du terrain. Si les constructions ont été faites à sa connaissance et surtout avec son autorisation, il ne pourra pas les revendiquer comme lui appartenant, ni forcer le constructeur à les démolir. Il intervient, en pareil cas, entre le propriétaire du terrain et le constructeur un contrat *sui generis*, en vertu duquel le propriétaire du sol autorise le constructeur à jouir des constructions pendant un certain temps, autant qu'elles dureront. Il y a création au profit du constructeur d'une sorte de droit de superficie.

Toute doute qu'il aurait pu y avoir sur la question de savoir si l'autorisation de bâtir que l'intimée a donnée à Potvin a été inspirée par une pensée de simple tolérance, soit à raison des liens de famille qui l'unissaient à lui, soit parce qu'elle espérait qu'il pourrait acheter d'elle et lui payer l'emplacement occupé par sa maison,—se trouve écarté dans l'espèce par suite du jugement sur l'opposition de l'intimée à la saisie pratiquée contre Potvin. Il n'est pas nécessaire d'envisager ce jugement comme formant chose jugée—car cette prétention n'a pas été formulée par l'appelant—mais on peut au moins dire que c'est un titre à la propriété de la maison. En d'autres termes, le jugement reconnaît à Potvin la propriété de la maison qu'il a bâtie. Le droit ainsi constaté au benefice de Potvin profite à l'appelant, son ayant cause, tant en raison du principe que l'ayant cause jouit de tous les droits et actions que son auteur avait acquis dans l'intérêt de la chose à laquelle il a succédé (Aubry et Rau, 5e éd., tome 2, p. 97), qu'en vertu de la règle formelle de l'article 780 C.P.C. Il s'ensuit que l'appelant est propriétaire de cette maison, ce qui ne doit pas s'entendre simplement des matériaux qui sont entrés dans sa construction, mais de la maison elle-même, comme maison, c'est-à-dire comme immeuble par sa nature.

Cette conclusion fait bien voir que nous ne pouvons maintenir le jugement de la Cour du Banc du Roi. Avec beaucoup de déférence, je suis d'opinion, pour les raisons que j'ai exposées, d'infirmer ce jugement et de rétablir le jugement de la cour supérieure. Je crois cependant qu'il convient de fixer un terme pendant lequel l'intimée pourra acquérir la propriété de la maison de l'appelant en lui payant la somme de $1,800, conformément à l'option que la cour supérieure lui a donnée. Je lui accorderais à cette

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fin un délai de six mois à partir de la signification du jugement de cette cour, passé lequel elle sera déchue de cette option.

L'appelant aura les frais de la Cour du Banc du Roi, mais, suivant la condition de la permission d'appel qu'il a obtenue, il devra payer à l'intimée ses frais devant cette cour.

Appeal allowed.

Solicitors for the appellant: *St. Laurent, Gagné, Devlin & Taschereau.*

Solicitor for the respondent: *Elzéar Lévesque.*

1928

*May 14.
*May 28.

GATINEAU POWER COMPANY (PETITIONER) ..... APPELLANT;

AND

FREEMAN F. T. CROSS (RESPONDENT)...RESPONDENT.

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

Appeal—Jurisdiction—Judgment by an appellate court quashing appeal to that court for want of jurisdiction—Matter in controversy to exceed $2,000—Supreme Court Act, s. 39.

The matter in controversy in this appeal is whether there exists a right of appeal to the Court of King's Bench from the decision of the Quebec Public Service Commission refusing to allow an expropriation. The right to have that body entertain an application for authority to expropriate is not appreciable in money and still less so is the right of appeal to the appellate court. The consequence of authorization by the Commission might result in a proceeding in which the amount involved would exceed two thousand dollars; but the ultimate award on the expropriation cannot be taken as the matter in controversy in this appeal.

MOTION to quash for want of jurisdiction an appeal from a decision of the Court of King's Bench, appeal side, province of Quebec, quashing an appeal to that court for want of jurisdiction.

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*PRESENT:—Anglin C.J.C., Mignault, Rinfret, Lamont and Smith JJ.

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GATINEAU POWER COMPANY v. CROSS.

Eug. Lafleur K.C. for the motion.

Aimé Geoffrion K.C. contra.

The judgment of the court was delivered by

RINFRET J.—The Gatineau Power Company applied to the Quebec Public Service Commission for authority to expropriate

a portion of the lot twenty-four in the fifteenth range of the township of Hull * * * , a power-house and a portion of the penstock connecting the said power-house with the dam on Meech's Creek and forming part of a water-power known as Meech's Creek power,

belonging to Freeman T. Cross.

It is alleged that the development of the applicant company's water-power at Chelsea Falls would have the effect of submerging these lands, constructions and water-power, which have a permanent force of less than two hundred horse-power.

The petition was made under section 28k of the *Public Service Commission Act* (R.S.Q. 1925 c. 17 as amended by 16 Geo. V, c. 16, s. 6).

The Quebec Public Service Commission refused to give the authorization applied for.

Under the *Public Service Commission Act,* an appeal lies to the Court of King's Bench as follows:

58. An appeal shall lie to the Court of King's Bench (Appeal Side) in conformity with article 47 of the Code of Civil Procedure, from any final decision of the Commission, upon any question as to its jurisdiction, or upon any question of law, except in expropriation matters, but such appeal may be taken only by leave of a judge of the said court, given upon a petition presented to him within fifteen days from the rendering of the decision, or from the homologation thereof in cases where the same is required, notice of which petition must be given to the parties and to the Commission within the said fifteen days. The costs of such application shall be in the discretion of the judge.

An application for leave to appeal under the above section was made to a Judge of the Court of King's Bench, who granted it.

On motion of Cross, however, the full court subsequently quashed the order for leave on the ground that this was an appeal "in expropriation matters," which are specially excepted from the jurisdiction of the Court of King's Bench.

The Gatineau Power Company then served notice of appeal to the Supreme Court of Canada, and Cross now moves to quash for want of jurisdiction.

The appeal is from the judgment of the Court of King's Bench only and the question to be decided on the motion is therefore: Whether an appeal lies to the Supreme Court of Canada from a judgment rendered in a provincial court where the appeal to that court was quashed for want of jurisdiction.

Since the amendments to the *Supreme Court Act* (10-11 Geo. V., c. 32) which came into effect on the first day of July, 1920, and "except as otherwise provided by sections thirty-seven and forty-three" (which have no application here):

no appeal shall lie to the Supreme Court from a judgment rendered in any provincial court in any proceeding unless,—

(*a*) the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or

(*b*) special leave to appeal is obtained as hereinafter provided.

(i.e. from the highest court of final resort having jurisdiction in the province in which the judicial proceeding was originally instituted).

Here, no special leave to appeal was obtained. In order therefore to entertain jurisdiction, this court must find that the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars.

The matter in controversy in this appeal, as we have seen, is whether in the premises there exists a right of appeal to the Court of King's Bench from the decision of the Quebec Public Service Commission refusing to allow the expropriation.

Should we come to the conclusion that such right exists, all that we could do would be to remit the case to the Court of King's Bench to be there heard on the merits. In turn, the only question then to be decided by the Court of King's Bench would be whether the Quebec Public Service Commission was right in holding, as it did, that it had no jurisdiction, under section 28k of c. 16 of the statute of 1926, to authorize the expropriation of an established industry or of a water-power already developed. Assuming this was held otherwise by the Court of King's Bench or by us on a further appeal, the application would return before the Commission, which might or might not then authorize the expropriation. Its order, in any event, would be made in the exercise of judicial discretion. Thus, the whole matter in controversy, even if traced back to the Commission—and

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Rinfret J.

we do not think it should be—is merely the right to have that body entertain an application for authority to expropriate. Such right is not appreciable in money. Still less so is the right of appeal to the Court of King's Bench which is the sole matter in controversy on the projected appeal here. The consequence of the authorization by the Commission might result in a proceeding in which the amount involved would exceed two thousand dollars; but the ultimate award on the expropriation is not the matter in controversy in this appeal; and, as was said in *Lachance* v. *La Société de Prêts et de Placements de Québec:* (1)

our jurisdiction does not depend on the possible consequence of a possible judgment.

We have no jurisdiction in this case as it now stands. The motion must be allowed and the appeal quashed with costs.

Motion granted with costs.

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*June 12.

RUSSELL McKENZIE AND ALLEN McKENZIE . . . . . } APPELLANTS;

AND

WILLIAM HUYBERS AND THE SHERIFF OF THE COUNTY OF HALIFAX. } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Statutes—Act to come into force on day to be fixed by proclamation—Proclamation fixing day—Appointment made under the Act before it came into force—Validity of appointment—Nova Scotia Acts, 1923, c. 30; 1924, c. 54; R.S.N.S. 1923, c. 1, s. 23 (44)—Imprisonment under The Collection Act, R.S.N.S., 1923, c. 232—Habeas corpus.

The appellants were imprisoned under *The Collection Act,* R.S.N.S., 1923, c. 232, for fraudulently contracting a debt which formed the subject of a judgment in the Supreme Court of Nova Scotia, they "intending at the time of the contracting of said debt not to pay the same." Their appeal to this Court was from the judgment of the Supreme Court of Nova Scotia *en banc* affirming (on equal division) the judgment of Mellish J. refusing, on return of a summons for a writ of *habeas corpus,* to discharge them from custody. The appellants attacked the committing order, mainly on the ground that M., the Ex-

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) (1896) 26 Can. S.C.R. 200, at p. 202.

aminer who committed them (and whose adjudication was, on appeal, affirmed by Harris C.J., who, however, set aside the warrants issued and directed the issue of a new warrant), had no jurisdiction, as his appointment was void. S. 1 of c. 30, 1923, provided for the appointment of one or two Examiners for the city of Halifax. The Act was to come into force on a day to be fixed by proclamation. C. 54 of 1924, passed May 9, 1924, repealed s. 1 of c. 30, 1923, and substituted another section providing for the appointment of one or two Examaminers for the city of Halifax. On May 23, 1924, it was proclaimed that c. 30, 1923, as amended, should come into force on June 1, 1924. On the same day—May 23, 1924—M. was appointed as an Examiner for the city of Halifax. Appellants contended that his appointment was void, because made under the authority of a statute that was not in force at the time of his appointment.

Held (affirming the judgments below) that the proclamation that c. 30, 1923, as amended, should come into force on June 1, 1924, had the same effect as if that date had been fixed by the statute itself as the date when it should become effective as law; and it was common ground that in the latter case appointments could be made in anticipation of the statute coming into force; the proclamation made that certain which had been contingent; it must be presumed that everything was done regularly unless the contrary was shown; the proclamation and order of appointment bore the same date and were gazetted the same day; and it must be presumed that the proclamation preceded the appointment; the appointment was, therefore, valid, and this ground of appeal failed.

Held, also, that the appeal failed on the other grounds taken; as to the contention that the evidence before the Examiner and, on appeal, before Harris C.J., did not disclose any fraud within the meaning of s. 27, subs. 1 (*a*) and (*d*) of *The Collection Act,* it was held that the evidence could not be gone into for the purpose of ascertaining whether there was anything in it to warrant the finding of fraud; the principle of the decision in *R.* v. *Nat. Bell Liquors, Ltd.* [1922] 2 A.C. 128, applied.

APPEAL from the judgment of the Supreme Court of Nova Scotia *en banc,* dismissing, on an equal division of the court, the present appellants' appeal from the refusal by Mellish J. of their application, on the return of a summons for a writ of *habeas corpus,* to discharge them from custody in the county jail at Halifax, where they were imprisoned under an order of Harris C. J., under *The Collection Act,* R.S.N.S., 1923, c. 232.

The appellants, against whom a judgment had been obtained for $8,400.40, were examined under *The Collection Act* before Richard A. MacLeod, Esq., who made two warrants of commitment, dated February 16, 1928, one against each appellant, committing him to gaol for six months or until he should pay the debt, on the ground that he "fraudu-

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lently contracted such debt, intending at the time of the contracting of said debt not to pay the same." These warrants were signed by Mr. MacLeod as "A Commissioner of the Supreme Court in and for the County of Halifax and an Examiner under *The Collection Act* for the City of Halifax. An appeal was taken, and was heard by Harris C. J., who confirmed the adjudication of Mr. MacLeod, but directed that the two warrants of commitment be set aside and that one warrant be issued, and that against both appellants, to keep them and each of them for the term of six months (to commence February 16, 1928) or until they or either of them should pay the debt.

A summons was taken out on appellants' behalf for a writ of *habeas corpus*, and, on its return, Mellish J. refused their application for discharge from custody; and their appeal from his order was dismissed by the Court *en banc*, on equal division of that court. They then appealed to the Supreme Court of Canada. Special leave to take such appeal was granted by the Court *en banc*.

The main ground of attack on the committing order (and the only ground on which there was a difference of opinion in the Court *en banc*) was that Mr. MacLeod had no jurisdiction, as his appointment as Examiner was void, and that the order of Harris C. J., on appeal, was likewise void, for want of jurisdiction in the Examiner. Other grounds were taken, including the grounds that the order of Harris C. J., was bad on its face, as showing that a Commissioner originally acted in the examination, such Commissioner being forbidden so to act (in the order of Harris C.J., Mr. MacLeod was designated as "a Commissioner of the Supreme Court of Nova Scotia" and not as Examiner); and that the evidence taken before Mr. MacLeod, and Harris C. J., on appeal, did not disclose any fraud within the meaning of s. 27, subs. 1 (a) and (d) of *The Collection Act*.

Chapter 30 of the Acts of 1923 (An Act to amend *The Collection Act*, R.S.N.S. 1900, c. 182), passed April 23, 1923, provided, by s. 1 (adding a subsection to s. 5 of said c. 182), that

> The Governor in Council may appoint a person to be a functionary or two persons to be functionaries respectively for the purposes of this Act in the city of Halifax, each such functionary to be called "An Examiner under the Collection Act for the city of Halifax.

The Act (c. 30 of 1923) was to come into force on a day to be fixed by proclamation of the Governor-in-Council. On May 9, 1924, before such proclamation was made, Chapter 54 of the Acts of 1924 (An Act to amend c. 30 of 1923, and *The Collection Act,* c. 232, R.S.N.S. 1923) was passed. By s. 1 of that Act, s. 1 of c. 30, 1923, was repealed, and there was substituted a provision that

> The Governor in Council may appoint one or more persons to be a functionary or functionaries respectively for the purposes of this Chapter in the city of Halifax, each such functionary to be called "An Examiner under 'The Collection Act' for the city of Halifax."

By proclamation dated May 23, 1924, it was declared that c. 30 of 1923, as amended, should come into force on June 1, 1924. On the same day—May 23, 1924—Mr. MacLeod was appointed to be an Examiner under *The Collection Act* for the City of Halifax.

It was contended on behalf of the appellants that the appointment of Mr. MacLeod was void, because made under the authority of a statute that was not in force at the time of his appointment.

In the Court *en banc,* Chisholm J., with whom Graham J. concurred, was of opinion that subs. 44 of s. 23 of c. 1, R.S.N.S. 1923 (*The Interpretation Act*), applied to c. 30 of 1923, and that it was proper to appoint Mr. MacLeod as Examiner as was done. Jenks J., with whom Carroll J. concurred, took a different view.

A. H. Russell K.C. for the appellants.

No one appeared for the respondents.

At the conclusion of the argument for the appellants, the judgment of the court was orally delivered by

ANGLIN C. J. C.—It is not necessary to reserve judgment in this case. We are all of the opinion that the judgment delivered by Mr. Justice Chisholm in the court below is correct. The basis of his judgment is that the proclamation that the amendments to the Debt Collection Act should come into force and operation on a date therein named had the same effect as if that date had been fixed by the statute itself as the date when it should become effective as law. It is common ground that in the latter case appointments could be made in anticipation of the statute coming into force. The proclamation made that certain which had been contingent.

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It must be assumed that everything was done regularly in such a case as this unless the contrary is shewn. The proclamation and order of appointment bear the same date and were gazetted on the same day. It must be presumed that the proclamation fixing the date for the Act to come into force preceded the making of the appointment.

As to the other points taken—if some of them are open to review at all here, which we very much doubt—I do not think they call for any extended opinion from us.

The suggestion that the examining officer is wrongly designated in the order of the learned Chief Justice is scarcely worthy of consideration. His jurisdiction being clear, it is of little moment that there is not precise accuracy in his designation. He was a well known official, and there can be no doubt as to the capacity in which he acted. It was as Examiner under the Statute.

The evidence cannot be gone into for the purpose of ascertaining whether there was anything in it to warrant the finding of fraud. The principle of the decision in *Rex* v. *Nat. Bell Liquors Ltd.* (1) applies. The sole question of importance is that of the validity of the Examiner's appointment, and of that we entertain no doubt.

The appeal is dismissed, and, as no one appeared for the respondent, without costs.

Appeal dismissed.

Solicitor for the appellants: *J. H. Power.*

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*Dec. 6.

ELDON BARTON .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Indictment containing three counts, charging: manslaughter (Cr. C., s. 268); causing grievous bodily injury (Cr. C., s. 284); and causing bodily harm by wanton or furious driving, etc., of motor vehicle (Cr. C., s. 285)—Acquittal on first two counts, and conviction on third count—Joinder of counts—Right of jury to find guilty on third count, while finding not guilty on other counts.

The appellant was tried on an indictment containing three counts (referring to the same occurrence), viz., (1) manslaughter (Cr. C., s. 268); (2) causing grievous bodily injury (Cr. C., s. 284); and (3)

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

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

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causing bodily harm by wanton or furious driving, etc., of a motor vehicle (Cr. C., s. 285). The jury found him not guilty on the first and second counts, but guilty on the third count. From the affirmance by the Appellate Division, Ont., of his conviction on the third count, he appealed, on the ground that, as the facts upon which the three counts were based were the same as to each of the three offences charged, it was not open to the jury, after acquitting him upon the first two counts, to convict him upon the third.

Held: It was open to the jury to find as they did. It was permissible to join the other counts to the first one charging manslaughter (Cr. C., s. 856). Whether the three counts should be tried together was in the discretion of the trial judge (Cr. C., s. 857). Had appellant been charged only with manslaughter, but so described as to include the offences charged in the said second and third counts, then, under s. 951, Cr. C., he could properly have been convicted of either of these latter offences, as "other offences" the commission of which was included in the offence "as charged in the count," if, in the jury's opinion, "the whole offence charged was not proved." (*R.* v. *Shea*, 14 Can. Cr. Cas. 319, if it implies the contrary, overruled). In the case at bar, that the jury had found that the whole offence charged either in the first count or in the second count had not been proved, was an intendment which must be made in support of the verdict; and it was within the jury's province so to find, while finding that the offence charged in the third count was proved; and it was not open to this Court to consider the evidence for the purpose of determining whether upon it the jury, as reasonable men, could have negatived the existence of any element necessary to constitute either of the offences charged in the first and second counts, consistently with their finding of guilty on the third count.

R. v. *Forseille*, 35 Can. Crim. Cas. 171, overruled.

Judgment of the Appellate Division, Ont., (35 Ont. W.N. 172; Middleton J.A. dissenting) affirmed.

Smith J. dissented, agreeing with the dissenting judgment of Middleton J.A., in the Appellate Division, and with the judgment in *R.* v. *Forseille*, and holding that, where injuries have been caused by the accused to a deceased person (as found in this case) and these injuries have caused the death, as was unquestionably so in this case, counts under ss. 284 and 285, Cr. C., should not be allowed to go to the jury; an acquittal on the charge of manslaughter is necessarily a finding that there was no criminal negligence, which negligence is necessary to constitute a crime under ss. 284 and 285.

APPEAL by the defendant under section 1023, and, by leave of Lamont J., under section 1025 of the *Criminal Code*, from the affirmance of his conviction by the Appellate Division of the Supreme Court of Ontario, Mr. Justice Middleton dissenting (1).

The question raised is whether, as was decided by the Court of Appeal for Saskatchewan in *R.* v. *Forseille* (2)

(1) (1928) 35 Ont. W.N. 172. (2) (1920) 35 Can. Cr. Cas., 171.

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when an accused is tried on a charge containing two counts, one for manslaughter and the other for causing grievous bodily harm, the second count should not be allowed to go to the jury; and, a jury having found him not guilty of manslaughter but convicted him on such second count, the conviction must be quashed.

In the case at bar the appellant was acquitted on the first two counts and was convicted on the third count in the following indictment:

1. That [he] at the Township of Sandwich East, in the County of Essex, on the sixteenth day of September, 1928, did unlawfully kill and slay one Albert J. Strockean, contrary to section 268 of the Criminal Code.

2. That [he, at the place and on the date aforesaid] by an unlawful act, or by doing negligently or omitting to do an act which it was his duty to do, did cause grievous bodily injury to one, Albert J. Strockean, contrary to section 284 of the Criminal Code.

3. That [he, at the place and on the date aforesaid] having charge of a motor vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, did cause or caused to be done, bodily harm to one Albert J. Strockean, contrary to section 285 of the Criminal Code.

As authorized by subs. 5 of s. 1013 of the *Criminal Code,* Middleton, J. A., adverting to the view to the same effect which he had expressed in *R.* v. *Stark* (1) delivered a dissenting judgment, avowedly to enable the appellant to appeal as of right to this Court. The sole ground of this dissent is expressed in these terms:

This case seems to me to be one well illustrating the difficulty resulting from what I humbly think is a departure from sound principle. The unfortunate victim was undoubtedly killed as the result of the accident. If his death was the result of the fault of the accused, the crime was manslaughter. He has been acquitted and as the death and the fact that the death resulted from the accident are not disputed, the finding of not guilty can only mean that in the opinion of the jury the death was not caused by the misconduct of the accused.

Similarly the finding of not guilty on the second count, that of causing grievous bodily harm, must mean that in the opinion of the jury the bodily harm unquestionably sustained by the deceased was not caused by the misconduct of the accused.

The finding of guilt on the third count must, in the light of the finding on the other counts, mean that the jury understood that it had the right to find this man guilty of the lesser offence while acquitting him of the only offence of which it was open to them to find him guilty upon the evidence.

(1) (1927) 60 Ont. L.R. 375.

The only relevant ground of appeal to the Appellate Divisional Court is thus stated in the judgment of the majority of that Court delivered by Orde, J. A.:

That, as the facts upon which the three counts are based are the same as to each of the three offences charged, it was not open to the jury after acquitting the accused upon the first two counts, to convict him upon the third.

After alluding to the fact that the Appellate Divisional Court had in the *Stark case* (1) declined to follow the judgment of the Court of Appeal for Saskatchewan in *R.* v. *Forseille* (2), Orde, J. A., proceeds:

It may be difficult to understand how upon the evidence in a particular case a jury could come to the conclusion that the accused had by his negligence done bodily harm to another and at the same time acquit him of manslaughter. But it is not open to us in my opinion to approach the matter in that way. The question is one of law simply, and I can see no legal reason for saying that a verdict of guilty of doing bodily harm is bad because upon the same state of facts the Appellate Court, not the jury, thinks it ought to have convicted the accused of manslaughter.

The relevant provisions of the *Criminal Code* are as follows:

856. Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shown in form 63, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

857. When there are more counts than one in an indictment each count may be treated as a separate indictment.

2. If the court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately: Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of theft, not exceeding three, alleged to have been committed within six months from the first to the last of such offences, whether against the same person or not.

898. Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, except by leave of the court or judge before whom the trial takes place, and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared.

2. No motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act.

907. On the trial of an issue on a plea of *autrefois acquit* or *autrefois convict* to any count or counts, if it appear that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and that he

(1) (1927) 60 Ont. L.R. 375.

(2) (1920) 35 Can. Crim. Cas. 171.

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might on the former trial, if all proper amendments had been made which might then have been made, have been convicted of all the offences of which he may be convicted on the count or counts to which such plea is pleaded, the court shall give judgment that he be discharged from such count or counts.

2. If it appear that the accused might on the former trial have been convicted of any offence of which he might be convicted on the count or counts to which such plea is pleaded, but that he may be convicted on any such count or counts of some offence or offences of which he could not have been convicted on the former trial, the court shall direct that he shall not be convicted on any such count or counts of any offence of which he might have been convicted on the former trial, but that he shall plead over as to the other offence or offences charged.

951. Every count shall be deemed divisible; and if the commission of the offence charged, as described in the enactment creating the offence or as charged in the count, includes the commission of any other offence, the person accused may be convicted of any offence so included which is proved, although the whole offence charged is not proved; or he may be convicted of an attempt to commit any offence so included.

2. On a count charging murder, if the evidence proves manslaughter but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence.

S. W. Springsteen for the appellant.

E. Bayly, K.C., for the respondent.

After hearing counsel for the appellant and the Court having retired for consideration of his argument, the Chief Justice, without calling on counsel for the respondent, announced that a majority of the Court was of the opinion that the appeal failed and should be dismissed.

Subsequently the following reasons for judgment were delivered.

The judgment of the majority of the Court (Anglin C. J. C. and Duff, Newcombe and Rinfret JJ.) was delivered by

ANGLIN, C. J.C.—The only question open on this appeal is whether in law it was competent to the jury to convict the accused on the third count of the indictment while finding him not guilty on the first and second counts. No ground of appeal involving a question of fact, or mixed fact and law can be considered here (s. 1023, Cr. C.). Whatever the evidence may disclose, all findings or intendments of fact necessary to support the verdict must now be made. Thus, it must be assumed that the jury, while it found that the evidence established beyond reasonable doubt that the accused while

having charge of a motor vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, did cause or caused to be done, bodily harm to one Albert J. Strockean, contrary to Section 285 of the Criminal Code.

nevertheless deemed such evidence insufficient to warrant a finding that some other elements or ingredients necessary to constitute either of the offences charged in the two other counts of the indictment, on which they returned a verdict of not guilty, were also proven. Especially must this be the case when, as here, the trial judge had correctly instructed the jury as to what constituted each of the two offences of which they acquitted the accused.

While, sitting here and considering the evidence as reported, we may find it difficult to appreciate how the jury, finding that the accused by doing an unlawful act had caused bodily harm to Strockean, could, death having ensued, acquit him of manslaughter, we cannot give effect to such a view without invading the realm of fact, which is closed to us by the statute.

Having regard to the provisions of s. 856 of the *Criminal Code,* and notably to the proviso thereto, it was, in our opinion, clearly permissible for the Crown to join counts nos. 2 and 3 to the first count charging manslaughter. Whether the three counts should be tried together was in the discretion of the trial judge (s. 857, Cr.C.).

Under s. 951, had the accused been charged only with manslaughter, but so described as to include the offences charged in counts nos. 2 and 3 of the indictment now before us, he could properly have been convicted of either of these latter offences as "other offences" the commission of which was included in the offence "as charged in the count," if, in the opinion of the jury, "the whole offence charged was not proved." If *R.* v. *Shea* (1), implies the contrary, that decision cannot be supported. In a case such as that at bar, that the jury had found that neither the whole offence charged in count no. 1 nor the whole offence charged in count no. 2 had been proved, is an intendment which we must make in support of the verdict. Moreover, had the accused been tried on an indictment framed as above indicated though charging manslaughter only, and been acquitted, and had he been sub-

(1) (1909) 14 Can. Cr. Cas. 319.

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sequently charged upon the same facts with either of the offences set forth in the second and third counts, he could successfully have pleaded *autrefois acquit* (s. 907 (2), Cr. C.). No harm can result from the indictment expressly charging the two lesser offences set forth in the second and third counts respectively, of either of which the jury might have convicted the accused upon an indictment charging manslaughter only, but so describing that offence as to include such lesser offences. Moreover, any objection to the indictment on the ground of the unlawful inclusion in it of counts nos. 2 and 3, if tenable, should have been the subject of a demurrer or motion to quash the indictment under s. 898 of the Code.

Whatever may be the powers of the provincial appellate courts in that regard, it is not open to this court to consider the evidence for the purpose of determining whether upon it the jury, as reasonable men, could have negatived the existence of any element necessary to constitute the offence of manslaughter, or the offence charged in the second count, consistently with their finding of guilty on the third count. It is clearly impossible to say as a matter of law that in no case where manslaughter is charged can a jury convict of some lesser offence included in that charge as laid, or that an indictment may not contain counts charging such lesser offences as well as the offence of manslaughter, which the evidence may not prove. It was within the province of the jury to find that the offence charged in the third count was satisfactorily proven, but that, for reasons which we can only surmise and as to the validity or the adequacy of which we are not at liberty to inquire, some essential element of each of the offences charged in the first and second counts respectively was, in their view, not established beyond reasonable doubt.

SMITH J. (dissenting).—With great respect I differ from the view expressed by the Chief Justice in this case. I am in accord with the view taken in the unanimous judgment of the Court of Appeal for Saskatchewan in *Rex* v. *Forseille* (1), and by Mr. Justice Middleton in this case. Where the death of a person is caused by the criminal negligence of another, the crime is manslaughter. Sections

(1) (1920) 35 Can. Cr. Cas. 171.

284 and 285 have no application, in my opinion, in such a case, as they are only applicable where the injuries have not caused death. Where injuries are caused by the accused to a deceased person (as has been found here), and these injuries have caused the death, as was unquestionably the case here, I agree with the Court of Appeal for Saskatchewan, and Mr. Justice Middleton, that counts under sections 284 and 285 should not be allowed to go to the jury.

In such case an acquittal on the charge of manslaughter is necessarily a finding that there was no criminal negligence, which negligence is necessary to constitute a crime under sections 284 and 285. It is, in my opinion, not proper in such a case to endeavour to entice a jury to convict the accused by presenting to it an option to convict of a lesser offence, not warranted by the facts, because it may be thought more easy to get a conviction for such lesser offence. It is an invitation to the jury to stultify themselves as the jury in this case has done, by first finding that the accused was not guilty of criminal negligence, and then that he was so guilty. It is said that the jury may have concluded that the injuries did not cause the death. If they made such a finding, it was contrary to all the evidence, and should be set aside.

The jury concluded that the accused was guilty of criminal negligence, and, had it not been for the holding up to them of the option of convicting either for the real crime or a lesser crime, they would in all probability have convicted for the real crime. At all events the crime committed by the accused, if any, was manslaughter and nothing else, and he was entitled to a trial and a verdict on that charge, untrammelled by the introduction of minor charges of which he could not, in my opinion, be properly convicted on the facts.

In submitting a count for the lesser offence to the jury in such a case, the prosecution is in effect saying to the jury, "The accused is first charged with having, through criminal negligence, killed the deceased, which is the very serious crime of manslaughter, of which you may not be inclined to convict him. There is, however, a less serious offence charged, which has nothing to do with the killing of the deceased. Under that count the only question is, did the accused, by criminal negligence in driving his auto-

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Smith J.

mobile, inflict bodily harm on the deceased? If you conclude that he did, you may disregard the killing altogether, and convict him of the minor offence under this count."

Where there is a real question as to whether or not the injuries inflicted by the accused caused the death, the case is entirely different, and the alternative counts are quite proper. In that case it would be the duty of the trial judge to tell the jury that if they found criminal negligence, they must then find whether or not death resulted from the injuries inflicted by the accused, and that if they should find that death did result from these injuries, they must convict of manslaughter, but if they should find that death did not result from this cause, they should convict of an offence under s. 284 or s. 285.

Appeal dismissed.

Solicitors for the appellant: *McTague, Clark & Racine.*

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

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*May 21.

IN RE COURT

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

Land—Descent—Construction of statute—Public Lands Act, R.S.O., 1914, c. 28, s. 47—Locatee's interest to "descend to, and become vested in, his widow during her widowhood"—Nature of estate taken by widow.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing the present appellant's appeal from the judgment of Meredith, C. J. C. P., dismissing his appeal from the decision of the Master of Titles at Toronto in refusing to approve of the Local Master of Titles at Sault Ste. Marie, Ontario, stating a case for the opinion of the Court and naming the parties to it, and, further, from the refusal by the said Local Master of Titles at Sault Ste. Marie of the appellant's application to have Susanna Norella Brownlee registered as owner, as executrix under the will of Emily Court, deceased, of the land registered as parcel 469, Algoma.

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

(1) (1927) 33 Ont. W.N. 79 (correction note, 33 Ont. W.N. 133).

The land was located by Frederick Henry Court in 1877, under the *Free Grants and Homesteads Act.* In 1892 he obtained a patent from the Crown. He died, intestate, in 1920, being then the registered owner of the land. His widow, Emily Court, was duly appointed his administratrix, and in 1921 was registered as owner of the land as administratrix of his estate. She did not remarry and did not elect to claim dower in the land. She died in June, 1926, leaving a will, by which she devised all her real estate to James Hincks Court, the present appellant, and appointed Susanna Norella Brownlee her executrix, to whom probate issued accordingly.

The appellant based his claim upon the provisions of s. 47 of *The Public Lands Act,* R.S.O. 1914, c. 28 (now s. 48 of c. 35, R.S.O. 1927) which reads as follows:

> On the death of the locatee, whether before or after the issue of the letters patent, all his then interest and right in the land shall descend to, and become vested in, his widow during her widowhood in lieu of dower, but the widow may elect to have her dower in the land in lieu of this provision.

The appellant contended that, under that section, the said Emily Court, the locatee's widow, took, on the locatee's death, a fee simple estate in the said land, determinable on her remarriage, and that, not having remarried, she died seized in fee of the land, and that the same passed to the appellant under her will, and that her executrix was entitled to be registered as owner in fee simple as executrix.

At the conclusion of the argument for the appellant, and without calling on counsel for the respondents, the Court orally delivered judgment dismissing the appeal with costs, holding that under said s. 47 the estate conferred on the widow is a life estate determinable on her remarriage.

Appeal dismissed with costs.

J. E. Irving for the appellant.

Sir William Hearst K.C. for the respondent Edith C. Matheson (a daughter of the said Frederick Henry Court and Emily Court).

A. W. Rogers for the respondent the Attorney-General for Ontario.

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*Oct. 22.
*Nov. 26.

FRANCIS MAWSON RATTENBURY (PLAINTIFF) ..... } APPELLANT;

AND

LAND SETTLEMENT BOARD (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Taxation—Land Settlement and Development Act, R.S.B.C., 1924, c. 128—Proceedings of Land Settlement Board under ss. 46-55—Penalty tax (s. 53)—Direct or indirect taxation—Legislation attacked as ultra vires—Board's capacity to be sued.

Defendant, the body incorporated by the British Columbia *Land Settlement and Development Act,* took proceedings under ss. 46-55 of the Act (R.S.B.C., 1924, c. 128) with respect to lands of which plaintiff was the registered owner, and penalty taxes provided for by s. 53 were imposed. Plaintiff sued defendant, attacking said legislation as *ultra vires,* as providing for indirect taxation, and claimed damages, an injunction, etc.

Held that, as the notice which defendant had given under s. 53 contained no reference to appraisal of "interests" in land or of any interest separate from that of the owner, and said nothing as to persons claiming any estate or interest in the land, or any charge or encumbrance thereon, and as no taxes, charges, etc., other than those imposed upon the land itself, were notified to the owner, and there was nothing in the notice to indicate or suggest any intention or project to impose a tax upon any person, other than the owner, having any estate or interest in the land, the taxation effected could not, on giving the proper interpretation and effect to the provisions of ss. 51 and 53 of the Act, extend beyond the land and the owner thereof; and that the taxation effected upon the land and the owner was direct, and *intra vires* of the legislature.

City of Halifax v. *Fairbanks,* [1928] A.C. 117, at pp. 124-126, cited and applied.

Att. Gen. of Manitoba v. *Att. Gen. of Canada* [1925] A.C. 561, distinguished, having regard to the nature of the statutory provisions in question. In the present case, while the statute provides imperatively for the appraisal of the land, and for the taxation of the land and of the owner, it is left to the Board's discretion (except where the fee is still in the Crown) to appraise interests other than that of the owner; and no taxation is intended, or can be effected, of any estate or interest which is not appraised and described in the notice issued by the Board, by means of which notice the taxation is effected; the legislature itself has, therefore, plainly provided for the "partition" which was lacking in the *Manitoba case,* by confiding a discretion to the Board to tax or not to tax persons, other than the owner, claiming

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

any estate or interest in the lands or any charge or encumbrance thereon. In the present case the defendant Board did not include persons interested other than the owner, and there was no evidence that it had, in any case, ever availed itself of the power; it was unnecessary, therefore, to consider what would be the nature of a tax imposed on other persons. Even assuming that such a tax would be indirect, a good tax is not to be held bad merely because the legislature had mistaken its powers so far as in terms to confer upon the Board an *ultra vires* power which the Board did not exercise.

Ss. 51 (1) and 53 of the Act discussed at length, with regard to their interpretation and effect.

Since persons claiming any charge upon the land are specially provided for in subs. 2 of s. 53 (the provision imposing the tax), that special provision may be regarded as a "requirement of the context" which, in relation to that subsection, excepts the definition of "owner" in the *Land Registry Act* (R.S.B.C., 1924, c. 127, s. 2) from the application to that subsection provided for in subs. 6 (*a*) of said s. 53.

Held further (*per* Mignault, Newcombe and Rinfret JJ.; Anglin C.J.C. and Lamont J. not passing upon the question) that the defendant Board had capacity to be sued in respect of the claim for an injunction with regard to the alleged *ultra vires* proceedings. By reference to its powers and duties provided by the Act and the business in which it is directed or empowered to engage, there is ample evidence of the convenience and necessity of a power to sue and be sued; such a power may be inferred or implied like any other power which is necessary or incidental to the due execution of the powers expressed. (*Graham* v. *Public Wks. Commrs.*, [1901] 2 K.B. 781, at p. 791; *Interpretation Act,* R.S.B.C., 1924, c. 1, s. 23 (13), cited). While it is true that the revenues of the Crown cannot be reached by judicial process to satisfy a demand against an officer or servant of the Crown in any capacity, whether incorporated or not, it is common practice, founded upon general principle, that the court will interfere to restrain *ultra vires* or illegal acts by a statutory body, and, when it is charged, as in this case, that the proceedings in question, though authorized by the letter of the statute, are nevertheless incompetent, by reason of defect in the enacting authority of the legislature, the court has jurisdiction so to declare, and to restrain the *ultra vires* proceedings, although directed by the statute and in strict conformity with the legislative text (*Nireaha Tamaki* v. *Baker,* [1901] A.C., 561, at pp. 575-6, cited).

Judgment of the British Columbia Court of Appeal (39 B.C. Rep. 523) affirmed in the result.

APPEAL by the plaintiff from the judgment of the Court of Appeal for British Columbia (1), which allowed the defendant's appeal, and dismissed the plaintiff's cross-appeal, from the judgment of Morrison J., and dismissed the plaintiff's action.

(1) 39 B.C. Rep. 523; [1928] 2 W.W.R. 475.

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The defendant Board was created under the *Land Settlement and Development Act,* Statutes of British Columbia, 1917, c. 34, which, with amending statutes, was consolidated as c. 128 of R.S.B.C. 1924. The sections of the Act hereinafter referred to are those of c. 128 of R.S.B.C. 1924 (as amended).

The matters in question in this action arose under sections 46 to 55, inclusive, of the said Act. The plaintiff complained of proceedings taken by the defendant in respect of lands in and to which the plaintiff claimed an estate or interest as registered owner and as an unpaid vendor. It complained that the defendant had taken proceedings under the provisions of s. 53 of the Act and had claimed against the plaintiff penalty taxes and works and performance of obligations in respect of such lands, and that the defendant had certified to the provincial collector of taxes amounts of penalty tax alleged to be payable, and that thereby, and by proceedings consequent thereon, and by defendant's acts generally, which resulted, as alleged, in the breaking up of the plaintiff's colonization business, the destroying of land values, and the breaking of contracts and abandoning of holdings by purchasers from the plaintiff, the plaintiff had suffered loss, injury and damages.

By par. 7 of the statement of claim, the plaintiff alleged that the defendant's acts and proceedings under s. 53 of said Act were illegal, invalid, unlawful and void, for the reason that (a) the said Act was *ultra vires;* (b) in the alternative, ss. 46 to 55, both inclusive, were *ultra vires;* (c) the Acts, c. 42 of 1918, c. 41 of 1919, c. 41 of 1920, and c. 23 of 1925 (said Acts enacting amendments to the *Land Settlement and Development Act*) were *ultra vires.*

In par. 12 of the statement of claim the plaintiff alleged that subs. 2 of s. 53 of said Act was *ultra vires,* by reason of the fact that the liabilities, charges, taxes and duties thereby created and imposed were indirect, being created against and imposed upon the miscellaneous group comprising and including the owner and all persons claiming any estate or interest in any land affected by the subsection and all persons having any estate or interest in such land or any charge or encumbrance thereon, so that there was no direct tax imposed upon the person who it was intended or desired should pay it.

The plaintiff claimed a declaration that sections 46 to 55, both inclusive, of the Act were *ultra vires,* and that the defendant's acts and proceedings against the lands and against the plaintiff were illegal, and it claimed damages, an injunction, an account, and a decree adjudging the plaintiff and its lands absolutely freed from all past and pending proceedings of the defendant.

The defendant, in its defence, set out that it was a branch of part of the Department of Agriculture of the Government of the Province and was a servant or agent of the Crown, and as the Land Settlement Board it possessed no other capacity, and its every act and proceeding as alleged was its act and proceeding in said capacity as servant and agent of the Crown and not otherwise, and submitted that it was not liable to be sued in respect of said acts and proceedings, and that the plaintiff's remedy (if any) was by petition of right; that defendant was not liable, in its capacity as Land Settlement Board or as servant or agent of the Crown or otherwise in its official capacity, to be sued in respect of any of the matters complained of; it denied plaintiff's allegations; and alleged that all its acts and proceedings were done and carried out under the provisions of the said Act, and not otherwise, and without malice.

By on order of D. A. Macdonald J., the following points of law raised by the pleadings were directed to be set down for hearing before the trial, namely

1. Whether the defendant is liable to be sued in respect of any of the matters complained of in this action.

2. Whether the plaintiff's claim discloses any cause of action.

3. Whether the *Land Settlement and Development Act,* and in particular the provisions thereof referred to in par. 7 of the plaintiff's statement of claim, are *ultra vires* the legislature of the province.

The said points of law came on for hearing before Morrison J., who ordered that points (1) and (2) be answered in the affirmative, and that point (3) stand to be considered and determined by the judge trying the action.

The defendant appealed to the Court of Appeal, and moved for an order or judgment setting aside the whole of the judgment of Morrison J., and for judgment for the defendant. The plaintiff cross-appealed as to the failure of

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Morrison J. to decide question no. (3), and moved for an order or judgment setting aside the said part of his judgment and for judgment on the said part for the plaintiff. The Court of Appeal (1) held that questions (1) and (2) should be answered in the negative, and that question (3) should also be answered in the negative, as the said Act was wholly *intra vires* of the legislature; it accordingly allowed the defendant's appeal, and dismissed the plaintiff's cross-appeal, and dismissed the action. The plaintiff appealed to this Court.

W. N. Tilley K.C. for the appellant.

E. Lafleur K.C. for the respondent.

The judgment of Anglin C. J. C. and Lamont J. was delivered by

ANGLIN C. J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Newcombe.

I concur in what I understand to be the ground on which he maintains the judgment *a quo*—namely, that the only tax here imposed is on the land and its owner, that that tax is, on the authority of the Judicial Committee in the recent *Fairbanks case* (2), a direct tax, and that the provision in the statute authorizing it is distinct and severable from the provisions for the taxing of other interests.

This makes it unnecessary to consider whether the defendant is liable to be sued in the British Columbia Courts —a question of some nicety, to which I should require to devote more time and attention than I am at present in a position to give before concluding that the considered judgment of the Court of Appeal for British Columbia upon it was erroneous.

The judgment of Mignault, Newcombe and Rinfret JJ., was delivered by

NEWCOMBE J.—The writ was issued on 18th May, 1927, and the plaintiff has pleaded his statement of claim, in which he complains of the imposition of taxes against his lands in the Province of British Columbia, and against him-

(1) 39 B.C. Rep. 523; [1928] 2 W.W.R. 475.

(2) *City of Halifax* v. *Fairbanks* [1928] A.C. 117.

self as the registered owner and unpaid vendor of the lands, under the *Land Settlement and Development Act*, c. 128, R.S.B.C., 1924, alleging that sections 46 to 55, upon which the defendant, the Land Settlement Board, relies, are *ultra vires* of the Legislature; and he claims a declaration, damages, an injunction, an account, and such further and other relief as the case may require.

The defendant, by its defence, denies the plaintiff's allegations; sets up that the alleged acts and proceedings of the defendant were done and carried out by the defendant under the provisions of the *Land Settlement and Development Act*, and amending Acts, and not otherwise, and without malice; avers that the defendant is a branch of the provincial Department of Agriculture, and a servant and agent of the Crown, and possesses no other capacity, and that the acts and proceedings of the defendant alleged were done and executed in that capacity, and submits that it is not liable to be sued in respect thereof, and that it cannot be sued; and the defendant, moreover, alleges that the statement of claim discloses no cause of action.

The plaintiff, by his reply, joined issue.

In this state of the case, D. A. MacDonald, J., made an order in chambers on 6th September, 1927, setting down, for hearing and disposal before the trial, three points of law, namely:

1. Whether the defendant is liable to be sued in respect of any of the matters complained of in this action.
2. Whether the plaintiff's claim discloses any cause of action.
3. Whether the *Land Settlement and Development Act*, and, in particular, the provisions thereof referred to in paragraph 7 of the plaintiff's statement of claim, are *ultra vires* the Legislature of the province of British Columbia.

The learned judge, by his order, also directed that notice of the hearing should be given to the Attorney-General of Canada and to the Attorney-General of the Province, as required by the *Constitutional Questions Determination Act*. The hearing of these questions took place before Morrison J.; notice was given to the Attorneys-General, but it does not appear that either of them was represented. The

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parties were heard, however, and the learned judge, in his judgment of 10th November, 1927, answered the first two questions in the affirmative, and directed that the third question should stand to be determined at the trial. There was an appeal, and a cross-appeal, to the Court of Appeal, and, in the result, by order of the Court of Appeal of 6th March, 1928, the first two findings were reversed, and it was held that the third question should be answered also in the negative, as it was considered that the *Land Settlement and Development Act* was wholly *intra vires;* the defendant's appeal was allowed, and the plaintiff's cross-appeal and action were dismissed (1).

The plaintiff now appeals to this Court, and there are, in the view which I take, two questions of substance: first, whether the defendant has capacity to be sued in relation to the matters alleged; and, if so, secondly, whether the statutory provisions in question are in excess of provincial legislative power, as intended to authorize taxation within the province which is not direct.

I think it advisable, if not necessary, to consider both questions, because the corporate capacity of the defendant Board was very fully discussed at the hearing, and in the provincial courts there was a difference of opinion between the trial judge and the Court of Appeal. It will be convenient to consider these questions in the order stated.

The Land Settlement Board, the defendant and respondent in this action, is the body incorporated by the *Land Settlement and Development Act.* It is upon the interpretation of this Act that the questions in dispute principally depend. Several of its sections have been amended by c. 23 of 1925. The amendments are not, I think, material for present purposes, but, as they were introduced before the action, I shall refer to the Act as amended. The Act provides that, for the purpose of administering and carrying out its provisions,

> there shall be in the Department of Agriculture or in the Department of Lands, as may be determined from time to time by the Lieutenant-Governor in Council, a Board, to be called the "Land Settlement Board," which shall consist of one or more members, who shall be appointed by and receive such remuneration as may be determined by the Lieutenant-Governor in Council, and such Board shall be a body politic and corporate.

(1) 39 B.C. Rep. 523; [1928] 2 W.W.R. 475.

Each member of the Board is to hold office during pleasure and to devote the whole of his time to the performance of his duties under the Act; and, with the approval of the Lieutenant-Governor in Council, the Board may from time to time appoint and employ such appraisers, inspectors, officers and clerks as may be required for carrying out the provisions of the Act, and may prescribe their duties and determine their remuneration. The Board is to have an official seal, inscribed with the words "Land Settlement Board of British Columbia," of which the courts shall take judicial notice.

The Minister of Finance is to advance to the Board, out of the Consolidated Revenue Fund, such moneys, appropriated by authority of the Legislature, as the Governor in Council may direct, and salaries and other expenses, incurred by the Board for the purposes of the Act, are, in the absence of any special appropriation available for the purpose, to be paid from the Consolidated Revenue Fund. All moneys collected or received by the Board are to be paid into a chartered bank for credit of the account of the Board, and, unless directed by the Minister of Finance to be refunded, may be expended by the Board from time to time for any of the purposes authorized by the Act. It is provided that all moneys in the hands of, or payable to, the Board, and all property whatsoever held by the Board or to which the Board is entitled, are to be "the property of the Crown in the right of the Province, represented by and acting through the Board," and all moneys so payable or owing to the Board shall be recoverable accordingly as from debtors to the Crown.

The Board is authorized, subject to the provisions of the Act and the regulations, among other powers, to advance money by way of loan for any purpose which, in its opinion, will maintain or increase agricultural or pastoral production, and for carrying out the objects of any association which, in its opinion, will maintain or increase agricultural or pastoral production, subject to approval of the Governor in Council; and, in addition to all other powers conferred by the Act, the Board may do and perform all acts necessary and incidental to the business of lending money at interest, taking mortgages therefor and realizing on the same. The Board is empowered to take as security for loans, first

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mortgages upon agricultural land in the Province, but before granting any loan, it must ascertain that the loan is justified upon grounds which are specified by the statute, including the value of the security offered, estimated on the basis of agricultural productiveness; and no loan is to be made except upon appraisal and upon the approval of two members of the Board, or of one member with the concurrence of the Minister of Agriculture. Every mortgage is to contain a personal covenant on the part of the borrower for the repayment of the loan, in accordance with the terms of the mortgage. In case of the mortgagor's default, the Board is empowered to enter upon, to seize and take possession, in whole or in part, of the security for the loan, and to dispose thereof at public auction or public tender, and upon such terms and conditions as, under all the circumstances, it deems to be just; and the Board may transfer the land or other security to any purchaser it sees fit, " and give a good and valid title thereto, notwithstanding any encumbrances which may have been placed thereon in favour of any other person."

There is a group of sections, 40 to 45 inclusive, under the sub-title *Land Development and Land Settlement,* which authorizes the Lieutenant-Governor in Council, from time to time, to select and grant to the Board Crown lands within the province suitable for agricultural and pastoral purposes. By section 41, the powers of the Board, to be exercised with the sanction of the Lieutenant-Governor in Council, are defined. They include powers to take over from the Crown, to purchase from or to obtain by exchange with private owners, or to acquire by compulsory purchase, lands within the province for agricultural or pastoral purposes; to survey, cultivate, improve and use the lands so acquired; to erect buildings; to farm the lands when necessary or desirable; to build roads and bridges for the improvement of the lands; to sell, lease or exchange the lands upon such terms as may be agreed; to buy, sell or exchange all kinds of live stock, and every kind of merchandise which may be of use or benefit to the Board in any of its undertakings; to manufacture explosives, and to construct, execute, operate and maintain any work or undertaking necessary or incidental to the exercise by the Board of any of its powers under this section.

It has been shewn, in the preceding review of the legislation, that the defendant Board, which is, by the statute, made part of one of the departments of the provincial government, consists of one or more members appointed by the Crown, that each member holds office during pleasure, and that the Board is declared to be a body corporate and politic. It is not expressly enacted by the *Land Settlement and Development Act* that the Board may sue and be sued; but, by reference to its powers and duties, and the business in which it is directed or empowered to engage, as already briefly described, and as more fully disclosed in the text of the statute, there is, I think, ample evidence of the convenience and necessity of such a power. To reiterate specifically some of these provisions: the Board is to collect and receive moneys of the Crown; moneys payable or owing to the Board are recoverable by and through the Board as from debtors to the Crown; mortgages are to be taken in the name of the Board, and every mortgage is to contain a personal covenant by the borrower for due payment; the borrower is also to insure against fire, if required, and the loss is to be payable to the Board; the Board is authorized to engage in trade, to sell goods and merchandise at retail, to manufacture explosives and to construct works. A power to sue and be sued may, I have no doubt, be inferred or implied, like any other power which is necessary or incidental to the due execution of the powers expressed. Phillimore J., in *Graham* v. *Public Works Commissioners* (1), after referring to the convenience of the practice by which the Crown, with the consent of Parliament, establishes officials or corporations who may sue and be sued in respect of business engagements, without the formalities of the procedure necessary when a subject is seeking redress from his sovereign, said:

> Now, the only question for us is whether the Commissioners of Public Works and Buildings are not of the class of persons well described by Lindley L.J., in *Dixon* v. *Farrer* (2), as "a nominal defendant sued as representing one of the departments of the State." There is no reason in principle why they should not be. As I have pointed out, there is nothing derogatory to the Crown, and there is very great convenience, in the establishment of such bodies. The mere fact of their being incorporated without reservation confers, it seems to me, the privilege of suing and the liability to be sued.

(1) [1901] 2 K.B. 781, at pp. 791. (2) (1886) 17 Q.B.D. 658; 18 Q.B.D. 43.

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But, moreover, it has become a fashion to rely upon the general interpretation Acts as sources of the express authority which a corporation exercises to sue and be sued, and, in the case of British Columbia, the enactment is to be found in R.S.B.C., 1924, c. 1, s. 23 (13), which provides that,

> In construing this or any Act of the Legislature, unless it is otherwise provided, or there is something in the context or other provisions thereof indicating a different meaning, or calling for a different construction:—
>
> * * * * *
>
> (13) Words making any association or number of persons a corporation or body politic and corporate shall vest in such corporation:—
>
> (*a*) Power to sue and be sued, contract and be contracted with, by its corporate name, to have a common seal, and to alter or change the same at its pleasure, and to have perpetual succession.
>
> * * * * *

I find nothing in the legislation "otherwise provided," or "indicating a different meaning," and it follows that the defendant body has capacity to sue and be sued.

But the question as stated is: "Whether the defendant is liable to be sued in respect of any of the matters complained of in this action;" and it is in substance suggested, although the suggestion is not put in this precise form, that the defendant corporation is "an emanation from the Crown * * * a delegation by the Crown of its own authority to particular individuals," *Gilbert* v. *Corporation of Trinity House* (1); and that, if it may be sued at all, it is only in its official and representative capacity; and that, as a body corporate, it furnishes no resort for relief in respect of the claims put forward in this action.

For myself, I see no reason to doubt that the defendant Board is sued in its official capacity. It is described and identified in the action not otherwise than by its corporate name; it is thus the corporation, and not its individual members, which is the party defendant; and as a statutory body, it has no capacity other than that which it derives from its constituting Act. I do not question the general truth involved in the proposition expressed by Bankes L.J., in *Mackenzie-Kennedy* v. *Air Council* (2):

> In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on

(1) (1886) 17 Q.B.D., 795, at p. 801.

(2) [1927] 2 K.B. 517, at p. 523.

principle and upon authority, that no such action is maintainable. The Air Council are not a corporation, and even if it were to be treated as one the respondent's position would not be improved.

The learned Lord Justice mentions the case of *Roper* v. *Public Works Commissioners* (1); and he quotes from an Irish case, *Wheeler* v. *Public Works Commissioners* (2), a passage from the judgment of Palles C.B., as follows:

> Now, if a corporation be constituted for the sole purpose of doing acts for the Crown, it is *prima facie* outside its powers to do anything except for the Crown, and, as in law a wrongful act cannot be done for the Crown, such a corporation is not capable of doing such wrongful act in its corporate capacity. In such a case, therefore, the wrongful act cannot be deemed that of the corporation, but must be deemed the personal act of those who committed it.

With these observations, however, are to be contrasted what was said by Atkin L.J., at p. 533 of the *Air Council case* (3). But whatever may be said about the Air Council, and while it is certainly true that the revenues of the Crown cannot be reached by judicial process to satisfy a demand against an officer or servant of the Crown in any capacity, whether incorporated or not, it is common practice, founded upon general principle, that the court will interfere to restrain *ultra vires* or illegal acts by a statutory body, and, when it is charged, as in this case, that the proceedings in question, though authorized by the letter of the statute, are nevertheless incompetent, by reason of defect in the enacting authority of the legislature, the court must, I should think, have jurisdiction so to declare, and to restrain the *ultra vires* proceedings, although directed by the statute and in strict conformity with the legislative text. To this extent, in my view, the action is properly constituted; indeed, upon this point the authority is conclusive. In *Nireaha Tamaki* v. *Baker*, in the Judicial Committee of the Privy Council (4), Lord Davey, prouncing the judgment, said:

> In the case of *Tobin* v. *Reg.* (5), a naval officer, purporting to act in pursuance of a statutory authority, wrongly seized a ship of the suppliant. It was held on demurrer to a petition of right that the statement of the suppliant shewed a wrong for which an action might lie against the officer, but did not shew a complaint in respect of which a petition of right could be maintained against the Queen, on the ground, amongst others, that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty

(1) [1915] 1 K.B. 45.
(2) [1903] 2 Ir. Rep. 202.
(3) [1927] 2 K.B. 517.
(4) [1901] A.C. 561, at pp. 575-576.
(5) (1864) 16 C.B. (N.S.) 310.

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imposed upon him by Act of Parliament, and in such a case the maxim "*Respondeat superior*" did not apply. On the same general principle it was held in *Musgrave* v. *Pulido* (1), that a Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor," or as "acts of State." It is unnecessary to multiply authorities for so plain a proposition, and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.

It is not necessary for me to consider the position of the individual members of the Board, because I hold that, as such, they are not before the Court; but, upon the authorities, it seems to be established that the doer of a wrongful act cannot escape liability by setting up the authority of the Crown, unless in proceedings by a foreigner against a British subject, in which case an exception is introduced, as appears by *Feather* v. *The Queen* (2), in which Baron Parke's charge in *Buron* v. *Denman* (3), was explained. It seems to be only in such a case that it is of any use to justify upon the authority of an act of State. *Walker* v. *Baird* (4).

Now we come to the main point, which gives rise to the action. It is put by the third stated question, and it is maintained by the appellant that the provisions of the *Land Settlement and Development Act* with respect to select areas are *ultra vires* of the Legislature as sanctioning taxation which is not direct.

Following the provisions of the *Land Settlement and Development Act,* to which I have already referred, there is another fascicle of clauses, entitled *Settlement Areas,* embracing sections 46 to 55 inclusive, by which the Board is empowered, when, in its opinion, agricultural production is being retarded by reason of lands remaining undeveloped, from time to time, with the approval of the Governor in Council, to establish a settlement area in any part of the province, and to limit that area. Notice of the establishment of any such settlement area is to be published in the *Gazette* and notified to the Land Registry Office of the district within which the area is established. The Board

(1) (1879) 5 App. Cas. 102.
(2) (1865) 6 B. & S. 257, at pp. 279, 295, 296.
(3) (1848) 2 Exch. 167.
(4) [1892] A.C. 491.

may make regulations, with the approval of the Lieutenant-Governor in Council, for carrying into effect the provisions of the Act with respect to any settlement area, and may enter into agreements with any person for the colonization of the settlement area, or any portion thereof. The Registrar of Titles is to file the notice and to make the prescribed notations, and this is declared to constitute notice to every person proposing to deal with, or to acquire any estate or interest in, or any charge upon, any land within the settlement area that the land is subject to the provisions of the Act, and shall put such person upon enquiry as to the proceedings which may have been taken by the Board; all subsequent registrations in respect of any parcel of land affected by such notice shall be subject to the rights, options and privileges of the Board; and the person claiming under such registration shall take the land subject to all charges and liabilities which have been imposed, or to which the land may be liable to be subjected under the Act.

Then follows section 51, the first subsection of which should be quoted. It is as follows:

51. (1) The Board shall, from information obtained, appraise all lands within a settlement area at such value as the Board considers the property would be taken in payment of a just debt from a solvent debtor, and each parcel the subject of separate ownership shall be separately appraised either as a unit or in such sections or divisions as the Board deems advisable. The Board may from time to time, as it deems advisable, again appraise the whole or any portion of the lands within a settlement area. The Board may, if it deems it advisable, for the purposes of this Act, appraise interests in land, and it shall, in the case of land whereof the fee is still in the Crown, make a separate appraisal of the interest which has been parted with by the Crown. The latest value so established is hereinafter called the "appraised value."

Section 53 is a long one, but it is the important section, and it seems necessary to quote it. I therefore set out its provisions in full:

53. (1) After every such appraisal the Board shall forthwith send notice thereof by registered mail to each owner of land in the settlement area, addressed to him at his last known place of residence. The notice shall contain:

(*a*) A short description of the land and, if all interests are not appraised, of the estate or interest appraised;

(*b*) A statement of the appraised value;

(*c*) A statement that unless the owner, within thirty days from the date of the notice if the notice is addressed to a place within the Dominion or the United States of America, or within sixty days from such date if the notice is addressed to any other place, or within such further time

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in any case as the Board may determine, irrevocably agrees that the Board may, in its discretion, buy from him or negotiate on his behalf a sale of the land at its appraised value at any time within two years from the date of the notice, and thereafter until the Board has been notified in writing by the owner of his election to withdraw the land from sale, he shall during each year after the date of the notice be required to make and execute improvements on the land in such manner and to such extent as the Board may by regulations prescribe;

(*d*) A statement that, in the event of the neglect or refusal of the owner to agree that the Board may, in its discretion, buy from him or negotiate on his behalf a sale of the land at the appraised value, and, failing such agreement, to improve the land according to the regulations of the Board, and to furnish to the Board a verified statement of such improvements as required by this section within one year from the expiration of the notice, the land shall immediately at the expiration of such year become subject in respect of that year to a penalty tax, payable to His Majesty, of five per cent. of the appraised value in addition to all other taxes imposed on the land; such tax to be payable in full in respect of that year, and thereafter to be payable in full in like manner in respect of such (*sic*) succeeding year so long as such neglect or refusal continues;

(*e*) A statement that each owner of land within a settlement area who decides to exercise the option of improving the land in the manner prescribed by the regulations of the Board is required to furnish to the Board before the end of each year following the expiration of the notice a detailed statement, satisfactory to the Board, of the improvements made by him in respect of that year, verified by statutory declaration;

(*f*) A statement that, in the event of the owner of lands within a settlement area having improved the same in accordance with the regulations of the Board for one or more years, he shall during the currency of the said regulations be required to maintain such improvements to the satisfaction of the Board, in addition to the improvements required to be made in the succeeding years;

(*g*) The date of the notice, which shall be the date on which it is mailed.

(2) Every notice mailed by the Board pursuant to this section shall have the effect of imposing upon the land described therein and upon the owner thereof, and all persons claiming any estate or interest therein or any charge or encumbrance thereon, the liabilities, charges, taxes and duties of which such owner is thereby notified, and shall be binding upon the land and upon the owner and upon all persons having any estate or interest in the land described in the notice in every respect in accordance with its terms, and every Provincial Assessor and Collector of Taxes shall, upon receipt of the certificate of the Board furnished pursuant to subsection (3), do all things necessary to assess and collect the penalty tax imposed in any case under this section. All the provisions of the "Taxation Act" as to the collection and recovery of taxes and all powers and proceedings which may be exercised or taken under that Act in default of payment of taxes shall, *mutatis mutandis*, apply to every tax imposed under this section.

(3) The Board shall from time to time certify to the Provincial Collector of Taxes the amount of penalty tax payable in respect of any lands under the provisions of this section. The certificate shall be conclusive

evidence of the amount of tax payable in each case, and all taxes so certified shall thereupon be deemed to be delinquent taxes within the meaning of the "Taxation Act."

(4) The Board shall file a copy of the form of notice sent with a schedule showing the persons to whom sent and the lands affected and the appraised value in the Land Registry Office, and the Registrar of Titles shall file the same under the same filing number as the notice of the establishment of the settlement area.

(5) The regulations of the Board as to improvements and the required extent thereof shall, in case of lands held by pre-emption, be, in so far as their effect extends, in addition to the requirements of the "Land Act."

(6) "Owner", for the purposes of this section and of sections 55, 56, 57, and 62, shall have the following meanings:—

(*a*) Where the title to the land is registered, the registered owner as defined by section 2 of the "Land Registry Act";

(*b*) Where the land is held as a pre-emption, the pre-emptor;

(*c*) Where the land has been granted by the Crown but the Crown grant has not been registered, the Crown grantee;

(*d*) Where the owner as defined in clauses (*a*), (*b*), and (*c*) is ascertained by the Board to be dead, the person upon whom the land has devolved.

The only other provision to which it may be desirable to refer is s. 55, which enacts that every agreement that the Board may buy from the owner, or negotiate a sale on his behalf of, the land at its appraised value, shall be in writing, and, when made with the Board by the owner, shall bind all persons having any estate or interest in the land.

Particular attention is directed to the provisions of s. 53 that, if all interests are not appraised, the notice to the owner of the land *shall* contain a short description of the estate or interest appraised; that the notice is directed to the owner of the land; that, by subsection 2, the effect of the notice is to impose upon the land described therein, and upon the owner thereof, and all persons claiming any estate or interest therein, or any charge or encumbrance thereon, the liabilities, charges, taxes and duties *of which such owner is thereby notified*, and that the notice shall be binding upon the land, and upon the owner, and upon all persons having any estate or interest in the land described in the notice, *in every respect in accordance with its terms;* from which I think one may be justified to infer that it is only such estates or interests as are appraised that are affected by the section; and that, in addition to the owner, it is only the persons claiming any estate or interest in the land, or any charge or encumbrance thereon, who are iden-

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tified by the notice sent out by the Board that are subject to the imposition of liabilities, charges and duties, or are bound by the declared statutory effect of the notice. It is thus the notice, which the Board is directed to frame, and the substance of which is to depend upon the facts of the case, that determines whether any interest other than that of the owner is taxed.

It may be useful to observe that it is enacted, for the purposes of section 53, and some later sections which it is not necessary now to mention, that the word "owner" shall mean, where the title to the land is registered, the registered owner as defined by s. 2 of the *Land Registry Act*, R.S.B.C., 1924, c. 127, and, referring to the latter provision, it is thereby enacted that

> In this Act, unless the context otherwise requires: * * * "owner" and "registered owner" mean any person registered in the book of any Land Registry Office as owner of land or of any charge on land, whether entitled thereto in his own right or in a representative capacity or otherwise.

The word "owner" occurs in several places in s. 53 of the *Land Settlement and Development Act*, and it will be perceived that in subs. 2 of that section, which is the provision that imposes the tax, it is the owner of the land, "and all persons claiming any estate or interest therein, or any charge or encumbrance thereon," who are expressly subjected to the imposition of "the liabilities, charges, taxes and duties," which are declared to be binding "upon the land, and upon the owner, and upon all persons having any estate or interest in the land." And, since persons claiming any charge upon the land are specially provided for in subs. 2 of s. 53, that special provision may, I think, be regarded as a requirement of the context which, in relation to that subsection, excepts the definition of owner in the *Land Registry Act* from the application to subs. 2 of s. 53 of the *Land Settlement and Development Act* provided for in subs. 6 (*a*) of s. 53. Therefore it would seem that subs. 2 of s. 53 of the latter Act may be interpreted as self contained, and as not controlled or to be interpreted by the definition of "owner" in the *Land Registry Act*.

Now the tax is five per cent. on the appraised value of the land, and we know that it is the duty of the Board to appraise all lands within the settlement area, and that the Board *may*, "if it deems it advisable," appraise interests in

land, and *shall*, if the fee be still in the Crown, make a separate appraisal of the interest which has been parted with by the Crown. We know also that the notice to be given by the Board upon the appraisal must contain a description of the estate or interest appraised; that the taxes are imposed by the statutory operation of the notice mailed by the Board; that the taxes imposed are those of which the owner of the land is notified, and that the taxes so notified are to be

> binding upon the land and upon the owner and upon all persons having any estate or interest in the land described in the notice, in every respect in accordance with its terms.

The Legislature cannot reasonably have meant that a person claiming a small charge or encumbrance upon land of considerable value should therefore become liable for a tax of five per cent. upon the value of the land; also it seems strange that, for the purpose of imposing a tax upon a person interested, other than the owner, it should be the owner of the land, and not of the separate interest, who is to be notified under subsection 2 of section 53.

The notice is set out in paragraph 10 of the statement of claim. According to the allegations, several of these notices were given, but they are each in the same terms, except as to the lot number and price per acre. It is not suggested that the notice is defective for lack of compliance with the statutory requirements; what is pleaded, and what was urged at the hearing, is stated in paragraph 12 of the statement of claim, which says that subsection 2 of section 53 of the *Land Settlement and Development Act* is *ultra vires* of the Legislature, because

> the liabilities, charges, taxes and duties by the said subsection created and imposed are indirect, being created against and imposed upon the miscellaneous group, comprising and including the owner and all persons claiming any estate or interest in any land affected by the subsection and all persons having any estate or interest in such land or any charge or encumbrance thereon; so that there is no direct tax imposed upon the person who it is intended or desired should pay it.

It may be assumed, therefore, that the notice is valid, except for the objection so stated, and that the notice complies with the statutory requirements. Then, by reference to the notice as alleged, it provides, by paragraph (*d*), after stating the appraised value of the land per acre, and specifying the improvements which the owner is required to make,

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That, in the event of your neglect or refusal to either enter into the agreement referred to, or to make and execute the improvements on the land specified in clause (*c*) of this notice, and to furnish the Board with a verified statement of such improvements, within one year from the date hereof, as the case may be, the said lands shall immediately after expiration of such year become subject, in respect of that year, to a penalty tax, payable to His Majesty, of five (5) per cent. of the appraised value, in addition to all other taxes imposed on the said land; the said tax to be payable in full in respect to that year, and thereafter to be payable in full in like manner in respect to each succeeding year, so long as such neglect or refusal continues.

There is no reference anywhere in the notice to the appraisal of interests in land, or of any interest separate from that of the owner, and nothing is said as to persons claiming any estate or interest in the land, or any charge or encumbrance thereon. No liabilities, charges, taxes or duties, other than those imposed upon the land itself, are notified to the owner, and nothing can be derived from the terms of the notice to indicate, or to suggest, any intention or project to impose a tax upon any person, other than the owner, having any estate or interest in the land described in the notice. In these circumstances, the taxation effected by the mailing of the notice cannot, I should think, extend beyond the land and the owner of the land.

The case upon which the appellant relies with relation to the quality of the taxation is *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1). The question there was as to the validity of taxes imposed by a statute of Manitoba upon contracts of sale of grain for future delivery. The seller was required to pay a tax proportionate to the quantity sold, and the liability extended not only to brokers and mere agents, but to factors, such as elevator companies, to whom the possession of the grain had been entrusted for sale. Lord Haldane, in pronouncing the judgment, pointed out that, by successive decisions of the Judicial Committee, the principle as laid down by John Stuart Mill, and other political economists, had been judicially adopted as the test for determining whether a tax was or was not direct within the meaning of the *British North America Act;* he reaffirmed the view that a direct tax is one that is demanded from the very person who is intended or desired to pay it; and he referred to the fact that the grain business had many ramifications, saying that, in view of the cases to which the liability would extend,

(1) [1925] A.C. 561.

If, therefore, the statute seeks to impose on the brokers and agents and the miscellaneous group of factors and elevator companies who may fall within its provisions, a tax which is in reality indirect within the definition which has been established, the task of separating out these cases (*sic*) of such persons and corporations from others in which there is a legitimate imposition of direct taxation, is a matter of such complication that it is impracticable for a court of law to make the exhaustive partition required. In other words, if the statute is *ultra vires* as regards the first class of cases, it has to be pronounced to be *ultra vires* altogether.

And he therefore considered it impossible to uphold the legislation. The appellant relies upon this case as establishing in principle that the taxation authorized by the *Land Settlement and Development Act* is not direct, so far as it affects persons claiming any estate or interest in the land appraised, or any charge or encumbrance thereon; and that, having regard to the variety and diversity of the estates or interests, charges or encumbrances, which may exist or come upon the land, it is, he says, obvious, in respect of some of them at least, that the tax must be imposed upon or demanded from one person in the expectation, and with the legislative intention, that he shall indemnify himself at the expense of another, and that so far at least, the legislation is *ultra vires*. Moreover, he contends that it is a matter of complication, and impracticable, as it was in the *Manitoba case* (1), for the court to make an exhaustive partition; and that the court cannot safely affirm that any part of the Act which, standing alone, might be sustained, can, in view of the context in which it was enacted, be upheld as expressive of the legislative intention, when it is ascertained that the Legislature had no power to give effect to the provisions of that context. But, in my view, that argument does not apply to this case.

I have already shewn that, while the statute provides imperatively for the appraisal of the land, and for the taxation of the land and of the owner, it is left to the discretion of the Board, except where the fee is still in the Crown, to appraise interests other than that of the owner; and that no taxation is intended, or can be effected, of any estate or interest which is not appraised and described in the notice issued by the Board, by means of which notice the taxation is effected. The Legislature itself has therefore plainly provided for the partition, which was lacking in the *Manitoba case* (2), by confiding a discretion to the

(1) [1925] A.C. 561. (2) [1925] A.C. 561.

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Board to tax or not to tax persons, other than the owner, claiming any estate or interest in the lands, or any charge or encumbrance thereon.

The position, as I see it, is this: the Board is required, when the statutory conditions occur and exist, to give effect to the statutory imposition as against the land and the owner, and it is empowered, "if it deems it advisable," also to tax all estates, interests, charges or encumbrances, because I hold that the expression "interests in land," within the meaning of subsection 1 of section 51, must be intended to comprise what is described in subsection 2 of section 53 as "any estate or interest therein or any charge or encumbrance thereon." Some question might arise as to how the taxation should be worked out, if the Board had desired to tax these interests; but, in the present case, the Board did not think it advisable to include persons interested other than the owner, and there is no evidence that the Board has, in any case, ever availed itself of the power. It is clearly within the contemplation of the statute that the Board might validly tax the land, and the owner, without introducing the holders of other estates, interests, charges or encumbrances; therefore, if the tax upon the land and the owner be direct, it is unnecessary to consider what would be the nature of a tax which might have been imposed upon other persons; and I express no opinion upon that hypothetical case.

Now it is laid down by the Judicial Committee, in the most recent case of *City of Halifax* v. *Fairbanks* (1), notwithstanding what was said in the earlier cases, including that of *Cotton* v. *The King* (2), which is said to depend upon its own facts, that taxes upon property or income were, at the time of the Union, everywhere treated as direct taxes; and that,

> When the Act of Union allocated the power of direct taxation for provincial purposes to the province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the provincial legislatures, and that without regard to any theory as the ultimate incidence of such taxation.

The Lord Chancellor proceeds to say, referring to Mill's formula, that

(1) [1928] A.C. 117, at pp. 124-126.

(2) [1914] A.C. 176 at p. 193.

No doubt it is 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; but it cannot have the effect of disturbing the established classification of the old and well-known species of taxation, and making it necessary to apply a new test to every particular member of those species * * * . It may be true to say of a particular tax upon property, such as that imposed on owners by section 394 of the *Halifax Charter*, that the taxpayer would very probably seek to pass it on to others; but it may none the less be a tax on property and remain within the category of direct taxes.

Therefore, within the authority of the *Fairbanks case* (1), as I interpret it, taxation upon land and upon the owner of the land is within the category of direct taxation, and there is no attempt in the case with which we are now concerned to impose or to levy any tax, except upon the land and the owner of the land, even assuming that other taxes which the Board has a statutory power to impose might, if imposed, be regarded as falling within the opposing classification. It cannot be, I should think, that a good tax is to be held bad merely because the legislature had mistaken its powers so far as in terms to confer upon the Board an *ultra vires* power which the Board, for one reason or another, deemed it advisable not to exercise.

It is urged in effect for the respondent that estates and interests in, and charges and encumbrances upon, lands might be taxed upon the footing of appraised value without introducing any new or unfamiliar principle; and that, even if the Board had executed to the limit its powers as expressed by the Act, none of the taxes thus imposed ought to be held otherwise than direct, within the interpretation of the *Fairbanks case* (1). But I am reluctant to enter upon the enquiry unnecessarily, and I shall therefore follow the wise counsel of Sir Montague Smith in the famous *Parsons case* (2), where he cautions those upon whom is cast the duty of interpreting judicially the meaning of the British North America Acts, to decide each case that arises as best they can, without entering more fully into the interpretation of the statute than is necessary for the decision of the particular question in hand.

(1) [1928] A.C. 117.

(2) (1881) 7 App. Cas. 96, at p. 109.

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For these reasons, in the result, the appeal should be dismissed, and the costs, I think, should follow.

Appeal dismissed with costs.

Solicitors for the appellant: *Elliott, Maclean & Shandley.*

Solicitor for the respondent: *J. W. Dixie.*

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*Nov. 21.
*Dec. 21.

HYMAN GOLD (DEFENDANT).....APPELLANT;

AND

B. L. REINBLATT (PLAINTIFF).....RESPONDENT;

AND

ISAAC KERT (MIS-EN-CAUSE).

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

Foreign law—Proof of—Competent and qualified witness—Art. 110 C.C.P.

In order to prove the law of a foreign country it is not necessary that the witness should be a lawyer actually practising his profession in that country; but, inasmuch as foreign law is a question of fact which must be proved as any other fact by a competent and qualified witness, any person whose occupation makes it necessary for him to have knowledge of the law of such foreign country may be a competent and qualified witness, the competency and qualification of such witness being a matter for the appreciation of the court.

Observations as to construction and effect of pleadings; surprise. (Art. 110 C.C.P.)

Judgment of the Court of King's Bench (Q.R. 45 K.B. 136) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Weir J. (2), and maintaining the respondent's action.

The respondent, in order to prove the law of Austria, called a witness described in the text of his deposition as an "insurance agent, of the city of Montreal, aged 39 years"; and the appellant's counsel objected that "the witness (was) not capable of making proof as to foreign law." This witness was born in Austria, where he lived until 1922,

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

(1) Q.R. 45 K.B. 136. (2) Q.R. 65 S.C. 17.

and at the time of the trial, he was a law student at McGill University, Montreal. He had already studied law at the University of Czerinowitz before the war, and, resuming his studies some time after, he received the degree of Doctor of Law. In 1919, he was admitted to the bar and began practice as a lawyer at Suczawa, in the province of Bucovina, in Roumania, where the law of Austria was in force. He produced a certificate of his degree from the dean of the University of Czernowitz and also a certificate from the President of the Lawyers of Bucovina that he had been admitted as a lawyer. After testifying as to the law of Austria as regards marriage and civil status, the witness cited some articles of the Austrian Civil Code which bore out his evidence.

The trial judge held that the witness was not competent to prove the law of Austria because he was not actually practising his profession there. The Court of King's Bench reversed that decision and the principal *considérants* of its judgment are the following:

" Considering that the said expert witness after having prosecuted his legal studies at an Austrian university, became a practising lawyer at the bar of Roumania because his native province was, by the Treaty of Versailles, transferred from Austria to Roumania;

" Considering that foreign law is a question of fact which must be proved as any other fact by a competent and qualified witness, and that, besides professional persons, any person whose occupation makes it necessary for him to give special attention to legal topics, may be a competent witness, the application of this test being left for decision to individual cases;

" Considering that, in the circumstances disclosed in the present action, the said witness was fully qualified to testify as to the laws of Austria, and that, moreover, his evidence is corroborated by the Austrian code to which he refers, and of which this court is, therefore, entitled to take cognizance;"

J. L. St. Jacques K.C. and *Louis Fitch K.C.* for the appellant.

Eug. Lafleur K.C. and *H. Weinfield K.C.* for the respondent.

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The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff (respondent) is endeavouring to enforce a contract for the sale to the defendant (appellant) of numbers 22 to 28 Duluth Avenue West, Montreal. The contract is in writing, dated 3rd March, 1925, and there is no dispute about its execution or validity. As the case is presented in this court, the difference between the parties relates to the matrimonial status of the plaintiff, and it is raised in this wise: By the notarial deed of sale and conveyance which the plaintiff caused to be tendered to the defendant on 30th April, 1925, the fifth of the vendor's declarations reads as follows:

> That he has been twice married, namely, first to Dame Chaia Sarah Weingost, from whom he was separate as to property in virtue of the laws of Austria, where he was domiciled at the time of his marriage, and who died in the month of May, 1921; and secondly, to Dame Chaia Spivack, who is alive.

The defendant rejected the deed, alleging community, by the law of Austria, between the plaintiff and his deceased wife, by whom the plaintiff had ten children. Of these, five died in childhood in Russia, and one son died in Canada, leaving four children of his own, who are living in Montreal. The defendant's answer to the notary, who tendered the deed, as recorded in the protest, was:

> Am ready to buy the property and pay the money, as soon as all the heirs sign the deed of sale and give clear titles to same.

The plaintiff claimed, by his declaration in the cause, dated 14th May, 1925, the execution of the deed and other relief, as therein particularly set out. The defence, dated 15th December, 1925, in so far as it relates to the matter now in controversy, consists of a single paragraph, no. 15, as follows:

> Plaintiff has at no time, although called upon to do so, produced a certificate of marriage, nor proof of the law of Austria, where the said marriage is purported to have taken place; and according to the laws of Austria, where plaintiff was married to his first wife, plaintiff and his wife were in community as to property; one-half of the immovable property belongs to the heirs of the plaintiff's first wife, who are still owners of a one-half interest in the said property, and who have not divested themselves thereof, and are not parties to the deed tendered to the defendant.

The plaintiff, by the ninth paragraph of his answer to the defendant's plea, alleges

> That as a matter of fact, according to the law of Austria, where plaintiff and his first wife were married, the consorts were separate as to property, which law provides that the consorts shall be separate unless an

ante-nuptial contract was entered into stipulating community, and as a matter of fact no such ante-nuptial contract had been entered into between plaintiff and his first wife.

And the defendant, by his replication, generally denied this paragraph, along with others.

At the trial, the plaintiff, in order to prove the law of Austria, called Milan Oxorn, described in the text of his deposition as "of the city of Montreal, insurance agent, aged thirty-nine years," and the defendant's counsel objected that "the witness is not capable of making proof as to foreign law." Subject to this objection, Mr. Oxorn testified that he was born in Austria, where he lived in the Austrian municipality of Bucovina (which subsequently became a Roumanian province) until the end of 1922, after which he came to Canada; and that he was, at the time of the trial, a law student at McGill University. He was studying at the University of Czernowitz before the war, but his course was then interrupted, and he became engaged in the Austrian military service. Then, after the war, he resumed his law studies, passed his remaining examinations at the university, and acquired the degree of Doctor of Law. In 1919, he was admitted and began practice as a lawyer at Suczawa, in the province of Bucovina, which had, by the terms of the peace, been added to Roumania, but where the law of Austria nevertheless continued to apply. Dr. Oxorn produces a certificate of his degree from the Dean of the University of Czernowitz, dated 4th August, 1919; also a certificate from the President of the Corporation of Lawyers of Bucovina, Roumania, dated 24th August, 1922, the English translation of which in evidence is suggestive of some imperfection; it reads as follows:

CORPORATION OF LAWYERS OF BUCOVINA

ROUMANIA

(Seal)

Certificate of Advocate

Seeing the application registered under no. 824/22 the Corporation of Lawyers of Bucovina, having examined the acts and diplomas of Dr. Milan Oxorn, stating that he was entered as a probationary advocate in the table of lawyers of Falticeni on the first day of August, 1922, as appears by his advocate's certificate no. 20 drawn up by the named corporation, as by resolution of August 24, 1922, admitted his transfer and

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entry as a definitive advocate in the list of the Corporation of Advocates of Bucovina, with domicile in Suczawa.

This certificate is drawn up to serve him in all judicial instances.

THE PRESIDENT OF THE CORPORATION,

DR. REUTZ.

Corporation of Lawyers of Bucovina.

(Seal)

No. 84/22. August 24th.

Dr. Oxorn testified that he has an intimate knowledge of the law of Austria as regards marriage and civil status; and he goes on to shew that, at the time of the plaintiff's marriage in 1877, and ever since, according to the law of Austria, marriage, in itself, does not carry with it any community of property between husband and wife; and that, in order that community should exist between them, there must be a special contract, which may be stipulated according to the will of the parties; and he read articles 1233, 1237 and 1238 of the Austrian Civil Code.

The witness was cross-examined upon his bar certificate, and explained:

Q. You were admitted to the bar in 1922, in August, 1922?

A. No, sir, I was admitted to the bar in 1919.

Q. I understood from your first certificate, which is in German, that you graduated in 1919?

A. Yes.

Q. At the University of Czernowitz?

A. Yes, but if you examine the wording you will see, a "definite" lawyer. I will explain to you. The first two years you are a candidate. As a candidate I could plead before courts, but not before the jury. After two years I was appointed definite advocate.

Q. You are finally called?

A. Yes.

Q. That was in 1922?

A. Yes.

It was brought out, in cross-examination and re-examination of the witness, subject to the plaintiff's objection to the introduction of this subject, that, according to the law of Austria, domicile was acquired by settlement in Austria with intention to remain permanently there; that ordinarily a minor could not, except by intervention of parents, curator or tutor, elect a domicile, but that he became emancipated by marriage; and the witness expressed himself, upon the hypothesis of the present case, in favour of

the acquisition of Austrian domicile. The defendant did not pursue the enquiry, nor produce any evidence as to the foreign law.

The uncontradicted facts shew that the plaintiff married his first wife in Skala, Austria, in 1877, when he was seventeen years of age, that he had been living there for six months before his marriage; that he continued to live there for a year and a half afterwards, and that his first child was born there. The plaintiff was cross-examined to shew that he was born in Komenitz Podolsk, a Russian province, where his parents resided; that when he left Russia, at the age of seventeen, he did not intend to return, and that when he married, he made up his mind to remain in Austria, where he was; but that, after a year and a half, when he could not get employment in Austria, he returned to Komenitz, and continued to reside there, and at Brechman, in Russia, until fifteen or sixteen years before the trial, when he migrated to Canada, where he has since lived with his family.

Weir J., the trial judge, pronounced his judgment on 22nd February, 1926. He dismissed the action upon two grounds: first, that Dr. Oxorn was not competent to prove the law of Austria, because he was not actually practising his profession there, and that his evidence was therefore inadmissible; and, secondly, that, since there was, in his view, no evidence of the Austrian law, it must be presumed to coincide with that of the province of Quebec, whereby there was, as the learned judge expresses it,

> legal community between man and wife, and legal or customary dower in favour of the wife and children born of their marriage;

and he held that the plaintiff

> has not proved that during his residence in Austria he made manifest his intention of abandoning his original domicile, and, as a consequence, the law of Russia applied to him at the time of his marriage.

In the Court of King's Bench, the appeal was heard by five learned judges, Greenshields, Tellier, Bernier, Hall and Cannon JJ., who held, in the circumstances disclosed, after considering the rule of evidence as to proof of foreign law, that Dr. Oxorn was fully qualified to testify as to the law of Austria; that his evidence, corroborated as it is by the Austrian Code, to which he had referred, should be accepted, and that there was, therefore, no community of

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property between the plaintiff and his wife. I am quite satisfied with the grounds upon which this conclusion is put.

The Court of King's Bench ignored, as a *ratio decidendi*, the question of Russian domicile, which was suggested on behalf of the defendant, although not pleaded, because the pleadings assumed Austrian domicile, and had put in issue only the law of Austria with regard to community of property. Greenshields, Hall and Cannon JJ., discussed this subject at some length, and Hall J., quotes paragraph 15 of the plea, pointing out that it is an affirmative allegation, importing a judicial admission that the marriage was governed by the laws of Austria, and Cannon J., introduces the following paragraph in his reasons:

> Le litige étant clairement délimité par les plaidoires écrites il semble inutile de se demander, comme le premier juge l'a fait, si l'appellant lors de son mariage, sujet russe mineur, était encore domicilé chez ses parents en Russie. La question ne se présente pas entre les parties qui, d'un commun accord, ont lié contestation sur l'effet que la loi autrichienne alors en vigueur pouvait avoir sur le régime matrimonial de l'appelant et de son épouse.

The construction and effect of the pleadings is a matter regulated by the provincial practice, with which this court is very reluctant to interfere, and particularly in a case such as this, where justice seems to require a strict application of the rules. Manifestly, having regard to the frame and substance of the pleadings, the plaintiff went to trial upon the question of the Austrian law of community, and he made an appropriate objection when, in the course of the cross-examination of his expert witness, the defendant attempted to introduce a question of Russian domicile. The defendant could, no doubt, have raised that question by an apt amendment, upon suitable terms, but he neither, at any time amended, nor asked for leave to amend. It is provided by the general rules of pleading, art. 110 of the Quebec Code of Civil Procedure, that

> Every fact which, if not alleged, is of a nature to take the opposite party by surprise, or to raise an issue not arising from the pleadings, must be expressly pleaded.

A litigant is not permitted to set up a new case of fact at the trial without consent or notice, unless upon reasonable terms; and this rule is very strictly applied when, in order to meet the new case, it becomes necessary for the party,

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against whom it is brought forward, to obtain additional information, or to examine distant witnesses, or witnesses whose attendance cannot be readily obtained.

In these circumstances, it seems unnecessary to consider whether the evidence of domicile which the defendant elicited upon cross-examination would accord to the plaintiff the Austrian domicile which he claims, at the time of his marriage; and I shall not enter upon the enquiry, which was argued at some length before us, as to whether emancipation of a minor by marriage and his contemporaneous election of a new domicile, operates, at the time of the marriage, or must be deemed to take effect only subsequently, after the marriage relation or status has become complete.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Louis Fitch.*

Solicitor for the respondent: *Weinfield & Sperber.*

E. T. WRIGHT, LIMITED (DEFENDANT) . . APPELLANT;

AND

THE ADAMS & WESTLAKE COMPANY, AND THE HIRAM L. PIPER COMPANY, LIMITED (PLAINTIFFS). } RESPONDENTS.

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*Dec. 3, 4.
*Dec. 5.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Invention—Novelty—Manufacture and importation—Patent Act, R.S.C., 1906, c. 69, s. 38—Patent Act, 1923, c. 23, ss. 40, 41, 66.

The judgment of the Exchequer Court of Canada, [1928] Ex. C.R. 112, holding that the patents in question (for improvements in trainmen's lanterns), relied on by plaintiffs, were valid, and had been infringed by defendant, was affirmed. It was held that, in the combination patented, there was invention, novelty, usefulness and commercial value; and that (in regard to the patents' validity) no violation was shown of any statutory provision as to manufacture and importation.

All matters of manufacture and importation prior to the coming into force of *The Patent Act* of 1923 (c. 23) are governed by the provisions of the earlier Act which it replaced. After the Act of 1923 came into

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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force, questions of manufacture and importation were governed by its provisions; and under them the Commissioner of Patents is *curia designata* to determine such questions; as to which, therefore, the Exchequer Court of Canada, in an action brought in that court, has no jurisdiction.

APPEAL by the defendant from the judgment of the Exchequer Court of Canada (Audette J.) (1).

The action was for alleged infringement of two Canadian patents, dated 13th September, 1921, and 30th January, 1923, respectively, for certain new and useful improvements in lanterns, especially adapted for the use of trainmen. The second patent was for improvements on the invention covered by the first patent. Counsel for defendant had admitted, at the opening of the trial, that, if the patents were good, there was infringement; but disputed the validity of the patents, alleging absence of novelty or invention, and absence of subject matter for valid letters patent. It was further alleged by defendant that the alleged inventions had not been manufactured in Canada in compliance with s. 38 (*a*) of the *Patent Act*, R.S.C., 1906, c. 69, under which the patents were granted, and that importation had taken place in contravention of s. 38 (*b*) of said Act. Audette J. (1) held against the defendant and gave judgment for the plaintiffs.

As to manufacture and importation, counsel for the plaintiffs (respondents) contended, among other things, that the uncontradicted evidence showed that no lanterns constructed under either patent were imported after 13th March, 1923, the last day allowed for importation under the first patent (the year allowed for importation having been extended for six months); that, as the prohibition against importation was repealed (1923, c. 23, s. 66) on 1st September, 1923, (the date of the coming into force of *The Patent Act*, 1923, c. 23), the time allowed for importation under the second patent never expired; that there was no evidence that any lantern parts were imported between 13th March, 1923, (the last day allowed for importation) and 1st September, 1923, when the prohibition against importation was repealed (1923, c. 23, s. 66); that, in any event, the importation of certain parts, common to the trade, did not constitute importation of the lanterns; the

(1) [1928] Ex. C.R. 112.

remaining parts, including those that were new, were manufactured in Canada and the lanterns assembled here; that, as the time allowed for manufacture in Canada under the former Act had not expired, as regards either of the patents in suit, on 1st September, 1923, when the requirement was repealed (1923, c. 23, s. 66), there could be no question of either patent's having become void for failure to manufacture; that under the present Act (1923, c. 23; see ss. 40, 41) which went into force on 1st September, 1923, the provisions as to importation and manufacture had no application here; that there is no provision in the Act rendering a patent void for importation or for non-manufacture in Canada; and that the only tribunal in which the provisions of the new Act relating to importation and manufacture can be invoked is before the Commissioner of Patents; the Exchequer Court has no jurisdiction save on appeal from him, or upon a reference to the Court by him, neither of which is the case here.

F. B. Fetherstonhaugh K.C. for the appellant.

W. L. Scott K.C. for the respondent.

After argument by counsel, judgment was reserved, and on the following day the judgment of the court was orally delivered by

ANGLIN C.J.C.—The Court is unanimously of the opinion that the appeal fails and must be dismissed—speaking generally, for the reasons assigned by Mr. Justice Audette. That the combination patented by the plaintiff's assignor involved invention was demonstrated; of its novelty we are satisfied; its usefulness and commercial value do not admit of dispute.

In regard to the questions of manufacture and importation, which were discussed, I should, perhaps, add that we agree with the construction put by Mr. Scott on section 66 of the Act of 1923. In our view, all matters of importation and manufacture prior to the date of the coming into force of that Act are governed by the provisions of the earlier statute, which it replaced. That leaves to be considered, in regard to the first patent, the question of importation between the 13th March, 1923, to which the time for importation into Canada had been extended, and the

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date of the coming into force of the Act of 1923, the 1st of September of that year. As to that, Mr. Scott contends that there is no evidence of importation between those dates. Mr. Fetherstonhaugh did not challenge that statement of Mr. Scott, and failed to point out any such evidence. The time for importation into Canada under the second patent had not expired in September, 1923. There is, therefore, nothing upon which to base a decision that there was importation affecting the validity of either patent prior to the date of the Act of 1923 coming into force.

After that Act came into force the questions of manufacture and importation were governed by its provisions, and under them the Commissioner of Patents is *curia designata* to determine such questions, and it would be only on appeal from him that the Exchequer Court would have jurisdiction. That being the case, the present proceeding is one in which, as to such questions, there was no jurisdiction in the court of first instance to entertain the action.

The attack on the patents entirely fails. The appeal, therefore, is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fetherstonhaugh & Fox.*
Solicitors for the respondents: *Ewart, Scott, Kelley & Kelley.*

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*Oct. 23, 24.
*Dec. 21.

EXECUTORS OF ESTATE OF ISAAC UNTERMYER, DECEASED ..... } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA .. .. } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Succession Duties—Succession Duty Act, R.S.B.C. 1924, c. 244—Valuation of mining company shares—"Fair market value" at date of death—Method of determining—Price on stock exchange—Question as to allowance for market depression if large block placed for sale—Constitutional law—Imposition of duty under said Act as to shares of British Columbia company owned by deceased domiciled abroad—"Property situate within the province"—Taxation within the province—Direct or indirect taxation.

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

U. died domiciled in the State of New York and owning a large block of shares in a British Columbia mining company. Shares of the company were dealt with on several stock exchanges. The executors of his estate appealed from the judgment of the Court of Appeal for British Columbia (39 B.C. Rep. 533) affirming the finding of a commissioner, appointed under s. 30 of the *Succession Duty Act*, R.S.B.C. 1924, c. 244, as to the "fair market value," for succession duty purposes, of U.'s shares at the date of his death.

Held: The value found below should stand, as it could not be said to exceed the fair market value.

In such cases, where the market price has been consistent and not spasmodic or ephemeral, that price should determine the "fair market value"; no deduction should be made on the assumption that all the deceased's shares would be placed on the market at once, thus depressing the market value, as no prudent stockholder would pursue that course.

Held, further, that the shares in question were "property situate within the province" within the meaning of said Act (*Brassard* v. *Smith*, [1925] A.C., 371, at p. 376, referred to), and that the taxation imposed under said Act in respect of the shares was direct taxation, and *intra vires*.

APPEAL by the executors of the estate of Isaac Untermyer, deceased, from the judgment of the Court of Appeal for British Columbia (1) affirming the finding of A. D. Macfarlane, Esq., a commissioner appointed under s. 30 of the *Succession Duty Act* of British Columbia (R.S.B.C. 1924, c. 244), as to the value, for succession duty purposes, of 318,800 shares of stock owned by the said deceased in Premier Gold Mining Company, Limited, a British Columbia company, with its head office and place of share registration in that province. The deceased died on August 31, 1926, domiciled in the State of New York.

Section 3 of said Act provides that "in determining the net value of property * * * the fair market value shall be taken as at the date of the death of the deceased."

The shares were of the par value of $1 each. The executors' valuation of the shares was $1.19 per share, based on what was alleged to be their book value as at the date of death. The contention of the government department having charge of the collection of succession duties was that the value should be arrived at by taking the market quotation at the date of deceased's death, which was $2.20 per share. The commissioner fixed the value at $2 per share, which was affirmed by the Court of Appeal (2).

(1) 39 B.C. Rep. 533; [1928] 2 W.W.R. 209.

(2) 39 B.C. Rep. 533; [1928] 2 W.W.R. 209.

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It was urged on behalf of the appellants that the market quotation was not a fair criterion; that the test of a "fair market value" was the amount the shares would have brought in the market if offered for sale at the date of the deceased's death; that the evidence shewed that the market quotation at said date was based on share transactions of a very limited quantity, and a comparatively limited market, and that the available markets at the time of death could not absorb all the deceased's shares at the price of $2.20, and that the best price possible could be obtained only through an underwriting syndicate and that such price would not be more than $1.50.

It was also contended on behalf of the appellants that the deceased's shares were not liable to succession duty, on the ground that they were not "property situate within the province" within the meaning of the Act; also that the provisions of the Act purporting to impose duties in a case such as that in question were *ultra vires,* as not being taxation within the province, and as being indirect taxation.

J. W. de B. Farris K.C. for the appellants.

E. F. Newcombe for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—The late Isaac Untermyer, among other property, was possessed at his death of 320,800 shares of Premier Gold Mining Company, Limited, a British Columbia corporation. Of these shares, of a nominal value each of one dollar, two thousand were held by him in trust, and the controversy here is restricted to the balance, 318,800 shares. The total share capital of the company is stated to be 5,000,000 shares. Untermyer was domiciled in New York, and left a will disposing of an estate said to be worth $1,555,000. His executors obtained probate of the will in New York and they also applied for ancillary probate in British Columbia.

It is a feature of the British Columbia *Succession Duty Act, R.S.B.C.,* 1924, c. 244, that probate of a will cannot be obtained until the succession duties are paid, or security for their payment is given to the satisfaction of the provincial authorities (ss. 21 and following). The applicant

for probate, or for letters of administration, must file two duplicate original affidavits of value and relationship, and this was done in the present instance. The amount of the duties depends on the relationship of the beneficiaries to the deceased, and also, of course, on the value of the property transmitted. The Act deals very briefly with the basis of valuation. It states that "net value" means the value of all the property of the deceased after the debts, encumbrances or other allowances or exemptions are deducted therefrom (s. 2). In determining this net value, the "fair market value" is taken as at the death of the deceased, less the allowances and deductions (s. 3). After the filing of the affidavit of value and relationship, the Minister of Finance through his deputy may determine the amount of succession duty (s. 22), or, if he be not satisfied with the value stated in the affidavit, the Lieutenant-Governor in Council may appoint a commissioner under the *Public Inquiries Act* "to inquire into and report what property of the deceased is subject to duty under this Act, and what is the value thereof or of any part thereof." The commissioner gives to the persons applying for probate of the will or for letters of administration one week's written notice of the time and place at which he will make such inquiry, and of the nature of the inquiry, and it is his duty to appraise the property of the deceased "at its fair market value," and to make his report in writing, in duplicate, one copy to be sent to the Lieutenant-Governor in Council, and the other copy to the executor or administrator, as the case may be, or to his solicitor (s. 31).

All this was done in the present case. There was no suggestion that all the property of the deceased had not been disclosed in the affidavit, nor was there any dispute as to its valuation with the exception of these shares. The inquiry was held both in Victoria and Vancouver, several witnesses, chiefly stock brokers and financial agents, were called, and the commissioner—Mr. A. D. Macfarlane, a barrister of Victoria—made his report in writing on December 23, 1927, appraising the shares in question at $2 each, or a total valuation for the 318,800 shares of $637,600. In the affidavit, the executors had valued the shares at what was said to be their book value, to wit $1·1924 a share, or $1.19, making a total valuation of $382,521.92.

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The Act states that any person dissatisfied with the report, or any portion of the report, of the commissioner, may appeal therefrom to the Court of Appeal, and the powers of that court in respect of the appeal are the same as in the case of an ordinary appeal to the Court of Appeal from any judgment of a judge of the Supreme Court (s. 33).

An appeal was brought by the present appellants from the report of Mr. Macfarlane, and this appeal was unanimously dismissed by the Court of Appeal (1). The respondent cross-appealed, seeking to have the value of the shares placed at $2.20 a share, and this cross-appeal was also dismissed (1). The appellants now appeal to this Court from the decision of the Court of Appeal. The respondent has not brought any further cross-appeal.

Mr. Farris, in his argument, attacked the report on two grounds:—

1. The valuation of the shares was too high;
2. The shares in question are not liable for succession duty.

Dealing with the second ground first, Mr. Farris summarized his contentions as follows:—

A. The words "property situate within the province" (s. 2 of the Act) are not intended to include *mobilia* of a deceased non-resident.

B. Intangible property cannot have a *situs* within the meaning of the *Succession Duty Act*.

C. The shares in question are taxable only under section 10 of the Act, and that section is *ultra vires* as being indirect taxation, and as not being taxation within the province.

At the hearing the Court was of opinion that Mr. Farris had not established a case on his second ground of appeal, calling for a reply from the respondent. It is impossible to hold, on the construction of the Act, that this taxation is other than direct taxation. And it appears clear to us that these shares in the capital stock of a British Columbia corporation, which are carried on the share register kept in the province, are "property situate within the province." The question of the *situs* of these shares is concluded by several pronouncements of the Privy Council. It will suffice to refer to the recent case of *Brassard* v. *Smith* (2).

(1) 39 B.C. Rep. 533; [1928] 2 W.W.R. 209.

(2) [1925] A.C., 371.

At page 376 of the report, their Lordships state that the test is "Where could the shares be effectively dealt with?" The answer here must be that these shares could be effectively dealt with in British Columbia. They were, therefore, at the death of the deceased, situate within the province.

There remains only the first ground of appeal, the contention that the valuation of the shares was too high. On this point we have had the benefit of full argument.

I have carefully read the evidence before the commissioner. The deceased died on August 31, 1926, in New York. Shares of the Premier Company, on September 1, 1926, were quoted on the stock exchange of Victoria and Vancouver at $2.20 a share, this referring to sales made the previous day, the day of Untermyer's death.

Dealings in these shares took place on several stock exchanges, but principally in Victoria and Vancouver (the quotations of which may be taken to have been the same; dealings on these exchanges exceeded in volume the transactions on any other stock exchange in so far as the shares of this company are concerned) and in New York (where the shares were dealt with on what is termed the curb). Exhibit 6, filed before the commissioner, shows the Vancouver and New York quotations of this stock, week by week, from the week ending August 29, 1925, to the week ending August 27, 1927. During the period of one year previous to Untermyer's death none of these quotations on the Vancouver stock exchange was under $2, the vast majority being considerably higher than that figure. For instance, the last week before Untermyer's death, the stock stood at $2.27 bid and $2.30 asked; and the lowest quotation during the whole previous year was $2.08 bid and $2.11 asked.

The evidence shows that on this stock, before and at the time of Untermyer's death, a quarterly dividend of eight cents a share was paid. This is an annual return of thirty-two per cent. on the face or nominal value of the shares; and these dividends had been paid regularly up to the time of the enquiry before the commissioner.

According to the *Succession Duty Act,* the property subject to the duty is to be appraised at its "fair market value" at the death of the deceased. The parties before

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the commissioner seem to have considered that the best test of "fair market value" was the price for which Untermyer's holdings could have been sold, but they differed widely in their views of the means whereby such a sale could have been best effected. All the witnesses recognized that it would have been impracticable to attempt to sell at once this large block of shares. Such a course would have broken the market where, of course, to a large extent, price is regulated by the economic law of supply and demand, and it fluctuates according as one or the other of these elements predominates. The suggestion of the respondent was that, if they had decided to sell, the executors would have acted reasonably, that they would have taken time, three months or even a year, to dispose of the stock, and that if they had done so they could have sold it for at least $2.20 a share. The appellants' witnesses thought that no such disposal was possible—they point to the fact that in the closing months of 1926 the stock declined below $2, presumably because a large block had been placed on the market—and they said that the only practicable course would have been to get a group of brokers to underwrite the shares, which would not have given a price exceeding $1.50 a share.

The learned commissioner considered that the possibility of a sale of the shares by private negotiation had not been sufficiently looked into. He arrived at a valuation of $2 per share, a figure which, as I read the testimony, was not suggested by any of the witnesses. He was impressed, he said, by a statement by one of the witnesses that he would adopt other methods than putting the stock on the market in the usual way, and by a remark of another witness that a good broker would be careful not to break the market, and he adds:—

> Using the market quotations as a guide I find that the sum of $2 per share or a total value of $637,600 would represent the fair market value of the Premier Gold Mining shares owned absolutely by the late Isaac Untermyer.

He was of opinion, he had said in a previous part of his report, that "fair market value"

> means such sum as could be obtained by sale of the property under conditions where you have a willing but not an anxious seller and where you have all possible potential purchasers acting under normal circumstances brought into consideration.

We were favoured by counsel with several suggested definitions of the words "fair market value." The dominant word here is evidently "value," in determining which the price that can be secured on the market—if there be a market for the property (and there is a market for shares listed on the stock exchange)—is the best guide. It may, perhaps, be open to question whether the expression "fair" adds anything to the meaning of the words "market value," except possibly to this extent that the market price must have some consistency and not be the effect of a transient boom or a sudden panic on the market. The value with which we are concerned here is the value at Untermyer's death, that is to say, the then value of every advantage which his property possessed, for these advantages, as they stood, would naturally have an effect on the market price. Many factors undoubtedly influence the market price of shares in financial or commercial companies, not the least potent of which is what may be called the investment value created by the fact—or the prospect as it then exists—of large returns by way of dividends, and the likelihood of their continuance or increase, or again by the feeling of security induced by the financial strength or the prudent management of a company. The sum of all these advantages controls the market price, which, if it be not spasmodic or ephemeral, is the best test of the fair market value of property of this description.

I therefore think that the market price, in a case like that under consideration, where it is shown to have been consistent, determines the fair market value of the shares. I do not lose sight of the fact that mining operations are often of a speculative character, that there is always a danger of depletion, and that a time will sooner or later arrive when no more minerals will be available, unless other properties are secured to keep up the supply. But all these elements have an effect on the price of the shares on the stock exchange, and no doubt they were fully considered by the purchasers of the stock at the then prevailing prices.

I would not deduct anything from the market value of these shares on the assumption that the whole of them would be placed on the market at one and the same time, for I do not think that any prudent stockholder would

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pursue a like course. To make such a deduction in a case like the one at bar, would be to render the "sacrifice value" or "dumping value" of the shares the measure of valuation. It is certainly impossible to say that the price allowed by the learned commissioner and approved in the Court of Appeal exceeded the fair market value of these shares.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Farris, Farris, Stultz & Sloan.*

Solicitor for the respondent: *H. C. Hall.*

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*Nov. 26, 27.
*Dec. 21.

WILLIAM R. HALL, ANNIE C. HALL, ALICE R. DALE AND FRANK J. JUSTIN (PLAINTIFFS) ..... APPELLANTS;

AND

THE TORONTO GUELPH EXPRESS COMPANY AND LEONARD HATCH (DEFENDANTS) ..... RESPONDENTS.

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

Motor vehicles—Negligence—Collision—Highway Traffic Act, R.S.O. 1927, c. 251—Law as to civil liability under ss. 9 (1) and 41 (1), assuming tail light to have gone out shortly before collision without knowledge or negligence of driver—Misdirection to jury—New trial—Amount in controversy on appeals—Jurisdiction—Quashing of appeals.

The liability imposed by ss. 9 (1) and 41 (1) of the *Highway Traffic Act*, Ont. (R.S.O. 1927, c. 251), exists even in absence of negligence; the failure to have a tail light burning and visible on a motor vehicle in accordance with s. 9 (1) is a violation of the Act, and, if a cause of a collision resulting in damages, may involve civil liability under s. 41 (1), even though the light was burning until shortly before the accident and went out without the knowledge or personal fault or negligence of the driver of the vehicle. (*Great Western Ry. Co.* v. *Owners of ss. "Mostyn,"* [1928] A.C. 57, applied).

In the case in question (an action for damages resulting from a collision of motor vehicles) it was held that the trial judge's direction to the jury to an effect contrary to the law as above stated was a mis-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

direction, and that it affected the jury's findings to such an extent that they should not stand, and a new trial was ordered.

Judgment of the Appellate Division, Ont. (34 Ont. W.N. 216), affirming the judgment at trial in favour of defendants, reversed. As the claims of two of the plaintiffs were each for an amount less than $2,000, their appeals were (at the opening of the argument) quashed for want of jurisdiction (*Armand* v. *Carr*, [1926] S.C.R. 575; *Reynolds* v. *C.P.R.*, [1927] S.C.R. 505, referred to), the Court refusing an application to allow the case to stand over to permit of leave to appeal being asked from the Appellate Division.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing their appeal from the judgment of Orde J.A., upon the findings of the jury, dismissing the action.

The action was for damages, and arose out of an accident due to the motor car in which the plaintiffs were riding, owned by the plaintiff Wm. R. Hall and driven by the plaintiff Justin, running into the rear of a truck belonging to the defendant The Toronto Guelph Express Company, and driven by the defendant Hatch. The collision occurred between Toronto and Brampton on the 16th November, 1927, at about 6 p.m. It was dark at the time. The plaintiffs alleged that the truck displayed no rear red light, or, if it did, that such light did not comply with the requirements of s. 9 of the Ontario *Highway Traffic Act* (R.S.O. 1927, c. 251). The defendants alleged that the truck was equipped with the lights required by law, that such lights were lit at the time of the accident, denied any negligence or breach of duty on their part, and alleged that the accident was due to the negligence of the plaintiff Justin in (among other things) driving at an excessive speed and failing to keep a proper look-out, and that the other plaintiffs assumed the risk of their driver's negligence.

At the trial questions were submitted to the jury, which are set out in the judgment now reported, as are also the jury's answers, so far as answers were made, and, at some length, portions of the judge's charge to the jury, and of discussions between the judge and counsel, and of questions passing between the judge and jury in regard to the jury's findings.

(1) (1928) 34 Ont. W.N. 216.

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As to the plaintiffs William R. Hall and Alice R. Dale, the appeal was allowed with costs here and in the Appellate Division, and the judgment dismissing the action was set aside and a new trial ordered; the costs of the abortive trial being reserved to the judge presiding at the new trial. The ground of the decision was misdirection in charging the jury, as indicated in the above headnote, and as fully set out in the judgment now reported.

As to the plaintiffs Annie C. Hall and Frank J. Justin, the appeal was, at the opening of the argument, quashed for want of jurisdiction, as their claims were each for an amount less than $2,000. The Court refused an application to allow the case to stand over to permit of leave to appeal being asked from the Appellate Division (*a*).

D. L. McCarthy K.C. and *A. W. Plaxton* for the appellants.

T. N. Phelan K.C. for the respondents.

The judgment of the court was delivered by

ANGLIN C.J.C.—As we have come to the conclusion that there must be a new trial in this action, following our usual practice, we shall discuss the facts only so far as is necessary to make clear the ground of our decision and as may be desirable to avoid further difficulty arising from the same cause.

The sole ground of liability now charged against the defendants is their alleged failure to comply with the requirements of s. 9 (1) of *The Highway Traffic Act*, R.S.O. 1927, c. 251, as to a rear or tail light.

Section 9 (1) reads as follows:—

9 (1) Whenever on a highway after dusk and before dawn, every motor vehicle shall carry three lighted lamps in a conspicuous position, one on each side of the front, which shall cast a white, green or amber coloured light only, and one on the back of the vehicle, which shall cast from its face a red light only, except in the case of a motor bicycle without a side car, which shall carry one lamp on the front which shall cast a white light only and one on the back of the vehicle which shall cast from its face a red light only. Any lamp so used shall be clearly visible at a distance of at least two hundred feet.

(*a*) The said plaintiffs have since obtained leave from the Appellate Division, and have brought appeal to this Court which came for hearing on February 14, 1929, when their appeals were allowed, the question of costs of the appeal being reserved.

Subsection (3) of that section reads as follows:—

9 (3) Any person who violates any of the provisions of subsections 1 or 2 shall incur, for the first offence, a penalty of not more than $5; for the second offence a penalty of not less than $5 and not more than $10; and for any subsequent offence a penalty of not less than $10 and not more than $25 and in addition, his license or permit may be suspended for any period not exceeding sixty days.

This alleged omission, it is claimed, entailed civil liability on the defendants under subs. 1 of s. 41 of the same statute, as owner and driver, respectively, of the motor truck. That section reads as follows:—

41 (1) The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation.

The defendants, however, also pleaded negligence on the part of the plaintiffs' driver as the sole cause, or as a contributing cause, of the collision, and gave the following particulars:—

1. The motor vehicle operated by the said Frank J. Justin was being driven at an excessive speed and was not under proper control.

2. The said Frank J. Justin was a person of defective vision and not competent to operate the said motor vehicle.

3. It was the duty of the said Frank J. Justin to have turned to the left as far as may have been necessary to avoid a collision with any vehicles on the highway ahead of him which he had overtaken, and this duty he failed to observe.

4. It was the duty of the said Frank J. Justin to so operate the motor vehicle of which he was in charge and to so control the same as to bring it to a stop within the distance that his headlights would reveal an object on the highway ahead of him and this duty he failed to observe.

5. Even after the danger of a collision with an object on the highway ahead of him became apparent, it was the duty of the said Frank J. Justin to keep such a look-out and have the said motor vehicle under such control as to bring it to a stop before coming into collision with such object, and this duty he failed to observe.

6. The motor vehicle being operated by the said Frank J. Justin was being operated contrary to the provisions of the Highway Traffic Act in that it was being operated at a speed or in a manner dangerous to the public.

7. The lights with which the motor vehicle of the said Frank J. Justin was equipped were defective or insufficient and the brakes with which the speed of the motor vehicle was controlled were defective or inefficient.

8. If the vision of the said Frank J. Justin of vehicles ahead of him on the highway was obstructed by weather or light conditions, it was

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his duty to have operated his motor vehicle at a slow rate of speed and under proper control and this condition he failed to observe.

They also charged assumption of the risk of the driver's negligence by his co-plaintiffs.

The following questions were submitted to the jury:—

1. Q. Were the defendants guilty of any negligence causing the accident?

2. Q. If so, what was that negligence?

3. Q. Was the plaintiff Justin guilty of any negligence contributing to the accident?

4. Q. If so, what was his negligence?

5. Q. After the plaintiff Justin became aware or ought to have become aware of the impending danger, could he by the exercise of reasonable care have avoided the collision?

6. Q. If so, what could he have done?

7. Q. At what sums do you assess the damages sustained by each of the four plaintiffs:—

William R. Hall,
Annie C. Hall,
Alice R. Dale,
Frank J. Justin?

8. Q. If you find the defendants and also Justin both guilty of negligence, in what degree did the negligence of each contribute to the collision:

Defendants	per cent?
Justin	per cent?

The learned trial judge, in the course of a somewhat lengthy charge, said:—

In a case like this, the parties are in exactly the same position as if the alleged negligence had nothing to do with motor vehicles at all, and the burden of establishing that the defendants were guilty of negligence rests with the plaintiffs. They must establish to your satisfaction that the injuries which they sustained resulted from some neglect of duty or some failure to comply with the law, which is practically the same thing, before they can recover. * * * They must prove, as I have said, that the defendants are guilty of the negligence which is alleged, or they cannot recover. * * * The only negligence which is imputed to these defendants and the only negligence which the plaintiffs must prove in order to succeed at all, is that there was no light shining, no visible light, on the rear of the truck when the accident happened and immediately before it happened. If the plaintiffs cannot prove and have not proved that allegation, then the action fails. * * * The law requires that every motor vehicle shall carry three lights, two white lights at the front and one red light at the rear; you need not bother about other requirements, but as to that the law requires that these lights shall be clearly visible at a distance of at least 200 feet. The first thing you have to determine, because it is at the very threshold of this case, is whether or not upon the evidence of all the witnesses both for the plaintiffs and for the defendants the rear light was burning on that truck and was visible on that occasion.

* * * * *

Q. 1. Were the defendants guilty of any negligence causing the accident?

If, as has been pointed out, the tail light of the defendant Hayhurst's truck was lighted and visible, that puts an end to the action if that is your conclusion and you should answer that first question: "No." You might, however, come to the conclusion, and quite properly, having regard to all the circumstances,—if you so conclude upon the evidence that that is the fact—that though the tail light was not burning the real cause of this accident was either excessive speed or failure to keep a proper look-out on the part of Justin, the driver of the plaintiff Hall's car in which the four plaintiffs were riding. Either of those conclusions will be sufficient justification for answering that question: "No." I think it will be wise for you first to deal with that question in those two aspects before proceeding to answer any other questions. * * * If you come to the conclusion from the evidence * * * that the plaintiff Justin was driving at an excessive rate of speed or failed to keep a proper look-out, and that notwithstanding any negligence on the part of the defendants, notwithstanding that the tail light was out, the sole cause of the accident was one or the other or both of those species of negligence on the part of the plaintiff Justin, then again you would answer the first question: "No," because the negligence of the defendants as to the tail light being out would not be the cause of the accident. A mere breach of duty on the part of one person towards another does not entitle the other to recover damages unless that breach of duty was the cause of the accident. * * * You may, however, come to the conclusion that the defendants were guilty of negligence causing the accident because of their failure to have the tail light burning. If that is the case, you will answer the first question: "Yes." Assuming that you have not found, also, that the plaintiff Justin was the sole cause of the accident, you will answer the second question:—

2. Q. If so, what was the negligence?

You will state fully what it was, in your opinion.

After being out for some hours (5.50—8.41 p.m.), the jury sent to the Judge, in writing, the following memorandum:—

The jury wish to know if by chance the tail light in question was to go out immediately prior to the accident would the defendant be considered guilty of negligence directly causing the accident, taking into consideration that the light by going out would be a matter out of his direct control.

After some discussion with counsel, the jury was sent for and the learned judge then said to them:—

I gather from that question that you may have it in your minds that the evidence establishes two facts. * * * The question, at all events, lends colour to this idea, that you are of the opinion that the evidence might establish that the tail light was in fact lit up until a very short time before the impact, but that it had gone out immediately before that, and therefore it would be quite true that the light had not been seen by the plaintiffs and also quite true that the light was burning, as sworn to by the defendants' witnesses, shortly before the accident, and in that way there would be a reconciliation of the two statements. I understand your question to amount to this, that having that

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in mind, and the light having gone out without the knowledge of the driver, under those circumstances would the driver be guilty of negligence directly causing the accident? As I have said, that is not an easy question to answer. I have had the benefit of argument both by Mr. Bell and Mr. Phelan. It is a question which, if I were trying it and had to decide it myself, would probably require several days in order to come to a conclusion. There are a good many aspects of the question which, from a lawyer's point of view, would have to be investigated. There is no time to do that now, and I have to do the best I can in instructing you. What I have to say may prove upon appeal to be utterly wrong, but that cannot be helped; you have to take it for the time being as being the law. My instruction to you is—I say it with some diffidence—that having regard to the fact that this is a civil action, an action for damages based upon the negligence of the defendant Hayhurst and his driver, *if you find* the circumstances such as you suggest, namely, *that the driver was not aware of the light being out because it had gone out suddenly before the impact, then, in my judgment, the defendants would not be liable.* I say I may be wrong as to that, and because of that I am going to ask you, if that is your conclusion, to make it perfectly plain in the answer to the question. It may be necessary for you to amplify your answer by adding a note to the foot of your answer, to the effect that you come to the conclusion as a fact and find it to be the fact that the light was burning up until shortly before the accident, and had gone out immediately before the accident, and that therefore the defendant driver was not aware of it. Have I made myself clear? Is there anything more you desire to know?

* * * * *

Now, gentlemen, please do what I have asked. If your conclusions are based upon any such findings, then make that clear. I think the simplest way would be to attach a memorandum at the foot of the answer, to the effect that you find as a fact certain things upon which you base the conclusions at which you arrive. Please retire.

The report of the trial proceeds:—

His Lordship: Gentlemen of the jury, have you agreed upon your answers to the questions?

The Foreman: Yes.

His Lordship: The jury has answered only one question and that is the first question:

1. Q. Were the defendants guilty of any negligence causing the accident? A. No.

The jury have attached to the answer this slip: "Assuming that the light may have gone out immediately prior to the accident unknown to the driver, we the jury believe the defendant not negligent."

Am I to understand, gentlemen, that it is your conclusion from the evidence that the light did go out immediately before the accident, and that you so find?

The Foreman: We do not know, sir.

After some discussion with counsel, the learned judge further said to the jury:—

His Lordship: Gentlemen of the jury, are you prepared to make a finding upon that question as to whether or not the plaintiff Justin was guilty of negligence causing the accident? In other words, is your

answer "No" to question no. 1 based upon this assumption which you have attached to the answer, and that only? Is that right?

The Foreman: (No answer).

His Lordship: That is, you find that the defendants were not negligent because of the assumption that the light may have gone out immediately before the accident? Am I correct in that?

The Foreman: (No answer).

His Lordship: I think the slip may be regarded as their conclusion that upon that ground and that alone they find for the defendants.

Mr. Phelan: In order to avoid the possible necessity for further trial in the matter, I think the jury ought to be asked their opinion on the answer to the first question. The jury have probably assumed that in answering that question as they have answered it, they have done all that is necessary.

His Lordship: It would have been all that is necessary if they had answered the first question: "No," without putting this question to me. It might have been assumed that it was on one or other of these two grounds, and it would not have mattered, for either would have been sufficient. You suggest now that they should either affirmatively or negatively *deal with the other questions?*

Mr. Phelan: Yes, my Lord.

His Lordship: Gentlemen of the jury, can you do that without much loss of time? Can you add, in view of the situation created by this assumption of yours, a further statement to the effect: "We find that the accident was caused *solely* by the negligence of the plaintiff driver," or "We find that the plaintiff driver was not guilty of any negligence causing the accident"? Do you think you can do that immediately? I think it is important, because if the law on the question you have answered is settled otherwise than I have assumed to be the law, there might have to be a new trial. You can put your finding on that point on another slip of paper, if you desire to do so: "We find that the plaintiffs were not guilty of negligence causing the accident," or "We find that the plaintiffs were guilty of negligence causing the accident."

Mr. Plaxton: Is there any doubt about the answer to the first question, my Lord?

His Lordship: In what way? I think their assumption is: "Assuming that the light may have gone out prior to the accident unknown to the driver, we find the defendant not negligent."

Mr. Plaxton: You are stating that as their assumption, my Lord.

His Lordship: That is their finding, I think.

Mr. Plaxton: As long as that is clear, my Lord.

Whereupon the jury again retired at 10.28 o'clock p.m.

* * * * *

Mr. Plaxton: My Lord, owing to the absence of senior counsel I am somewhat embarrassed, but on giving this matter further consideration I think the first question should be answered positively. I have in mind a case where there was an answer like this answer made by a jury on an assumption, and the Court of Appeal sent it back for a new trial on the ground that there should have been a positive answer. I think the jury should bring in a positive answer to that question.

His Lordship: Do not you think it would be better to let sleeping dogs lie? You are in a stronger position before the Court of Appeal on that answer than are the defendants.

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Mr. Plaxton: Supposing the jury find that Justin's negligence is the sole cause of the accident, that puts us in an embarrassing position.

His Lordship: No; that is a positive finding to that effect, and amplifies or explains the "No" and eliminates any difficulty that has been raised by this rider.

Mr. Plaxton: I have in mind, my Lord, the future developments that might arise in this case.

His Lordship: No doubt it will go to appeal. We will wait and see what the jury have to say.

Mr. Plaxton: My Lord, I hope that this case does not look like a "Comedy of Errors," but after reading over these questions I am going to ask your Lordship to direct the jury to answer all the questions, and particularly question no. 7, dealing with the quantum of damages.

His Lordship: I have told the jury that if they negative the first question there is no necessity for their answering any of the other questions. If there has to be a new trial, the jury on the new trial will deal with the question of damages.

Mr. Plaxton: Surely we do not want that, my Lord?

His Lordship: You cannot have a series of findings, some by one jury and some by another. The jury is sometimes directed to find the quantum of damages because the trial judge thinks there is a lack of evidence to justify the finding and that the plaintiffs should be nonsuited, and in order to avoid the possibility of a new trial on the question of damages if he is wrong the jury is requested to assess the damages. But if in this case the jury had simply answered the first question: "No," and none of the trouble had developed because of the question they put to me, there would have been no necessity for assessing the damages in this case, because if there has been misdirection on my part and a new trial is directed, then all the questions would go back to the new jury. It is only in those cases where a new trial is not necessary that a jury is asked to find the damages, Mr. Plaxton.

Mr. Plaxton: If we are right in our assumption of the law, namely, that the defendants are liable even though they were not aware of the tail light being out?

His Lordship: How can you possibly get that question settled except by another jury?

Mr. Plaxton: If they give a positive answer.

His Lordship: They give a positive answer, namely that the defendants were not guilty of negligence causing the accident.

Mr. Plaxton: Pursuant to a direction from your Lordship.

His Lordship: If I am wrong in that direction, no higher court is going to find the defendants guilty of negligence upon this or any other evidence; they are going to direct a new trial.

Mr. Plaxton: I submit not, my Lord. I submit that if the Court of Appeal came to the conclusion that it was the jurors' intention to find the defendants negligent, or to find that they would have been negligent, in law, if (with respect) properly directed with regard to the question of the tail light—I have in mind a situation that arose in a case I was in.

His Lordship: I would be very much surprised to find that a higher Court has ever, where the jury has not found negligence on the part of the defendants, usurped the functions of the jury and found negligence.

Mr. Plaxton: The point is, that if the jury had been directed that it was in law negligence to have the tail light out, even though the

driver did not know it—and that apparently is their idea having regard to their answer to the first question—and the Court of Appeal said that there had been a misdirection as a matter of law, then they would say, if these other questions were answered here, that they could deal with the matter without sending it back for a re-trial.

His Lordship: I do not see how. Your right to relief is a finding of such negligence on the part of the defendants and until you get that you cannot succeed, and that finding must be—as you have chosen to submit the matter by questions to the jury—a finding of the jury; and no higher court will, because the jury has, upon insufficient grounds or upon an untenable ground, as you suggest, found the defendants not negligent, infer from that that because the ground was wrong therefore the jury would have found that they were negligent.

Mr. Plaxton: I submit it is logical, my Lord.

His Lordship: I do not agree with you.

Mr. Plaxton: I press the objection, my Lord.

His Lordship: In view of that answer I would not ask them to answer the other questions. They are all based upon the theory of a finding of negligence on the part of the defendants.

The jury returned to the court room at 10.45 o'clock p.m.

His Lordship: The memorandum reads:—

"We the jury find the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions."

Have you any comment to make upon that finding?

Mr. Phelan: Do the jury find that that was the cause of the accident? I think that is apparently their intention, but they ought to say it in order to make the matter clear.

His Lordship: Gentlemen of the jury, is that your conclusion, that the plaintiff Justin's negligence caused the accident?

Mr. Plaxton: How can they say that?

His Lordship: Wait a moment, please. It might only be a finding of contributory negligence.

Mr. Phelan: It might be, unless the jury is prepared to say that that was the cause of the accident.

His Lordship: Gentlemen of the jury, can you say that that was the cause of the accident? If that is what you conclude, you can add some words to the effect that the plaintiff Justin's negligence was the cause of the accident.

The Foreman: By that memorandum I think that is what we inferred.

His Lordship: If that is what you believe, just go back to your room once more and add those words, or words to that effect—I do not desire to suggest what words should be employed, but words to express what you really find. Just continue the sentence to that effect.

Whereupon the jury again retired and returned to the court room at 10.51 o'clock p.m.

His Lordship: Your memorandum now reads:—

"We the jury find that the plaintiff was negligent to the extent of not using necessary precautions as demanded by such adverse weather conditions, and was the cause of the accident."

It is not quite grammatical in form, but we will not say anything about that now.

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Upon those findings I am constrained to dismiss the action with costs.

Only question no. 1 of the series of questions submitted to them was answered by the jury; but, to the paper containing them, we find pinned, one below the other, the two memoranda above mentioned.

I have thought it advisable to set out these latter proceedings somewhat *in extenso* in order to make clear the course of the trial, which, in our opinion, unfortunately renders a new trial unavoidable.

In the first place, it seems open to doubt whether the second memorandum brought in by the jury should be regarded as an answer by them to questions nos. 3 and 4, which were otherwise unanswered, or, as intended to give a second reason, pursuant to the instruction of the learned trial judge, for the negative answer which they made to question no. 1. Physically the paper on which this memorandum is written is attached to the sheet of paper containing the questions as if it might be intended as an answer to questions nos. 3 and 4, and it was so treated by the learned judge who delivered the judgment of the Appellate Court, and is also so dealt with towards the close of the respondents' factum, where counsel says that a certain conclusion for which he was arguing "is fortified by the jury's answer to questions 3 and 4," although he had, earlier in the factum, as he did at bar in this Court, dealt with the second memorandum as part of the jury's explanation of, or reasons for, their answer, "No," to the first question. So regarded, this second memorandum might present a serious obstacle to the success of this appeal. On the other hand, if it should be treated as made in response to questions 3 and 4, the second memorandum may amount to nothing more than a finding of contributory negligence on the part of the plaintiffs' driver.

But, however that may be, we are clearly of the view that the minds of the jury were so affected by the learned trial judge's direction to them, that, although the tail light was out and its being extinguished was a cause of the collision, the defendants would not be liable "if the driver was not aware of the light being out, because it had gone out suddenly before the impact"—which was tantamount to telling them that the statutory duty under s. 9 (1) was

not absolute but involved civil liability under s. 41 (1) only if the non-observance of s. 9 (1) was in some degree attributable to personal fault or negligence of the defendant Hatch, the driver of the motor truck of his co-defendant, and that, unless they found such fault or negligence to be established by the evidence, they should answer the first question in the negative—that that direction influenced all their findings.

In effect, the jury's findings, as they now stand, merely negative such personal fault or negligence of the defendant Hatch, because, having reached that conclusion, they may have deemed themselves dispensed from making any finding on the vital question whether the tail light of the defendants' truck was, or was not, in fact lighted and clearly visible at a distance of at least 200 feet, as prescribed by s. 9 (1), at the moment of the collision, or immediately prior thereto. The learned judge had very properly said earlier in his charge:—

> The first thing you have to determine, because it is at the very threshold of this case, is whether or not upon the evidence of all the witnesses both for the plaintiffs and for the defendants the rear light was burning on that truck and was visible on that occasion.

Upon that crucial question, owing to the course of the trial and notwithstanding the insistence of counsel for the appellants, there is no finding. The foreman's answer to the question of the learned judge, thus reported:

> Am I to understand, gentlemen, that it is your conclusion from the evidence that the light did go out immediately before the accident, and that you so find?
>
> The Foreman: We do not know, sir.

does not mean that the jury could not find whether the tail light was in fact lighted or extinguished, but only that they could not determine precisely when it had gone out, if it was in fact out. Nor does their first memorandum imply that the light was in fact out, as the learned judge might appear to have thought:—

> Mr. Plaxton: Is there any doubt about the answer to the first question, my Lord?
>
> His Lordship: In what way? I think their assumption is: "Assuming that the light may have gone out prior to the accident unknown to the driver, we find the defendant not negligent."
>
> Mr. Plaxton: You are stating that as their assumption, my Lord?
>
> His Lordship: That is their finding, I think.
>
> Mr. Plaxton: As long as that is clear, my Lord.

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Having, in effect, been told that negligence causing the accident was the only matter for their consideration, and that the fact that the requirement of s. 9 (1), as to the tail light, was not complied with, would not, if established, amount, *per se,* to negligence, the jury, not improbably, put that aspect of the case entirely out of their minds when dealing with the question of the negligence of the plaintiffs' driver, and took the view that his negligence, which they, no doubt, found to have been proven, could alone in law be regarded as negligence causing the collision. Their second memorandum cannot in any view of it be taken to import more than this. It does not imply either that the tail light was in fact burning, or that, if not, its being out did not contribute to causing the collision. Fault attributable to the defendants being excluded, the only material negligence was that of the plaintiffs' driver, which was in that sense *the cause* (the jury, though invited to do so, did not say "the *sole* cause") of the collision. The direction to the jury as to the purview and effect of ss. 9 (1) and 41 (1) of the Ontario *Highway Traffic Act* was impliedly, if not expressly, approved in the judgment delivered by the Appellate Divisional Court in May, 1928. That that direction was erroneous, in our opinion, admits of no doubt under the decision of the House of Lords in *Great Western Railway Co.* v. *Owners of S.S. "Mostyn"* (1), decided late in 1927, which apparently was not referred to either at the trial or in the Appellate Divisional Court. The head note of the report reads as follows:—

> Under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, the owner of a vessel doing damage to a harbour, dock or pier, or works connected therewith, is responsible to the undertakers for the damage, whether occasioned by negligence or not, where the vessel is at the time of the damage under the control of the owner or his agents.

In the course of his speech, Viscount Haldane says:—

> The claim is based on an allegation of negligence, resulting in liability at common law, and also on the provisions of s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, which it is said does not require proof of negligence in order to render it applicable. The courts below have agreed in holding that negligence has not been proved, and the nautical assessors who have been present to advise us are of opinion that there was no negligence shown. I understand that we are unanimously of the same opinion. * * *

(1) [1928] A.C. 57.

The question which we have to answer is whether, in a case in which neither negligence nor any other act of an unlawful nature has been established against the owners of the *Mostyn* or those in charge of her, s. 74 makes the owners answerable for the damage done in this case to the dock.

I assume that the master and those in charge were not answerable for any wilful act or negligence, inasmuch as none has been proved against them. But in the case of the owner the section does not in terms require any wrongful act to be established as the condition of liability. The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the undertaking. My Lords, if the language of this section could legitimately be construed by us who sit here without regard to authority, I should find difficulty in saying that the appellants were not entitled to claim that it applied. It has been said that to take this view is to attribute to Parliament an intention which is hardly conceivable, the intention of making people liable for damage where they have been in no way to blame. But I am unable to attach much weight to this consideration, where the words are clear. What the motives of Parliament were we do not know and cannot inquire. It may be that it desired to encourage undertakers of this class by providing insurance at the cost of owners who are in no way to blame. There are instances of such a principle in modern statutes, such as the Workmen's Compensation Acts, and it may be that it was something analogous that was in the mind of the legislature. I do not know, and I feel myself precluded from even trying to inquire, or from speculating.

But we cannot proceed here on this simple view. It has been established by a decision which is binding on us by this House that the language must be interpreted as subject to some qualification which is implicit in the words, and the question which alone we are free and bound to examine, is what this qualification is, and how far it extends.

After discussing at length the decision in *River Wear Commissioners* v. *Adamson* (1), the learned Viscount thus states his conclusion as to "what was really laid down" in that case:—

I think only that there having been no human agency as the cause, and the real cause having been the act of God, the case was not covered by the section. The learned judges were at least agreed on this, that when the cause was not human agency but a *vis major* beyond human control, it did not come within the words.

In the case before us there was not only no negligence, but, on the hypothesis which I am making, there was no breach of duty at all. It is therefore important to see whether the grounds of the decision in this House in the *Adamson* case (1) laid down for us any different principle which was held to take the case outside of the words of the statute. This is not easy to determine, for there was divergence of opinion.

(1) (1877) 2 App. Cas., 743.

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After carefully analyzing the speeches delivered in the House of Lords in *Adamson's* case (1), Lord Haldane concludes:—

> We appear to me to be bound by the authority of the *Adamson* case (1) to hold that the section in question is not to be read literally, but as applying when the damage complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not. The decision further exempts the owner when the vessel is not under such control but is for instance derelict. When there are facts to which it applies it effects an alteration in the common law which imposes a new liability to be sued on the owner, and to that extent changes not merely procedure but also substantive law.

Although Mr. McCarthy, for the appellants, practically rested his appeal on the authority of the decision in the *Mostyn case* (2), in the course of his very able argument in answer, Mr. Phelan for the respondents made no allusion to that very recent and most important decision, a careful study of which has failed to disclose to us any real ground of distinction between the statutory provisions there dealt with and those now before us. There, as here, the responsibility of the owner for damages done by his vessel (here, by his motor vehicle) is declared in terms unqualified and unrestricted save by one exception, that of the vessel being under compulsory pilotage—here, the one exception is that of the motor vehicle being in the possession of some person other than the owner, or his chauffeur, without the owner's consent. In each case alike the exception merely serves to emphasize the unlimited scope of the main provision. Obliged by the decision in the *Adamson* case (1) to place a further limitation upon the responsibility of the owner created by s. 74 of the English statute, the House of Lords in *Mostyn's* case (2) confines that limitation most strictly to what they were bound to hold that the judgment in the *Adamson* case (1) necessarily implied. There is no earlier decision on the scope of the statute now before us which precludes our holding that it imposes, subject to the one exception expressed, unrestricted and absolute liability on the owner, thus giving to it the effect which we think its plain language clearly imports. But if the restriction held to have been placed on the application of the English statute in *Adamson's* case (1) should also be held to apply to the liability im-

(1) (1877) 2 App. Cas. 743. (2) [1928] A.C. 57.

posed by ss. 9 (1) and 41 (1) of the Ontario *Highway Traffic Act*, that would not help the present defendants, because they were not within it. If the rear or tail light was not burning, or if, though burning, it was not visible at a distance of at least 200 feet, neither of these facts can be attributed to an act of God; and the motor truck was at the time of the collision admittedly under the direction of the owner or his agent.

It will be noted that Lord Haldane in the *Mostyn* case (1) dealt with the arguments of counsel as to presumed intention and motives of Parliament. Similar arguments were advanced at bar in this Court. Conceding that s. 41 (1) was intended to impose civil liability upon the owner of a motor vehicle where there had been a violation of the statute, counsel for the respondents argued that such responsibility is vicarious and must be confined to cases in which the person in charge of such motor vehicle would be responsible at common law. We find nothing in the statute to justify so restricting its application. On the contrary, the imposition by s. 41 (1) of liability on the driver as well as the owner and the provision of subs. (3) seem to make clear that the purpose of the section is not only to impose direct civil liability, but also that that liability should be unrestricted, save as explicitly otherwise declared in the section itself. The inclusion of the driver's statutory responsibility is idle, if the application of the section is confined as Mr. Phelan contends.

We are accordingly of the opinion that the learned trial judge misdirected the jury as to the scope and effect of ss. 9 (1) and 41 (1) of the Ontario *Highway Traffic Act*, and that such misdirection affected their findings to such an extent that they cannot stand. It follows that the judgment for the defendants must be set aside and that a new trial must be ordered in favour of the appellants William R. Hall and Alice R. Dale.

While the Court is naturally reluctant to grant a new trial, it is satisfactory in this case to find such a clear and distinct ground of misdirection on which to base our order; for, otherwise, the later proceedings at the trial, by which the jury's findings were elicited, seem to us to have been so unsatisfactory that we should have to consider very

(1) [1928] A.C. 57.

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carefully whether, in the sound exercise of judicial discretion, we ought not, on that ground, to direct a new trial rather than affirm a judgment based on a verdict so arrived at.

If, perchance, the Legislature should consider that our interpretation of the statute imposes a liability wider than was intended, that body can by appropriate amendment change the law in whatever direction it may deem proper.

There is no reason why on the new trial the jury should not be asked, at the outset, these two direct questions:—

1. Q. Did the defendants' motor truck carry up to the moment of the collision a rear lamp lighted and casting a red light clearly visible at a distance of 200 feet?
2. Q. If not, did the failure to have such a light cause the collision?

Of course these two questions will be followed by questions appropriate to cover the other issues.

At the opening of the argument it was pointed out to counsel for the appellants that the claims of the plaintiffs Annie C. Hall and Frank J. Justin were each for an amount less than $2,000 and that, as was held in *Armand* v. *Carr* (1), and *Reynolds* v. *C.P.R.* (2), the Court is without jurisdiction to entertain the appeal by them. An application to allow the case to stand over to permit of leave to appeal being asked from the Ontario Appellate Divisional Court, the Court felt itself obliged to refuse. The appeals of these two plaintiffs, Annie C. Hall and Frank J. Justin, were accordingly quashed. They will not, however, be required to pay to the defendants any costs in this Court.

The judgment of the Court, therefore, is that, as to the plaintiffs William R. Hall and Alice R. Dale, this appeal is allowed and the judgment dismissing the action is set aside with costs in this Court and in the Appellate Divisional Court to the successful appellants and a new trial is ordered. The costs of the former trial will be reserved to the judge who shall preside at the new trial.

Appeal allowed with costs (as to appellants William R. Hall and Alice R. Dale).

Solicitor for the appellants: *Herbert A. W. Plaxton.*
Solicitors for the respondents: *Phelan & Richardson.*

(1) [1926] S.C.R., 575. (2) [1927] S.C.R., 505.

IN RE JOHN MANUEL

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*Dec. 4.
*Dec. 21.

Criminal law—Conviction under Customs Act, R.S.C. 1927, c. 42, s. 217—Harbouring goods unlawfully imported into Canada—Summary jurisdiction under s. 217 (2)—Value of goods not shown to be under $200.

Appellant was convicted before a stipendiary magistrate (the conviction being affirmed, on appeal, by the County Court Judge) for harbouring spirits unlawfully imported into Canada whereon the duties had not been paid, contrary to s. 217 of the *Customs Act*, R.S.C. 1927, c. 42. The warrant of commitment did not show that the value of the goods was under $200, and was, on that ground, attacked as bad on its face, as not showing jurisdiction in the convicting court.

Held (Mignault J. *dubitante*): In not showing such value to be under $200 the warrant of commitment did not fail to show jurisdiction.

Per Anglin C.J.C., Newcombe and Smith JJ.: Subs. 3 of said s. 217, introduced by amendment in 1925 (c. 39), does not impliedly limit the summary jurisdiction to cases where the value of the goods is less than $200. The special jurisdiction conferred by subs. 3 to proceed, alternatively, by indictment, for a more rigorous penalty, where the value is $200 or over, does not, so long as the procedure by indictment is not invoked, detract from the power exerciseable by magistrates under subs. 2, interpreted independently.

Per Rinfret J.: The warrant recited a conviction of an offence described in terms strictly following those of subs. 1 of s. 217; then subs. 2 enacts that "every such person" guilty of the offence so described is "liable on summary conviction," etc. Therefore it could not be said that, on its face, the warrant did not show jurisdiction. It may be that subs. 3 makes the offence indictable when the goods are of the value of $200 or over; but there was nothing in the proceedings before the court or on the face of the commitment to show they had that value; moreover, the presumption is that the jurisdiction was rightly asserted.

MOTION by way of appeal from the judgment of Lamont J., dismissing an application by the present appellant for a writ of *habeas corpus*.

The appellant was convicted before a stipendiary magistrate "for that he * * * did, in the city of Halifax, on * * * unlawfully, without lawful excuse, harbour a quantity of spirits, to wit, rum unlawfully imported into Canada, whereon the duties lawfully payable have not been paid, contrary to the provisions of section 217" of the *Customs Act*, c. 42, R.S.C. 1927. The conviction was affirmed, on appeal, by the County Court Judge.

The warrant of commitment, which recited the conviction in the above terms, was attacked on the ground that

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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it did not show that the value of the goods alleged to have been harboured was under $200, and, therefore, that it was bad on its face, as not showing jurisdiction in the convicting court. It was contended, on appellant's behalf, that the effect of the enactment, in 1925 (c. 39), of what is now subs. 3 of s. 217, was to make the offence an indictable one where the goods are of the value of $200 or over, and impliedly to limit the summary jurisdiction to cases where the value of the goods is less than $200. *Rex* v. *Thompson* (1) was cited in support of the motion.

Duncan MacTavish for the motion.

John F. MacNeill for the Attorney-General of Canada, *contra.*

The judgment of Anglin C.J.C., Newcombe and Smith JJ., was delivered by

NEWCOMBE J.—This motion comes by way of appeal from the judgment of my brother, Lamont, of 23rd November, 1928, dismissing an application by the prisoner for a writ of habeas corpus. The papers shew that the prisoner was convicted before Mr. Cluney, Stipendiary Magistrate of the city of Halifax, on 4th July, 1928, for the offence which will be literally described; and that the conviction was, on 14th November, affirmed on appeal by the County Court Judge for the district. A verified copy of the warrant of commitment dated 27th November, 1928, is produced, and, in it, the conviction is recited as follows:—

> Whereas John Manuel, late of Halifax, in the county of Halifax, was on this day convicted before the undersigned, Judge of the County Court for District No. 1 (acting on appeal by the said John Manuel from a conviction made on the 4th day of July, 1928, before A. Cluney, Stipendiary Magistrate in and for the city of Halifax), for that he, the said John Manuel did, in the city of Halifax, on the 24th day of April, A.D. 1928, unlawfully, without lawful excuse, harbour a quantity of spirits, to wit, rum unlawfully imported into Canada, whereon the duties lawfully payable have not been paid, contrary to the provisions of Section 217 of the Customs Act, chapter 42, Revised Statutes of Canada, 1927, and it was thereby adjudged that the said John Manuel for his said offence should forfeit and pay the sum of one hundred and fifty dollars, to be paid and applied according to law, and should pay to the prosecutor the sum of five dollars and fifty cents for his costs in that behalf;

(1) (1928) 50 Can. Cr. Cas. 183.

and it was thereby further adjudged that if the said several sums were not paid forthwith the said John Manuel should be imprisoned in the city prison of the said city of Halifax in the said city of Halifax, for the term of three months, unless the said several sums and the costs and charges of the commitment and of the conveying of the said John Manuel to the said city prison were sooner paid.

The ground of the application is that the commitment is bad upon its face, because it does not shew " that the value of the said goods alleged to have been harboured is under $200."

The most recent revision of the Public Statutes of Canada came into force on 1st February, 1928, although declared by the proclamation to operate by the designation of the Revised Statutes of Canada, 1927. Section 217 of the *Customs Act*, c. 42, as contained in that revision, is immediately derived from c. 39, s. 2, of 1925, and c. 50, ss. 25 and 26, of 1927.

The question arises under subs. 2 of the Act as it appears in the revision designated 1927. That subsection originally formed part of s. 197 of the *Customs Act*, as enacted by c. 14, s. 38, of 1888, and it was re-enacted in a subsection, as it now stands, by the Revised Statutes of 1906, c. 48, s. 219. In 1925, s. 219 was repealed and at the same time re-enacted with some amendments, including the addition of subs. 3; but there was nothing in any of the earlier Acts corresponding in anywise with subs. 3. Subsection 1 of section 219, as enacted in 1925, in conformity with the repealed section, had made it an offence, knowingly to harbour or conceal goods unlawfully imported into Canada, and had provided that, if such goods were found, they should be seized and forfeited; and that, if not found, the person offending should forfeit the value thereof; and by subss. 2 and 3 it was enacted that

(2) Every such person shall, in addition to any other penalty, forfeit a sum equal to the value of such goods, which may be recovered in any court of competent jurisdiction, and shall further be liable, on summary conviction before two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one year and not less than one month, or to both fine and imprisonment.

(3) Where the goods so harboured, kept, concealed, purchased, sold or exchanged are of the value of two hundred dollars, or over, such person shall be guilty of an indictable offence and liable to a term of imprisonment not exceeding seven years and not less than one year for a first offence, and to a term of imprisonment not exceeding ten years and not less than three years for a second and each subsequent offence.

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These two subsections were not in themselves altered by the amendments of 1927, and are introduced into the revision, in the terms in which they were enacted, by c. 39 of 1925. Subsection 2 has in effect thus been in force for forty years, and, as a separate subsection, since 1906. The amendments by c. 50 of 1927 are immaterial to the question now at issue. It is the interpretation of subsections 2 and 3 of c. 39 of 1925 which is really involved, and the question is, whether the commitment is bad because it is not stated therein that the value of the rum unlawfully imported and harboured by the prisoner was less than $200.

It will be perceived that, by subsection 2, the person harbouring the goods is liable, in addition to the penalties previously provided, on summary conviction, to a penalty not exceeding $200, and not less than $50, or to imprisonment for a term not exceeding one year, and not less than one month, or to both fine and imprisonment. There is, in this subsection itself, no limitation of the magistrates' jurisdiction to proceed summarily, depending upon the value of the goods. It is, however, provided by the following subsection that, where the value of the goods is $200 or over, the offender shall be guilty of an indictable offence, and liable to the imprisonment therein prescribed; and it is argued that that provision impliedly limits the summary jurisdiction to cases where the value of the goods is less than $200.

I would reject that contention. It is not uncommon practice, in Dominion legislation, to provide that a statutory offence may be prosecuted either summarily or upon indictment; s. 499 of the *Criminal Code* is an example; and ss. 127 and 128 of the *Excise Act* are other examples; there is no inherent objection to such alternative methods of procedure, and another specimen is introduced by the enactments now in question. Subsection 2, in express terms, applies to "every such person"; that is, to any person who, without lawful excuse, harbours any goods unlawfully imported into Canada, whereon the duties lawfully payable have not been paid. He is to forfeit a sum equal to the value of the goods, recoverable in any court of competent jurisdiction, and is further liable, on summary conviction, to the additional penalties prescribed. I

think the intention of Parliament is sufficiently obvious; and that the special jurisdiction conferred by subsection 3 to proceed, alternatively, by indictment, for more rigorous penalties, where the value of the goods is $200 or over, or, in such a case, for first, second or subsequent offences, at the option of the prosecuting authority, does not, so long as the procedure by indictment is not invoked, detract from the power exerciseable by the magistrates under subsection 2, interpreted independently.

It is not said, and cannot, I think, be said with any justification, that subsection 3 affects the liability of an offender under subsection 2 to forfeit a sum equal to the value of the goods, if that value be $200 or more; and, if not, why should it affect the offender's liability to the penalties enforceable by summary proceedings, also imposed by subsection 2? The two subsections appear to be independent and self-contained, and subsection 3 does not, in my opinion, imply or suggest any intention to abridge or affect the operation of subsection 2 as it theretofore existed, and continues to exist. I cannot help thinking that, when, in 1925, Parliament amended the original section, if it were the intention to reduce the well established jurisdiction of the magistrates, apt words would have been used, and that it was not meant to change the law in such an important particular by a far-fetched inference.

I am fortified in my conclusion by the judgment of the Supreme Court of Nova Scotia *en banc,* pronounced in the case of *Rex* v. *Boutillier* (1).

The appeal should, in my opinion, be dismissed.

MIGNAULT J.—I have had the advantage of reading the judgment of my brother Newcombe dismissing the appeal of the prisoner Manuel from the refusal by my brother Lamont of a writ of *habeas corpus* to enquire into the cause of his commitment, which commitment purports to have been made under section 217 (formerly 219) of the *Customs Act,* chapter 42, R.S.C., 1927.

I understand that a majority of my learned colleagues concur with my brother Newcombe in rejecting the appeal. I have not been able, however, to free myself from

(1) (1928) 49 Can. Cr. Cas. 312, at p. 314.

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considerable doubt as to the correctness of his decision. Subsection 2 of section 217 (formerly 219), as originally drafted, undoubtedly conferred upon two justices of the peace jurisdiction to try the offence created by subsection 1, without regard to the value of the goods. When, however, Parliament repealed the whole section in 1925 and re-enacted it, a very important provision was inserted in the new section as subsection 3, declaring that when the goods so harboured, etc., are of the value of $200 or over, such person (the person harbouring the goods) shall be guilty of an indictable offence and subject to a term of imprisonment not exceeding seven years, and not less than one year, for a first offence.

It seems clear that in proceedings by indictment, it would be essential to the validity of the indictment that it should set out that the goods are of the value of $200 or over. When this value exists, the statute creates an offence which, as it appears to me, is triable only by indictment. The words "where the goods so harboured * * * are of the value of two hundred dollars or over, such person *shall be guilty of an indictable offence*," seem to me to exclude any proceedings other than by indictment. I cannot, therefore, in a case coming within the condition of subsection 3, conceive that it should be tried under the summary conviction provisions referred to by subsection 2.

I do not think that there is any parity between this case and the case contemplated by section 499 of the *Criminal Code*. Parliament, no doubt, by express enactment, can provide that an offence shall be punishable either on conviction on an indictment, or on summary conviction. Under section 499 the offence and the punishment are the same, whether the one or the other mode of trial is selected. Here, however, where the value of the goods is under $200, the offence is not the same as that contemplated by subsection 3, nor is the punishment the same.

I am not in favour of dissents in criminal cases coming before this Court by way of appeal, so I merely give expression to the doubt I feel with respect to the decision of the majority of my colleagues.

RINFRET J.—The ground of the application by John Manuel for a writ of *habeas corpus* was: That the warrant

of commitment is bad on its face because it does not shew jurisdiction in the convicting court, inasmuch as the goods unlawfully imported into Canada are not therein alleged to have been valued under $200.

I think the application was rightly refused by my brother Lamont and the appeal from his judgment ought to be dismissed.

The warrant of commitment recites that John Manuel was convicted, first, before a stipendiary magistrate; and then, on appeal, by a judge of the County Court, for that he did

unlawfully, without lawful excuse, harbour a quantity of spirits, to wit: rum unlawfully imported into Canada whereon the duties lawfully payable have not been paid, contrary to the provisions of section 217 of the Customs Act.

Subsections 1 and 2 of section 217 of the *Customs Act* read in part:—

1. If any person * * * without lawful excuse, * * * harbours * * * any goods unlawfully imported into Canada * * * whereon the duties lawfully payable have not been paid * * *

2. Every such person shall * * * be liable, on summary conviction before two justices of the peace, to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding one year and not less than one month, or to both fine and imprisonment.

The warrant, therefore, recites that Manuel was convicted of an offence which is described in terms strictly following those of subs. 1 of s. 217 of the Act. Then subs. 2 enacts that "*every such person*" guilty of the offence so described is "liable on summary conviction, before two justices of the peace," etc.

I fail to see how, under those circumstances, it can be said that, on its face, the warrant of commitment does not show jurisdiction in the stipendiary magistrate.

It may be that subs. 3 of s. 217 makes the offence indictable when the goods so harboured "are of the value of two hundred dollars or over," but there is nothing in the proceedings before us or on the face of the commitment to shew that the spirits harboured by Manuel had that value. Moreover, the presumption is that the jurisdiction was rightly asserted.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for the appellant: *James H. Power.*
Solicitor for the Crown: *Rainard H. Scriven.*

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*Nov. 22.
* " 28.

FAUTEUX *v.* MASSICOTTE

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

Notary—Agency—Representations to obtain renunciation to a privilege—Unpaid creditor—Liability of the notary

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the trial judge, P. Demers J., and dismissing the appellants' action.

The appellants are contracting plumbers and their action is to recover balance of the amount due for work done on a building erected by a third party then insolvent, on the ground that the defendant respondent, a notary, had promised to pay that amount and, alternatively, on the ground that he had induced the appellants to continue the work and not to register any privilege, on the representation that he had in hand sufficient moneys to settle appellants' claim.

The Supreme Court maintained the appellants' action, but that judgment was reversed on appeal.

The Court of King's Bench held that, under the circumstances of this case, a notary who informs a contractor that moneys had been deposited in his hands by an hypothecary lender and transmits to him the terms of the instructions given by the lender to employ those moneys for the payment of the contractors' claims does not incur any liability, either as personal debtor or as surety for the owner of the building.

On the appeal to the Supreme Court of Canada after hearing counsel for the appellants and the respondent, judgment was delivered orally dismissing the appeal with costs for the reasons assigned by Mr. Justice Hall in the Court of King's Bench.

Appeal dismissed with costs.

J. C. Lamothe K.C. for the appellants.

E. Lafleur K.C. and *P. Couture K.C.* for the respondent.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1928) Q.R. 46 K.B. 81.

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THE LONDON LIFE INSURANCE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

TRUSTEE OF THE PROPERTY OF THE LANG SHIRT COMPANY, LIMITED, DEBTOR (PLAINTIFF) ..... } RESPONDENT.

*Nov. 29, 30.
*Dec. 21.

METROPOLITAN LIFE INSURANCE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

MARGARET ELIZABETH MOORE (PLAINTIFF) ..... } RESPONDENT.

AETNA LIFE INSURANCE COMPANY (DEFENDANT) ..... } APPELLANT;

AND

MARGARET ELIZABETH MOORE (PLAINTIFF) ..... } RESPONDENT.

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

Life Insurance--Death of insured—Recovery under policies—Allegation of suicide—Circumstances of death—Motive—Presumption against suicide —Presumption against crime—Policy providing for insurance in case of death and for further insurance if death results from accident— "Contract of accident insurance"—Application of s. 179 of Ontario Insurance Act, 1924, c. 50—Bodily injury happening "without the direct intent of the person injured, or as the indirect result of his intentional act"—"Bodily injuries effected solely through external, violent and accidental means"—"Internal injuries" revealed by autopsy.

The defendant insurance companies appealed from the judgment of the Appellate Division, Ont. (62 Ont. L.R. 83) which (reversing judgment of Meredith C.J.C.P., 60 Ont. L.R. 476) held that the deceased's death was not from suicide, but was an accident within the meaning of the insurance policies in question, and that plaintiffs were entitled to recover on the policies.

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*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

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LONDON LIFE INS. CO. v. TRUSTEE OF THE PROPERTY OF LANG SHIRT CO. LTD.

METROPOLITAN LIFE INS. CO. v. MOORE.

AETNA LIFE INS. CO. v. MOORE.

Held: On the facts and circumstances in evidence, and the question being one of probabilities and inferences, as to which an appellate court was in as good position to decide as the trial judge, and having regard to the presumption against suicide, the finding of the Appellate Division that the death was an accident within the meaning of the policies was affirmed; and the appeals were dismissed.

Per Anglin C.J.C., Mignault and Rinfret JJ.: Under the criminal law of Canada suicide is a crime (Russell on Crimes, 8th ed., vol. 1, p. 618; Blackstone, Commentaries, Lewis's ed., vol. 4, marg. p. 189; discussion of the point by Riddell J.A., in this case, 62 Ont. L.R. 83; *Cr. Code,* ss.10, 269, 270, referred to). Moreover, in this case, the contention of suicide was coupled with the suggestion that deceased planned to give his death an appearance of death by accident, to enable recovery of insurance moneys, thus committing a fraud, and such fraud would be a crime. Before crime can be held to be established, there is required proof of a more cogent character than in ordinary cases where crime is not imputed; and it is a rule, although it may not be so strict in civil cases as in criminal, that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed (Rule as stated by Middleton J.A. in this case, 62 Ont. L.R. 83, at p. 93, adopted).

The regard to be paid to evidence of existence of motive to commit suicide discussed; reference to *Dominion Trust Co.* v. *New York Life Ins. Co.,* [1919] A.C., 254, at p. 259. (That case distinguished on the facts.) It was held that here the evidence did not establish such an impelling motive as would warrant the assumption that deceased contemplated taking his life, if, indeed, proof of motive, however potent, can, without more, ever justify such an inference.

S. 179 of the *Ontario Insurance Act,* 1924, c. 50, notwithstanding its collocation, is applicable to every contract of accident insurance, including contracts, such as were here in question, where there is insurance in the event of death generally, irrespective of its cause, and also further insurance made payable only when the death results from an accident; this second species of insurance is a "contract of accident insurance" to which s. 179 applies.

Held, further, that the deceased's death, which was caused by carbon monoxide poisoning, through his having started his motor engine in his garage, happened "without the direct intent of the person injured, or as the indirect result of his intentional act" within the reasonable intendment of those words in said s. 179; further, that his death was the result of "bodily injury effected solely through external, violent and accidental means" within the terms of policies in question; also, that an autopsy had revealed "internal injuries," within the terms of a policy in question, when the internal tissues, and the blood, were found to have the cherry red colour characteristic of carbon monoxide poisoning.

APPEALS by the defendants from the judgment of the Appellate Division of the Supreme Court of Ontario (1).

The actions were to recover upon certain insurance policies upon the life of one Moore. They were tried together (along with another action not now in question) and were dismised by Meredith, C.J.C.P. (2), whose judgment was reversed by the Appellate Division (1), which held that the plaintiffs were entitled to recover.

The appeals were argued at the same time, and are dealt with together, the main question of fact being the same in each, namely, did Moore die by his own act, or was his death a death by accident within the meaning of the policies? The material facts and circumstances of the case are sufficiently stated in the judgment of Mignault J. now reported. The appeals were dismissed with costs.

R. S. Robertson K.C. and *S. E. Weir* for the appellant The London Life Insurance Company.

I. F. Hellmuth K.C. and *G. W. Mason K.C.* for the appellant Metropolitan Life Insurance Company.

G. W. Mason K.C. for the appellant Aetna Life Insurance Company.

W. Lawr for the respondent the Trustee of the property of the Lang Shirt Co. Ltd.

G. Grant K.C. and *V. H. Hattin* for the respondent Moore.

The judgment of Anglin C.J.C., Mignault and Rinfret JJ., was delivered by

MIGNAULT J.—These three cases were tried together. In each of them the action is based on an insurance policy on the life of William Raymond Moore, the husband of Margaret Elizabeth Moore, who, in two of these cases, is the plaintiff; and is here a respondent. The other action is on behalf of the trustee in bankruptcy of the property of the Lang Shirt Company, Limited, of which William Raymond Moore was president and managing director. By the judgments of the Second Appellate Divisional Court of Ontario (1), reversing (Latchford C.J., dissenting) the judgments at the trial of Meredith C.J.C.P. (2), the trustee of

(1) (1928) 62 Ont. L.R. 83. (2) (1927) 60 Ont. L.R. 476

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the Lang Shirt Company, Limited, recovered $26,311.64 against The London Life Insurance Company, and Mrs. Moore recovered $5,294.52 against the Metropolitan Life Insurance Company, and $10,924.54 against the Aetna Life Insurance Company. The three insurance companies appeal from these judgments. There was also an action by Mrs. Moore against the London Life Insurance Company, tried at the same time and dismissed by the learned trial judge. Mrs. Moore appealed from this judgment but she subsequently abandoned her appeal. This fourth action is therefore not in question in these proceedings, and need not be further mentioned.

The three appeals were argued at the same time, and will be dealt with together, the main question of fact being the same in each, to wit: did William Raymond Moore die by his own act, or was his death a death by accident within the meaning of the insurance policies? It will be convenient to state at once the nature of the contract of insurance in each case.

The policy of the London Insurance Company, dated the 2nd of February, 1924, on the life of W. R. Moore, issued by that company in favour of the Lang Shirt Company, Limited, as beneficiary, was for $25,000, payable if the insured died before the expiration of seven years from "the policy year date," defined to be the 2nd of February, 1924. Its seventh condition was as follows:—

7. *Suicide.* In case the insured shall die within two years from the date when this policy is signed and sealed, by his own act, whether sane or insane, this policy shall be void and the company shall not be liable thereunder.

The policy of the Metropolitan Life Insurance Company, dated the 9th of August, 1920, was issued by that company on the life of Moore, in favour of his wife, the respondent, as beneficiary, for $5,000, payable on the death of the insured. By a clause of the policy, in consideration of an additional premium of $6.25, the company promised to pay the beneficiary, on the receipt of due proof of the death of the insured "as the result of bodily injury effected solely as described below," a further sum equal to the amount of assurance, on the following conditions:—

Conditions: The indemnity provided for herein shall be payable only if the death of the insured result in consequence of bodily injury effected solely through external, violent and accidental means, within sixty days

after such injury, independently and exclusively of all other causes. This indemnity shall not be payable if the death of the insured results directly or indirectly from disease or from bodily or mental infirmity, or from self-destruction whether sane or insane, or from bodily injury received while the insured is engaged in military or naval service in time of war, or in aeronautic or submarine operations, nor if such death occur in time of war as a direct or indirect result of travel on the high seas or residence or travel in any war zone outside the continental limits of the United States or the Dominion of Canada, or while engaged in Red Cross or other Relief Service in the territory last described.

The company paid the $5,000 of insurance on the life of Moore, but disputes its liability to pay an equal amount under the clause just quoted, its contention being that Moore's death was not accidental within the meaning of this clause, but was a death by suicide.

The policy of the Aetna Life Insurance Company, dated the 6th of November, 1920, was for $5,000, payable on the death of Moore to Mrs. Moore as beneficiary. The policy contained a clause whereby the company undertook to pay a further amount of $5,000 on the death of the insured if such death results directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental means within ninety days from the occurrence of such accident, and if such accident is evidenced by a visible contusion or wound on the exterior of the body (except in case of drowning and internal injuries revealed by an autopsy), and if such death does not result from suicide, while sane or insane, nor from military or naval service in time of war, nor from an aeronautic flight or submarine descent, nor directly or indirectly from disease in any form.

All these policies are governed by the law of Ontario.

Moore was found dead in his garage at Kitchener, at about 8.40 p.m., on the 17th of December, 1925. It is not disputed that his death was the result of carbon monoxide poisoning. It will be necessary, however, to state in some detail the surrounding circumstances, in order to make clear whether his death should be held to have been accidental, or, as the appellants contend, a death by suicide.

Moore had arrived in Kitchener that day at about noon, returning from a business trip to Ottawa. One of his friends, Isaac Hertel, met him on the street shortly after his arrival, and arranged to have a game of bridge with him that evening. Moore walked to his house and had dinner with his wife and children. After dinner, Moore and his wife went into the living room and busied themselves tying up several parcels, Christmas presents, to be sent to the United States. At about 2 p.m. he telephoned to his fac-

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tory enquiring whether a certain person had called for him, and stating that he would be there about three o'clock. Moore then told his wife that he would take the car, because he was going uptown first, uptown being in the opposite direction from the factory. During the previous week Moore had been out in the car with his wife, and had stopped to try to repair the chain on the right rear tire, some part of which was loose and striking the mudguard. He did not succeed in fixing it at that time, and remarked to his wife that if he had a hammer he could repair it because it was nothing serious.

At about 2.20 p.m., Moore went to the kitchen door to go to the garage, but came back and told his wife that he was going to fix the chain. He then had on his overcoat. He went to the cellar door where the hammer was kept. His wife did not see him after that, and assumed that he had gone to the garage.

This garage is a wooden structure to the right hand side of the house, but further back, and on the opposite side to the kitchen. A roadway from the street leads up to it. It measures 20½ feet in length by 14½ feet in width, these being outside measurements. There are four windows, two on the left side, and two in the rear wall. In front are two large doors opening to the outside, and in the left wall a smaller door near the large doors.

After Moore left his house saying he was going to fix the chain, no one saw him alive. The day was windy, but there is no evidence that it was also cold, and about three o'clock, one Albert Steffer, a driver for a bakery, came to the house and delivered bread there. He says that he saw the side door of the garage open about a foot and swinging in the wind. From where he was he could not see the large front doors. He also heard the car (the engine) going, and says he could hear a knock inside which sounded like a tool in use. The learned Chief Justice of the Second Appellate Division discredited this testimony, but nothing appears to show that the learned trial judge rejected it.

At 7.15 p.m. Hertel, who had arranged to have a game of bridge that evening with Moore, called at the house. Moore was not there, and Hertel came back, he says, about 8.35 p.m. At that time Mrs. Moore was anxious about her husband, and had telephoned to the factory to find out if he

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was there. As a result of what she told Hertel, the latter went out to the garage and entered by the side door; he cannot say whether it was closed or not, but remembers that it was not locked or hooked. He found the motor car running fairly slowly, and the first thing he did was to turn on the headlights of the car and then to stop the engine. The car was facing inwards. After turning on the lights, Hertel looked for Moore, called his name, and receiving no answer, walked round to the back of the car, and in so doing he struck Moore's feet. Moore was lying on the floor of the garage cross-wise, at the rear of the car, and between it and the front doors of the garage, his head on a cushion near the rear right wheel, which cushion was used in the car. There was a hammer near him, and towards the side wall of the garage there was an iron spade. Moore's hat lay in a child's express wagon near the back wheel. Hertel felt Moore's heart and found the body warm. He pushed open the front doors of the garage, dragged Moore's body out, and with Mrs. Moore's assistance carried it into the house.

The learned Chief Justice of the Appellate Court, in his dissenting judgment, says:—

> It is certain that the large doors of the garage were closed and that they remained closed until opened by Hertel about 8.40 in the evening. The small side door, it is equally certain, was also closed when Hertel entered by it.

With respect, there is no certainty on the point whether the front doors were closed when, or immediately after, Moore went into the garage. Moore may have opened them before attempting to work on the broken chain, as the respondents suggest, and they may have been later closed by the wind. The only testimony on this point is that of Hertel, who merely says that he "pushed open" these doors, which apparently were not fastened. And, with regard to the side door, there is certainly nothing to show that it was closed when Hertel went into the garage.

Moore was undoubtedly dead when he was brought into the house; but, as the body was still warm, the doctors and other people who were called in worked over it and tried in vain to induce artificial respiration. According to the medical testimony, Moore's body was cherry red, an indication of carbon monoxide poisoning. The way carbon monoxide operates, when inhaled, is thus described. It is

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absorbed by the haemoglobin of the blood, and the oxygen of the air is excluded, thus bringing about what Dr. Crowley calls a chemical change in the blood, and causing asphyxiation or suffocation. An autopsy was subsequently performed on Moore, and the tissues inside the body were likewise found to have this characteristic cherry red colour diffusely distributed all over the body, the blood being also cherry red. The first and practically immediate effect of the carbon monoxide gas, when inhaled, is to produce a semi-conscious condition. The person who has inhaled it is unable to make an effort to escape, the muscles lose their power to act, and death ensues sooner or later.

None of the physicians who were called could say even approximately how long Moore had been dead when his body was discovered. The warmth of the body is not a dependable indication, for sometimes it persists for hours after death. In this case the fumes may have produced almost immediately a state of unconsciousness, yet death may not have supervened for some time. Dr. Powell, one of the physicians called, speaks of a case which came under his personal observation where his man went into the garage and started the engine, and this man, within three minutes, was rendered unconscious, although one of the doors of the garage was open.

In all these circumstances, I have been unable to discover anything which is inconsistent with the conclusion of the appellate court that Moore's death was accidental. It is said that Moore was aware of the danger of inhaling carbon monoxide gas. Most men are in a general way, but, nevertheless, it is common knowledge that accidental deaths are not infrequently caused by exposure to this gas. The appellants ask why Moore started his engine. But this was the obvious thing to do, unless he jacked up the car, if he wished to move the wheel so as to get at the broken part of the chain. The appellants also claim that unless the large front doors were opened, there would not be sufficient light to work in the right hand corner of the garage, but one of the photographs seems to show enough light with the front doors closed and the side door open; and, as already pointed out, there is nothing to show that the front doors were not open when Moore lay down to work at the broken chain, as the plaintiffs suggest he did. That these doors were then

closed is a mere conjecture. Then stress is laid on Moore's position in the rear of the car, with his head on the cushion, but it is well known that that is a convenient position for a workman to take to repair a part of car which is not otherwise readily accessible. It may be objected that these are mere surmises, but they are less conjectural than is the supposition that Moore deliberately planned to commit suicide by inhaling the fumes of the engine.

It will now be convenient to consider the rules of evidence applicable to a case such as that at bar.

With all deference, I think that there can be no doubt that, according to our criminal law, suicide is a crime, although the learned trial judge thought otherwise. It is obvious, of course, that there can be no punishment under modern law when suicide is successful, except with regard to abettors of the crime, and it is clearly not "homicide" within the *Criminal Code* (s. 250). But it is an indictable offence to aid or abet a person in committing suicide (s. 269 *Crim. Code*); it is also an indictable offence to attempt to commit suicide (s. 270 *Crim. Code*), and I am unable to follow the contention urged upon us by the appellants that where the criminal attempt is successful there is no crime. At common law it seems clear that self-murder, *felo de se*, is a crime (Russell on Crimes, 8th ed., vol. 1, p. 618). Speaking of suicide, Blackstone, Commentaries, says:—

> The law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self (Lewis's Edition, vol. 4, marginal page 189).

I do not think the point requires elaboration, but, if I may, I would like to refer to the discussion of it by Riddell J.A., in the court below. See also s. 10 of the *Criminal Code*.

Moreover, the contention that Moore committed suicide is coupled with the suggestion that not only did he do so, but that he deliberately planned to give to his alleged self-inflicted death the appearance of a death by accident, in order that his wife and family, and not only these persons so closely connected with him, but also the Lang Shirt Company, might recover his insurance, thus committing a fraud against the appellants that could be described by no other term than that of crime.

That there is, in the law of evidence, a legal presumption against the imputation of crime, requiring, before crime can

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be held to be established, proof of a more cogent character than in ordinary cases where no such imputation is made, does not appear to admit of doubt. In criminal cases this rule is often expressed by saying that the crime imputed must be proved to the exclusion of reasonable doubt. There is authority for the proposition that the same presumption of innocence from crime should be applied with equal strictness in civil as well as in criminal cases (Taylor, Evidence, 11th ed., vol. 1, par. 112, and cases referred to). Whether or not, however, the cogency of the presumption is as great in civil matters as in criminal law (a point not necessarily involved here), I would like to adopt the statement of the rule by Middleton J.A., in the court below, which appears entirely sound:—

> * * * While the rule is not so strict in civil cases as in criminal, I think that when a right or defence rests upon the suggestion that conduct is criminal or quasi-criminal, the Court should be satisfied not only that the circumstances proved are consistent with the commission of the suggested act, but that the facts are such as to be inconsistent with any other rational conclusion than that the evil act was in fact committed. See Alderson, B., in *Rex* v. *Hodge* (1).

I would also refer to the authorities cited by Riddell J.A., in the court below, dealing with the presumption against suicide.

I am, clearly, of the opinion that, taking into consideration all the circumstances of Moore's death, it cannot be said that the facts proved are inconsistent with any other rational conclusion than that he committed suicide. They are, as has been already said, entirely consistent with the conclusion that Moore's death was accidental, and, on the evidence relating to the attendant circumstances, giving due weight to the presumption against criminal intent, it must be held to have been accidental.

It is scarcely necessary to say that the finding of the learned trial judge to the contrary is based upon inferences drawn by him from the facts in evidence. We are therefore at liberty, as was the Judicial Committee in *Dominion Trust Co.* v. *New York Life Insurance Co.* (2), to substitute our findings of fact for those of the learned Chief Justice of the Common Pleas, the more so since the appellate court has set aside the latter findings.

(1) (1838) 2 Lewin C.C. 227. (2) [1919] A.C., 254.

There remains to be considered the argument addressed to us on the question of motive, the contention of the appellant being that if the facts in evidence are consistent either with an accidental or a self-inflicted death, the existence of an impelling motive for self-destruction would justify the court in coming to the conclusion that Moore's death was a death by suicide.

But it must be observed that, as stated by Lord Dunedin, in rendering the judgment of the Judicial Committee in *Dominion Trust Company* v. *New York Life Insurance Co.* (1).

> Motive, however, can never be of itself sufficient. The utmost that it can do is to destroy or attenuate the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred. The proof of suicide must be sought in the circumstances of the death.

This rule was laid down in that case, although Lord Dunedin was there of the opinion that "if ever there can be said to be motive for self-destruction, such motive was present in this case." The Judicial Committee, it is true, found on the facts that suicide had been proved in the *Dominion Trust Company's case* (2), but it was vastly different from the case now under consideration.

I have very carefully read the evidence on which the appellants rely as establishing a motive for self-destruction. It may be granted that Moore's financial position, when he returned to Kitchener after his trip to Ottawa, was quite precarious. When he became president and manager of the Lang Shirt Company, Moore had purchased the stock, or a large portion of the stock, of Lang, the founder and practically the owner of the company. In order to pay for this stock he had drawn on the company's funds by cheques signed by himself as manager, counter-signed by one Oliver Moyer, the accountant and book-keeper of the company, and cashed by the bankers of the concern, the amount outstanding on such cheques being about $19,000. These cheques or drawings were entered in what was termed a "suspense account" and also, as Moore himself told the auditor, Walter Berner, in the sales or accounts receivable ledger. The company's financial position was not at the time good and, about the time of Moore's Ottawa trip, the

(1) [1919] A.C., 254, at p. 259. (2) [1919] A.C. 254.

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directors, with Moore's full consent, had arranged to have an audit made of its affairs, and Berner, the auditor, was engaged on this audit when Moore returned from Ottawa.

A short time before, an inventory of the company's stock-in-trade had been taken, and the sheets containing the inventory went to the company's office in the usual course. Summaries or extensions of these sheets were made out in the office and on them Moore or Moyer inserted the prices. Moyer says that after this was done, some alterations were made in the quantities marked on the extensions, by inserting a figure before or after the amount carried into the extension sheets, the effect being to indicate a larger stock-in-trade than really existed, to a value, the auditor says, of $11,800 in material and manufacturing cost. No witness says that Moore himself made these alterations, but the appellants rely on the circumstance that when on his return from Ottawa Moore telephoned to his office, as above stated, Moyer says he told him that the auditors had discovered that some figures had been changed in the inventory sheets, and Moore replied that "he guessed they would have it in for him."

Moore's house in Kitchener, which had cost originally $4,900, was mortgaged for $8,000. Outside of his interest in the Lang Shirt Company, he had no property, and the balance of his private bank account at his death was $12.42. The motor car was the property of his wife.

Reverting again to the financial position, the Lang Shirt Company is now established to have been insolvent, its assets, outside of the insurance policy sued on, having yielded only 25 cents on the dollar to its creditors. Moore was endeavouring at the time to raise money by disposing of some of his shares, and he had taken up the matter with Mr. A. A. Fournier, the proprietor of a departmental store in Ottawa. Fournier had invented a reversible shirt cuff, and had granted to the Lang Shirt Company a license for its manufacture. It was to him that Moore had applied, trying to get him to take shares held by him (Moore) in the Lang Company, and the object of his trip to Ottawa, in December, 1925, was to discuss that matter with Fournier. The trip was not immediately successful from this point of view, and Moore so told Hertel on his arrival, but Moore stated to Hertel that he hoped that Fournier would

take an interest in the company in January. From Fournier's testimony it does appear that he had given Moore some sort of hope that after the Christmas season he would do this, although he says that if Moore had been able to read between the lines, he would have seen that such financial assistance from him was unlikely. But Moore was apparently hopeful that Fournier would take some of his shares, and in this connection we are told that Moore was of an optimistic, energetic and even enthusiastic disposition. He was still a comparatively young man, forty-one years of age, and in perfect health. Mr. George B. McKay, called by the appellants, and manager of the Bank of Toronto at Kitchener, where both Moore and the Lang Company had their bank accounts, was well acquainted with Moore and his business affairs, and he says in cross-examination:—

Q. Moore was energetic, always working, and on the job? A. Yes.
Q. He realized it was an uphill road? A. Yes, he did.
Q. But he was determined to see it through? A. Yes.
Q. And you had confidence he would do that? A. Yes.

There is still another matter that should be mentioned here bearing on this question of motive. At the time of Moore's return from Ottawa, two representatives of creditors of the Lang Company for large amounts were anxious to see Moore. They were Mr. Rose of the Wabasso Company and Mr. Lilley, who represented an English company. Much stress is laid by the appellants on the assumed fact that Moore, expecting to be dunned by Rose and Lilley in connection with the indebtedness of the Lang Shirt Company, had endeavoured to avoid meeting them. But both these gentlemen were called in rebuttal, and each said that the object of his visit was not to demand payment, but to try to sell more goods to Moore. The learned Chief Justice of the appellate court states that Moore, who had been asked, on the 17th of December, to telephone to Lilley and make an appointment with him, did not do so, as "there was perhaps no person whom he wished less to talk to or see." But Lilley says that Moore did telephone to him and made an appointment with him to see him the next day, the 18th. And Lilley adds: "We had every confidence in him (Moore) and so did our office in Manchester."

There was, further, a question at the trial of a small draft drawn by Lilley on the Lang Company, payment of which, on the instructions of Mr. Clement, the vice-president, had

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been refused. But Mr. Lilley states that it was not on account of the return of this draft that he desired to see Moore in Kitchener. He adds: "That didn't worry us."

There are other matters referred to in the evidence, among them that Moore telephoned from Ottawa to Moyer asking how the auditors were getting on, which I mention merely to show that I have not overlooked it, since, in my opinion, it has no significance.

I think I have stated everything in any way material which has been relied on as showing that Moore had a motive to commit suicide, but I am unable to come to the conclusion that there was here such an impelling motive as would warrant the assumption that Moore ever contemplated taking his life, if, indeed, proof of motive, however potent, can, without more, ever justify such an inference. I cannot help thinking that there has been some exaggeration in this part of the appellants' case.

There remains the contention of the appellants, that Moore's death, assuming it not to have been suicidal, was not a death by accident within the terms of the policies sued on. This contention is not open to the London Life Insurance Company in the suit brought against it by the trustee of the Lang Shirt Company, because the policy issued by the London Company was an insurance on the life of Moore for a period of seven years irrespective of the cause of death, but with an exclusion of liability in case of suicide within two years. On the other hand, the policies of the Metropolitan Life Insurance Company and of the Aetna Life Insurance Company contain contracts of insurance on the life of Moore in the event of his death by accident as therein described. It is therefore open to these two latter companies to raise this point, and the question is whether Moore died as a result of "bodily injury effected solely through external, violent and accidental means."

The material clauses of each policy need not be repeated. The governing statute is *The Ontario Insurance Act*, 1924, 14 Geo. V, c. 50.

The clause relied on by the learned judges of the appellate court as applicable to these policies is section 179, which is as follows:—

179. In every contract of accident insurance, the event insured against shall include any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or as the

indirect result of his intentional act, and no term, condition, stipulation, warranty or proviso of the contract, varying the obligation or liability of the insurer shall, as against the insured, have any force or validity, but the contract may provide for the exclusion from the risks insured against of accidents arising from any hazard or class of hazard expressly stated in the policy.

Mr. Hellmuth, on behalf of the appellants, contended that this section, being found in Part VII of The Insurance Act, which is a group of sections under the title of "Accident and Sickness Insurance," does not apply to contracts like those under consideration. He also referred to section 180, his argument being that if this were really accident insurance, the conditions therein mentioned would, in each case, govern the contract, and these conditions, he argued, are inconsistent with a life insurance contract.

Section 179 must be read with section 2, paragraph 1, which defines "accident insurance" as insurance against loss from "accident" to the person of the insured; and section 179 should itself be regarded as a definition of "the event insured against," namely, injury occasioned by "accident." I can see no reason why, in a life insurance policy, there may not be, on the one hand, insurance in the event of death generally, and irrespective of the cause of death, and, on the other hand, further insurance made payable only when the death results from an accident. Under both clauses, death is the event insured against, but, under the second clause, the death must be accidental.

This second species of insurance is certainly a "contract of accident insurance," for it is an insurance against death by accident, although it may differ from the usual accident insurance, some of the benefits of which are payable although the person insured does not die from the effects of the accident.

I think we may look on section 179, notwithstanding its collocation, as a provision applicable to every contract of accident insurance, for there can be no doubt that "accident insurance," properly so called, may be restricted to the case of an accident causing death. The object of the Legislature was unquestionably to put an end to the controversies that had arisen with regard to the meaning of the word "accident," and it is noticeable that most statutes dealing with accidents, such as the *Workmen's Compensation Act*, contain definitions of this term.

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But on the assumption that section 179 applies, Mr. Hellmuth argued that Moore's death cannot be said to have happened "without the direct intent of the person injured, or as the indirect result of his intentional act." Everyone, he contended, must be held to have intended the natural result of his acts, and, consequently, when Moore started his engine, knowing of the danger of inhaling carbon monoxide gas, he must be deemed to have intended the natural result, namely, his death by what has been called, perhaps loosely, poisoning by carbon monoxide gas.

I think, however, that the case now under consideration comes within the reasonable intendment of the words "without the direct intent of the person injured, or as the indirect result of his intentional act." If Moore's death was caused by "the direct intent of the person injured," it would be a case of suicide. I cannot look on it as being other than "the indirect result" of an intentional act of Moore's in starting his engine before attempting to repair the broken chain. His death resulted from what I may call a concurrence of circumstances entirely fortuitous as far as the evidence indicates; and I know of no word that can better describe it than the word "accident." Indeed to give effect to the contention submitted would render recovery impossible in most cases of accident insurance.

Mr. Hellmuth cited the case of *In re Scarr and General Accident Assurance Corpn.* (1). I have carefully considered it but it appears to me to be an entirely different case.

Assuming however, that, as contended by Mr. Hellmuth, the scope of section 179 is so restricted by the introductory section (177) of Part VII of The Insurance Act that it cannot be applied to these policies, I think the circumstances of Moore's death come well within the conditions of the contracts of insurance. The descriptive words common to each policy are "external, violent, and accidental means." We have seen that Moore's death was "accidental." The means that caused death were both "external" as opposed to "internal," and "violent" since the inhalation of the carbon monoxide gas produced suffocation or asphyxiation. The learned trial judge said, although he would himself have thought otherwise, that the decided cases seemed to require him to hold that the taking in of

(1) [1905] 1 K.B. 387.

the poisonous gas was an external means, and that the disturbances by it of the respiratory functions, internally, of the man, were violent means, within the meaning of the words "external, violent and accidental means" employed by the parties to the contracts in question.

Special reference at the argument was made to the additional condition of the policy of the Aetna Company "and if such accident is evidenced by a visible contusion or wound on the exterior of the body (except in case of drowning and internal injuries revealed by autopsy)." There was an autopsy here and it certainly revealed internal injuries, to wit, the condition of the internal tissues and of the blood to which I have already referred.

I think the respondents have shewn that Moore's death was accidental within the meaning of the policies in suit. I would, accordingly, dismiss the three appeals with costs.

NEWCOMBE J.—This case depends upon the circumstantial evidence of the manner in which the assured met his death, and my difficulty is to find a reasonable inference which points to a cause other than his own act. The plaintiff's theory, as the case is put, is, to my mind, scarcely consistent with accident; but, in fact, the man may not have attempted to repair the chain, nor deliberately have put himself in the fatal position. He may have been stricken very suddenly in the course of his preparations, and guilty of nothing worse than negligence in starting his engine before opening the doors of the garage; or the cushion may have been left on the ground by the children, who were accustomed to play with it. Strange things are apt to happen. The question is one of probabilities and inferences, and the Appellate Division was as well qualified to weigh and determine these as the learned trial judge. There is a presumption of law against suicide; and, after most careful and anxious consideration of the whole case, I am not satisfied to reverse the standing judgment.

SMITH J.—Viewing all the circumstances in connection with the death of the assured in this case, I have found myself in considerable doubt as to the correct finding of fact. Viewing these circumstances independently of motive, the act of the deceased in proceeding to make repairs to one of the chains of the rear wheel of his automobile with the

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engine running and the doors closed, so as not only to shut out light from the place where the repair was to be made, but to confine the poisonous gases escaping from the exhaust within the small garage, points strongly towards a design to commit suicide, assuming that the deceased was quite aware of the deadly effect of these gases.

The inference, however, to be drawn from these circumstances has been considerably weakened by the close analysis of the evidence made by my brother Mignault. The evidence does not disclose anything beyond a general knowledge by the deceased that these gases were poisonous. The side door, by which the deceased is supposed to have entered the garage, was apparently flapping in the wind, and therefore admitting a draught of air which of itself might be expected to dilute the gases, and which deceased might be expected to close, if he had a design to commit suicide, in order to make the fumes more effective. The larger double doors were not shown to have been fastened, and, according to the witness, he simply pushed them open; and it is argued that therefore these doors may in fact have been open, and have been closed by the wind.

The evidence further shows that one of the windows threw light upon the particular place at which the repairs were to be made, although that light would necessarily be very much dimmer than the light that the open door would have supplied.

While, as stated, I find it difficult to remove doubts from my mind, in view of the fact that the burden is upon those who allege suicide to establish it, I am not prepared to dissent, on the mere question of balance of probability, from the judgment of the Appellate Division and the conclusion of the other members of this Court.

Appeals dismissed with costs.

Solicitors for the appellant The London Life Insurance Company: *Jeffery, Weir, McElheran & Moorhouse.*

Solicitors for the appellants Metropolitan Life Insurance Company and Aetna Life Insurance Company: *Donald, Mason, White & Foulds.*

Solicitors for the respondent trustee: *Aylesworth, Wright, Thompson & Lawr.*

Solicitors for the respondent Moore: *Clement, Hattin & Company.*

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*Jan. 24.

IN THE MATTER OF ORDER OF THE BOARD OF RAILWAY COMMISSIONERS NO. 41945 AUTHORIZING THE CANADIAN PACIFIC RAILWAY COMPANY TO OPEN FOR THE CARRIAGE OF TRAFFIC THAT PORTION OF ITS LINE FROM * * * WILLINGDON TO * * * STRATHCONA, BOTH IN THE PROVINCE OF ALBERTA.

THE CANADIAN NATIONAL RAILWAYS. APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY ..... } RESPONDENT.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Appeal—Leave to appeal—Jurisdiction—Order of the Board of Railway Commissioners—Leave of Board for operating railway—Jurisdiction of the Board—Railway Act, [1927], R.S.C., c. 170, ss. 52 (2), 276.

The Canadian National Railways applied for leave to appeal from an order of the Board of Railway Commissioners, made upon an application of the Canadian Pacific Railway Company under s. 276 of the *Railway Act*, by which that company was "authorized to open for the carriage of traffic that portion of its Swift Current north-westerly branch from * * * Willingdon to * * * Strathcona." Willingdon is the north-western terminus of the Cut Knife branch of the Canadian Pacific Railway Company, a branch constructed and operated under Parliamentary authority independently of that company's principal Act of 1881. In 1919, the respondent company secured the approval by the Minister of Railways for the construction of a branch line to be known as the Swift Current branch, extending from a point near Galihead, in a northerly direction to Willingdon and thence in a westerly direction to Strathcona. On the 30th of July, 1928, when the Board made an order approving of a revised general location of this route, parts only of the line had been constructed leaving extensive gaps where the building of the line had not yet proceeded. The points of jurisdiction raised by the Canadian National Railways are stated thus: the authority of the Canadian Pacific Railway Company to operate branch lines under the Act of 1881 is a single indivisible authority applying only to a branch line in its entirety, as defined by the approved route map and consequently section 276 of the *Railway Act* invests the Board with no jurisdiction to sanction the opening

*PRESENT:—Duff J. in chambers.

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for traffic of a part of any such branch line; and, alternatively, the appellant contended that in effect the order of the Board will enable the respondent company to work that part of the Swift Current branch, from Willingdon to Strathcona, as an extension of the Cut Knife branch, this not being permissible under the *Railway Act*.

Held, that leave to appeal should not be granted, as the intending appellant has not advanced any arguable objection to the jurisdiction of the Board of Railway Commissioners. (*Railway Act*, s. 52 (2)). As to the first of the alternative contentions: there is no doubt that, under the provisions of sections 4 and 15 of the schedule to the contract between the respondent company and the Parliament of Canada, that company stands in an exceptional position with regard to unspecified branches thereby authorized and it cannot be contended that the authority to operate, any more than the authority to construct, any part of the "line of railway" to be known as the Canadian Pacific Railway under the direction of section 15, is conditioned upon the working of the system as a whole or of any integral part thereof. Moreover, by section 17 of the schedule, the enactments of the *Consolidated Railway Act* of 1879 when applicable have been incorporated in the respondent's contract; and section 37 of that Act, which seems to be the parent of the present section 276, presupposes authority in the respondent company, in the absence of an order to the contrary under section 39, to proceed with the working of a portion only of the railway. As to the second alternative point: the Board has jurisdiction under section 276 to make orders authorizing the opening for traffic of part of a railway; this contemplates, as the sequence of such an order, subject to the control of the Board, the working of the particular part of the railway to which the order applies under no greater restrictions than those which would affect the operation of it if the branch were in operation as a whole.

APPLICATION for leave to appeal to this court under section 52 (2) of the *Railway Act* from an order of the Board of Railway Commissioners of the 21st day of December, 1928, made upon an application of the Canadian Pacific Railway Co. under section 276 of the *Railway Act*.

E. Lafleur K.C., A. Fraser K.C. and *Geo. F. Macdonnell K.C.* for the application.

W. N. Tilley K.C. and *E. P. Flintoft K.C. contra.*

DUFF J.—The Canadian National Railways applies for leave to appeal from an order of the Board of Railway Commissioners of the 21st of December, 1928, made upon an application of the Canadian Pacific Railway Company under s. 276 of the *Railway Act*, by which the company was

authorized to open for the carriage of traffic that portion of its Swift Current north-westerly branch from mile 361·3 at Willingdon to mile 428·7 at Strathcona.

The jurisdiction to grant leave to appeal vested in a judge of this court under s. 52 (2) of the *Railway Act*, is operative only for the purpose of enabling the intending appellant to arraign the order of the Board as exceeding the jurisdiction of that body.

The question of jurisdiction which the Canadian National Railway wishes to raise is put by counsel in two ways; and in order to make the point intelligible, it is necessary first to state briefly the cardinal facts. Willingdon is the north-western terminus of the Cut Knife branch of the Canadian Pacific Railway Company, a branch constructed and operated under Parliamentary authority independently of that company's principal Act of 1881 (44 Vic., c. 1). In 1919, the company secured the approval, under the *Railway Act* as it then stood, by the Minister of Railways, of a branch line referred to as the Swift Current branch, to be constructed under the authority of that Act. The route so approved extended from a point at or near Galihead, in a northerly direction to Willingdon, and thence in a westerly direction to Strathcona. On the 30th of July, 1928, when the Board made an order approving of a revised general location of this route, parts only of the line had been constructed; from Swift Current to Empress, from Coronation to Lorraine and from Willingdon to Strathcona, leaving extensive gaps on the route as approved, where the building of the line had not yet proceeded.

The parliamentary sanction for the Swift Current branch, as already mentioned, rests upon the provisions of the Canadian Pacific Railway Company's principal Act. The point of jurisdiction, which the Canadian National Railways ask leave to bring before the Supreme Court of Canada is stated thus: the authority of the company to operate branch lines under the Act of 1881 is a single indivisible authority applying only to a branch line in its entirety, as defined by the approved route map, and consequently, s. 276 of the *Railway Act* invests the Board

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with no jurisdiction to sanction the opening for traffic of a part of any such branch line. Alternatively, the intending appellants propose to contend that in effect the order of the Board will enable the Canadian Pacific Railway to work that part of the Swift Current branch (from Willingdon to Strathcona) which the order affects, as an extension of the Cut Knife branch, and this, they say, is not permissible under the *Railway Act*.

As to the first of the alternative contentions. The pertinent provisions of the contract and schedule are article 14 of the contract, and sections 4 and 15 of the schedule. The precise words of s. 2, in virtue of which the schedule has the force of law, are these

> the Governor may grant to them (the persons whose names are mentioned in the contract) under the corporate name of the Canadian Pacific Railway Company, a charter conferring upon them the franchises, privileges and powers embodied in the schedule to the said contract, and to this Act appended, and such charter shall have force and effect as if it were an Act of the Parliament of Canada.

Sections 4 and 15 of the schedule are respectively as follows:

> 4. All the franchises and powers necessary or useful to the company to enable them to carry out, perform, enforce, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage agreed upon, contained or described in the said contract, are hereby conferred upon the company. And the enactment of the special provisions hereinafter contained shall not be held to impair or derogate from the generality of the franchises and power so hereby conferred upon them.
>
> 15. The company may lay out, construct, acquire, equip, maintain and work a continuous line of railway, of the gauge of four feet eight and one-half inches; which railway shall extend from the terminus of the Canada Central Railway near Lake Nipissing, known as Callander Station, to Port Moody in the province of British Columbia; and also, a branch line of railway from some point on the main line of railway to Fort William on Thunder Bay; and also the existing branch line of railway from Selkirk, in the province of Manitoba, to Pembina in the said province; and also other branches to be located by the company from time to time as provided by the said contract,—the said branches to be of the gauge aforesaid; and the said main line of railway, and the said branch lines of railway, shall be commenced and completed as provided by the said contract; and together with such other branch lines as shall be hereafter constructed by the said company, and any extension of the said main line of railway that shall hereafter be constructed or acquired by the company, shall constitute the line of railway hereinafter called The Canadian Pacific Railway.

It will be observed that the powers of the company under s. 15, touching the construction and working of the unspecified branch lines, are bestowed by the self same words as its powers in relation to the main line and the specified branches; while s. 4 plainly manifests the intention of Parliament that this language shall receive the most liberal construction in order to effectuate the purposes of the contract and in particular of articles 13 and 14.

My duty on this application is to consider whether the question which the Canadian National Railways desire to raise is one in respect of which there can be said to be a fairly arguable controversy. I am quite unable to discern any possible ground for doubt upon the question whether under these provisions the Canadian Pacific Railway Company stands in an exceptional position with regard to unspecified branches thereby authorized. I can discover nothing giving any substance to the contention that the authority to operate, any more than the authority to construct, any part of the "line of railway" to be known as the Canadian Pacific Railway, under the direction of s. 15, is conditioned upon the working of the system as a whole or of any integral part thereof. Moreover, by sec. 17 of the schedule, the enactments of the *Consolidated Railway Act* of 1879, in so far as applicable to the undertaking of the company, and if not inconsistent with, or contrary to the provisions of the schedule, are incorporated therewith. Section 37 of that Act (s. 200 of the statute of 1888), which seems to be the parent of the present s. 276, obviously presupposes authority in the company, in the absence of an order to the contrary under s. 39 (s. 202 of the statute of 1888), to proceed with the working of a portion only of the railway; and it is of course not disputed that this view has dictated the practice of the railways, of the Railway Committee of the Privy Council, and of the Board of Railway Commissioners in respect of railways generally; and as a rule the Special Acts governing railway construction and operation do not in any relevant respect differ materially in their cardinal provisions as to construction and operation from the provisions of s. 15. The objection now sought to be raised appears to be without foundation in the lan-

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guage of the statutes, and to give effect to it would involve a startling departure from the settled opinion as to the meaning of these statutes and from the long settled practice thereunder.

As to the second alternative, I am constrained to the conclusion that it is not a point of substance. The Board has jurisdiction under sec. 276 to make orders authorizing the opening for traffic of part of a railway. This seems to contemplate as the consequence of such an order, subject to such control as the Board is entitled to exercise in execution of its powers under the Act, the working of the particular part of the railway, to which the order applies, under no greater restrictions than those which would affect the operation of it if the branch were in operation as a whole; and it is not suggested that the Canadian Pacific Railway Company contemplates a use of this particular part of its Swift Current branch in a manner which would not be permissible in such circumstances. Some expressions let fall by the Chairman of the Board of Railway Commissioners in dealing with the application of the 25th of July, 1928, were relied upon. The words used by the learned Chairman are these:

> It is proposed to practically extend the Cut Knife branch from Willingdon to Edmonton.

As a famous judge once observed, the adverb "practically" has the force of a negative. It is not to be supposed that the learned Chairman was treating the piece of railway with which he was concerned as such an extension, which, as he fully recognizes, it in law could not be; and what was meant, no doubt, was that the Canadian Pacific Railway Company would take advantage of its line from Willingdon to Strathcona to reap as far as possible the economic benefits which might be derived from such an extension. I can discover no arguable ground for a contention that such a course is not entirely within the rights of that company.

For the reasons I have thus outlined, I have come to the conclusion that this is not a proper case for leave, because I entertain no doubt that no arguable objection to the jurisdiction of the Board has been advanced.

The application is dismissed with costs.

Application refused with costs.

CONSOLIDATED MINING AND SMELTING COMPANY OF CANADA (DEFENDANT) ..... } APPELLANT;

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*Oct. 18.
*Dec. 21.

AND

WILLIAM MURDOCH AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Master and servant—Negligence of servant—Liability of master—Scope of employment—Failure to extinguish fire started in wilderness for cooking purposes—Contract providing that the servant was to board himself—Mining.

The respondents had a license to cut timber on certain lands in British Columbia. The appellant company had also a license to prospect for phosphate on the same lands and employed two brothers, John and Robert Ewan, as members of one of their prospecting parties. Prior to May, 1926, the Ewan brothers were each receiving a wage of five dollars for an eight hour day and were paying the appellant one dollar per day for their meals. In May, 1926, they became dissatisfied with the boarding arrangements at the appellant's camp and at their request they were permitted to "board themselves." On June 4, they were directed to work at a certain place about three miles distant from the camp; and, on arriving there, they pitched their tent and built a small fire-place, in which, each morning and evening, they kindled a fire to cook their food. On June 7, an engineer of the company directed the Ewan brothers to commence work the next morning at a trench two thousand feet further on. On the morning of June 8, about 6.15 a.m., John Ewan kindled a fire to boil the breakfast coffee; and then he and his brother, after pouring water over the fire, left the place. Some time between ten o'clock and noon, smoke was observed in the vicinity of the place where the Ewan's tent had stood; and, before any one could reach the spot, fire overran the lands on which the respondents had the licence to cut timber and burned not only the standing timber but also a quantity of posts and poles. The respondents brought this action to recover damages.

Held that the appellant cannot be held liable on the ground that the Ewan brothers were acting in the course of their employment when they lighted the fire which escaped and did damage to the respondent's property, it having been shown that the lighting of that fire was an act which they were under no contractual obligation to perform as a duty to their employer, or which their employer had ordered them to do. Although their contract with the appellant called upon them to board themselves, this did not constitute a contractual obligation on their part as a duty to the appellant to cook their meals. In cooking their food, these employees were doing something for themselves rather than discharging a duty towards the appellant.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

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Held, also, that the appellant was not liable (under the rule laid down in *Rylands* v. *Fletcher* (L.R. 3 H.L. 330)), because, although it was by virtue of its licence an occupier of the land from which the fire escaped, that escape was due not to any act or negligence of the appellant or anyone under its control, but was due to the negligence of the Ewan brothers at a time when their negligence must be deemed the negligence of a stranger.

Judgment of the Court of Appeal ([1928] W.W.R. 578) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Morrison J., and maintaining the respondents' action in damages.

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

W. N. Tilley K.C. and *A. G. Cameron* for the appellant.

J. W. de B. Farris K.C. and *A. I. Fisher K.C.* for the respondents.

The judgment of the court was delivered by

LAMONT J.—The first question in this appeal is: Were the appellant's workmen, John and Robert Ewan, acting in the course of their employment when, on the morning of June 8, 1926, they kindled a fire which escaped and destroyed the respondents' property.

The material facts are: The respondents had a license to cut timber on certain lands in British Columbia covered by timber license 141, and the appellant had a license to prospect for phosphate on the same lands. John and Robert Ewan were employed by the appellant and were members of one of their prospecting parties. Prior to May, 1926, according to the terms of their employment, the Ewan brothers were each receiving a wage of five dollars for an eight hour day, and were paying the appellant one dollar per day for their meals. In May, 1926, they became dissatisfied with the camp arrangements and asked Burgess, one of the engineers in charge, if they might work by themselves. As the Ewans were good men and the appellant desired to keep them in its employ, Burgess agreed to their request. It was arranged that instead of taking their meals

(1) [1928] 1 W.W.R. 578.

in the appellant's dining tent, they would thereafter board themselves. To assist them the appellant loaned them a tent, a pot and a frying pan. Although they had a right to obtain their food from any person from whom they could buy it, these workmen made an arrangement with the appellant, which purchased its supplies wholesale, to supply them with the provisions they required for 50 cents a day each. By cooking their own meals the Ewans were thus saving 50 cents a day. At this time the prospecting party was working in the vicinity of Lizzard Creek, at which place the camp was situated. On June 4, Burgess directed the Ewan brothers to go to trench 50, some two or three miles distant, and cut a trail along it. This trench was located between Bean Creek and Hartley Creek. On arriving there the Ewans made their camp and pitched their tent close to Bean Creek. They built a small fire-place in which each morning and evening they kindled a fire to boil their coffee and fry their bacon. On June 7, Telfer, another engineer, went to the Ewans' camp and directed them to commence work next day on trench 49 on Baldry Creek, which was about two thousand feet distant from trench 50. On the morning of June 8, about 6.15 a.m., John Ewan kindled a fire in the fire-place and boiled the breakfast coffee. After breakfast, he says, he and his brother extinguished the fire by pouring water over it. They then went to trench 49 taking with them their tent and a portion of their camp equipment. Some time between ten o'clock and noon smoke was observed in the vicinity of the place where the Ewans' tent had stood. Before anyone reached the spot a fire had got under way and, fanned by a strong wind, overran the lands on which the respondents had a license to cut timber and burned not only the standing timber but also a quantity of posts and poles belonging to the respondents. To recover damages for the loss they suffered on account of this fire, the respondents brought this action. In their statement of claim they allege that the fire was caused by the negligence of the appellant's workmen in the course of their employment, or alternatively, that the appellant's workmen set out a fire on the appellant's property in the midst of inflammable material and did not totally extinguish it but allowed it to spread and damage the respondents' property. To this claim the appellant set

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up two defences: first, that the fire in question was not kindled by its workmen and, secondly, that if it was, its workmen, in so kindling it, were not acting in the course of their employment.

The trial judge found in favour of the respondents, holding that the fire which destroyed the respondents' property had its origin in the fire kindled by the Ewan brothers for the purpose of cooking their meals, and that at the time it was so kindled they were acting in the course of their employment. This judgment was affirmed by the Court of Appeal (McPhillips J.A., dissenting). The defendant now appeals to this court.

Knowing the jurisprudence of this court to be against interference with the concurrent findings of two courts on a pure question of fact unless satisfied that the conclusion reached was clearly wrong, Mr. W. N. Tilley, K.C., who appeared for the appellant, confined his argument to the question of agency.

The Ewans were employed to cut trails and strip phosphate veins with tools provided by the appellant, for eight hours a day. For this they were to receive a daily wage of $5. The usual time for commencing work was eight o'clock in the morning. Having, by the terms of their employment, to board themselves, the appellant was under no obligation to cook their meals or to see that they obtained them. It was argued, however, that as eating was a necessary operation, the preparation of their meals was incidental to their employment and that therefore, while engaged in preparing their meals the workmen were acting in the course of their employment. The acts of a workman which come within the scope of his employment are in general determined by the terms of the contract, including the terms implied as well as those expressed, and many authorities were cited to us in which the terms to be implied had received judicial consideration. A number of these authorities were discussed in *St. Helens Colliery Company* v. *Hewitson* (1). In that case Lord Atkinson, at page 71, suggested the following test:

> A workman is acting in the course of his employment when he is engaged "in doing something he was employed to do." Or what is, in other and I think better words, in effect the same thing—namely, when he is

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

doing something in discharge of a duty to his employer, directly or indirectly, imposed upon him by his contract of service. The true ground upon which the test should be based is a duty to the employer arising out of the contract of employment, but it is to be borne in mind that the word "employment" as here used covers and includes things belonging to or arising out of it.

In the same case Lord Wrenbury, at page 92, said:

A useful test in many cases is whether, at the moment of the accident, the employer would have been entitled to give the workman an order, and the man would have owed the duty to obey it.

In *Parker* v. *Black Rock (Owners)* (1), the contract of employment contained a clause "crew to provide their own provisions." A fireman belonging to the steamship went ashore, with leave, to buy provisions for himself. When he endeavoured to return to the ship he fell off the pier where the ship was supposed to be (though in fact she had been moved) and was drowned. It was held that his widow could not recover as the deceased owed no duty to his employer to go ashore to buy provisions. In his judgment, at page 730, Lord Sumner, in commenting on the clause "crew to provide their own provisions," said:

I think it does not constitute any promise by the seamen severally to the master of the vessel that they would as a duty towards him provide themselves with their own provisions. Could he have recovered damages if one of them had provided no provisions or not enough? Could he have dismissed one of them because he preferred to be abstemious instead of providing himself amply with food? The answer in each case must be No.

And, at page 733, Lord Wrenbury expressed his opinion as follows:—

But then it was said that, contract or no contract, at any rate under the circumstances the man was bound to get provision in order to sustain himself during the next journey of the vessel, and that it was a duty which he owed, and he was performing that duty. It seems to me that from the stipulation that he was to get his own provisions this consequence ensued—that the master was bound to give him reasonable facilities from time to time for going to buy them, but it does not follow that when he was buying them he was discharging any duty towards his employer. The man was doing an act which under the circumstances he had to do, but he was not doing an act which he owed to his employer the duty to do.

Another instructive case in point is *Philbin* v. *Hayes* (2). In that case the contract of employment provided that the plaintiff should be paid by the hour, his hours of work being from 7 a.m. to 5.30 p.m. It also provided that the employer, for the sum of two pence per day, would furnish a hut in which the plaintiff could live and sleep. He was

(1) [1915] A.C. 725. (2) (1918) 87 L.J.K.B. 779.

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not, by the contract, bound to take the hut, but, as it was difficult to obtain other sleeping accommodation, a number of workmen, including the plaintiff, took huts. While the plaintiff was asleep in the hut a strong wind blew it down and the plaintiff was injured. It was held that the accident did not occur in the course of his employment. In his judgment Swinfen Eady J., at page 782, said:—

> This man was not living in the hut upon any term of contract for his employer's benefit that he should be there. He was given the choice, and was as free as possible to come and go. Counsel for the applicant urged that there was a difficulty in obtaining lodging in the village. That I quite accept, and, of course, the man could only obtain such lodging as was available, but if he could have obtained accommodation elsewhere suitable to his means, he was perfectly free to avail himself of it. The employer had no right to make him live in the hut.

and Neville J., said:—

> It seems to me impossible to say that when the man was in the hut, sitting there or resting there, he was doing anything within the scope of his employment. I think he was no more doing something within the scope of his employment while sleeping in this hut than he would be sleeping in a lodging. Therefore, it is impossible to say that the accident happened in the course of the employment.

In view of these and other authorities to which we were referred, I am of opinion that before it can be held that the Ewan brothers were in the course of their employment when they lighted the fire which escaped and did damage to the respondents' property, it must be shewn that the lighting of that fire was an act which they were under a contractual obligation to perform as a duty to their employer, or which their employer had ordered them to do. The appellant in this case did not order its workmen to light a fire nor were the workmen under any contractual obligation to do so. Their contract called upon them to board themselves which, as Lord Sumner and Lord Wrenbury, in the passages above quoted, point out, did not constitute a contractual obligation on their part as a duty to the appellant to cook their meals. It was necessary for them to have food if they wished to be in physical condition to do their work, just as it was necessary for them to wear stout boots while performing it, but in securing these necessary things they were doing something for themselves rather than discharging a duty towards the appellant.

If, instead of cooking their own food, the Ewan brothers had, without loss of time to their employers, gone elsewhere for their meals the appellant could not have ob-

jected thereto for it was none of its concern. Once the workmen had finished their eight hours' work in any one day they were, it seems to me, at liberty, so far as the appellant was concerned, to go where they wished and to do what they pleased until they commenced their next day's work.

I am, therefore, of the opinion that when they lighted the fire which escaped and damaged the respondents' property, the Ewan brothers were not acting in the course of their employment.

For the respondents it was argued that even if the Ewan brothers were not acting in the course of their employment in lighting the fire in question, yet the appellant should be held liable because it was the occupier of the area covered by timber license 141, and a fire having arisen thereon the appellant failed to prevent its escape.

At the trial this ground does not appear to have been urged and it was not shewn who owned the soil covered by the timber license. It was, however, established that both appellants and respondents were licensees entitled to be in possession of the area for the purpose of their respective operations. The fact that the respondents were licensees only, would not, in my opinion, prevent them, if otherwise entitled, from recovering for the loss they suffered as the result of fire escaping from the land occupied by the appellant. (*Charing Cross Electric Supply Company* v. *Hydraulic Power Company* (1)). It was also established that, although the Ewan brothers were not in the course of their employment when they kindled fires with which to cook their meals, the appellant knew they had pitched their tent close to Bean Creek within the area covered by the timber license, and knew also that morning and evening they kindled a fire; and yet it raised no objection whatever either to their occupation of the camp site or to the use of fire for cooking purposes. Knowledge on the part of the appellant of such acts without objecting thereto may be evidence of a tacit acquiescence therein which would thereafter prevent the appellant from treating these workmen as trespassers. *Lowery* v. *Walker* (2). But passive acquiescence while it might as against the appellant give the

(1) [1914] 3 K.B. 772. (2) [1911] A.C. 10.

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workmen the status of bare licensees, would subject the appellant to no other obligation.

In this case I am not sure that the Ewan brothers can be considered even bare licensees of the appellant. Subsections 2 and 3 of section 95 of the *Forest Act* (R.S.B.C., 1924, c. 93), provide that, subject to the observance of all obligations and precautions imposed by the Act, or the Regulations, a person may set out, start or kindle a fire for, *inter alia,* " cooking or preparing food," but no person shall do so for that purpose in any forest or wood-land without first obtaining a written permit authorizing the kindling of such fire, and every person kindling a fire pursuant to such permit " shall totally extinguish the fire before leaving the vicinity of the fire." It was not suggested by the respondents that the Ewan brothers did not have a permit to light a fire to cook their food, and, in the absence of any such question being raised, I think it must be assumed that they complied with that requirement of the law. Having a permit to light a fire, where they did, they would not require any license from the appellant to justify their occupation of the camp site or the kindling of the fire. They were totally independent of the appellant which had no control over them until they commenced to work.

Assuming however that they were bare licensees of the appellant, the question we have to determine on this branch of the case is the extent of the liability of an occupier of land towards an adjoining proprietor for damage occasioned by fire escaping from the occupied land through no fault of the occupier but which was kindled thereon by a bare licensee, and allowed to escape by reason of the licensee's negligence.

At common law all householders were under obligation to keep their fires from damaging their neighbour's property. Hence if a fire arose in a house by the act of a servant or guest and damage was done to the house of another, the householder was liable. He could only escape liability if he could shew that the fire originated from the act of a stranger. Holdsworth's History of English Law, vol. 3, p. 385.

By a statute passed in the reign of Queen Anne (6 Anne, c. 31, s. 6) the rigour of the common law was mitigated and thereafter an owner was not liable in cases where the

fire "accidentally began." And by a subsequent statute (14 Geo. III, c. 27, s. 86) this provision was made to apply to fires occurring in the fields as well as those occurring in a building. The reason for holding an occupier liable for a fire started by a servant or agent is stated by Littledale J. in *Laugher* v. *Pointer* (1), as follows:—

> The injuries done upon lands or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by law to himself, and he should take care not to bring persons there who do any mischief to others.

Over the acts of persons whom he brings upon his land an occupier is supposed to exercise control.

The common law was based upon the broad maxim "*sic utere tuo ut alienum non laedas,*" which found expression in the rule laid down in *Rylands* v. *Fletcher* (2), which may be formulated thus:—

> The occupier of land who brings and keeps upon it anything likely to do damage if it escapes, is bound at his peril to prevent its escape, and is liable for all the natural and probable consequences of its escape, even if he has been guilty of no negligence.

Under this rule an occupier is liable not only where he causes, but also where he fails to prevent the escape from his land of the dangerous agency. Fire is a dangerous agency if not kept under control, and a person who has fire on his land must keep it under control at his peril. The rule, however, is subject to a number of exceptions. It is not applicable where the dangerous agency is brought on, or kept on the land of the occupier with the consent of the person damnified; nor, perhaps, where it escapes in consequence of an act of God, or *vis major*. Neither has it any application where the damage is caused by the act of a stranger or third person, whether such act be malicious or merely negligent. *Richards* v. *Lothian* (3); *Smith* v. *Grand Trunk Ry. Co.* (4).

Even in the case of a servant the rule has no application if the act of the servant, which caused the damage, is outside of his employment. But where the servant's act is done in the course of his employment and for his master's benefit the rule applies and the employer is liable not only where the act had not been authorized by the employer,

(1) 5 B. & C., 547, at p. 560.
(2) L.R. 3 H.L. 330.
(3) [1913] A.C. 263.
(4) (1926) 42 T.L.R. 391.

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but even if the servant has been expressly forbidden to do it. *Black* v. *Christ Church Financial Co.* (1).

In the old case of *Rich* v. *Basterfield* (2), the head-note reads as follows:—

> Although the owner of property may, as occupier, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants,—such liability attaches only upon parties in actual possession.

In commenting on that case in *Barker* v. *Herbert* (3), Vaughan Williams L.J., says:

> The responsibility of the possessor of land as defined in that case would appear to be limited to cases where the injury has arisen from the acts of himself, or of his agents or servants, or those persons who, though not his agents or servants, are upon his premises by his permission, and are therefore under his control.

It is this control over the acts of those whom he brings or permits to come upon his land that differentiates the cases in which an occupier is held vicariously liable for such acts, from those cases in which he is held not liable for the acts of a stranger. In *Job Edwards Limited* v. *Birmingham* (4), Scrutton L.J., at page 355, states the cases in which an occupier will be held liable for a nuisance on his land which spreads and damages his neighbour's property. His language is as follows:—

> In my view it is clear that a landowner or occupier is liable to an action by a private persons damaged by a nuisance existing on or coming from his land: (1) if he or his servants or agents created the nuisance; (2) or if an independent contractor acting for his benefit created the nuisance, though contrary to the terms of his employment; (3) or if being a tenant, or successor in title, he took the land from his landlord or predecessor with an artificial nuisance upon it.

The third of these classes has no application here, and the other two, it will be noted, are limited to persons over whose acts the occupier has control, or who, in creating the nuisance, are acting for the occupier's benefit. The appellant in the case at bar does not come within either of these classes. In lighting the fire which escaped and created a nuisance, the Ewan brothers were not acting for the appellant's benefit but solely for their own, and their act in lighting the fire must, as regards the appellant, be deemed the act of a stranger.

If a farmer sees a workman taking a short cut across his field to and from his work, and smoking as he goes, must

(1) [1894] A.C. 48.
(2) 136 E.R. 715.
(3) [1911] 2 K.B., at p. 638.
(4) [1924] 1 K.B. 341.

he forbid him to smoke on his premises on pain of being liable for damages in case the smoker, after lighting his pipe, throws down a lighted match which sets fire to the grass, spreads to the adjoining property and there occasions damage. I do not think the law goes so far. I am unable to see how an occupier can be said to bring a person upon his land simply because when he sees him there he takes no steps to put him off.

In *Williams* v. *Jones* (1), the plaintiff had gratuitously permitted the defendant to use his shed for the purpose of having a sign-board made therein. The defendant employed a carpenter to make the sign-board for him in the shed. Whilst at work making the sign-board the carpenter lighted his pipe with a shaving which he dropped setting fire to the shed with the result that it was totally destroyed. In an action by the plaintiff against the defendant for the loss sustained it was held that he could not recover because the carpenter, although he had leave and license to occupy the shed for the defendant's purpose, was not in the course of his employment in lighting his pipe as he did. Mr. Justice Blackburn and Mr. Justice Mellor dissented, but, as pointed out by Bankes L.J., in *Jefferson* v. *Derbyshire Farmers, Ltd.* (2), the judges in that case did not differ on any question of law but as to the proper inference to be drawn from the fact that the man lit his pipe while working at a sign-board.

In *Williams* v. *Jones* (1), the majority of the court were of opinion that the negligent act of the carpenter was unconnected with the work he was employed to do.

In *Whitmore's Limited* v. *Stanford* (3), Eve J., after quoting the rule in *Rylands* v. *Fletcher* (4), said:

> The rule so stated does not appear to me to extend to make the owner of land liable for consequences brought about by the collecting and impounding on his land, by another, of water, or any other dangerous element, not for the purposes of the owner of the land, but for the purposes of such other.

This statement of the law applies to the case before us: The Ewan brothers introduced to the land covered by the appellant's license, a dangerous element, not for the purposes of the appellant but for their own. They were not

(1) 3 H. & C. 602.
(2) [1921] 2 K.B. at p. 286.
(3) [1909] 1 Ch. D., 427 at p. 438.
(4) Q.R. 3 H.L. 330.

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there either by the command or invitation of the appellant, and the appellant, at the time they set out the fire which escaped, had no control over their acts. In my opinion, therefore, the respondents' action fails.

Counsel for the respondents referred us to the case of *Port Coquitlam* v. *Wilson* (1), as supporting the respondents' argument. That case is clearly distinguishable as the facts appearing therein bring it within the general rule that an employer is liable for the tortious act of his servant acting in the course of his employment. At page 247 of the report my brother Duff, whose judgment was concurred in by the Chief Justice and Anglin and Brodeur JJ., said:

> On the other hand it has been laid down that the occupier is not responsible for the fire brought about by the act of a servant who is doing something entirely outside his employment (*McKenzie* v. *McLeod* (2)); the theory apparently being that the act of the servant in such circumstances is the act of a "stranger."
>
> But here we have a servant who admittedly as servant occupies for his master and whose occupation is therefore his occupation and who moreover as incidental to his occupation has his master's authority to light fires.

Idington J. gave judgment to the same effect, while my brother Mignault, who dissented, did so not because of any difference of opinion as to the law but because he thought the proper inference from the facts established was that the employee was acting outside of his employment when he started the fire in question.

I would therefore allow the appeal, set aside the judgment below and enter judgment for the appellant, dismissing the action with costs in all courts.

Appeal allowed with costs.

Solicitor for the appellant: *R. C. Crowe.*

Solicitors for the respondents: *Lowe & Fisher.*

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(1) [1923] S.C.R. 235. (2) 10 Bing 285.

WASYL KRYS (PLAINTIFF).....APPELLANT; 1928

AND *Oct. 25. *Dec. 21.

ANTON KRYS (DEFENDANT).....RESPONDENT.

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

Title to land—Parent and child—Father claiming right to property standing in son's name—Conflict of evidence—Findings at trial—Estoppel—Presumption and onus arising from relationship and other circumstances—Alleged attempt, by conveyance, to defeat creditors, as disentitling to relief of re-conveyance—Circumstances of conveyance—Exemptions Act, Alta.

Plaintiff claimed that his homestead, which he had conveyed to defendant, his son, was held by defendant in trust for him and should be reconveyed; also that he was entitled to an interest in two other parcels of land standing in the defendant's name. The trial judge (Boyle J.) held, on the evidence, in plaintiff's favour as to the homestead, and against him as to the other parcels. The Appellate Division, Alta., reversed his judgment as to the homestead, and affirmed it as to the other parcels. Plaintiff appealed.

Held, that, on the evidence and the circumstances of the case, the findings at trial should not be varied by an appellate court; and that the judgment at trial should be restored in plaintiff's favour as to the homestead, and should stand as to the other parcels.

Held, further, as to a certain document signed by plaintiff reciting the ownership of the homestead to be in defendant and purporting to give plaintiff certain rights thereon, that, in view of all the circumstances under which it was signed, the plaintiff was not estopped from asserting his claim. A presumption arose from the relation of the parties, the nature of the document, and the other circumstances, which cast upon defendant the duty to explain and satisfy the court that plaintiff realized what he was doing and acted as a voluntary agent; and there was no satisfactory evidence to overcome or rebut that presumption. The law as stated in Pollock's Principles of Contract, 9th ed., p. 648 *et seq.*, quoting from *Smith* v. *Kay,* 7 H.L.C. 750, at p. 779, and from *Tate* v. *Williamson,* L.R. 2 Ch. App. 55, at p. 61, approved. *Turner* v. *Collins,* L.R. 7 Ch. App. 329, at p. 338, and *Inche Noriah Binte Mohamed Tahir* v. *Shaik Allie Bin Omar Bin Abdullah Bahashuan,* 45 T.L.R. 1, also referred to.

Held, further, that there was not shown, in the circumstances of the conveyance of the homestead by plaintiff to defendant, any attempt to defeat creditors, so as to disentitle plaintiff to the relief claimed. *Scheuerman* v. *Scheuerman,* 52 S.C.R. 625, distinguished on the facts, and commented on as follows: "The facts in the *Scheuerman* case were special; that decision depends upon its own facts, and there does not seem to be that unanimity in the reasons handed down by

*PRESENT:—Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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the judges constituting the majority that is necessary for a ruling case." Further, under the *Exemptions Act* of Alberta, the homestead is exempt from seizure under execution, and therefore, if there be any creditors of plaintiff, the conveyance does not prejudice them.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta, reversing in part the judgment of Boyle J.

The plaintiff, who was the father of the defendant, sued for a declaration that the defendant held in trust for the plaintiff a certain quarter-section of land, being the plaintiff's homestead, which the plaintiff had conveyed to the defendant, and for an order that the defendant transfer the same to the plaintiff; also for a declaration that the defendant held in trust for the plaintiff a half interest in two other parcels of land, and for a certain sum alleged to be owing to the plaintiff in respect of one of these latter parcels.

The action was tried before Boyle J., who, at the close of the trial, delivered judgment orally, finding in favour of the plaintiff in regard to the homestead and ordering a retransfer of the same by the defendant to the plaintiff, but finding in favour of the defendant as to the other parcels of land in question.

The defendant appealed, and the plaintiff cross-appealed, to the Appellate Division of the Supreme Court of Alberta, which allowed the defendant's appeal, and dismissed the plaintiff's cross-appeal, and ordered that the plaintiff's action be dismissed with costs. No written reasons were delivered. The plaintiff appealed to this Court.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed as to the homestead with all costs here and also in the Appellate Division (except costs of the cross-appeal in that court, which were to be allowed to defendant and set off against plaintiff's costs), and the judgment of the trial court was restored.

O. M. Biggar K.C. for the appellant.

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

The judgment of the court was delivered by

NEWCOMBE J.—The trial of this action occupied three days, beginning 22nd March, 1927. The parties are Ruthenian immigrants, father and son, who have lived for

twenty-five years in the province of Alberta, engaged in farming. Three parcels of land and some live stock are in controversy.

The plaintiff (appellant) is Wasyl Krys, the father, and the defendant (respondent), Anton Krys, the son. The former gave his testimony wholly through an interpreter; the latter used an interpreter at critical places. Wasyl was seventy years of age at the time of the trial, and Anton was then forty-two. Anton lived with his wife and seven children on his farm, situated about a mile from the homestead upon which his father lived. Anton's mother had been dead for many years, and his father had married again, and, by his second wife, had several children, the eldest of whom, at the time of the trial, was seventeen or eighteen years old. Wasyl was industrious and thrifty, but he did not get on very well with his second wife. Anton was his favourite son, and Wasyl appears to have trusted and relied upon him. The evidence suggests that Anton looked with disfavour upon his step-mother and her children, and that he encouraged or promoted divorce proceedings which his father at one time prosecuted against his second wife.

Wasyl, in 1914, when his wife was in hospital, became suspicious that she was likely to ruin him with expenses. He consulted with Anton, and in the result he conveyed, or, as he says, "lent" to Anton his homestead upon which he lived—the North-East quarter of section 2, township 57, range 20, west of the 4th Meridian, and, at the same time, by bill of sale, transferred to Anton all the horses and horned cattle which he had upon the place. The secret understanding was that the property so conveyed should remain Wasyl's, and should be subsequently reconveyed. Wasyl remained upon the land and farmed it, and continued to take the crops and to use and dispose of them and the live stock as theretofore. Anton subsequently denied his father's equitable title, and claimed that the conveyance of the land, which was upon its face expressed to be in consideration of the sum of one dollar and love and affection, really represented a purchase of the land by him from his father in consideration of $2,000, which Anton says he paid at the time the conveyance was executed. The plaintiff, in these circumstances, claims a declaration that the land is held in trust for him by the defendant. and that the de-

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fendant should execute a transfer, and other appropriate relief. The bill of sale is not mentioned in the pleadings, but the facts connected with it were investigated at the trial, and the learned judge, who gave an oral judgment, at the conclusion of his remarks was requested by the plaintiff's counsel to dispose of that question, and he did so without any objection.

There were two other parcels of land with which the case is concerned, namely, an undivided half-interest in the South-West quarter of section 23, township 56, range 20, W. 4th Meridian, and the North-East quarter of section 14, township 56, range 20, W. 4th Meridian, which were standing in the defendant's name, and as to which the plaintiff likewise alleges that he has the equitable title, or an interest which the defendant holds in trust for him, though not represented upon the registry; the plaintiff claiming that he had been defrauded by his son in acquiring the titles, or otherwise in relation to the transactions. But as to these two parcels, it is exceedingly difficult to ascertain the true facts, owing to the confusion of the testimony and the conflict and character of the witnesses.

I have, since the hearing, read and considered the evidence, but I do not think it would be profitable to attempt to make an intelligible review of the facts, because there is certainly evidence to sustain the findings, and I am satisfied that this Court cannot displace these without a considerable risk of doing some injustice.

Boyle J., examined the case at considerable length in the oral judgment which he pronounced at the trial. He finds that the plaintiff, although "quite illiterate and unfamiliar with the language of the country," had obtained a good homestead and done fairly well; that he was not in any way above the average in intellect of the class of immigrants to which he belongs, while his son, the defendant, was particularly bright and intellectual above the average. He says that he does not think that the son

> is entirely without filial affection, nor do I think that up to the time that his father had the disagreement with the stepmother that he was anything but probably what a young man should be with respect to his father. The plaintiff's troubles started when he commenced to think about how he would prevent his wife from getting satisfaction out of him by way of his property, and I think the facts are that he consulted his son and decided he would have his son hide away his property from the wife so as to see that she did not get it. And he had sufficient confidence in the

son that the son would protect him. Whatever the arrangement was is not certain. We have the story of the two of them which is in some respects contradictory. It seems to me that was the motive that the plaintiff had in undertaking to transfer this land to his son. I am satisfied that the son agreed to act as trustee for the father, and that when the father thought it was safe to have the land reconveyed to him, the son was to reconvey it.

Continuing, the learned judge refers to the documentary evidence, and to the divorce proceedings, which I shall mention again, and expressed the opinion that the defendant recognized that he held the homestead as trustee for his father, although he became unwilling to reconvey it. He says that

> The story told by the son in the witness box was not very convincing. He was fairly lucid on his transactions in connection with the other property, but when it came to giving evidence with regard to the homestead, it did seem to me that after all he had some conscience in the matter, and he did not really have the stomach to definitely press the matter in his evidence in connection with the homestead, the way he did with regard to the other land.

And he makes the following observations:

> when all is said and done, a man's actions are more likely to be the truth than his statements when it comes to a question of his own interest in a legal action. I do not think that the circumstances, considering the illiteracy of the plaintiff, considering his ignorance of both the language and the customs of the country—that the conditions are such that the Court is barred from compelling the son to make restitution.

He does not credit the evidence of Pullishy, the defendant's leading witness. He does not think Pullishy's recollection good enough to justify the evidence which Pullishy gave; about that the learned judge is very confident. And, on the question as to whether Anton bought the homestead from his father and paid $2,000 for it, as he testified he did, the learned judge expresses himself in these words:

> I am satisfied of one thing; I may have some doubts or some hesitation about some of the other facts, but I am absolutely confident on the evidence about one thing, and that is that there never was any consideration paid for this homestead.

He alludes also to the fact that

> The father never moved off, he was always there, he is there yet, and never was disturbed in his possession.

which, the learned judge says,

> helps to confirm my opinion that the son held that property in trust for the father all the time. When this land was encumbered the son knew that he only held it in trust and in my opinion he should not have encumbered it; the rights of the mortgagees, who were innocent parties, in so far as any evidence before me is concerned, cannot, of course, be

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disturbed. But in my view the plaintiff is entitled to succeed with respect to the homestead. He is entitled to a conveyance of that land back to him, and he is entitled to have the son remove that mortgage.

With regard to the S.W. ¼ of sec. 23, which was transferred to Anton by one Henkelman, "There is," as the learned judge says,

> the evidence of one side against the other side, and no documents of any kind, and the only thing I can do is to say that the onus is upon the plaintiff, and he has not satisfied it.

Then, as to the fact that the plaintiff made the first payment on the S.E. ¼ of sec. 14, the learned judge says:

> That seems to be fairly clearly established now from the documents. But what finally was done regarding that is not so clear. It is very difficult for me to be able to decide whether or not the old man received really consideration for turning that over or whether he just made a gift of it to his son. Of course, there is nothing in the law of this country that prevents a father from presenting his son with $700 if he wants to do it. I am going to take the documents in that case again and hold that while the father paid $700 on account of that property, he gave the property as a gift to the son, and I do not think that the evidence in that case is clear enough to say that he is able to recover that amount back.

After reading the evidence more than once and considering the well known advantages which the judge possessed for determining the facts, and which are of special weight in a case of this kind, where the parties and their witnesses go upon the stand, where it is necessary to introduce an interpreter, and where local knowledge is useful, I am impressed with the view that a Court of Appeal should not venture to vary any of these findings. It is, I think, abundantly clear that it would be impossible for any judge, upon whom the duty is cast to review the evidence, to find otherwise than did the learned trial judge with relation to the homestead; and, while I might at first instance have been disposed to come to a different result upon the other two parcels, especially the S.E. ¼ of sec. 14, I do not think I can properly reverse the conclusion reached.

There is no well founded complaint of misdirection. Neither party has the credit of strict reliability, and the trial judge said, towards the end of the trial, that he did not intend to accept as truth all the evidence that had been uncontradicted on either side.

There is, however, one feature of the case which was not, perhaps, adequately considered at the trial, and which was strongly pressed on behalf of the defendant upon the hearing of the appeal; to this I shall direct a few observations.

Wasyl Krys had sued his wife for divorce, and apparently she had counter-claimed for judicial separation. That action was tried in March, 1925, before Tweedie J., who dismissed both the claim and the counter-claim; but at the close of the trial, immediately after the judgment had been pronounced, the judge addressed the parties, evidently through an interpreter, as follows:

You have used up a great deal of time and spent a great deal of money in Court here. Neither of you get a divorce and there is no judicial separation between you. She is entitled to go back to that homestead and live, and he is bound to maintain her and support her, and he cannot in any way ill-treat or abuse her or drive her away from that place. And I think that the son has got that farm; that Krys ought to have the farm and she should not be working there all her life and raising children by him, and other people get his property, and she is entitled to be protected, and that they had better straighten out their property difference between themselves, and I do not think they will have any trouble. I think that the trouble is caused by the fact that this woman thinks the homestead is in the name of his son, and she is working there and raising children of her own for nothing.

Then the parties left the Court. Anton and Pullishy had been in attendance, and they went out at or about the same time. They prevailed upon Wasyl to go to Mr. Ewing's office. It was, as I understand the evidence, Mr. Ewing, or his partner, Mr. Bury, who had conducted the divorce proceedings on behalf of Wasyl, and Wasyl says that Anton asked him to go to Mr. Ewing's office, so that Anton could give him back his land, a purpose that coincided with the view expressed as above by Tweedie J. Arrived at the office, a document was produced, or prepared, under instructions communicated either by Anton or Pullishy, which reads as follows:

MEMORANDUM OF AGREEMENT made this Twelfth (12) day of March, A.D. 1925.

BETWEEN:—

ANTON KRYS, of Skaro, in the Province of Alberta, farmer,
Of the First Part,

AND

WASYL KRYS, of Skaro, in the Province of Alberta, farmer,
Of the Second Part.

WHEREAS Anton Krys is the natural and lawful son of the said Wasyl Krys, and in consideration of natural love and affection, the parties hereto are desirous of entering into the arrangement hereinafter set out:

AND WHEREAS the said Anton Krys is the owner of the North-East Quarter of Section Two (2) Township Fifty-seven (57), Range Twenty (20), West of the Fourth (4) Meridian, free and clear of all encumbrances;

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NOW THIS AGREEMENT WITNESSETH:

(1) It is agreed between the parties hereto that, in consideration of natural love and affection, the said Wasyl Krys shall have the sole and exclusive right to reside in the Buildings situate on the South half of the North-East Quarter of Section Two (2), Township Fifty-seven (57), Range Twenty (20), West of the Fourth (4) Meridian in the Province of Alberta, during his natural life, without rent or charge of any kind, and shall have the right to use the stables, granaries and all other buildings on the said land.

(2) The said Wasyl Krys for the consideration above named shall have the sole and exclusive right to cultivate and crop the said South half of the South-East (*sic*) Quarter of Section Two (2), Township Fifty-seven (57), Range Twenty (20), West of the Fourth (4) Meridian without rent or other charge whatsoever, and all crop, hay or other produce grown upon the said land shall belong to and be the sole property of the said Wasyl Krys.

(3) The said Wasyl Krys agrees to pay the taxes on the above land.

(4) If at any time the said Wasyl Krys becomes physically unable to cultivate the said land owing to old age or infirmity, then, in such case, the said Anton Krys may cultivate the said land for the sole use and benefit of the said Anton Krys, but in such case the said Anton Krys shall pay the taxes on the said land.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and date first above mentioned.

(Sgd.) WM. PULLISHY,	(Sgd.) ANTON KRYS.	(Seal).
	his	
(Sgd.) E. MICHAJLUK.	WASYL X KRYS.	(Seal).
	mark.	

Anton signed this, and Wasyl, at the request of Anton and Pullishy, signed also. The subscribing witnesses are Pullishy and Michajluk. The latter was a law student in the office of Mr. Ewing, articled to him. It does not appear who prepared the instrument. Michajluk says that Mr. Ewing called him in from the general office, and when he went in, he found there, " the old gentleman, Krys, and his wife, and the young man Anton," and Pullishy; and that Mr. Ewing asked him to read out the contents of the document to them, and tell him (presumably Wasyl) what was in it, which Michajluk says he did very carefully. His testimony upon the point is this:

Q. And when you read that, I would assume that you understood it yourself?

A. I think so.

Q. And you read that, and you understand, don't you, that it says: " Whereas Anton Krys is the owner of certain property?"

A. I interpreted it to him just as it is in this document.

Q. And what did you understand the document to be?

A. Well, it was an agreement between the two Krys's.

Q. What is it called? Is it an agreement you would stamp as a bill of sale or is it an encumbrance or a mortgage? Has it the effect of an encumbrance or what?

A. I was not asked by Mr. Ewing to give the definition of the document, but just to interpret the contents of the document.

The COURT: What did you tell him it was?

A. I told him word for word just what it was, Your Lordship.

Q. Mr. MACKIE: You did not tell Mr. Krys: "Your son is the owner of the land, and in consideration of the love and affection he has for you, he is going to let you stay on that land with your wife, but if you should die before she does, she has to get off?" You did not explain it that way to him?

A. Well, to be earnest about it, I could not say. I did not tell him anything that is not in this document, but I am sure I explained everything to him that is in this document.

Q. What explanation did you give?

A. I explained to him the contents of this document.

The COURT: What did you tell him?

A. I could not tell you what I told to him. I know this much, that I was asked by Mr. Ewing to translate the document as it is.

Q. But you told us now you explained to him as to what the document was?

A. When I read this over to him once, I read it sentence by sentence, and I did not read the whole document over, but I was explaining to him after each sentence. I told him the contents of the sentence in Ukrainian and explained it to him where it was necessary.

Q. You mean you translated it?

A. Yes, that is right.

Q. But outside of translating it, quite apart from the question of translating it, what explanations did you give?

A. I did not give any explanations unless he asked me.

There is no evidence of any conversation between Mr. Ewing or Mr. Bury, or any solicitor in the office, and Wasyl, or that Wasyl gave or concurred in any instructions for the preparation of the agreement. Pullishy, however, who appears usually to have been at Anton's elbow when business was being transacted with Wasyl, and who says he had an intimate knowledge of their affairs, also signed as witness, and it was he who accompanied the father and son to the solicitor who prepared the document by which, in 1914, Wasyl transferred the homestead to Anton. It is not shewn that either Mr. Ewing, or anybody belonging to his office, knew that Anton held the title under a transfer without consideration in trust for his father, who remained in possession, and it is sufficiently apparent that Wasyl re-

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ceived no independent advice or explanation whatever as to the purpose and effect of the agreement, or as to the inadvisability of his entering into any such transaction. It must be realized also that he did not speak English, and could not read a word; that he was relying upon his son, to whose hands he had committed this property in trust, and that it was either his son or Pullishy, or, perhaps, both, who contrived the meeting and originated the project for the agreement. A more foolish or improvident arrangement, in the interest of the old man, it is difficult to imagine. It was made a strong point of the defendant's case that the plaintiff was conclusively estopped by the recital that Anton was owner of the homestead, free and clear of all encumbrances. But the Court has to deal with the particular circumstances of the case, and, having regard to these, I am satisfied that the learned trial judge was right in reaching the conclusion that the plaintiff ought not to be bound.

The law is admirably stated in Sir Frederick Pollock's Principles of Contract, 9th Edition, 648 *et seq.*, where he quotes a passage from the judgment of Lord Kingsdown in *Smith v. Kay* (1); also the following from Lord Chelmsford in *Tate* v. *Williamson* (2):

> Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the party so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

See also *Turner* v. *Collins* (3).

The most recent case is that of *Inche Noriah Binte Mohamed Tahir* v. *Shaik Allie Bin Omar Bin Abdullah Bahashuan,* an appeal from the Straits Settlements, decided only a few weeks ago in the Judicial Committee of the Privy Council (4). That was the case of a deed of gift of considerable property by a Malay woman, wholly illiterate and of great age, to the respondent, who was of Arab birth, and the appellant's nephew by marriage. The facts

(1) (1859) 7 H.L.C., 750, at p. 779.
(2) (1866) L.R. 2 Ch. App. 55, at p. 61.
(3) (1871) L.R. 7 Ch. App., 329, at p. 338.
(4) (1928) 45 T.L.R. 1.

cannot very well be stated in the space here available. They are, no doubt, more convincing than those upon which the present case depends; nevertheless I am persuaded that the principles enunciated by the Lord Chancellor are not irrelevant to the determination of the present appeal. His Lordship, having referred to the judgment of Lord Justice Cotton in the well known case of *Allcard* v. *Skinner* (1), and some of the other authorities, expresses the views of their Lordships as follows:

The decision in each of these cases seems to their Lordships to be entirely consistent with the principle of law as laid down in *Allcard* v. *Skinner* (1). But their Lordships are not prepared to accept the view that independent legal advice is the only way in which the presumption can be rebutted; nor are they prepared to affirm that independent legal advice, when given, does not rebut the presumption, unless it be shown that the advice was taken. It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means by which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Lord Justice Cotton, and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.

In the present case their Lordships do not doubt that Mr. Aitken (the solicitor) acted in good faith; but he seems to have received a good deal of his information from the respondent; he was not made aware of the material fact that the property which was being given away constituted practically the whole estate of the donor, and he certainly does not seem to have brought home to her mind the consequences to herself of what she was doing, or the fact that she could more prudently, and equally effectively, have benefited the donee without undue risk to herself by retaining the property in her own possession during her life and bestowing it upon him by her will. In their Lordships' view the facts proved by the respondent are not sufficient to rebut the presumption of undue influence which is raised by the relationship proved to have been in existence between the parties; and they regard it as most important from the point of view of public policy to maintain the rule of law which has been laid down and to insist that a gift made under circumstances which

(1) (1887) 36 Ch. D., 145, at p. 171.

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give rise to the presumption must be set aside unless the donee is able to satisfy the Court of facts sufficient to rebut the presumption.

I think a presumption arises from the relation of the parties; the astonishing nature of the instrument which emerged from their meeting on 12th March, 1925, when Anton took his father to the lawyer's office on the pretence of giving him back his property, and from the other circumstances of the case, which casts upon Anton the duty to explain, and to satisfy the court that his father realized what he was doing, and acted as a voluntary agent; and no satisfactory evidence has been produced to overcome or to rebut that presumption; the testimony of the Ukrainian law student is quite inadequate to clear up the situation.

There was an appeal, and a cross appeal, to the Appellate Division, and upon the hearing, the appeal was allowed and the cross appeal was dismissed, without reasons. There is nothing in the record to suggest why this was done, but it is said that the Court considered that, at least with respect to the homestead and the chattels, it was bound by the decision of this Court in *Scheuerman* v. *Scheuerman* (1), and that the plaintiff was disentitled to relief, because the conveyance by Wasyl to his son evidenced an attempt to defeat creditors, and was fraudulent and void as against them under the statute of 13 Eliz., Ch. 5, and that to give effect to the claim would be a breach of the principle that the court will not assist a suiter to obtain relief from the consequence of his own unlawful act. The facts in the *Scheuerman* case (1) were special; that decision depends upon its own facts, and there does not seem to be that unanimity in the reasons handed down by the judges constituting the majority that is necessary for a ruling case. I need not, however, review the judgments, because the present facts are entirely different. Here there are no pleadings and no proof of intent to defraud creditors, and that question was not raised or suggested at the trial. The plaintiff testified as follows:

Q. When did Anton begin to tell you things about your wife?
A. Every time he came up to me.
Q. Did he say anything about her before she went to the hospital?
A. He said "She will ruin everything for you."
Q. When did he say that? Did Anton say that to you before your wife went to the hospital, or after she went to the hospital?

(1) (1916) 52 S.C.R. 625.

A. He told me that before she went to the hospital and after she was in the hospital.

Q. Do you know why your wife went to the hospital?

A. Well, she took sick. I could not tell you what was the cause of it.

Q. Well, did you beat her up?

A. I did not.

And, referring to his homestead,

Q. And did you give it to Anton in some way?

A. The time my wife was in the hospital I decided I should assign that land to my son to protect myself from the expenses which my wife put on me in the hospital and arranged it then he had to assign it back to me again.

Q. Your wife went to Lamont Hospital, did she?

A. Yes.

The impression which this evidence left with the trial judge was, as already shewn, that the plaintiff consulted with his son, " and decided he would have his son hide away his property from the wife so as to see that she did not get it." There was obviously trouble between the plaintiff and his wife at the time, the particulars of which were not investigated; but there was no proof that he had creditors or that any creditor was defeated, hindered or delayed by the transfer; and a judicial inference, in these circumstances, that the conveyance was unlawful under the Statute of 13 Eliz., Ch. 5, is, in my opinion, not only unjustified, but seems directly to conflict with the venerable principle propounded in the Year-Books by Brian C.J., that

Having in your mind is nothing, for it is common learning that the thought of man is not triable; for even the Devil has not knowledge of man's thoughts.

That is said by Lord Macnaghten, in *Keighley, Maxsted & Co.* v. *Durant* (1), to be a sound maxim, at least in its legal aspect.

Moreover, it is provided by the *Exemptions Act* of Alberta, R.S.A., 1922, ch. 95, sec. 2 (i), that

The homestead of an execution debtor actually occupied by him, provided the same be not more than one hundred and sixty acres.

is free from seizure by virtue of all writs of execution, and also, by paragraph (*d*) of the same section, that horses and cattle, substantially including those which were subject to the bill of sale, are also exempt; and it was in fact admitted at the hearing that the homestead and the chattels are not available to the creditors. Therefore the conveyance and transfer which the plaintiff made to the defendant in 1914 does not prejudice Wasyl's creditors, if there be any, and,

(1) [1901] A.C. 240, at p. 247.

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so far as the later transactions are concerned, it was not even hinted that there was evidence to manifest or to suggest any unlawful purpose on the part of Wasyl.

For these reasons, I would allow the appeal and restore the judgment at the trial; and I think the plaintiff should have his costs throughout, except the costs of his cross appeal to the Appellate Division, the defendant to have his costs of that cross appeal, to be set off.

Appeal allowed in part, with costs.

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

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

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*Nov. 20.
*Dec. 21.

QUEBEC ASBESTOS CORPORATION (DEFENDANT) ..... APPELLANT;

AND

GEDEON COUTURE (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Asbestos mine—Dynamite—Explosion—Injury—Liability—Whether injured is an employee or an independent contractor

The respondent had charge of the mining operations in the appellant's mine. The appellant supplied the dynamite, the tools and accessories. The respondent hired the men, paid them, controlled them, and discharged them. He was allowed to do the work as he pleased, except that he was indicated where the mining should take place. He was not in any way the subordinate of the company, his whole obligation towards the latter consisting in supplying a sufficient quantity of mineral rock of a given size for the run of the mill. He was responsible in damages if he failed in this respect. He was paid twenty cents per wagon; and in addition, the appellant paid the insurance premiums required by the Workmen's Compensation Board to cover accidents to the respondent's employees; but this was done as the result of an express condition of the agreement between the respondent and the appellant. The respondent had to deliver rock of the required size. The rock was loaded into small wagons and carried to the mill. The loading was done by means of a steam shovel operated by one of the employees of the appellant company. When the rock was found too large, it was laid aside and it became the respondent's duty to reduce it to the required size. The respondent, one day, while performing the latter operation and while engaged in drilling a hole in one of the rocks, was seriously injured by an explosion of dyna-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

mite. It was generally admitted that the cause of the accident was the fact that the drill had come into contact with an unexploded charge previously placed in the rock by the respondent or his employees in the course of the former operations and which had failed to explode. The respondent brought an action in damages against the company.

Held that, under the circumstances of his engagement, the respondent was an independent contractor; that the appellant company was not liable, as the respondent was not its employee and it did not have towards him the responsibility of an employer; and that the accident was due to the fault or negligence of the respondent himself or that of his employees and he could not recover against the appellant company.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the trial judge, Tessier J., and maintaining the respondent's action in damages.

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

Alfred Savard K.C. and *M. A. Phelan K.C.* for the appellant.

Louis Morin K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—Quebec Asbestos Corporation exploite à East Broughton dans la province de Québec, une mine d'amiante.

Le 7 novembre 1927, Gédéon Couture, le demandeur intimé, y fut la victime d'une explosion de dynamite qui l'a rendu infirme pour la vie. Il a obtenu de la Cour Supérieure, siégeant dans le district de Beauce, un jugement condamnant la compagnie à lui payer les dommages résultant de cet accident. La majorité de la Cour du Banc du Roi a confirmé ce jugement. Deux des juges de la cour cependant étaient d'avis qu'il y avait "au moins faute commune" de la part de Couture; et, pour cette raison, ils auraient réduit de moitié le montant de la condamnation. Cette cour est maintenant saisie de la question.

Pour en faciliter l'examen, il est d'abord nécessaire d'expliquer les procédés de travail à la mine.

Le puits est à ciel ouvert. On commence, au moyen de la dynamite, par en détacher des pans entiers des parois latérales. Sous l'action des explosifs, les parois se fractionnent

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en quartiers de roc qui tombent et s'entassent au fond du puits. De là, une pelle mécanique les charge dans les wagonnets qui les transportent à l'usine où l'on extrait le minérai. Mais les machines de l'usine ne peuvent recevoir que les quartiers de roc qui n'excèdent pas une certaine dimension. Il ne faut charger dans les wagonnets que la pierre de minerai qui répond à cette dimension. Il arrive donc que, avant de laisser le puits, les quartiers de roc doivent être de nouveau soumis à une et parfois à deux explosions supplémentaires afin de les réduire à la dimension voulue.

C'est Couture qui avait entrepris de la compagnie le contrat de miner les parois et le roc et de fournir aux wagonnets la pierre de minerai du volume requis en quantité suffisante pour alimenter l'usine. A cette fin, il employait plusieurs hommes. Il les engageait, fixait leur salaire (sauf qu'il ne lui était pas permis de dépasser le maximum des salaires établis à l'usine); il les payait, les dirigeait, les déplaçait et les renvoyait. Pour l'exécution de son contrat, il était libre d'adopter la méthode de travail qu'il entendait. Les seules instructions que le contremaître de la compagnie avait à lui donner étaient de lui indiquer les endroits où il devait miner. La compagnie fournissait les outils, les accessoires et la dynamite. Couture recevait "vingt cents du char." Il était responsable en dommages s'il manquait à son obligation de fournir toute la pierre dont on avait besoin pour la marche régulière de l'usine.

La pelle mécanique qui chargeait le roc sur les wagonnets était manoeuvrée par un employé de la compagnie. Lorsque ce dernier rencontrait des pierres (block-holes) trop grosses pour être envoyées au moulin, il les mettait de côté, et Couture devait y pratiquer de nouveau la dynamite. C'est au moment où Couture perforait une de ces pierres qu'une explosion se produisit: il fut projeté dans les airs et gravement blessé. On a expliqué l'accident de la façon suivante: Une charge de dynamite déjà introduite dans ce même quartier de roc au cours des opérations antérieures aurait manqué d'exploser (ce qui arrive parfois) et aurait éclaté lorsque Couture entreprit une nouvelle perforation. C'est la théorie qui fut généralement acceptée.

Les jugements soumis à cette cour ont considéré Couture comme étant l'employé de Québec Asbestos Company; et c'est en appliquant à l'espèce les principes qui régissent les

relations entre patrons et employés qu'ils ont tenu l'appelante responsable des dommages subis par l'intimé. Ils ont trouvé que la compagnie avait failli à ses obligations à l'égard de son ouvrier, qu'elle aurait dû prévoir toutes les causes non-seulement habituelles mais simplement possibles d'accidents et adopter toutes les mesures et les précautions nécessaires pour les éviter. Ils ont déclaré spécialement qu'il était du devoir de la compagnie de s'assurer qu'il n'y avait pas d'explosifs dans le quartier de roc sur lequel travaillait Couture au moment de l'accident et qu'elle avait manqué à ce devoir.

Mais il est évident que la responsabilité de l'appelante doit être envisagée d'un point de vue différent si Couture, au lieu d'avoir été son employé, était en réalité un entrepreneur indépendant.

Or, nous sommes d'avis que c'est bien là la nature juridique du contrat qu'il avait fait avec la compagnie. On y trouve les principaux caractères distinctifs du contrat d'entreprise: le mode adopté pour sa rémunération; le droit de choisir les hommes qu'il employait, de fixer leur salaire, de les diriger et de les renvoyer; la responsabilité en dommages comme conséquence de son défaut d'alimenter l'usine; surtout l'absence d'un lien de subordination entre Couture et la compagnie et son indépendance dans la méthode de travail.

Le contrat de louage d'ouvrage se distingue du contrat d'entreprise surtout par le caractère de subordination qu'il attribue à l'employé. Même payés à la tâche, les ouvriers peuvent être

des locateurs de services, s'ils sont subordonnés à un patron; mais au contraire les ouvriers sont des entrepreneurs, s'ils ne sont pas soumis à cette subordination.

(Baudry-Lacantinerie & Wahl, Traité de droit civil, 3ème éd., Du contrat de louage, tome 2, première partie, n^{os} 1638 et 1641).

C'est d'ailleurs la jurisprudence de la province de Québec:

Beaulieu v. *Picard, Cour de Révision* (Tellier, Delorimier, Greenshields JJ.) (1); *Lambert* v. *Blanchet* (2), Cour d'Appel (où Monsieur le Juge Howard fait une revue complète de la question); *Collin* v. *Gagnon* (3), Cour d'Appel,

(1) Q.R. 42 S.C. 455, at p. 458. (2) Q.R. 40 K.B. 370.
(3) Q.R. 44 K.B. 389.

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où Monsieur le Juge Létourneau, parlant au nom de la cour, dit, entre autres choses:

> Et si l'on ajoute que le revenu et le profit des *jobbers*, au lieu d'être fixe ou l'équivalent d'un salaire, dépendait en somme du contrôle et de la direction qu'ils exerceraient exclusivement sur leurs hommes et de leur habileté à tirer parti d'un travail qu'il leur était permis de diriger, on en vient facilement à la conclusion qu'ils étaient des chefs d'entreprise distincts.

Couture exécutait son travail d'une façon indépendante, en dehors de la direction et du contrôle de la compagnie; et celle-ci devait seulement en vérifier la bonne exécution lors de son achèvement (Dalloz, Répertoire Pratique, vbo Louage de services, nos 29 et 57).

Le contrat que nous avons à interpréter ne réservait pas à Quebec Asbestos Corporation le droit de donner à Couture des ordres et des instructions sur la manière de remplir les fonctions qu'il avait acceptées. C'est ce droit qui fonde l'autorité et la subordination sans laquelle il n'existe pas de véritable commettant (*Bouly* v. *Lefebvre,* Cour de Cassation (1)).

Il est vrai que la compagnie avait assuré les employés de l'intimé contre le risque des accidents du travail; mais elle l'avait fait conformément à une convention qui faisait partie de son contrat avec Couture. Cette stipulation elle-même, peut-être encore plus que tout autre fait, confirme la nature du contrat, puisqu'il avait fallu une condition expresse pour faire assumer par la compagnie une charge qui autrement eût incombé à Couture à l'égard de ses employés. Il nous dit que c'est lui-même qui avait exigé cette convention. Il s'était donc bien rendu compte de sa responsabilité vis-à-vis de ses employés, en matière d'accidents du travail, et, dès lors, de sa situation d'entrepreneur indépendant.

L'intimé avait entrepris de miner la pierre de minerai dont la compagnie avait besoin et de la lui livrer aux wagonnets qui la transportaient à l'usine, de la dimension et en la quantité requises pour les besoins de l'usine. Il travaillait sur une matière appartenant à la compagnie; mais cela n'affectait pas ses relations juridiques avec la compagnie. En cela, sa situation n'était pas différente de celui qui entreprend la coupe du bois sur les limites appartenant à un autre et qui s'engage à le lui livrer à la rivière, par la voie

(1) S. 1923-1-115.

de laquelle le bois est amené à la scierie. Dans ces conditions, tous deux, celui qui a le contrat de la coupe et celui qui a le contrat de la mine (comme Couture), sont des entrepreneurs indépendants. Depuis le moment où Couture commençait à miner la paroi du puits de la mine jusqu'au moment où il livrait aux wagonnets la pierre de minerai, toute l'opération se faisait sous son contrôle et sous sa responsabilité.

Il était obligé de se servir d'une substance dangereuse. Il avait l'habitude de tirer plusieurs coups de mine à la fois. Il savait qu'il arrive parfois qu'une charge, ou plusieurs charges de dynamite ne partaient pas en même temps que les autres et que la ratelle faisait long feu. Il se rendait compte du danger imminent qui pouvait en résulter pour tous. Il reconnaissait son devoir, après chaque explosion, de faire une inspection minutieuse de toutes les charges afin de vérifier si quelqu'une n'avait pas explosé. C'est à lui qu'incombaient la responsabilité de cet examen et les conséquences qui pouvaient résulter de son insuffisance. (*Citizens Light* v. *Lepître* (1). Si toute autre personne eût été blessée comme lui, c'est à lui que la faute en eût été imputée. De la même façon, en cette circonstance, il a été la victime de cette faute.

Cela ne nous paraît pas faire de doute si le quartier de roc eût fait explosion avant qu'il eût été déplacé par la pelle mécanique. Nous ne pouvons voir comment l'intervention de la pelle mécanique a pu modifier la responsabilité. Tout ce que Lessard, le préposé à cette pelle mécanique, avait à faire était de charger la pierre que Couture et ses employés préparaient. Ses fonctions ne lui imposaient pas l'obligation de vérifier si la pierre qu'il remuait pouvait encore être chargée de dynamite. L'on ne pouvait s'attendre que Lessard, qui se tenait dans la petite cabane à l'arrière de sa machine, descendit à chaque mouvement pour aller constater si les explosifs avaient ou non éclaté. Nous croyons que Lessard lui-même eût eu un recours contre Couture si, pendant qu'il déplaçait les pierres, il lui fût arrivé un accident semblable à celui dont Couture fut la victime. En mettant de côté les quartiers de roc qui excédaient la dimension requise, Lessard ne faisait pas autre chose que de refuser d'accepter pour le compte de la com-

(1) (1898) 29 S.C.R. 1.

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pagnie un travail qui n'était pas encore complété conformément aux conventions; et c'est dans le but de remplir son obligation contractuelle de livrer des pierres de la dimension définie que Couture, au moment de l'accident, était à perforer le quartier de roc qui avait besoin d'être réduit. Couture savait que ce quartier de roc était un de ceux que lui ou ses hommes avaient déjà travaillé et qu'il pouvait contenir encore une charge qui n'avait pas éclaté. C'était à lui d'être sur le qui-vive; et, à tout événement, si la dynamite se trouvait encore dans cette pierre, pleine de danger pour tous ceux qui l'approcheraient, c'est que son travail de mine avait été mal fait ou que son examen, après les explosions, avait été insuffisant.

Dans cas circonstances, nous croyons que Quebec Asbestos Corporation ne peut être tenue responsable de l'accident qui est arrivé à l'intimé et qu'il aurait dû être débouté de son action.

Il en résulte que l'appel doit être maintenu.

Appeal allowed with costs.

Solicitors for the appellant: *Savard & Savard.*

Solicitors for the respondent: *Morin & Vezina.*

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*Nov. 27, 28.

SEMET-SOLVAY COMPANY .....APPELLANT;

AND

THE COMMISSIONER OF PATENTS....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Refusal by Commissioner of Patents of application for patent—Want of invention—Improvements in coke ovens.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1) dismissing the present appellant's appeal from the decision of the Commissioner of Patents refusing an application for patent made by the appellant's assignor; the alleged invention relating to improvements in coke ovens.

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) [1927] Ex. C.R. 218.

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SEMET-SOLVAY CO. v. COMMISSIONER OF PATENTS.

On conclusion of the argument of counsel for the appellant, the Court retired for consideration of the case, and on returning to the Bench, without calling on counsel for the respondent, delivered judgment dismissing the appeal, on the ground that the Court could see no reason for disagreeing with the view of the learned President of the Exchequer Court that there was no satisfactory evidence of invention. With regard to the other points in dispute, the Court pointed out that it must be distinctly understood that it expressed no opinion thereon.

Appeal dismissed with costs.

R. S. Smart K.C. for the appellant.

A. W. Anglin K.C. and *C. P. Plaxton K.C.* for the respondent.

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*Oct. 26.

GRAND TRUNK PACIFIC RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

MELLEY ANWEILER, ADMINISTRATRIX OF THE ESTATE OF FRED ANWEILER, DECEASED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Trial—Withdrawal of case from jury—Action for damages for alleged negligence, as being responsible for death of defendant's employee—Plaintiff non-suited at trial—Judgment of Court of Appeal ordering new trial, affirmed.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1). The action was brought under the *Fatal Accidents Act* of Saskatchewan, for damages for the death of an employee of the defendant, it being alleged that the deceased came to his death owing to negligence of the defendant, its agents, officers or employees. At the trial Maclean J. granted the defendant's application for non-suit, withdrew the case from the

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1928] 2 W.W.R. 514.

1928

GRAND TRUNK PACIFIC RY. CO. v. ANWEILER.

jury, and dismissed the action. The Court of Appeal (1) allowed the plaintiff's appeal from the judgment of Maclean J., and ordered a new trial. The defendant appealed to this Court.

At the conclusion of the argument for the appellant, and without calling on counsel for the respondent, the judgment of the Court was orally delivered by the Chief Justice, dismissing the appeal with costs; holding that the Court could not say that the jury would not have been justified, by drawing inferences from the facts in evidence, in making findings as to how the deceased met his death and whether or not it was caused by negligence of the defendant. The Court pointed out that it did not pass upon the question of the admissibility of the evidence contained in Steeper's examination for discovery, as to which it had not heard argument; and that, of course, it must not be understood even to suggest that upon the evidence now in the record the plaintiff should succeed; all it determined was that the Court of Appeal was right in holding that the case should not have been withdrawn from the jury.

Appeal dismissed with costs.

C. E. Gregory K.C. for the appellant.

David Campbell K.C. for the respondent.

1928

*Oct. 26.

HERMAN D. HOWSON (DEFENDANT) ..... APPELLANT;

AND

HERBERT LEWIS AND GEOFFREY R. LEWIS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Sale of land—Misrepresentation—Rescission

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (2) which, reversing the judgment of Knowles J., held that a certain agreement of

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1928] 2 W.W.R. 514

(2) 22 Sask. L.R. 624; [1928] 2 W.W.R. 197.

1928

HOWSON v. LEWIS.

sale of lands and chattels from the defendant to the plaintiffs should be rescinded on the ground of material misrepresentation inducing the purchase; that a certain lien note made by the plaintiffs to the defendant should be set aside, rescinded and cancelled; and that the plaintiffs should recover against the defendant the sum of $1,531, with certain interest.

On the conclusion of the argument for the appellant, and without calling on counsel for the respondent, the judgment of the Court was orally delivered by the Chief Justice, dismissing the appeal with costs.

Appeal dismissed with costs.

Henry Rees and *Cuthbert Scott* for the appellant.

J. M. Stevenson K.C. for the respondent.

1928

*Nov. 28.

DONALD M. ROBERTSON, ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS OF GEORGE H. ROBINSON (PLAINTIFF)... } APPELLANT;

AND

ESTHER M. ROBINSON, WIFE OF GEORGE H. ROBINSON, AND THE SAID GEORGE H. ROBINSON (DEFENDANTS) ..... } RESPONDENTS.

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

Husband and wife—Alleged attempts to defeat husband's creditors—Alleged payment of husband's moneys in purchase of, or for benefit of, property standing in name of wife—Whether property exigible to satisfy claims of husband's creditors—Claim on behalf of creditors as to policies of insurance on husband's life payable to wife.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, reversing in part the judgment of Kelly J. (1), held against the plaintiff's claim that certain land standing in the name of the defendant wife was the property of her husband and exigible to satisfy the claims of the plaintiff and the other creditors of her husband, or that the said

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) 62 Ont. L.R. 12.

1928

ROBERTSON v. ROBINSON.

land should be charged in favour of the plaintiff and all other creditors of the husband to the extent of moneys of the husband alleged to have been paid in the purchase of, or for the benefit of the title to, or for improvements or additions to, the property; and also held against the plaintiff's claim that certain policies insuring the life of the husband, and payable to his wife, should be charged in favour of the creditors of the husband with the amount of premiums paid thereon with interest.

After hearing argument, the Court retired for consideration of the case, and, on returning to the Bench, dismissed the appeal with costs.

Appeal dismissed with costs.

J. P. MacGregor K.C. for the appellant.

D. L. McCarthy K.C. for the respondent.

1928

*Oct. 26.

LARRY LESTER CUTHBERTSON SUING BY HIS NEXT FRIEND, HUGH W. CUTHBERTSON, AND THE SAID HUGH W. CUTHBERTSON (PLAINTIFFS).. APPELLANTS;

AND

THE CORPORATION OF THE CITY OF LETHBRIDGE (DEFENDANT) .... RESPONDENT.

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

Negligence—Evidence—Finding of negligence by jury—Sufficiency of evidence to justify finding—Sufficiency of corroboration.

The judgment of the Appellate Division, Alta., [1928] 1 W.W.R. 815, which reversed the judgment at trial on the findings of a jury, and held that plaintiffs were not entitled to recover damages for injury to the infant plaintiff, who was run over by defendant's street car, on the ground of want of the requisite corroboration of the evidence given by infant witnesses not under oath, to show that the accident was caused by negligence of defendant's motorman, was set aside, and the judgment at trial was restored, the Court holding that, apart altogether from the question of corroboration, there was sufficient in the evidence of the motorman himself, under the circumstances, to justify

*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

the jury in drawing the inference that he was negligent; that there was, in any case, corroboration of the infant plaintiff's story of what happened just before the accident, sufficient to enable the jury to say that a proper watch was not kept; that the jury's finding that there was not sufficient lookout should not have been disturbed.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Alberta (1) allowing (Beck and Clarke JJA., dissenting) the defendant's appeal from the judgment of Tweedie J., upon the verdict of a jury, given in favour of the plaintiffs, in an action for damages for injuries to the infant plaintiff, a boy of seven years of age, caused by his being run over by the defendant's street car, owing, as alleged by the plaintiffs, to the negligence of the defendant's motorman.

The accident happened about 2.30 o'clock in the afternoon of May 23, 1927, near the intersection of Ninth Avenue South and Twelfth Street South in the city of Lethbridge. The car was going westward on Ninth Avenue. The track on Ninth Avenue is a single track, and Ninth Avenue runs straight from Thirteenth Street westward to Sixth Street. The boy's leg was badly injured and had to be amputated.

According to the boy's story, he was running to catch the street car to go home on it. To get on the car he had to cross the track from the south side of it to the north side. He was wearing rubbers on his shoes, and as he was crossing the track, in front of the car, he got stuck in the mud, could not get his foot away, cried "help" and waved his arms, but the car ran over him. He said that before the car hit him he saw the motorman talking to a lady in the car, and looking towards her and not towards him.

According to the motorman's evidence, he did not see the boy at all, or anybody on the track; he was keeping a watch ahead, and there could not have been anything on the track without his seeing it; he knew nothing of the accident until his car returned to the same place, about seventeen minutes after the accident. He said that a lady came out into the vestibule of the car, and he applied his brakes, thinking she wanted to get off at Twelfth Street, but when they were at Twelfth Street she said "Not here. Ninth Street." His application of the brakes brought the

(1) [1928] 1 W.W.R. 815.

1928
CUTHBERTSON
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CITY OF
LETHBRIDGE.

car almost to a standstill, but at her said remark he released the brakes and went on. He said also, in the course of his evidence:

A. When I expected my car to come to a stop I attempted to open the door, and during the time I was attempting to open the door she said, "Not here."

Q. You did not actually open the door, though?

A. No; I was on the point of opening it and my head was turned at that time.

Q. So until that time which way had you been facing?

A. Straight to the front.

Q. And how long, or for how long a period did you turn your head towards Mrs. Younkers?

A. It might be a second. Just a matter of turning and going back.

The said lady, Mrs. Younkers, who was a witness for the plaintiff, testified that she came out into the vestibule and asked the motorman to let her off at Ninth Street, as she could not get off at Eighth Street (her usual place to get off) as it was so muddy, and he said "All right." She could not say whether or not she got up to come out (into the vestibule) before the car came to Twelfth Street, but it was "along there" that she went out into the vestibule. She did not see anybody on the track. She did not learn of the accident until afterwards.

A Mr. Wood, who was working in his garden at the North West corner of Twelfth Street and Ninth Avenue, heard, after the car had passed, the boy shouting "help me," and went and picked him up. The leg that was hurt was across the rail on the south side of the track. Blood was lying on the south side of the track inside the rails. A rubber was found in the mud.

Two men, who were on the car at the back, testified that they saw, from the back of the car, a boy lying on the roadway. One of these men was an employee of the defendant, but did not report the matter, as he did not connect it at the time with anything to do with the street railway.

The evidence of the infant plaintiff, and also the evidence of a girl of nine years of age (called on behalf of the plaintiffs) and of a girl of seven years of age (called on behalf of the defendant) was given not under oath, as provided for in s. 19 of *The Alberta Evidence Act,* R.S.A., 1922, c. 87, which reads as follows:

19. (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence

of such child may be received, though not given upon oath if, in the opinion of the judge, justice or other presiding officer, as the case may be, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and such evidence must be corroborated by some other material evidence.

The jury found that the motorman "was negligent by not being on a proper lookout," and judgment was entered for the plaintiffs for damages.

The Appellate Division (1), by a majority, reversed the judgment at trial, on the ground that, although the evidence established that the boy was run over by the street car in question at the place alleged, and as a result lost his leg, yet there was no evidence to corroborate the story of the infant witnesses for the plaintiffs going to show that the accident was caused by negligence of the defendant's motorman, and such corroborative evidence was necessary in order for the plaintiffs to succeed. Hyndman J.A., whose judgment was concurred in by Harvey C.J.A., and Mitchel J.A., said, in the course of his judgment (after referring to authorities):

In these cases it would appear that what is meant by "other material evidence," is material to the issue to be sustained by the party to be corroborated. In the case at bar since the substantial issue is negligence, it must mean, material to the issue of negligence. Every particular, of course, need not, and in most cases could not, be corroborated, but in some substantial respect the negligence complained of must be. It is not sufficient that some particular of the evidence given in the case be corroborated unless it is connected with the issue of negligence.

Just how this accident happened, apart from the infants' evidence, is to my mind left to conjecture and capable of different theories, and there is not the necessary corroboration of their testimony touching the heart of the question or issue involved in the action, namely, negligence.

Beck and Clarke JJA., dissented from the judgment of the majority of the Appellate Division.

The plaintiffs appealed to this Court.

A. M. Sinclair K.C. for the appellant.

W. S. Ball K.C. for the respondent.

Counsel for the appellant was stopped by the Court, and on the conclusion of the argument of respondent's counsel the judgment of the Court was orally delivered by

(1) [1928] 1 W.W.R. 815.

1928

CUTHBERTSON v. CITY OF LETHBRIDGE.

ANGLIN C.J.C.—We are all of the opinion that the appeal must succeed, the judgment of the Appellate Division be set aside, and the judgment of the trial judge in favour of the plaintiffs restored. Apart altogether from the question of corroboration, we are of opinion that there was sufficient in the evidence of the motorman himself, under the circumstances, to justify the jury in drawing the inference that he was negligent. There is, in any case, corroboration of the boy's story of what happened just before the accident, sufficient to enable the jury to say that a proper watch was not kept. Their finding is that there was not a sufficient lookout. That finding is sustained by the evidence, and should not have been disturbed. The appeal is allowed, as indicated, with costs throughout.

Appeal allowed with costs.

Solicitor for the appellants: *J. C. Hendry.*

Solicitor for the respondent: *W. S. Ball.*

1929

*Feb. 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LTD. (AUTHORIZED TRUSTEE) ..... } PETITIONER;

AND

HOFFAR LIMITED .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Bankruptcy—Constitutional law—Conflict between Dominion and provincial enactments—Dominion enactment prevailing—Bankruptcy Act, R.S.C., 1927, c. 11, s. 64; Fraudulent Preferences Act, R.S.B.C., 1924, c. 97, s. 3 (2)—Leave to appeal to Supreme Court of Canada refused —Bankruptcy Act, s. 174.

S. 64 (1) of the *Bankruptcy Act*, R.S.C., 1927, c. 11, provides that a transfer made by an insolvent person "with a view of giving" a preference, shall, if the insolvent makes an authorized assignment within three months thereafter, be deemed fraudulent and void as against the trustee in bankruptcy; and s. 64 (2) provides that if a transfer by the insolvent has the effect of giving a preference "it shall be presumed *prima facie* to have been made" with such view. S. 3 (2) of the *Fraudulent Preferences Act*, R.S.B.C., 1924, c. 97, provides (subject as

*PRESENT:—Mignault J. in Chambers.

therein stated) that a transfer made by a person in insolvent circumstances which has the effect of giving a preference shall "if the debtor, within 60 days after the transaction, makes an assignment for the benefit of his creditors, be utterly void" as against the assignee, etc.

Held: There is a conflict between said enactments, and the Dominion enactment prevails; so, in the case of a transfer by an insolvent person having the effect of giving a preference, where the fraudulent intent (*prima facie* presumed under s. 64 (2) of the *Bankruptcy Act*) has been rebutted, the transfer, though made within 60 days before the assignment in bankruptcy, cannot be attacked.

Att. Gen. of Ontario v. *Att. Gen. of Canada,* [1894] A.C. 189, at p. 200; *La Compagnie Hydraulique de St. François* v. *Continental Heat & Light Co.,* [1909] A.C. 194, at p. 198; *Royal Bank of Canada* v. *Larue,* [1928] A.C. 187, referred to.

Judgment of the Court of Appeal of British Columbia, [1929] 1 W.W.R. 557, to above effect, held to be clearly right, and leave to appeal therefrom (applied for under s. 174 of the *Bankruptcy Act*) refused.

PETITION by the trustee of a bankrupt estate, under s. 174 of the *Bankruptcy Act,* R.S.C., 1927, c. 11, for special leave to appeal from the judgment of the Court of Appeal of British Columbia (1) reversing the judgment of W. A. Macdonald J.

The trustee moved for an order setting aside a transfer by the insolvent to the respondent of the sum of $4,053.95 due him by the Government of Canada. The transfer was made less than sixty days before the assignment under the *Bankruptcy Act,* and it was attacked on two grounds: (1) that it was utterly void as against the trustee by virtue of s. 3 (2) of the *Fraudulent Preferences Act,* R.S.B.C., 1924, c. 97; and, alternatively, (2) that it was fraudulent and void as against the trustee by virtue of s. 64 of the *Bankruptcy Act.*

Section 64 of the *Bankruptcy Act,* R.S.C., 1927, c. 11, reads as follows:

64. Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view of giving such creditor a preference over the other creditors shall, if the person making, incurring, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, incurring, taking, paying or suffering the same, or if he makes an authorized assignment, within three months after the date of the making, incurring, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy or under the authorized assignment.

(1) [1929] 1 W.W.R. 557.

1929

CANADIAN CREDIT MEN'S TRUST ASSOCIATION LTD. v. HOFFAR LTD.

2. If any such conveyance, transfer, payment, obligation or judicial proceeding has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed *prima facie* to have been made, incurred, taken, paid or suffered with such view as aforesaid whether or not it was made voluntarily or under pressure and evidence of pressure shall not be receivable or avail to support such transaction.

3. For the purpose of this section, the expression "creditor" shall include a surety or guarantor for the debt due to such creditor.

Section 65 of the Act contains provisions protecting from invalidation payments, conveyances, etc., made under certain conditions.

Section 3 of the *Fraudulent Preferences Act*, R.S.B.C., 1924, c. 97, reads as follows:

3. (1.) Subject to the provisions of section 4, every gift, conveyance, assignment, transfer, delivery over or payment of goods, chattels, or effects, or of bills, bonds, notes, or securities, or of shares, dividends, premiums, or bonus in any bank, company, or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, shall:—

(*a.*) If made with intent to defeat, hinder, delay, or prejudice his creditors or any one or more of them, be, as against the creditor or creditors injured, delayed, or prejudiced, utterly void; and

(*b.*) If made to or for a creditor with intent to give such creditor preference over his other creditors or over any one or more of them, be, as against the creditor or creditors injured, delayed, prejudiced, or postponed, utterly void.

(2.) Subject to the provisions of section 4, every such gift, conveyance, assignment, or transfer, delivery over or payment as aforesaid, made to or for a creditor by a person at any time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, and which has the effect of giving such creditor a preference over the other creditors of the debtor or over one or more of them, shall

(*a.*) In and with respect to any action or proceeding which, within sixty days thereafter, is brought, had, or taken to impeach or set aside such transaction, be utterly void as against the creditor or creditors injured, delayed, prejudiced, or postponed; and

(*b.*) If the debtor, within sixty days after the transaction, makes an assignment for the benefit of his creditors, be utterly void as against the assignee or any creditor authorized to take proceedings to avoid the same.

3. [Provides as to when a transaction shall be deemed to be one which has the effect of giving a creditor a preference within the meaning of subs. 2.]

4. ["Creditor" or "creditors" in subss. 1, 2 and 3, to include a surety or endorser who would upon payment by him become a creditor of the person giving the preference, and to include a cestui que trust or other person to whom the liability is equitable only.]

Section 4 of the Act contains, among other things, provisions protecting from the application of s. 3 payments, conveyances, etc., made under certain conditions.

W. A. Macdonald J. found that the debtor was insolvent, within the meaning of the law, at the time the transfer was made, that it had the effect of giving the respondent a preference over the other creditors of the debtor, but that it was not made with a view of giving the respondent a preference; and that, if the trustee were confined solely to s. 64 of the *Bankruptcy Act,* the presumption created would have been destroyed by the evidence; but he held that the trustee was entitled to the benefit of the provincial statute, and that under it the transfer was void.

The Court of Appeal (1) set aside this judgment on the ground that there was here a conflict between Dominion and provincial legislation, and that the Dominion enactment should prevail; and that, as the presumption of fraudulent intent had been rebutted, the attack on the transfer failed.

From this judgment the trustee sought leave to appeal. The petition was dismissed with costs.

N. G. Larmonth for the petitioner.

R. W. Ginn for the respondent.

MIGNAULT J.—This is a petition by the trustee of the bankrupt estate of S. R. Wallace, under section 174 of the *Bankruptcy Act* (R.S.C., 1927, c. 11), for special leave to appeal from the unanimous judgment of the Court of Appeal of British Columbia (1) reversing the judgment of Mr. Justice W. A. Macdonald.

The litigation arose in connection with a motion of the trustee for an order setting aside a transfer by the insolvent to the respondent of the sum of $4,053.95 due him by the Canadian Government. The transfer was made less than sixty days before Wallace's assignment under the *Bankruptcy Act,* and it was attacked on two grounds: 1, that it should be deemed fraudulent and void against the trustee under section 64 of the *Bankruptcy Act;* 2, that it was utterly void under section 3 of the provincial statute, the *Fraudulent Preferences Act,* R.S.B.C., c. 97.

(1) [1929] 1 W.W.R. 557.

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CANADIAN CREDIT MEN'S TRUST ASSOCIATION LTD. v. HOFFAR LTD.

Mignault J.

The difference between the two statutory enactments, both of which deal with fraudulent preferences, is that subsection 2 of section 64 of the *Bankruptcy Act*, when the transfer, made within three months of the assignment in bankruptcy, has the effect of giving any creditor a preference over other creditors, creates merely a *prima facie* presumption that the transfer was made with a view to give the creditor such a preference; whereas section 3 of the provincial statute renders the transfer, having the effect to give a creditor preference over other creditors, utterly void as against the assignee or any creditor authorized to take proceedings when it was made within sixty days before an assignment by the debtor for the benefit of his creditors. Under the former statute the presumption of a fraudulent intent can be rebutted, under the latter it cannot.

The learned trial judge, upon consideration of section 64 of the *Bankruptcy Act*, found that the presumption of a fraudulent intent had been successfully rebutted, but he annulled the transfer under section 3 of the provincial statute, which he held established an irrebuttable presumption of fraudulent intent from the mere fact that the transfer, made less than sixty days before the assignment in bankruptcy, had the effect of giving the creditor a preference over the other creditors.

The Court of Appeal (1) set aside this judgment for the reason that there was here a clear conflict between Dominion and Provincial legislation, and that the Dominion enactment should prevail. Inasmuch, therefore, as the fraudulent intent had been rebutted, the court held that the transfer could not be attacked.

The petitioner now seeks leave to appeal from this judgment. In my opinion, the decision of the Court of Appeal is clearly right. The learned judges base their judgment on the decision of the Judicial Committee in *La Compagnie Hydraulique de St. François* v. *Continental Heat & Light Co.* (2), where it was held that when

> a given field of legislation is within the competence both of the Parliament of Canada and of the Provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict.

(1) [1929] 1 W.W.R. 557. (2) [1909] A.C. 194, at p. 198.

The decision of the Privy Council in *Attorney General of Ontario* v. *Attorney General of Canada* (1) is, moreover, directly in point. The question there was as to the effect of a similar provincial statute, "An Act respecting assignments and preferences by insolvent persons" (R.S.O., 1887, c. 124), which had been enacted at a time when no Bankruptcy Act of the Dominion was in force. After discussing features common to all systems of bankruptcy and insolvency, Lord Herschell, speaking on behalf of their Lordships, said at p. 200:—

> In their Lordships' opinion these considerations must be borne in mind when interpreting the words "bankruptcy" and "insolvency" in the British North America Act. It appears to their Lordships that such provisions as are found in the enactment in question, relating as they do to assignments purely voluntary, do not infringe on the exclusive legislative power conferred upon the Dominion Parliament. They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the provincial legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might properly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the provincial legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

The recent pronouncement of the Judicial Committee in *Royal Bank of Canada* v. *Larue* (2) is also in point

The advisability of granting special leave to appeal to this Court from a judgment of a Court of Appeal, which is final and conclusive unless such special leave to appeal be obtained, is left to the discretion of the judge of this Court to whom the application for special leave is made (s. 174, *Bankruptcy Act*). I think that were leave to appeal granted in this case to the petitioner, the latter would not have a fairly arguable case to submit to this Court. Under these circumstances I would not be justified in retarding the liquidation of the insolvent estate by allowing a further appeal on this question of conflict between Dominion and Provincial legislation, which I must regard as settled beyond peradventure.

(1) [1894] A.C. 189. (2) [1928] A.C. 187.

1929

CANADIAN CREDIT MEN'S TRUST ASSOCIATION LTD. v. HOFFAR LTD.

Mignault J.

The petition is therefore dismissed with costs.

Petition dismissed with costs.

Solicitors for the petitioner: *Griffin, Montgomery & Smith.*

Solicitor for the respondent: *R. W. Ginn.*

1928

*Oct. 24.

1929

*Feb. 5.

NORTHWESTERN UTILITIES, LIMITED ..... APPELLANT;

AND

THE CITY OF EDMONTON AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF ALBERTA..... RESPONDENTS.

THE CITY OF EDMONTON..... APPELLANT;

AND

NORTHWESTERN UTILITIES, LIMITED, AND BOARD OF PUBLIC UTILITY COMMISSIONERS OF ALBERTA ..... RESPONDENTS.

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

Public utilities—Public Utilities Act, Alta.—Hearings and investigations by Board of Public Utility Commissioners—Powers of Board—Obtaining of evidence—Absence of evidence—Order of Board fixing rates for gas supply in municipality by franchise holder—Return on investment—Inclusion in "rate base" of discount on sale of bonds—Appeal from Board's order—"Question of law."

The Board of Public Utility Commissioners of Alberta made an order in 1922 fixing rates chargeable for gas proposed to be supplied in the city of Edmonton by the predecessor of the appellant company. The Board fixed the rates on the basis of an allowance of 10% as a fair return on the investment in the enterprise, and in determining the "rate base" (the amount to be considered as invested in the enterprise) it included as a capital expenditure a sum which was the discount on the sale of the company's bonds. The rates were to continue in force for three years from the date on which gas was first

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

supplied. In 1926 the appellant company applied for continuation of the rates. On this application the city objected to such a high rate of return and to the inclusion in the rate base of the item for bond discount. The Board continued said item in the rate base, but reduced the return to 9% "in view of the elements which go to make up the rate base, and in view of the altered conditions of the money market." The parties appealed (by leave) to the Appellate Division, Alta., and then to this Court, the company against the reduction of the rate of return, and the city against the inclusion of the bond discount item in the rate base. The company contended that no evidence was adduced before the Board of "altered conditions of the money market," and that, without hearing evidence upon the point and giving the company opportunity to establish that the conditions of the money market had remained unaltered since 1922, the Board acted without jurisdiction in making the reduction. Under s. 47 of *The Public Utilities Act, 1923*, Alta., c. 53, as amended 1927, c. 39, an appeal lies from the Board upon a question "of jurisdiction" or "of law," upon leave obtained.

Held 1. The company's last mentioned contention involved a "question of law," and therefore it had a right to appeal.

2. The city's appeal failed; the question raised thereon was not one of jurisdiction or law.

3. The company's appeal failed. The Board had power to reduce the rate of return, notwithstanding that at the hearing before it no witnesses testified as to altered conditions of the money market. The company's contention that to alter the rate of return would be unfair to its shareholders who had invested in the enterprise after the order fixing the rates in 1922, was not a matter open for consideration upon the appeal, as it did not involve a question of jurisdiction or law.

Per Rinfret and Lamont JJ.: A consideration of ss. 21 (4) (5), 25, 43, and 44 of the said Act, the purposes of the Act, and the extent of the powers vested in the Board, leads to the conclusion that the intention of the legislature was to leave it largely to the Board's discretion to say in what manner it should obtain the information required for the proper exercise of its functions; it was not to be bound by the technical rules of legal evidence, but was to be governed by such rules as, in its discretion, it thought fit to adopt. An inference that it had not the proper evidence before it as to the altered conditions of the money market could not be drawn from the fact that no oral testimony in respect thereof was given at the hearing. The company had notice that a reduction was sought and that the city was attacking the methods and principles adopted in fixing the rate of return in 1922. This put the whole question of a fair return at large and informed the company that it would have to establish to the Board's satisfaction every element and condition necessary to justify a continuation of the 10% rate; and there was nothing in the record to justify the conclusion that the company had not the opportunity of making proof at the hearing as to the conditions of the money market.

Per Smith J.: The Board has power to reduce the rate of return without evidence; the question of a fair rate of return is largely one of opinion, hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

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APPEALS by Northwestern Utilities, Limited, and the City of Edmonton, respectively, from the dismissal by the Appellate Division of the Supreme Court of Alberta of their respective appeals from the award of the Board of Public Utility Commissioners for the Province of Alberta fixing rates to be paid by consumers of natural gas, for the supply of which within the city of Edmonton the said company, Northwestern Utilities, Limited, has a franchise.

The company applied to the Board for an order continuing the rates which had been fixed for a certain period by an order of the Board made in 1922. The Board made an award fixing the rates, from which each party appealed to the Appellate Division. Under s. 47 of *The Public Utilities Act* of Alberta, 1923, c. 53, as amended 1927, c. 39, an appeal lies from the Board to the Appellate Division "upon a question of jurisdiction or upon a question of law," if leave to appeal is obtained as therein provided. Such leave to appeal was obtained, it being reserved to each party to move before the Appellate Division to set aside the order granting leave to the other party, on the ground that the matters as to which leave to appeal was given did not involve any question of law or jurisdiction.

The company's objection to the Board's award was that it fixed the rates on the basis of an allowance of only 9%, instead of 10% which was allowed under the order made in 1922, as the "rate of return" on the investment in the enterprise. The Board in its award said:—

> In view of the elements which go to make up the rate base, and in view of the altered conditions of the money market, the Board believes it is justified in reducing the rate of return that the company shall be allowed, to nine per cent., and the Board's estimates are on that basis.

The company contended that there was before the Board no evidence of any "altered conditions of the money market," that the "elements which go to make up the rate base" were the same as in 1922, and afforded no reason for changing the rate of return, that to reduce the rate of return would be unfair to its shareholders, who had invested in the enterprise after the order fixing the rates in 1922, that the money was invested and the plant constructed on the strength of the principles laid down in the 1922 award, and that it was clearly understood that the principles then adopted would govern all future revisions.

The city's objection to the award was that, in determining the "rate base" (the amount to be considered as invested in the enterprise) it included (as it had done in the 1922 award) as a capital expenditure a sum which was the discount on the sale of the company's bonds.

The Appellate Division dismissed both appeals (no written reasons being given). Subsequently it made separate orders giving each party leave to appeal to the Supreme Court of Canada. On an application by both parties in the Supreme Court of Canada, the appeals were consolidated.

By the judgment of this Court both appeals were dismissed with costs.

E. Lafleur K.C. and *H. R. Milner K.C.* for Northwestern Utilities, Limited.

O. M. Biggar K.C. for the City of Edmonton.

The judgment of Anglin C.J.C. and Mignault J., was delivered by

ANGLIN C.J.C.—While, with my brother Smith, I incline to the view that the appellant company may have some reason to complain of unfairness in the judgment of the Board of Public Utility Commissioners reducing the rate of return from 10% to 9%, I agree with the conclusion reached by my brother Lamont and concurred in by my brother Smith that it is not open to us to entertain the appeal of the company on that ground. It does not seem to raise either a question of law or jurisdiction within the purview of the statute on which the right of appeal rests. I would dismiss the appeal.

The judgment of Rinfret and Lamont JJ. was delivered by

LAMONT J.—These are separate but consolidated appeals by the Northwestern Utilities, Limited (hereinafter called the Company) and the City of Edmonton, respectively, from the dismissal by the Appellate Division of the Supreme Court of Alberta of their respective appeals against the award made by the Board of Public Utility Commissioners on an application by the company for an

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order fixing the price to be paid by the consumers of natural gas within the city. Subsequent to the dismissal of the appeals, the Appellate Division made separate orders giving each party leave to appeal to this Court. By a further order the appeals were consolidated.

The company is the successor of the Northern Alberta Natural Gas Development Company, which held a franchise from the city for the supply of natural gas to the inhabitants thereof.

Disputes having arisen between the Development Company and the city, and an action having been commenced, the parties, on August 28, 1922, agreed to a settlement of their difficulties. One of the terms of the settlement was that the prices or rates to be paid by the inhabitants of the city should be fixed by the Board of Public Utility Commissioners. An application was accordingly made to the Board, the parties were heard, and, on November 27, 1922, an order was made fixing the rates to be paid. These rates were to continue in force for three years from the date on which gas was first supplied to consumers.

In order to fix just and reasonable rates, which it was the duty of the Board to fix, the Board had to consider certain elements which must always be taken into account in fixing a rate which is fair and reasonable to the consumer and to the company. One of these is the rate base, by which is meant the amount which the Board considers the owner of the utility has invested in the enterprise and on which he is entitled to a fair return. Another is the percentage to be allowed as a fair return.

In the award of 1922, which came into operation in the fall of 1923, the Board included in the rate base as a capital expenditure the sum of $283,900 (10% of the cost of plant) as, " an allowance for the promotion and financing " of the company, and the sum of $650,000 which was the discount on the sale of the Development Company's bonds. It also determined that 10% was a fair return on the investment. The rates thus fixed by the Board, with certain alterations made with the consent of all parties, continued in force for three years. In October, 1926, the appellant company, which had succeeded to the rights of the Development Company, applied to the Board for an order continuing the rates for such period as the Board might see fit. In its

reply to the application the city submitted (par. 23) that the order of November, 1922, should in certain respects be disregarded. One of these was the following:—

(*e*) Rate of Return. It is submitted that the methods and principles adopted in the fixing of the rate of return are erroneous and that the rate of return allowed is too high.

The city also protested against including in the rate base the item for the promotion and financing of the company and the item for bond discount.

In its answer to the city's reply the company alleged (par. 10) that at the hearing in 1922 the city was fully and adequately represented, that it had submitted evidence, that upon the award being delivered it raised no objection to any part thereof, and, therefore, was now estopped from contending that the principles then laid down were wrong in principle or in fact.

In its award the Board continued both the above mentioned sums in the rate base, but reduced the rate of return to the company from 10% to 9%. The reason assigned by the Board for this reduction is as follows:—

In view of the elements which go to make up the rate base, and in view of the altered conditions of the money market, the Board believes it is justified in reducing the rate of return that the Company shall be allowed, to nine per cent., and the Board's estimates are on that basis.

From the award the parties appealed, first to the Appellate Division of the Supreme Court of Alberta, and now to this Court. The company appealed against the reduction of the rate of return on its capital expenditure to 9%. Referring to the reasons given by the Board for making the reduction the company in its factum says:—

1. The city adduced no evidence as to "altered conditions of the money market" and

2. "The elements which go to make up the rate base" in 1927 are the same as in 1922.

The city appealed against the inclusion in the rate base of the item of the bond discount above mentioned.

The *Public Utilities Act* allows an appeal from the Board only upon a question of jurisdiction, or upon a question of law, and even then only when leave to appeal has first been obtained from a judge of the Appellate Division.

As against the company's appeal the city raises the preliminary objection that no question either of jurisdiction or law is involved therein. In my opinion the objection cannot be sustained. The substance of the company's

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appeal is that the Board in making a reduction in the rate of return did so for two reasons, one of which was the "altered conditions of the money market," and that of this no evidence was adduced before the Board. The company contends that, without hearing evidence upon the point, and without giving it an opportunity to establish that the conditions of the money market had remained unaltered since 1922, the Board was without jurisdiction to make the reduction. This contention was not stated in this form in the order granting leave to appeal to the Appellate Division, but the fixing of the rate of return at 9% only, was there set out as an error of the Board in respect of which leave to appeal was granted.

Whether or not the Board can properly base an order (in part at least) on the existence of a state of fact of which no evidence was adduced before it at the hearing and as to which the party affected has not had any opportunity of being heard is, in my opinion, a question of law which depends for its answer upon the construction to be placed upon the *Public Utilities Act.*

I am, therefore, of opinion that the company had a right to appeal.

The question involved in this appeal is: Had the Board jurisdiction to find as a fact how the conditions of the money market had altered between November, 1922, and July, 1927, without any witness testifying at the hearing that an alteration had taken place.

As the Board was determining what would be a fair return on the capital invested by the company in the enterprise, and as it reduced the return from 10% to 9%, it can, I think, be taken that by "the altered conditions of the money market" the Board meant that the returns for money invested in securities in which moneys were ordinarily invested had decreased during the period in question. In other words, that the rate of interest obtainable for moneys furnished for investment was, generally speaking, lower by a certain percentage in 1927 than it was in 1922. That, in my opinion, is all that is involved in the finding.

The duty of the Board was to fix fair and reasonable rates; rates which, under the circumstances, would be fair to the consumer on the one hand, and which, on the other

hand, would secure to the company a fair return for the capital invested. By a fair return is meant that the company will be allowed as large a return on the capital invested in its enterprise (which will be net to the company) as it would receive if it were investing the same amount in other securities possessing an attractiveness, stability and certainty equal to that of the company's enterprise. In fixing this net return the Board should take into consideration the rate of interest which the company is obliged to pay upon its bonds as a result of having to sell them at a time when the rate of interest payable thereon exceeded that payable on bonds issued at the time of the hearing. To properly fix a fair return the Board must necessarily be informed of the rate of return which money would yield in other fields of investment. Having gone into the matter fully in 1922, and having fixed 10% as a fair return under the conditions then existing, all the Board needed to know, in order to fix a proper return in 1927, was whether or not the conditions of the money market had altered, and, if so, in what direction, and to what extent.

For the city it was argued that, as one of the statutory powers of the Board was to deal with the financial affairs of local authorities (s. 20 (*d*)), and as this included the power to authorize the issue of new debentures by these authorities and to determine the rate of interest to be paid thereon and also the power to order a variation of the rate of interest payable upon any debt of the local authority (s. 103), the Board must necessarily be familiar with the rate of interest prevailing from time to time and therefore did not require to have witnesses called to furnish it with information which in the regular performance of its duty it was obliged to possess. In view of the powers and duties of the Board under the Act there is, in my opinion, considerable to be said for the city's contention. It is not necessary, however, to determine this question, for in the statute itself I find sufficient to justify the conclusion that the intention of the Legislature was to leave it largely to the discretion of the Board to say in what manner it should obtain the information required for the proper exercise of its functions.

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The material provisions of the Act on this point are as follows:—

21. (4) The Board may in its discretion accept and act upon evidence by affidavit or written affirmation or by the report of any officer or engineer appointed by it or obtained in such other manner as it may decide.

(5) All hearings and investigations before the Board shall be governed by rules adopted by the Board, and in the conduct thereof the Board shall not be bound by the technical rules of legal evidence.

Section 25 provides that upon a complaint being made to the Board that any proprietor of a public utility has unlawfully done or unlawfully failed to do something relating to a matter over which the Board has jurisdiction, the Board shall "after hearing such evidence as it may think fit to require" make such order as it thinks fit under the circumstances. Section 43 provides that the Board may "appoint or direct any person to make an inquiry and report upon any application * * * before the Board." And by section 44 the Board may "review, rescind, change, alter or vary any decision or order made by it." A perusal of these statutory provisions and a consideration of the purposes of the Act and the extent of the powers vested in the Board leads me to the conclusion that the Legislature intended to create a Board which in the exercise of its functions should not be bound by the technical rules of legal evidence but which would be governed by such rules as, in its discretion, it thought fit to adopt (s. 21 (5)). We have not been made acquainted with the rules, if any, adopted by the Board to govern its investigations. Nor do we know what information it possessed as to the altered conditions of the money market; but, as it had authority to act on evidence "obtained in such manner as it may decide" (s. 21 (4)), an inference that it had not the proper evidence before it cannot be drawn from the fact that no oral testimony in respect thereof was given at the hearing. If, in this case, the Board had asked its secretary to inquire from the various financial institutions in Edmonton if there had been any alteration in the conditions of the money market between 1922 and 1927, and the secretary had reported that there had been a certain decrease in the returns from invested capital, would it have been necessary to call witnesses to verify the report? In my opinion it would not. Nor would it have been necessary to afford to either party an opportunity to controvert before the

Board the information so obtained. Then would it have been necessary to mention in the award that the fact that such altered conditions had been established to the satisfaction of the Board by a report of its secretary? I can find nothing in the Act requiring mention to be made of the evidence or of the manner of obtaining it.

Reference was made to s. 86, which provides that no order involving any outlay, loss or depreciation to the proprietor of any public utility or to any municipality or person shall be made without due notice and full opportunity to all parties concerned to make proof to be heard at a public sitting of the Board, except in the case of urgency. A reduction in the rate of return to the company would, in my opinion, come within this section. The Board was, therefore, without jurisdiction to make the reduction unless the company had notice that a reduction was sought and had an opportunity of proving that under the circumstances existing at the time of the hearing the existing rate of return was fair and reasonable. That the company had notice that the city was demanding a reduction is beyond question (par. 23 (*e*)). It had more. It had notice that the city was attacking the methods and principles adopted in fixing the rate of return in 1922. This, in my opinion, put the whole question of a fair return at large and informed the company that it would have to establish to the satisfaction of the Board every element and condition necessary to justify a continuation of the 10% rate. The company does not say that it was refused an opportunity of putting in evidence as to the conditions of the money market. Nowhere does it deny that it could have put in evidence had it so desired. What it does say is that the city did not adduce evidence on the point and that no witnesses were called to testify before the Board in regard thereto. There is nothing before us to justify an inference that the company was not at liberty to call witnesses as to the conditions of the money market had it so desired. Moreover, in the order which the company obtained giving it leave to appeal it did not even suggest that it had no opportunity of submitting evidence as to the existing market conditions. The ground upon which the company relied to meet the city's demand for a reduction, as set out in the answer which it filed, was that as the city had ac-

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cepted the award when it was delivered and had raised no objection thereto, it was now precluded from seeking to set aside the principles upon which the rate of return was based. In its factum it went further and contended that, even if there was no estoppel, the principles then adopted should now be adhered to because it was on the strength of their having been adopted that the shareholders of the company invested their money in the enterprise. This contention cannot be made effective. In the first place, it involves neither a question of jurisdiction nor of law. In the second place, it is the duty of the Board to fix rates which, in its opinion, will be fair and reasonable at the time the order is made and for the period for which they are fixed. If any wrong principle or erroneous view has been adopted it is the duty of the Board at the next revision to correct the error. The argument that it would be unfair to the shareholders now to alter the rate of return is not a matter open for consideration on appeal. Moreover, when these shareholders invested their money they knew that the rates fixed were to be in force for three years only and that it would be the duty of the Board on the next revision to fix rates which at that time would be fair and reasonable under the circumstances then existing.

Our attention was also called to s. 47 (1*a*) as indicating an intention that evidence must be taken on all material points. That subsection reads as follows:—

(1a) On the hearing of any appeal referred to in subsection 1 of this section no evidence other than the evidence which was submitted to the Board upon the making of the order appealed from shall be admitted, and the Court shall proceed either to confirm or vacate the order appealed from, and in the latter event shall refer the matter back to the Board for further consideration and redetermination.

In my opinion this subsection means no more than that no new evidence is to be admitted on appeal.

The appeal of the company should therefore be dismissed with costs.

The appeal of the city should likewise be dismissed with costs. The items which should be included in the rate base cannot, in my opinion, be considered a question of jurisdiction or of law.

SMITH J.—The City of Edmonton had made an agreement with the Northern Alberta Natural Gas Development Company, by which the company obtained a fran-

chise to supply natural gas to the city, and agreed to construct the necessary works. The company failed to construct the works, and the city sued for damages for breach of contract. The actions were settled by an agreement dated 22nd August, 1922, under which the determination of the rates to be charged by the company for gas was referred to the Board of Public Utility Commissioners, and the company was, within six months after the fixing of the rates, to deposit $50,000 with the city, which was to be forfeited to the city as liquidated damages in case the company did not complete the construction of the works as agreed.

A rate hearing was held by the Board after this settlement, at which the company and the city were represented, and the Board made an award, setting out a rate basis and fixing prices for gas on this basis.

The difficulty about proceeding with the works had been the procuring of capital on the basis of prices provided in the original agreement and amendments made. The whole object of fixing a rate base and prices in advance of construction was to facilitate financing by the company. It would necessarily be on the basis of the award that investors would buy bonds and stock of the company. The company had the option of proceeding with the works or abandoning them and forfeiting the $50,000, after seeing the award. In July following the making of the award, the company assigned its franchise and property to the appellant, the Northwestern Utilities, Limited, which, by sale of its bonds and stock, raised the necessary capital, constructed the works, and put them in operation. The rate to be charged for gas was fixed by the award for three years, and at the end of this period the company applied to the Board for continuation of the rates fixed by the award. The rate base fixed by the Board in the award of 1922 contained many items, such as total investment, operating cost, depletion reserve, reserve for repayment of cost of plant, total necessary revenue, amounts of gas to be sold, and the rate of return on capital to be allowed. It is evident that, with the exception of the last of these items, the amounts fixed must have been estimates, liable to be varied by actual results.

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The rate of return to be allowed on capital was fixed in the award at 10%, not based on the ordinary rate of money on the market at the time or on an estimated future rate, but on consideration of the rate that would induce investors to risk their capital in an extremely hazardous and doubtful venture. At the hearing before the Board in 1922, the company had asked a 12% rate of return on capital, and the city had conceded 10%, which the Board fixed, though it stated that under the circumstances a return of more than 10% would not seem to be unjust. The reason set out for not fixing this higher rate was that it might so restrict the market that the higher rate would not compensate for the restriction of the market, and would therefore not be to the advantage of the company. It is, however, stated that in case of future revision, it may be found desirable, under certain circumstances, to increase this rate.

On the revision at the end of three years, this rate was not increased, but was reduced from 10% to 9%, at the instance of the city, and this reduction constitutes the ground of appeal.

In the reasons given by the Board in fixing the new rates, it is pointed out that, where rates have been fixed in advance of construction and financing, the Board is not precluded from subsequently making changes that may appear from subsequent reconsideration to be necessary, and it is then stated that

> those investing in such a case *must* depend on the fairness of the Board in seeing that the Company is allowed a fair and reasonable return upon its investment, but the Board may, and indeed it should, take into consideration the circumstances under which such investment was made.

In discussing these circumstances in reference to a request by the city for elimination from the rate base of the 1922 award of the item for bond discount, the Board says:

> There is, moreover, an additional factor to be considered in the present case and that is, that in 1922 the inclusion of the allowance for bond discount was practically agreed to by the city in its case and the item was not questioned by the city until at the recent hearing. It is only fair to assume that the fact of the inclusion of the bond discount in the rate base formed part of the inducement for the making of the investment. Under the circumstances, therefore, the Board does not feel justified in adopting the City's contention in this regard.

This lays down a principle with which one heartily agrees, and which applies exactly to the city's application for reduction of the rate of return on capital fixed in the award

of 1922 at 10%. The Board fixed this rate with the assent of the city, and this rate, coupled with the suggestion by the Board that it might be increased, "formed part of the inducement for the making of the investment."

The altered condition of the money market, given as a reason for the reduction of the rate to 9%, seems to me to have no bearing on the matter. The representation to the investor in 1922 was, for the risk you take in placing your capital in a hazardous undertaking, you will be allowed as a basis in fixing rates to be charged for gas a return of 10%. What the regular money market might be three years later could have nothing to do with the decision to invest. The whole question was, viewing the risk, and the chances, as matters then stood, was the chance of 10% on the money worth the risk of a bad investment, with the possibility of the loss of all or part of the capital?

The Board then, in my opinion, laid down a proper principle, and applied it in other instances, but failed to apply it to this item, as to which I think it was particularly applicable. The question is, can this Court set aside the finding of the Board as to this item on the appeal? I agree with my brother Lamont that, whether or not under the Act the Board was entitled to reduce the rate to 9% without evidence, because of a change in money market conditions, is a question of law, and that there is therefore a right of appeal, and it is with some regret that I feel bound to agree with him that the Board had jurisdiction to make the change in rate without evidence, and without giving the company an opportunity to offer evidence. The question of a fair rate of return on a risky investment is largely a matter of opinion, and is hardly capable of being reduced to certainty by evidence, and appears to be one of the things entrusted by the statute to the judgment of the Board.

I am not entirely in accord with the observations of my brother Lamont in reference to the sending out of someone to gather evidence of the state of the money market and acting on that party's report without the knowledge of the company. The objection in such a case would not be the failure to set out in the award the fact of such evidence and its nature, but the failure to disclose it to the company with an opportunity to answer it. If it were a case where, evi-

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dence being necessary, it had been taken in the manner suggested, or otherwise, and a finding based on it without disclosure of it to the company and an opportunity to answer it, I would regard such a proceeding as contrary to elementary principles of justice, and as affording, under the statute, a ground for setting the award as to this item aside and referring it back for reconsideration. It does not, however, appear that any evidence was taken, and as stated, I have concluded that there was power to make the change without evidence.

I therefore concur with my brother Lamont in the disposal of this appeal.

Appeals dismissed with costs.

Solicitors for Northwestern Utilities, Limited: *Milner, Carr, Dafoe & Poirier.*

Solicitor for the City of Edmonton: *John C. F. Bown.*

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*Oct. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 15.

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*Feb. 5.

IN THE MATTER OF A REFERENCE AS TO THE RELATIVE RIGHTS OF THE DOMINION AND PROVINCES IN RELATION TO THE PROPRIETARY INTEREST IN AND LEGISLATIVE CONTROL OVER WATERS WITH RESPECT TO NAVIGATION AND WATER-POWERS CREATED OR MADE AVAILABLE BY OR IN CONNECTION WITH WORKS FOR THE IMPROVEMENT OF NAVIGATION.

Constitutional law—Water-powers—Navigable river—Public right of navigation—Right of the Dominion as to the use of the bed of a river and as to expropriation of provincial property—Relative rights of the Dominion and provinces over water-power created by works done by the Dominion—Boundary waters—Interprovincial and provincial rivers—B.N.A. Act, ss. 91, 92, 102 to 126.

The questions referred to this court by the Governor General in Council were answered as follows: (1)

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

(1) *Reporter's Note.*—In view of the difficulties which the court found in dealing with the questions before it and of the impossibility of giving precise and categorical answers, it was thought best in order to avoid misleading as to what was decided, to put as a head-note the text of the formal judgment.

Question 1 (*a*). Where the bed of a navigable river is vested in the Crown in the right of the province, is the title subordinate to the public right of navigation?

Question 1 (*b*). If not, has the Dominion the legislative power to declare that such title is subordinate to such right?

Answer: The questions as framed postulate the existence of a public right of navigation in the rivers to which they refer, as well as their navigability.

The title to the bed of the river is subject to that public right, except in so far as, at the date of the Union, the Crown possessed by law or has since acquired, under Dominion legislation, a superior right to use or to grant the use of the waters of the river for other purposes, such for example, as mining, irrigation or industry.

Question 2. Where the bed of a navigable river is vested in the Crown in the right of the province, has the Dominion power, for navigation purposes, to use or occupy part of such bed or to divert, diminish, or change the flow over such bed (*a*) without the consent of the province; (*b*) without compensation?

Question 3. Has the Parliament of Canada the power, by appropriate legislative enactment, to authorize the Dominion Government to expropriate the lands of the Crown in the right of the province for the purposes of navigation with provision or without provision for compensation?

Answer: These questions cannot be answered categorically either in the affirmative or in the negative.

The conditions controlling the exercise of Dominion legislative powers for purposes embraced within the comprehensive phrase, "navigation purposes," depend in part upon the nature of the "purpose," in part upon the nature of the means proposed for accomplishing it, and in part upon the character of the particular power called into play. Reference is respectfully made to the observations in the accompanying reasons, as indicating the governing principles with as much definiteness as is safe or practicable.

Question 4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province, amongst others, shall be the property of Canada, namely "Canals with lands and water-power connected therewith."

Has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purpose of navigation?

Question 5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works for the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since Confederation which is not required from time to time for the purposes of navigation?

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REFERENCE *re* WATERS AND WATER-POWERS.

Answer: Whatever subjects are comprehended under the phrase "Water-Power" in the 1st item of the third schedule, by section 106 passed to the Dominion, there was left to the provinces neither proprietary interest in, nor beneficial ownership of such subjects; and under section 91 (1) legislative control over them is exclusively committed to the Dominion.

As to water-powers (and these of course, are not comprised within that item) "created or made available by reason of extensions, enlargements or replacements made by the Dominion since Confederation" or "by works for the improvement of navigation constructed * * * in whole or in part since Confederation," it is impossible to ascertain the respective powers or rights of the Dominion and the provinces in relation thereto, in the absence of a more precise statement as to the character of the works, as to the legislative authority under which the works were executed, and as to the circumstances pertinent to the question whether or not the conditions of such authority were duly observed.

Question 6 (*a*). Has the Dominion exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (1) the improvement of navigation in such waters, or (2) for the development of power, or (3) for both?

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

Question 6 (*b*). If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

Answer: The nature and extent of the respective powers, rights and interests of the Dominion and the provinces in, and in respect of such water-powers, would depend upon a variety of facts, including, *inter alia*, the terms of the Treaty, and the respective rights of the Dominion and the provinces in, and in relation to, the waters affected. In the absence of information as to such facts, it is impracticable to give an intelligible answer to the questions propounded.

Question 7. Has the Parliament of Canada legislative power to authorize the construction and operation by the Dominion Government of works wholly for power purposes and the acquisition by purchase or expropriation of the lands and property required for the purposes of such works including lands of the Crown in the right of a province (*a*) in inter-provincial rivers; and (*b*) in provincial rivers?

"Interprovincial rivers" in this question means rivers flowing along or across the boundaries between provinces.

Answer: As to both "provincial rivers" and "interprovincial rivers," Parliament has jurisdiction in respect of such works, if they fall within the ambit of sec. 92 (10*a*). With reference to the expropriation of provincial

Crown lands "for the purposes of such works," the answer to the question would, to some extent, depend upon the particular purpose for which such lands were required. In answering this question, sec. 92 (10*c*) is not taken into account. Reference is respectfully made to what has been said upon that subject in the accompanying reasons.

Question 8. May a province notwithstanding the construction by the Dominion for the purposes of navigation of works in a river the bed of which is within such province, control, regulate and use the waters in such river so long as such control, regulation and use does not interfere with navigation? In the case of a river flowing between two provinces may such provinces jointly control, regulate and use the water in the same manner?

Question 9. Has a province the right to control or use the waters in provincial rivers and to develop or authorize the development of water-powers within the province provided that in so doing navigation is not prejudiced and that the province complies with Dominion requirements as to navigation?

Answer: These two questions mutually overlap, and it is convenient to deal with them together. If there is no valid conflicting legislation by the Dominion under an overriding power—the power for example bestowed upon the Dominion by sec. 92 (10*a*)—the several provinces have the rights which are the subject of interrogatory number 9.

As to the first branch of the eighth question. The authority of the provinces to "control, regulate and use" such waters, in the circumstances mentioned, is subject to the condition that, in the exercise thereof, the provinces do not interfere in matters the control of which is reserved exclusively for the Dominion, and that all valid enactments of the Dominion, in relation to the navigation works, or in relation to navigable waters, be duly observed.

This condition is not necessarily identical with the condition expressed in the question by the words "so long as such control, regulation and use does not interfere with navigation." The question therefore, in the form in which it is put, cannot be answered in the affirmative; and, as the exercise of legislative jurisdiction, in the comprehensive terms of the question, might encroach upon the exclusive jurisdiction of the Dominion, the proper answer seems to be in the negative.

As to the second branch, considering the variety of meanings which might attach to the phrase "jointly control, regulate and use," no precise or useful answer is possible.

The answers to these questions, conformably to the views adverted to above, also proceed upon the assumption that the questions have no reference to any jurisdiction which might be acquired by the procedure laid down in sec. 92 (10c).

Question 10. (*a*) If question 4 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*b*) If question 5 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*c*) If the answers to both questions 6 (*a*) and 6 (*b*) are in the negative, what are the respective rights and interests of the Dominion and the provinces in relation to such water-powers?

Answer: In view of what has already been stated in response to the 4th, 5th and 6th interrogatories, no answer to this question is called for.

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REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act*, of certain questions for hearing and consideration as to the relative rights of the Dominion and Provinces in relation to the proprietary interest in and legislative control over waters with respect to navigation and water-powers created or made available by or in connection with works for the improvement of navigation.

The first Order in Council providing for the reference, dated 14th April, 1928 (P.C. 592), was as follows:—

"The Committee of the Privy Council have had before them a report, dated 13th April, 1928, from the Minister of Justice, submitting that at the conference of representatives of the Dominion and Provincial Governments held at Ottawa in the month of November, 1927, the Premiers of certain of the Provinces questioned the right of the Dominion to water-powers created or made available by the erection of Dominion works for the improvement of navigation and asserted a right on the part of the Provinces to such water-powers within the limits of the Province.

"The Minister observes that in the discussion which followed with regard to this claim and also with regard to the whole question of the division of legislative control over and proprietary interest in water-powers it was found impossible to reach any general agreement as between the Dominion and the Provinces, and in the result a request was made by the Premiers of Ontario and Quebec that the Dominion undertake to submit a case to the Supreme Court of Canada for hearing and consideration.

"In pursuance of this request, Your Excellency was pleased, by Order in Council of the 18th January, 1928, (P.C. 115), passed on the recommendation of the Minister of Justice, to refer certain questions to the Supreme Court of Canada for hearing and consideration pursuant to section 60 of the Supreme Court Act.

"The Minister states that the statistics show that the inland water-borne commerce of the Dominion has attained to great dimensions and with the growth and settlement of the country will involve large future expenditures

for improvements of the extensive waterways comprising the inland navigation of the Dominion.

"The Minister submits that owing to the great importance of the questions in controversy, it was considered advisable to consult with representatives of the Provinces with respect to the questions to be submitted, and such conference having been held it was deemed advisable to revise the said questions and to submit additional questions, viz., Nos. 8 and 9 hereinafter set out, at the request of representatives of the Province of Ontario.

"The Minister accordingly recommends that Order in Council of the 18th January, 1928 (P.C. 115) be rescinded, and that, pursuant to the powers in that behalf conferred by section 60 of the Supreme Court Act, Your Excellency may be pleased to refer to the Supreme Court of Canada for hearing and consideration the following questions:—

1. (*a*) Where the bed of a navigable river is vested in the Crown in the right of the Province, is the title subordinate to the public right of navigation?
   (*b*) If not, has the Dominion the legislative power to declare that such title is subordinate to such right?
2. Where the bed of a navigable river is vested in the Crown in the right of the Province, has the Dominion power, for navigation purposes, to use or occupy part of such bed or to divert, diminish, change the flow over such bed (*a*) without the consent of the Province; (*b*) without compensation?
3. Has the Parliament of Canada the power, by appropriate legislative enactment to authorize the Dominion Government to expropriate the lands of the Crown in the right of the Province for the purposes of navigation with provision or without provision for compensation?
4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province, amongst others, shall be the property of Canada, namely, "Canals with lands and water-power conected therewith."

   Has the Province any proprietary interest in or beneficial ownership of or legislative control over

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the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purposes of navigation? If so, what is the nature or extent of such interest or ownership or control?

5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works of the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since Confederation which is not required from time to time for the purposes of navigation? If so, what is the nature or extent of such interest, ownership or control?

6. (*a*) Has the Dominion the exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (i) the improvement of navigation in such waters, or (ii) for the development of power, or (iii) for both

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

(*b*) If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the Province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

(*c*) If neither the Dominion nor the Province has the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-

powers, what are their respective rights and interests in relation to such water-powers?

7. Has the Parliament of Canada legislative power to authorize the construction and operation by the Dominion Government of works wholly for power purposes and the acquisition by purchase or expropriation of the lands and property required for the purposes of such works including lands of the Crown in the right of a province (*a*) in interprovincial rivers; and (*b*) in provincial rivers?

"Interprovincial rivers" in this question means rivers flowing along or across the boundaries between provinces.

8. May a province notwithstanding the construction by the Dominion for the purposes of navigation of works in a river the bed of which is within such province, control, regulate and use the waters in such river so long as such control, regulation and use does not interfere with navigation? In the case of a river flowing between two provinces may such provinces jointly control, regulate and use the water in the same manner?

9. Has a Province the right to control or use the waters in provincial rivers and to develop or authorize the development of water-powers within the province provided that in so doing navigation is not prejudiced and that the province complies with Dominion requirements as to navigation?

"The Committee concur in the foregoing and advise that Your Excellency may be pleased to refer the said questions to the Supreme Court of Canada for hearing and consideration, accordingly."

A second Order in Council, rearranging questions, dated 31st May, 1928 (P.C. 921), was as follows:—

"The Committee of the Privy Council have had before them a report, dated 29th May, 1928, from the Minister of Justice, stating that by Order in Council dated 14th April, 1928 (P.C. 592), certain questions touching the rights of the Dominion and the Provinces, respectively, in relation to the proprietary interest in, and legislative control over, waters with respect to navigation and water-powers created or

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made available by or in connection with works for the improvement of navigation, were referred to the Supreme Court of Canada for hearing and consideration pursuant to section 60 of the Supreme Court Act;

"The Minister observes that the said Court have suggested to counsel for the Attorney-General of Canada that it would be more convenient in considering and answering the questions if the concluding sentence of questions Nos. 4 and 5 and paragraph (*c*) of question No. 6 were transposed from their present position and consolidated in a new question, to be added as question No. 10.

"The Committee, on the recommendation of the Minister of Justice, advise that the questions set forth in Order in Council of the 14th April, 1928 (P.C. 592), be rearranged in accordance with the suggestion of the Supreme Court of Canada, and that the said questions, so rearranged, be as follows:—

1. (No change.)

2. (No change.)

3. (No change.)

4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province amongst others, shall be the property of Canada, namely, "Canals with lands and water-power connected therewith."

   Has the Province any proprietary interest in or beneficial ownership of or legislative control over the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purposes of navigation?

5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works for the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since

Confederation which is not required from time to time for the purposes of navigation?

6. (*a*) Has the Dominion the exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (i) the improvement of navigation in such waters, or (ii) for the development of power, or (iii) for both?

The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.

6. (*b*) If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the Province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?

7. (No change.)

8. (No change.)

9. (No change.)

10. (*a*) If question 4 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*b*) If question 5 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?

(*c*) If the answers to both questions 6 (*a*) and 6 (*b*) are in the negative, what are the respective rights and interests of the Dominion and the Provinces in relation to such water-powers?

Pursuant to an order of the Court, notification of the hearing of the reference was sent to the Attorneys General of all the provinces and was published in the *Canada Gazette*. The Attorneys General of the Provinces of

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Ontario, Quebec, British Columbia, Manitoba and Saskatchewan were represented by counsel at the hearing.

N. W. Rowell K.C., C. Laurendeau K.C., H. J. Symington K.C., C. P. Plaxton K.C., and *V. C. Macdonald* for the Attorney General of Canada.

W. N. Tilley K.C., S. Johnston, K.C., and *C. F. H. Carson* for the province of Ontario.

E. Lafleur K.C., C. Lanctot K.C., and *A. Geoffrion K.C.* for the province of Quebec.

E. B. Ryckman K.C., I. F. Strachan and *J. E. Lane* for the province of British Columbia.

F. H. Chrysler K.C. for the province of Manitoba.

H. Fisher K.C. for the province of Saskatchewan.

The judgment of the Court (1) was delivered by

DUFF J.—Certain interrogatories have been referred to us by the Governor General in Council concerning chiefly the distribution of public assets and legislative powers under the B.N.A. Act. They particularly relate to the scope of the legislative authority of the Dominion under certain of the enumerated heads of section 91, considered in connection with the authority of the provincial legislatures under section 92, and under the group of sections beginning with section 102 and ending with section 126, dealing with assets, revenue and sources of revenue. By the last mentioned group of sections, the assets, duties and revenues, including the sources of revenue over which the legislatures of the confederated provinces possessed the power of appropriation at the date of the Union, were distributed, and assigned in part to the control of the Dominion Parliament, and in part to that of the provincial legislatures. *Attorney-General of Ontario* v. Mercer (2). The sources of revenue assigned to the provinces as well as the revenues derived from them, and the revenues raised under the special powers conferred by the Act, were to remain vested in the Crown, as the Sovereign Head of the several provinces, but were to be "subject to the administration and control" of the

(1) *Reporter's Note.*—Mr. Justice Smith, while concurring with Duff J., wrote a separate judgment.

(2) (1883) 8 App. Cas. 767, at pp. 774 to 779.

legislatures of those provinces. *St. Catherines Milling and Lumber Company* v. *The Queen* (1), and *Liquidators of the Maritime Bank of Canada* v. *The Receiver-General of New Brunswick* (2). By the same series of sections, provision was made for the assumption by Canada of the burden of the public debts of the several provinces, within limits designated by the Act for each province, and for the payment, by the Dominion, according to a prescribed scale, of an annual grant to each of the provinces; which grants were to be " in full settlement of all future demands on Canada." By section 91, the Dominion was given power to raise money, by any mode or system of taxation, and by section 92, each of the provinces was given the power to raise a revenue for provincial purposes by direct taxation, and by means of licenses.

It has never been suggested that either the Dominion alone or a province alone is entitled to alter the terms of this arrangement for the distribution of assets, liabilities and sources of revenue.

In the *Ontario Mining Co.* v. *Seybold* (3), the Judicial Committee of the Privy Council had to consider whether the Dominion Parliament, without the concurrence of Ontario, in the exercise of its legislative authority over Indians and lands reserved for Indians, could, after the surrender of the Indian title by the North West Anglo Treaty of 31st October, 1873, for the purposes of an Indian reserve, for which provision was made by that treaty, set out and appropriate portions of the land surrendered as reserves for the use of the Indians. Their Lordships negatived any such power in express terms (page 82), and held that such an appropriation could only be effected by the joint action of the two governments; a conclusion in which the Dominion and Ontario had, by legislative agreement, already concurred. Their Lordships declared (page 79) that the right of disposing of Crown lands

> can only be exercised by the Crown under the advise of the Ministers of the Dominion or the province, as the case may be, to which the beneficial use of the land or its proceeds has been appropriated, and by an instrument under the seal of the Dominion or the province.

(1) (1888) 14 App. Cas. 46, at p. 57.
(2) [1892] A.C. 437, at pp. 443, 444.
(3) [1903] A.C. 73.

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This decision of 1902 proceeded upon the principle of earlier judgments delivered in 1898, in the first *Fisheries* case, *Atty. Gen. for Canada* v. *Atty. Gen. for Ontario* (1), and in the *St. Catherine Milling and Lumber Company's* case (2) already mentioned, which was decided in 1888. In the first *Fisheries case* (1), their Lordships had to pass upon the validity of an enactment of the Parliament of Canada (R.S.C., c. 95, s. 4) empowering the Governor in Council to grant fishery leases. Their Lordships decided that "in so far as" it empowered

> the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it.

The legislative authority in respect to "Fisheries," conferred upon the Dominion Parliament by section 91, does not, it was held, involve the power to deal with the property of a province as if the administration of that property had been entrusted by the B.N.A. Act, to the control of the Dominion Parliament; for, as Lord Herschell, who delivered the judgment of the Board, said, such a ruling would enable the Dominion to

> transfer to itself property which had by the B.N.A. Act been left to the provinces and not vested in it. (p. 713).

The effect of the decisions seems to be, that neither the Dominion nor a province can take possession of a source of revenue which has been assigned to the other, and as a source of revenue, appropriate it to itself, nor, as owner, transfer it to another.

This, of course, is not to say that the Dominion in exercising its legislative authority under section 91, may not legislate in such a way as to affect the proprietary rights of a province. It is plain that in consequence of legislation on the subject, for example, of Fisheries, the provinces may be very greatly restricted in the exercise of their proprietary rights; but so long as the Dominion legislation truly concerns the subject of "Fisheries," as that subject is envisaged by section 91, such legislation has the force of law, however harmful, or even foolish, it may appear to be. Within the limits of the subject matters assigned to it, the authority of the Dominion is supreme, and no court of justice has jurisdiction to take cognizance of any complaint that such authority has been abused.

(1) [1898] A.C. 700. (2) 14 App. Cas. 46.

The extent to which the provincial legislatures may be restricted in, or excluded from, the control of provincial property by the enactment of Dominion laws operative under section 91 cannot be defined in the abstract. That depends primarily upon the character of the particular authority which the Dominion is exercising. On the present Reference, the discussion has been largely concerned with the legislative authority of the Dominion Parliament in relation to the permanent occupation of Provincial Crown lands, and the permanent diversion and alteration of the flow of rivers and streams in derogation of the rights of a province, as proprietor of the beds of such rivers and streams, for purposes which have been compendiously styled, in the interrogatories, "navigation purposes."

Before proceeding to a consideration of some of the points debated, it is necessary to notice the distinction, now well settled, between those matters, which, according to the true construction of the words designating the subject or subjects falling under a "specially enumerated" head of s. 91, are strictly and necessarily within the limits of those subjects, so that legislation in relation to such matters, by a province, is in no circumstances competent; and other matters, which, though not necessarily or strictly falling within such subjects, may be dealt with by Dominion legislation under some power arising by implication, because such implied power is requisite to enable the Dominion fully to perform the legislative functions devolving upon it in relation to the designated subject or subjects. With regard to such last mentioned matters, provincial legislation, dealing with them in their provincial aspects, may be competent and operative, until superseded or overborne by some valid enactment passed by the Dominion, having relation to their Dominion aspects.

There is one subject in relation to which it has been expressly held that the exclusive authority of the Dominion, within the strict limits traced by the language of s. 91 involves the power to legislate for the taking and using of provincial Crown lands for the purposes for which the authority was bestowed. In legislating for railways extending beyond provincial limits, it has been held, that it is of the essence of the Dominion authority to define the course of the railway, and to authorize the construction and working of the railway along that course, without

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regard to the ownership of the lands through which it may pass (*Attorney General for Quebec* v. *Nipissing Central Ry. Co.* (1)) "railway legislation, strictly so called" (in respect of such railways), is within the exclusive competence of the Dominion, and such legislation may include, *inter alia* (*Canadian Pacific Ry.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2)), regulations for the construction, the repair and the alteration of the railway and for its management. In the circumstances of this country, a provincial right of interdiction upon the occupation of provincial Crown property lying upon the route of the railway is incompatible with either a plenary or an exclusive Dominion authority over the construction or working of such railways; and this would have been even more strikingly evident, in 1867. On the other hand, the authority granted by section 91, head 4, "Indians and lands reserved for Indians," while it enables the Dominion to legislate fully and exclusively, upon matters falling strictly within the subject "Indians," including, *inter alia,* the prescribing of residential areas for Indians, does not, as we have seen, embrace the power to appropriate a tract of provincial Crown land for the purposes of an Indian reserve, without the consent of the province, (*Seybold's* case (3)).

So also under head 12 of section 91, which invests the Dominion with jurisdiction to make laws in relation to all matters pertaining to the subjects, "Seacoast and Inland Fisheries," it has been decided that the Dominion has no right to authorize, for the purposes of fishing in waters where there is a public right of fishing, the affixing of fishing apparatus to the *solum,* where that is the property of a province. The exclusive power to license such use of the *solum* is, according to this decision, committed to the province. *Atty. Gen. for Quebec* v. *Atty. Gen. of Canada* (4).

Again, there is judicial sanction for the view that the authority given to the Dominion under s. 91 (10), "Navigation and shipping," does not, in its essence, include the power to authorize the permanent occupation of provin-

(1) [1926] A.C. 715.
(2) [1899] A.C. 367, at p. 372.
(3) [1903] A.C. 73.
(4) [1921] 1 A.C. 401, at pp. 428, 431, 432.

cial lands for harbour works, or to vest the bed of a river belonging to a province in a Board of Harbour Commissioners for harbour purposes; that such a power, if it exists, is in the nature of an ancillary power, and can only be exercised upon the condition of paying compensation to the province. *City of Montreal* v. *Harbour Commissioners of Montreal* (1); *Reference re s. 189, Railway Act* (2); *Atty. Gen. for Quebec* v. *Nipissing Central Ry. Co.* (3).

Counsel for the Dominion claim, under section 91, a much more sweeping jurisdiction. Legislative authority, under the enumerated heads of that section, being plenary, carries with it, it is argued, in virtue of that authority, the widest discretion touching the means to be employed for the advancement of any legislative scheme or purpose within the purview of any such enumerated head. To the extent to which it is considered advisable to do so, in order to proceed effectually in pursuit of its objects, Parliament, it is said, is clothed with the power to legislate, for affecting such proprietary rights, and indeed, where it is conceived to be necessary, for the transfer of such rights to the Dominion, or to others. In support of this view, the initial words of section 91 are invoked.

It is hereby declared that notwithstanding * * * anything in this Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the subjects next hereinafter enumerated.

From these words, coupled with the concluding paragraph of s. 91, the deduction is drawn that in construing and giving effect to the language of section 91, defining the powers of Parliament, you may disregard the provisions of the Act, already discussed, by which certain assets and sources of revenue are exclusively vested in the control of the provincial legislatures; in the sense that you may treat the rights of the provinces under those sections as upon the same plane as the proprietary rights of private individuals.

It was argued that, to deny to the Dominion Parliament an unrestricted discretion in disposing of provincial property for purposes within the enumerated heads of s. 91 is equivalent to denying the plenary character of the Do-

(1) [1926] A.C. 299, at pp. 312, 313.
(2) [1926] S.C.R. 163, at pp. 175, 176.
(3) [1926] A.C. 715.

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minion legislative authority; that the provincial contention in the opposite sense has no other basis than the possibility that legislative powers of the Dominion, as interpreted by the Dominion, in argument, might be abused to the injury of the provinces; a consideration inadmissible in a court of law.

There is nothing more clearly settled than the proposition that in construing section 91, its provisions must be read in light of the enactments of section 92, and of the other sections of the Act, and that where necessary, the *prima facie* scope of the language may be modified to give effect to the Act as a whole. It was recognized at an early stage in the judicial elucidation of the Act that any other principle of construction might have the effect of frustrating the intention of its authors who

> could not have intended that the powers assigned exclusively to the provincial legislatures should be absorbed in those given to the Dominion Parliament.

The Citizens Ins. Co. of Canada v. *Parsons* (1); *Great West Saddlery Co.* v. *The King* (2); *Atty. Gen. for Ontario* v. *Reciprocal Insurers* (3). The argument presented on behalf of the Dominion hardly does justice to this principle. The authority of the Dominion Parliament in relation to railways under section 92-10 (*a*) is a plenary authority, which *prima facie* would enable the Dominion to legislate fully in respect of such enterprises as the Intercolonial Railway, and the railway stipulated for in the Terms of Union with British Columbia. But it could hardly be argued, as the Dominion contention, carried to its logical conclusion, seemed to suggest, that the arrangement embodied in the B.N.A. Act as to the Intercolonial Railway, might, as to date of completion, for example, be amended at will by the Dominion in exercise of its authority to legislate in respect of interprovincial railways. Similar observations might be made with regard to the terms of Union with Prince Edward Island, dealing with steamboat services. Then there are the provisions in sections 102-126 and the corresponding stipulations contained in the Terms of Union with British Columbia and with Prince Edward Island, touching the apportionment of the burden of the debts of the provinces.

(1) (1881) 7 App. Cas. 96, at p. 108.
(2) [1921] 2 A.C. 91, at pp. 100, 101.
(3) [1924] A.C. 328, at pp. 340, 341.

The Dominion has, under section 91 (1), complete authority to legislate on the subject of the public debt, but it could hardly be contended that this authority would enable the Dominion to legislate in such a manner as to prejudice its obligations so constituted.

Then it seems proper to call attention to s. 91 (3) of the Act, and to contrast the unrestricted language of that head with section 125.

It is perhaps not superfluous to observe that the provisions of the Order in Council, setting forth the terms of the agreement, in pursuance of which British Columbia entered the Union, in so far as they concern the subjects of revenue and assets, were treated by the Judicial Committee of the Privy Council in the *Precious Metals* case, *The Atty. Gen. of British Columbia* v. *The Atty. Gen. of Canada* (1), as constituting a modification of the provisions of the principal statute, in sections 102-126, dealing with the same subjects, and as having, in virtue of s. 146 of the B.N.A. Act, precisely the same force as those provisions.

The view cannot be accepted that, by the enactments of s. 91, the Dominion, in execution of its legislative powers under that section, is empowered to rewrite the terms of the agreements under which British Columbia and Prince Edward Island entered the Union; and that being so, it cannot be maintained that it is competent to the Dominion in exercise of such powers to legislate in disregard of the provisions of sections 102-126.

In considering the effect of the phrase "notwithstanding anything in this Act" one must not overlook the fact that it is only the "exclusive authority" of the Dominion under the enumerated heads of s. 91 which is accorded the primacy intended to be declared by those words. In themselves they have not the effect of giving pre-eminence to the incidental or ancillary power; which are not strictly exclusive. As already observed, in recent pronouncements touching the appropriation of Provincial Crown property in professed exercise of such powers, support is given to the view that, if such appropriation be permissible in exercise of them, then the payment of compensation may be a condition of that exercise; and there appears to be, it may be added, no decision, and, except in the observations in the

(1) (1888) 14 App. Cas. 295.

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judgments referred to, no dictum, giving any support to the view that in virtue of an ancillary or incidental power the Dominion Parliament is entitled to authorize the permanent occupation of Provincial Crown property.

The task of reconciling the various sections of the Act is one of great difficulty. You must give full effect to the exclusive powers of the Dominion under section 91; yet in ascertaining the scope of those powers you must have regard to the other provisions of the Act. The character of the exclusive power may be such, on the true construction of section 91, as to involve the right to take, or to give to others, possession of Provincial Crown property, for the purpose of executing the power. The decisions already cited seem to show that such a conclusion must be founded on solid, not to say demonstrative, considerations; but, where the right is unmistakably involved in the authority given, then, of course, to that right effect must be given. But although the Dominion may, by legislation enacted in exercise of its exclusive powers relating to railways and canals, authorize the construction through the property of a province of a railway or canal, to which its jurisdiction extends, this does not involve the right to appropriate the whole beneficial interest of the site of the work (including the minerals, for example), for the purpose of making it available as an asset or source of revenue for the benefit of the Dominion or of the Dominion's grantees, where that site is vested in His Majesty and is, by the B.N.A. Act, subject to the administration and control of the Provincial legislature.

Apart from the fact that such legislation would not be legislation exclusively competent to the Dominion, it would transcend the ambit of Dominion authority touching railways or canals, which was not intended to enable the Dominion to take possession of sources of revenue assigned to the provinces, and by assuming the administration of them, to appropriate to itself a field of jurisdiction belonging exclusively to the provinces. Similar considerations apply to the exploitation and disposition of water-powers appropriated by the Dominion in exercise of its legislative authority in relation to canals. Assuming such an appropriation by the Dominion to be competent without payment of compensation, the Dominion could not constitutionally assume the administration or control of water-powers so acquired for purposes not connected with the canal.

We must, as best we can, reconcile the control by the provinces of their own assets as assets, with the exercise by the Dominion of its exclusive powers for the purposes which those powers were intended to subserve. This can only be accomplished by recognizing that the proprietary rights of the provinces may be prejudicially affected, even to the point of rendering them economically valueless, through the exercise by the Dominion of its exclusive and plenary powers of legislation under the enumerated heads of section 91. On the other hand, in giving effect to the provisions of the British North America Act, we must rigorously adhere to the radical distinction between these two classes of enactment: legislation in execution of the Dominion's legislative powers under section 91, which may, in greater or less degree, according to the circumstances and the nature of the power, affect the proprietary rights of the provinces, and even exclude them from any effective control of their property; and, in contradistinction, legislation conceived with the purpose of intervening in the control and disposition of provincial assets, in a manner, which, under the enactments of that Act touching the distribution of assets, revenues and liabilities, is exclusively competent to the provinces.

Before proceeding to an examination of the interrogatories submitted, a few words of comment are required upon a point of more or less general application.

During the argument there was much discussion touching the effect of s. 92 (10c). In the construction and application of that enactment, questions must emerge of far-reaching significance and importance. But such questions do not appear to be presented by the interrogatories before us. True, it cannot admit of much doubt that, as regards many of the kinds of works within the scope of them, the Dominion might acquire legislative jurisdiction by following the procedure prescribed by s. 92 (10c); but the interrogatories, which are expressed in general terms, are naturally read as concerning a jurisdiction given directly by the *British North America Act* itself, rather than mediately through the instrumentality of declarations by the Parliament of Canada under s. 92 (10c). Questions 2 and 3 illustrate this. At bar, the discussion of this sub-head 92 (10c) was chiefly directed to an investigation of its bearing upon the answer to interrogatory no. 7. But it does

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not appear that this interrogatory ought to be read as requiring an opinion upon the points discussed.

The authority created by s. 92 (10c) is of a most unusual nature. It is an authority given to the Dominion Parliament to clothe itself with jurisdiction—exclusive jurisdiction—in respect of subjects over which, in the absence of such action by Parliament, exclusive control is, and would remain vested in the provinces. Parliament is empowered to withdraw from that control matters coming within such subjects, and to assume jurisdiction itself. It wields an authority which enables it, in effect, to rearrange the distribution of legislative powers effected directly by the Act, and, in some views of the enactment, to bring about changes of the most radical import, in that distribution; and the basis and condition of its action must be the decision by Parliament that the "work or undertaking" or class of works or undertakings affected by that action is "for the general advantage of Canada," or of two or more of the provinces; which decision must be evidenced and authenticated by a solemn declaration, in that sense, by Parliament itself.

Had the intention been to address to us interrogatories touching the conditions under which this abnormal responsibility may devolve upon Parliament, it seems probable that such intention would have been explicitly manifested.

The language of the 7th interrogatory does not suggest an intention to elicit a response concerning a hypothetical jurisdiction, which may never come into existence; but rather concerning the extent and conditions of an existing jurisdiction, arising directly and immediately from the enactments of the Act itself.

The 2nd and 3rd questions are broadly expressed. "Navigation purposes" is a sweeping phrase. It has been employed to denote not only regulation and control of ships and shipping, but the control of navigable waters in the interests of shipping, including the improvement of navigability, the execution of works for facilitating navigation, the provision of such aids to navigation as beacons, buoys, and lighthouses; the establishment of harbours and harbour works, such as those considered in the *Montreal Harbour* case (1), which included an embankment and railway on

(1) [1926] A.C. 299.

the shore of the harbour, quays, a dry-dock, and a ship-repairing plant. And it was argued on behalf of the Dominion that "navigation and shipping" within the intendment of s. 91 (10), would embrace all such matters as those just mentioned, as well as the construction, maintenance and operation of canals and incidental works, and generally all matters relating to transport by water.

It is, at least, doubtful whether the exclusive jurisdiction contemplated by item 10, s. 91, extends to many of the matters, which are above indicated as falling within the scope of the phrase "navigation purposes," when that phrase is given an interpretation so wide as that which counsel for the Dominion ascribe to it. By the 9th head of the same section, exclusive jurisdiction is entrusted to the Dominion in respect of matters falling within the subjects described by the words "beacons, buoys and lighthouses," and, under no. 13 in respect of matters included within the subject "Ferries" between a province and other countries or between two provinces. Exclusive jurisdiction with regard to canals, and to other works of like character, extending beyond the limits of a province, is confided to the Dominion under s. 92 (10a); and by sub-heads (*a*) and (*b*) of s. 92 (10) the subjects of that exclusive jurisdiction comprise all matters falling within the descriptions "Lines of steam or other ships connecting the province with any other or others of the provinces," and "Lines of steamships between the province and any British or foreign country." Further, there is much to be said for the view that, subject to the power bestowed upon the Dominion by sub-head (*c*) of s. 92 (10) exclusive authority is committed to the provinces with respect to canals and other similar works (which, according to the contention of the Dominion, would fall within the tenor of the phrase "navigation purposes"), when such works are wholly situated within a province. It is not necessary to decide the point, but it is, at all events, quite open to argument that sub-heads (*a*) and (*b*) are intended to define exceptions to the principal clause of head 10, s. 92; and that, consequently, "works and undertakings," under the principal clause, include works and undertakings of the nature of those specified in these sub-heads so long as they are wholly within the boundaries of a province.

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If the subjects included under head 10, s. 91, embrace those falling within head 13, as well as "beacons, buoys, lighthouses" designated in head 9, and "works and undertakings" connected with "navigation and shipping" and within the field of sub-heads (*a*) and (*b*) of s. 92 (10), then, to borrow the phrase used by Lord Haldane speaking for the Privy Council in *John Deere Plow Co.* v. *Wharton* (1), the enactment in no. 13 and the designation of "beacons, buoys, lighthouses" in item 9 and of the subjects, as well, connected with navigation and shipping in sub-heads (*a*) and (*b*) of s. 92 (10) are nugatory; on the other hand, if the principle be applied which has controlled the operation of the second head of s. 91 "Regulation of Trade and Commerce" (*Toronto Electric Commissioners* v. *Snider* (2)), and of head 13 of s. 92, "Property and Civil Rights," as respects matters connected with the subject (head 11), "Incorporations and Companies" (*John Deere Plow Co.* v. *Wharton* (3)), then the matters explicitly dealt with in heads 9 and 13 of s. 91 and 10a and 10b of s. 92, which ordinarily might be embraced within the general language of no. 10 of s. 91, must be treated as outside the scope of that head.

Nevertheless, it has been said that the language of ss. 91 and 92

> and of the various heads which they contain obviously cannot be construed as having been intended to embody the exact disjunctions of a perfect logical scheme. The draftsman had to work on the terms of a political agreement, terms which were mainly to be sought for in the resolutions passed at Quebec in October, 1864. To these resolutions and the sections founded on them, the remark applies which was made by this Board after the Australian Commonwealth Act in a recent case *Attorney General for Commonwealth* v. *Colonial Refining Co.* (4), that if there is at points obscurity in language, this may be taken to be due, not to uncertainty as to general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages. It may be added that the form in which provisions in terms over-lapping each other have been placed side by side shows that those who passed the Confederation Act intended to leave the working out an interpretation of these provisions to practice and to judicial decision. *John Deere Plow Co.* v. *Wharton* (5).

It is notorious that for many years, probably ever since the formation of the Union, the Dominion Parliament and

(1) [1915] A.C. 3 30, at p. 339, 340.
(2) [1925] A.C. 396.
(3) [1915] A.C. 330.
(4) [1914] A.C. 254.
(5) [1915] A.C. 330, at p. 338.

Government have assumed, and acted on the assumption, that the authority derived from head no. 10 of s. 91 was sufficient to enable Parliament to legislate, in respect of most, if not all, the classes of matters it is now contended fall within the scope of the phrase "navigation purposes"; and in support of that view it may be noticed that the majority of the members of this court took the view in *Booth* v. *Lowery* (1), that river improvements, consisting of storage dams and basins, intended to improve the navigability of the river Ottawa and one of its tributaries, were subject to the legislative control of the Dominion under that head. Further, as already observed, the recent pronouncements in the judgments in the Privy Council and this court in the three cases cited above, beginning with the *Montreal Harbour* case (2), give countenance to the view that the Dominion may have an implied authority incidental or ancillary to its exclusive authority under head 10 of s. 91, to legislate in respect of some of the purposes intended to be described as "navigation purposes" in these two questions; although the judgment in the *Montreal Harbour* case (2) seems to say that the exercise of this ancillary or incidental authority is, or may be, conditioned upon the payment of compensation.

The principle of the decision in *Atty. Gen. for Quebec* v. *Nipissing Central Ry. Co.* (3) would apply to the authority given by 92 (10a) in respect to canals extending beyond a province, which must, for reasons similar to those governing the scope of the authority given by the same sub-head in relation to railways, be held to include the power to determine the route of the canal and make effectual provision for the construction and operation of it on the route determined. Such powers are of the essence of the exclusive authority vested in the Dominion in relation to railways and canals. Obviously, therefore, the 2nd and 3rd questions cannot be answered in the negative. Answers in that sense might convey the impression that the authority of the Dominion, in relation to such a purpose as the construction of a canal, would not in any circumstances involve the power to make use of Provincial Crown property without the consent of the province.

(1) (1916) 54 Can. S.C.R. 421. (2) [1926] A.C. 299.
(3) [1926] A.C. 715.

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On the other hand, it is impossible to affirm, in respect of every "navigation purpose," within the purport of these questions that the authority in relation thereto, whether derived from s. 92 (10) and s. 91 (29) or from one of the other heads of s. 91—whether within the exclusive sphere of the Dominion Parliament, or only referable to its incidental or ancillary powers—invests the Dominion with the right to override by its legislation the proprietary rights of the provinces.

There is no general formula for deciding whether or not, in respect of any such given purpose, the nature of the Dominion authority imports the existence of such a right. That can only be determined after an examination of the nature of the purpose, the character of the power invoked and the character of the means proposed to be employed in order to effectuate the purpose.

The word "expropriate" in the 3rd question, moreover, would seem to include the act of transferring compulsorily to the Dominion itself, or to the others, the absolute beneficial title of the Crown to lands committed to the control of the provincial legislatures. As already explained, that is an authority which the Dominion did not expressly receive under any of the relevant clauses of s. 91.

Question 4. This interrogatory is also general in form. Moreover, the works, which are the subject of it, although indicated by a general phrase, are existing works. The facts affecting each of them are capable of ascertainment. These facts are not before us; yet a categorical answer to the question would involve an expression of opinion as to powers and rights of the provinces in respect of each of them. Such an opinion could, of course, only proceed upon some general legal rule necessarily governing every case to which the interrogatory, as framed, applies. We have nothing before us to show whether in any given case the water-power has been acquired through private treaty from a provincial government, or from a subject, or, if it has been appropriated without the consent of the owner, or under what authority the officials of the Dominion have acted or professed to act, whether, for example, the Dominion has legislated under the authority of s. 91 (10), or under the authority of s. 92 (10a) or, after the necessary declaration, under s. 92 (10c). Nor have we the facts necessary to enable us to judge whether any authority to

take the particular water-power in question did, in point of law, exist, in the circumstances in which it was taken; or, if so, whether the conditions of such authority were duly fulfilled.

Question 5. This, once more, is a general question embracing a group of concrete cases in respect of which the facts are capable of ascertainment. We have before us neither the relevant physical facts nor the character of the authority under which the construction of the particular works involved in the inquiry purported to proceed. For the reasons indicated in discussing the 4th question, it is not practicable to give a general answer to this question.

Question 6. Broadly speaking, the Dominion has under s. 132 full authority to legislate for the execution of obligations imposed upon Canada, or upon a province, in virtue of an Imperial Treaty. But the rights and jurisdiction of the Dominion and of a province, respectively, in relation to water-powers, created or made available by joint works, such as those referred to in this question, could only be determined after disclosure of the facts touching the terms of the Treaty, and the nature of the works, as well as the rights of the Dominion and of the province, in respect of the waters to be affected by the execution of the treaty.

For the reasons above stated, the assumption of jurisdiction under s. 92 (10c) is not discussed.

As to works constructed either in "provincial" or in "inter-provincial" rivers, the Dominion would appear to have jurisdiction respecting such works, if, within the meaning of s. 92 (10a) they extend beyond the boundaries of one of the provinces or connect two provinces. It does not seem practicable to lay down any general test for determining the application of s. 92 (10a), other than that furnished by the language of the enactment itself.

As to that branch of the interrogatory which relates to the taking of provincial lands and property for "the purpose of such works," works being described as "works wholly for power purposes," it does not seem possible to give any useful answer. "Acquisition by expropriation" points to the taking absolutely of the property "required." Reasons have been adduced suggesting that this is not permissible. And, moreover, it is not practicable, in the ab-

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sence of some more specific description of the nature of the purpose, to state whether, "for the purposes of such works," assuming the works themselves to be within the control of the Dominion, the proprietary rights of the province may be overborne or, if so, on what conditions, if any.

Question 8. The second branch of this question is too vaguely expressed to permit of any answer not equally vague and indefinite. As to the first branch, it seems unnecessary to say that a province would be exceeding its powers if it attempted to intervene in matters committed exclusively to Dominion control, by attempting, for example, to interfere with the structure or management of a work withdrawn entirely from provincial jurisdiction, such as a work authorized by the Dominion by legislation in execution of its powers under s. 92 (10a). A province is, moreover, bound, of course, in dealing with rivers in respect of which it has powers of control, to observe any regulation validly enacted by the Dominion in relation to navigation works or in exercise of its authority over navigable waters.

It would not be a sufficient recognition of the jurisdiction of the Dominion to affirm that, in the circumstances mentioned in the question, a province is entitled to regulate and control the waters of the river so long as navigation is not interfered with. The obligation of the province in such circumstances is much more definite and precise, as has just been stated. The exercise of jurisdiction by a province, in a manner permitted by the terms of the question, might constitute a substantial encroachment upon the exclusive authority of the Dominion.

As to question 9, it was not seriously disputed that, under the conditions mentioned, the provinces have the rights which are the subject of the question. This, of course, is on the assumption that there is no conflicting legislation by the Dominion under an over riding power, a power, for example, conferred by the combined operation of section 91 (29) and 92 (10a).

Sufficient has been said to call attention to the difficulty, indeed the impracticability, of giving precise and categorical answers to some of the questions submitted. As regards most of them, the limit of practicability seems to be reached,

when the principles to which reference must be made for the determination of particular cases have been indicated. The authority of the Governor in Council to submit these questions under the statute, and the validity of the statute itself are no longer open to question; and it is the duty of the judges of this court to endeavour, to the utmost of their powers, to return to His Excellency answers as precise and as useful as the questions admit of. Nevertheless the Privy Council has recognized, more than once, that, in the exercise of the statutory authority, interrogatories may through inadvertence be presented, to which it is not possible to give accurate or exhaustive answers, or indeed any answers which are not so encumbered by qualifications and reservations as to deprive them of all practical value. In *Attorney General for British Columbia* v. *Attorney General for Canada* (1), Lord Haldane said:

> under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question (*sic*) of future litigants be prejudiced by the court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied.

Again in *John Deere Plow Co.* v. *Wharton* (2), Lord Haldane, speaking for the Judicial Committee used these words:

> The structure of ss. 91 and 92, and the degree to which the connotation of the expressions used overlaps, render it, in their Lordships' opinion, unwise on this or any other occasion to attempt exhaustive definitions of the meaning and scope of these expressions. Such definitions, in the case of language used under the conditions in which a constitution such as that under consideration was framed, must almost certainly miscarry. It is in many cases only by confining decisions to concrete questions which have actually arisen in circumstances the whole of which are before the tribunal that injustice to future suitors can be avoided.

And, in the same judgment, at pp. 341 and 342, speaking with reference to the answers given by the judges of this court to certain questions submitted by the Governor in Council:

> In the course of the argument their Lordships gave consideration to the opinions delivered in 1913 by the judges of the Supreme Court of Canada in response to certain abstract questions on the extent of the powers which exist under the Confederation Act for the incorporation of companies in Canada.

(1) [1914] A.C. 153, at p. 162.

(2) [1915] A.C. 330, at pp. 338 and 339.

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Their Lordships have read with care the opinions delivered by the members of the Supreme Court, and are impressed by the attention and research which the learned judges brought to bear, in the elaborate judgments given, on the difficult task imposed on them. But the task imposed was, in their Lordships' opinion, an impossible one, owing to the abstract character of the questions put. For the reasons already indicated, it is impracticable to attempt with safety definitions marking out logical disjunctions between the various powers conferred by ss. 91 and 92 and between their various subheads *inter se*. Lines of demarcation have to be drawn in construing the application of the sections to actual concrete cases, as to each of which individually the courts have to determine on which side of a particular line the facts place them. But while in some cases it has proved, and may hereafter prove, possible to go further and to lay down a principle of general application, it results from what has been said about the language of the Confederation Act that this cannot be satisfactorily accomplished in the case of general questions such as those referred to.

In *Attorney General for Ontario* v. *Attorney General for Canada* (1), the Lord Chancellor, Lord Loreburn, pointed out that when such considerations as these come properly into operation, it is permissible for the judges of this court to make any necessary representations to the Governor in Council, by calling attention to them in their answers.

It is important, also, since the opinions evoked by such questions, " are of course," as Lord Loreburn states in the same passage, " only advisory, and will have no more effect than opinions of the law officers," to observe that, when a concrete case is presented for the practical application of the principles discussed, it may be found necessary, under the light derived from a survey of the facts, to modify the statement of such views as are herein expressed.

SMITH J.—I concur with my brother Duff, but I think it may be of advantage to refer to certain circumstances which will indicate more precisely some of the difficulties that stand in the way of giving complete and definite answers to a number of the questions.

It is common knowledge that negotiations have been going on for some time between the Government of the Dominion and the Government of the United States in connection with a proposed scheme for improving navigation on the St. Lawrence river so as to provide passage for large vessels of 25 or 30 foot draft from the ocean to the head of the Great Lakes. A Joint International Commission of Canadian and United States engineers was formed

(1) [1912] A.C. 571, at p. 589.

to investigate and report on this project, and a report by this Commission has been made, setting out plans for such improvements. The Canadian members of the Commission were appointed by the Dominion Government, by Order in Council and the Board acted on instructions agreed to by the two governments by an exchange of notes. The part of international waters where large water powers would be involved in carrying out the scheme proposed is the St. Lawrence river where its centre line forms the boundary between the United States and the province of Ontario from the westerly boundary of the province of Quebec on the south shore, westerly some 48 miles to a point beyond the head of the Galop Rapids at Cardinal. In this part of the river there is a succession of rapids, namely, the Galop at Cardinal, the Rapide Plat at Morrisburg, a small rapid at Farran's Point, and finally, the Long Sault, which is much greater than any of the others, having a drop of about 42 feet. Along the Canadian shore at each of these rapids there is a canal owned by the Dominion Government.

Two alternative schemes for providing the deep waterway are set out in the report of the Commission. It is sufficient for my purpose to refer to one of these. It provides for a dam across the whole river, extending from the Cornwall Canal, on the Canadian main shore, to the head of Barnhart's Island, which is United States territory, and then from the foot of this island to the United States main shore, by which the water level at this latter point would be raised to nearly the level of the river at the head of the swift water above the Galop Rapids, thus wiping out all the rapids, and making the whole of the river where the series of rapids occurs navigable for large vessels. This would provide a water head at the dam of about 85 feet, and make available there water-power of over 2,000,000 horse-power, by passing the flow of the river through water wheels, instead of allowing it to waste over the dam. Navigation from the level above the dam to the level below would be by a side canal, and locks connecting these two levels.

The international negotiations referred to and the questions that arise as to the respective powers and rights of the Dominion and the province of Ontario in reference to these proposed works and the water-power that would be made

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available by their construction have given rise to this reference. The questions, of course, are not confined to these particular waters, but it is particularly as to these waters that there is immediate need for clearing up the difficult questions that the proposed works give rise to, because the continuance of the negotiations awaits the result of this reference, as has been officially stated. Question 1 (*a*) is limited to "where the bed of a navigable river is vested in the Crown in right of the province," and it may be noted in passing that a question may be raised as to whether the bed of these rapids is in the province or the Dominion. Under the British North America Act, the canal and canal lands became the property of the Dominion, so that the Dominion became riparian owner of the lands bordering on the stream opposite these rapids for nearly their whole length. It has been held by the Ontario Court of Appeal that the common law presumption that the riparian proprietor owns to the middle of the bed applies in Ontario, and although the Ontario Legislature promptly nullified the effect of that decision by an Act (1 Geo. V, c. 6) declaring that the presumption shall be the other way, as to grants, both before and after the passing of the Act, that Act could not affect the Dominion title, if it had any. It may be, as intimated in later Ontario decisions, that the presumption would not in any case apply to the St. Lawrence river. I am merely pointing out the possibility of the question being raised in a higher court. We have, of course, nothing to do with it here.

Much more complicated questions than this, however, arise, and in order to indicate their character it is necessary to look at the geography of the river. It will be sufficient to consider the situation at the Long Sault Rapids. At their head, the river is divided into two channels by Long Sault Island, which is United States territory. Much the larger volume of water passes down the international channel between this island and the Canadian shore, the bulk of it at this point being in Canadian territory. About two miles below the head of the rapids is a Canadian island near the Canadian shore, known as Sheik's Island, the head of which is nearly opposite the foot of Long Sault Island. Below the foot of Long Sault Island is the head of Barnhart's Island, already referred to as United States territory.

The main body of water of the Long Sault Rapids coming down the international channel crosses southerly through the channel between the foot of Long Sault Island and the head of Barnhart's Island, and joins with the waters of the United States South Sault Channel, together comprising about 96 per cent of all the water of the river, which continues in one stream down the channel between Barnhart's Island and the United States main shore, entirely in United States territory, for nearly four miles to the foot of Barnhart's Island, which is about the foot of the rapids, where, as stated, the proposed dam is to be built.

The fall in these rapids to the foot of Long Sault Island is some 12½ feet, and the rest of the total fall of about 42 feet, where, as stated, about 96 per cent of all the water runs, is entirely in the United States. Assuming that the province owns the bed at these rapids to the boundary at the middle of the stream, and that the course of the water is about as I have stated it, and that ownership of the bed gives some right of property in the power that may be made available from water running over this sloping bed, it would be a difficult matter to define the respective rights of the province and the Dominion in the water-power, even on an agreed upon statement of the facts. We have here, however, no statement of facts at all in the record in reference to the situation I have outlined, and it would probably have been impossible to get an agreed upon statement of facts in reference to it. There is a treaty with the United States dealing with the apportionment of water-power of international streams, but it may be that the province of Ontario would have to rely entirely on its own right, independently of this treaty, and that its claim to power would be limited to what the province could develop from these waters by its own unaided powers, situated as these rapids are. It is difficult to see how the province could develop any water-power from these rapids solely by virtue of its own rights and powers. To develop power from a rapid, the practical method employed is to transform the flow from down a slope into a perpendicular fall. This may be done by diverting the flow at or above the head of the slope into an artificial channel on the land, which would carry the flow below the foot of the rapids at about the level above the head, and there discharge it through water-wheels to the lower level. The other

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method would be by a dam at the foot to raise the level at the upper side of the dam to the level above the head of the rapids, thus providing a perpendicular fall from the upper side of the dam to the lower. If the province were to divert a large part of the water of the international channel referred to, it would be obliged to return it in such a way as to permit it to flow into the entirely United States channel to the extent that it flows there naturally; otherwise the United States would have the same cause to complain that Canada has to complain of the Chicago diversion. The water would therefore have to be returned so that nearly all of it would flow through its natural channel between Long Sault Island and Barnhart's Island, and could only be brought there by bringing it across the Cornwall Canal. Once diverted into an artificial channel on the Canadian shore, the water could not be returned to the river without crossing the canal till carried below its foot at Cornwall, 12 miles down, which would be a complete and permanent diversion from its natural course through the United States channel. To make any diversion to the Canadian shore at the head would, moreover, require a dam in the natural channel to turn the water from that channel to the artificial one, and such a dam would close the navigation of the natural channel, which is now used daily, in the summer months, for a line of large passenger steamers. To get a head of water opposite the foot of Long Sault Island would require a dam from that island to Sheik's Island, which would again completely stop navigation, and of course would require co-operation on the part of the United States and assent of the Dominion Government under the *Navigable Waters Protection Act*. Sheik's Island, too, is part of the Indian Reservation, rented and administered by the Dominion Government for the Indians.

It would appear, therefore, that water-power from these rapids could only be developed by Ontario with the co-operation of the United States and the Dominion Government, and that whatever right the province might have to power might, at most, be a part of what could be developed from the 12½-foot fall to the foot of Long Sault Island. The four per cent flow in Canadian territory north of Barnhart's Island would be too small for practical development.

There may be a still further limitation to the right of the province as owner of the bed, because the ordinary development of water-power requires the use of not only the bed, but also of the bank. Here the Dominion Government, as stated, is riparian proprietor of the bank opposite these rapids, and as such would have rights that would put in question the rights of the province to develop water-power by virtue of ownership of the bed only. The situation at this point, as I have outlined it, does not, of course, appear in the record. We might, perhaps, take judicial notice of some of the facts, and might gather others from statutory enactments. A glance at a map of the locality, and particularly at the maps annexed to the report referred to, would show the geographical situation and flow of the main body of water in the river, but we would still fall short of such a full knowledge of facts as would be necessary for the basis of a decision. I have gone beyond the record, not to obtain material as a basis for answering the questions, but merely to emphasize what my brother Duff has said as to the impracticability of giving full and definite answers to all the questions that would have general application, regardless of particular circumstances capable of proof but not established or admitted in the record.

What I have said in reference to the Long Sault Rapids would apply in some, but not all, respects to the other rapids. There are probably localities throughout Canada where the situation would be entirely different, so that the difficulty of giving general answers to a number of the questions applicable to every possible variation of facts and circumstances becomes, I think, apparent.

Questions referred answered accordingly.

Solicitor for the Attorney General of Canada: *W. Stuart Edwards.*

Solicitors for the Attorney General of Ontario: *Tilley, Johnston, Thomson & Parmenter.*

Solicitor for the Attorney General of Quebec: *Charles Lanctot.*

Solicitor for the Attorney General of British Columbia: *William D. Carter.*

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REFERENCE *re* WATERS AND WATER-POWERS.

Solicitor for the Attorney General of Manitoba: *F. H. Chrysler.*

Solicitor for the Attorney General of Saskatchewan: *A. Z. Geddes.*

1927

*Oct. 1.
*Dec. 16.

1928

**Nov. 14, 15.

1929

**Feb. 5.

DAME M. A. L. VALOIS (PLAINTIFF).....APPELLANT;

AND

J. B. DE BOUCHERVILLE AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Will—Action to annul—Residuary legacy—Whether vague, uncertain and not susceptible of enforcement—Legacy for charitable purposes—Validity—Fiduciary legatee—Discharge releasing him from rendering account—Jurisdiction of the Superior Court to supervise execution of will—Power of the Attorney General to intervene in the interest of undefined beneficiaries—Arts. 831, 840, 869, 916, 921 C.C.—Art. 50 C.C.P.—R.S.Q. [1925], c. 16, s. 5 (1).

Dame Philomène Valois, widow of the late Paul Lussier, died at Montreal on September 26, 1920, without issue, leaving an estate amounting to $925,825.55. According to the terms of her last will, dated May 8, 1913, she devised that part of her property derived from the estate of her father among the members of the Valois family. As for the residue of her property, estimated at $497,436.79, the testatrix, under clause 15 of her will, directed that it be liquidated by the testamentary executors and the proceeds handed over by them to the respondent de Boucherville, whom she named fiduciary legatee for the purpose of distributing the same as he may deem advisable, "pour être par lui seul employés et distribués comme il le jugera opportun en oeuvres de charité, en oeuvres pies, au soulagement des souffrances de l'humanité, à l'éducation de jeunes gens pauvres." The testatrix also stipulated in the same clause that the fiduciary legatee would be accountable to his own conscience only in the fulfilment of his trust, "sans qu'aucune personne puisse lui en demander compte ou explication." The appellant, a next of kin of the testatrix, brought an action attacking the validity of the residuary legacy made to the respondent de Boucherville as being null, illegal and irregular because it was too vague, uncertain and not susceptible of enforcement, and also because the real legatees were not designated.

Held, that since the coming into force of the Civil Code, as well as under the old law anterior to the Code, the law of the province of Quebec has always been that public charitable bequests should not be set

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Smith JJ.

**PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

aside for want of certainty, provided it is at all possible to carry out the intention of the will.

Held, also, that clause 15 of the will was valid and that the disposition therein contained was for charitable purposes within the meaning of article 869 C.C. The terms of the clause: "en oeuvres de charité, en oeuvres pies, au soulagement des souffrances de l'humanité, à l'éducation de jeunes gens pauvres" fell sufficiently within the terms "fins de bienfaisance ou autres fins permises" contained in article 869 C.C., specially if those terms are read in conjunction with the comments of the Commissioners of Codification (4 & 5 Rep., 180) on that article.

Held, also, that the disposition in the will, by which the fiduciary legatee was dispensed with rendering an account of his administration, was not in contravention with the civil law of Quebec, being on the contrary in conformity with articles 831, 840, 916, 921 C.C.

Held, further, that the Superior Court had no jurisdiction, under article 50 C.C.P. or any other provision of the law of the province, to supervise the carrying out of the charitable bequest of the testatrix, or to itself proceed to the distribution of the funds.

The majority of the court expressed no opinion on the question whether the Attorney General of Quebec had, under s. 5 (1), R.S.Q. 1925, c. 16, or otherwise, a status to intervene in this case in order to protect the interests of the undefined beneficiaries of the charitable disposition of the testatrix, and whether he was under an obligation to do it, similar to that which attaches, under like circumstances, to the office of the Attorney General of England. Anglin C.J.C. and Smith J. *dubitantes;* Mignault J. expressing the opinion that the Attorney General of Quebec has not that power.

Observations upon the decision of this court in *Ross* v. *Ross* (25 Can. S.C.R. 307): It was not held that the word "poor" was "too vague and uncertain to have any meaning attached to it" as contained in the head-note. The majority of the court, in that case, expressly declared that the construction of the provisions of the will as to the legacies to "poor relations" and charities was left "open for future consideration"; and the dissenting judge, Fournier J., stated that the terms "poor relations" were vague and uncertain not on account of the word "poor" but owing to the difficulty in ascertaining what "relations" the testator had in mind.

The Royal Institution for the advancement of learning v. *Desrivières* (Stuart K.B. 224); *Desrivières* v. *Richardson* (Stuart K.B. 218); *Freligh* v. *Seymour* (5 L.C.R. 492); *Abbott* v. *Fraser* (20 L.C.J. 197); *Brosseau* v. *Doré* (Q.R. 13 K.B. 538; 35 Can. S.C.R. 307); *Molsons Bank* v. *Lyonnais* (3 L.N. 82; 26 L.C.J. 278; 10 Can. S.C.R. 535); *McGibbon* v. *Abbott* (8 L.N. 267); *Stevens* v. *Coleman* (Q.R. 16 K.B. 235); *Latulippe* v. *La fabrique de l'église méthodiste de Mégantic* (Q.R. 43 S.C. 380); *Cinq-Mars* v. *Atkinson* (Q.R. 24 K.B. 534; Q.R. 46 S.C. 226); *Lyman* v. *The Royal Trust* (Q.R. 50 S.C. 480); *Hastings* v. *Macnaughton* (Q.R. 51 S.C. 174) also discussed.

Judgment of the Court of King's Bench (Q.R. 42 K.B. 319) aff.

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APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming a judgment of the Superior Court (Ph. Demers J.) and dismissing the appellant's action with costs.

Dame Philomène Valois, widow of the late Paul Lussier, died at Montreal on the 26th of September, 1920, without issue. She left a considerable estate amounting, according to the statement prepared for purposes of succession duties, to the sum of $925,825.55. According to the terms of her will, executed on the 2nd of March, 1898, before Maîtres Pepin & Hetu, notaries, that part of her property derived from the estate of her father, Simon Valois, is distributed among the members of the Valois family; as for the balance, the testatrix bequeaths the same to the two testamentary executors, the Rev. Kavanagh and the Rev. Duckett, priests, to be expended or employed by them for benevolent work. According to a second will, revoking the previous one, executed on the 23rd day of May, 1904, before Maîtres Cox & Charbonneau, notaries, the testatrix made a new distribution among members of the Valois family of the property which she received from her father; as for the balance, she ordered that the testamentary executors hand over the proceeds thereof to the Reverends Kavanagh and Duckett, whom she named fiduciary legatees, to be employed by them for charitable work and work of a similar nature. Finally, the testatrix made a third and last will, revoking all the others; it was executed before Maîtres Brunet and Ogden on the 8th of May, 1913. It contains dispositions identical to that of the other wills in reference to members of the Valois family. The respondents are named testamentary executors, with full power to sell and realize upon the assets and make a distribution thereof. As for the residue of her property, the testatrix, under clause 15 of her will, directs that it be liquidated by the testamentary executors and the proceeds thereof handed over by them to the respondent, J. de Boucherville, whom she names fiduciary legatee, for the purpose of distributing the same as he may deem advisable, for charitable or devotional work, to alleviate the sufferings of humanity and to educate young people in straitened circumstances: "pour

(1) Q.R. 42 K.B. 319.

être par lui seul employés et distribués comme il le jugera opportun en oeuvres de charité, en oeuvres pies, au soulagement des souffrances de l'humanité, à l'éducation de jeunes gens pauvres." * * * The value of that part of the estate bequeathed to the Valois family is $415,560, and the portion devolving to the respondent, de Boucherville, as fiduciary legatee, is $497,436.79. The testamentary executors took possession of all the property comprised in the estate, realized upon the same, and turned over the proceeds of the residue thereof to the respondent, de Boucherville, in conformity with clause 15. The appellant is a cousin in the first degree of the testatrix and at the time of the latter's death, was her next of kin, as she was the only cousin german then living; and, by her action, she attacked the validity of the residuary legacy made to the respondent, de Boucherville, as being null, illegal and irregular because it was too vague, uncertain and not susceptible of enforcement, and also because the real legatees are not designated. The trial judge dismissed the action on the ground that the clause contained an absolute legacy in full ownership in favour of the respondent, de Boucherville. The Court of King's Bench affirmed this judgment but on different grounds; it held that the legacy was valid according to the terms of article 869 of the Civil Code.

In the Supreme Court of Canada, the case was first argued on October 21, 1927; and the Court reserved judgment. On December 16, 1927, the following judgment was rendered by the Court:—

"After consideration the Court is of the opinion that this appeal should not be disposed of without the Attorney General of the province of Quebec being notified of its pendency and of the nature of the questions presented and given an opportunity, if so advised, to intervene.

"Inasmuch as the respondent, while admitting his moral obligation, asserts a right to receive the property in question as a personal bequest and free from any legal obligation, as a trustee or otherwise, to distribute the same amongst the charitable objects of the bounty of the testatrix, it would seem reasonably clear that he cannot adequately represent these prospective beneficiaries.

"The validity of the bequest in their favour is contested and an intestacy as to the subject of such bequest is asserted by the appellant as one of the heirs of the testatrix.

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"Has the Attorney General of Quebec, under the R.S.Q., 1925, c. 16, s. 5 (1), or otherwise, a status to intervene in these proceedings; and has he an obligation to protect the interests of the undefined beneficiaries of the charitable disposition of the testatrix similar to that which attaches, under like circumstances, to the office of the Attorney General of England?

"Has the Superior Court jurisdiction under article 50 C.C.P., or any other provision of the law of the province of Quebec, to supervise the execution of the charitable bequest of the testatrix, or to compel its being carried out either by holding the respondent accountable to it, or to its officers, or otherwise?

"It will be realized that if the foregoing questions are determined in the negative, the testatrix's charitable purpose may fail; and, if so, the result in law may be either an absolute gift to the respondent, or an intestacy as to the subject of the bequest.

"Such are the points to which the Court deems it proper that the attention of the Attorney General of Quebec should be drawn. To permit of his dealing with the matter by intervention, or otherwise, as he may be advised, the Court directs that a copy of this memorandum be transmitted to him, that this appeal shall stand over to be re-argued at the February term and that it be placed for that purpose on the docket for that term at the head of the list of cases from the province of Quebec."

On November 14 and 15, 1928, re-argument took place before the full court, when counsel for the appellant, for the respondent and for the Attorney General of Quebec were heard. On February 5, 1929, the Supreme Court of Canada delivered judgment dismissing the appeal with costs.

Aimé Geoffrion K.C. for the appellant.

C. Laurendeau K.C. for the respondents.

E. Lafleur K.C. and *C. Lanctot K.C.* for the Attorney General of Quebec.

The judgment of the court was delivered by Rinfret J.; but Anglin C.J.C. and Mignault and Smith JJ., while concurring with the opinion of Rinfret J., also delivered written judgments.

THE CHIEF JUSTICE.—I regard this case as, in some of its aspects, transcending in importance any that has in recent years come before this court from the province of Quebec. That importance is due not chiefly to the fact that the value of the public charitable bequests involved is said to aggregate upwards of $400,000, but rather to the questions raised in respect of which the court deemed it advisable to bring the appeal to the attention of the Attorney General of Quebec, in order to afford him an opportunity, if so advised, to seek to intervene—namely, whether or not he is, as Attorney General, invested with the powers and charged with the duties in regard to such bequests which appertain to the office of Attorney General in England; and to what extent, if at all, the Superior Court of the province of Quebec possesses the right of supervision over the administration of public charitable bequests, which is exercised by the English High Court of Justice as the successor of the former Court of Chancery. Owing to the substantial amount at issue and still more so because of the unimpeachable integrity of the gentleman designated as fiduciary, in whom the testatrix has reposed such unbounded confidence, we thought it opportune to suggest consideration of these matters on the present appeal.

I have had the advantage of reading the exhaustive opinion prepared by my brother Rinfret, in which I understand my brother Mignault concurs, and I fully accept his conclusion that the impugned bequests are valid and that the respondent takes the property bequeathed to him solely as a fiduciary and in no event as a beneficiary. But for the very explicit language of article 916 C.C., however, which I read as applicable to a testamentary trustee, I am by no means certain that I should not have regarded the extraordinary provisions of the will now before us, which purport to relieve the respondent from all the obligations of accountability and from all subjection to curial control (which to one trained in English law seems incompatible with the existence of a trust), as giving the respondent a possible interest in conflict with his duty and attaching to the bequests " conditions contrary to public order and good morals " within the meaning of article 831 C.C. (8 Pothier (Ed. Bug.), p. 288, no. 227; 22 Demolombe, no. 119; 4 Marcadé, no. 158; 14 Laurent, 386; Dalloz, 1846, 1, 155),

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with the result that, while the conditions would fail because invalid, the fiduciary bequests would stand freed from them.

Notwithstanding the great deference which is due to the considered opinions of my esteemed colleagues from the province of Quebec, I am not wholly convinced that the law of that province is so defective as to provide no adequate means for the supervision of the carrying out of a public charitable bequest such as that now before us. The remedies afforded by arts. 981 (d) and 981 (h) C.C., I regard as quite inadequate. Arts. 981 (l) and 981 (m) are probably inapplicable to cases within art. 916 C.C. The statutory provision now found in s. 5 of the R.S.Q., 1925, c. 16 (notwithstanding the presence in it of the words "in so far as the same are applicable in this province") I rather think was enacted with a view to conferring upon the Attorney General of Quebec, *inter alia,* some of the responsibility of the Attorney General of England in regard to such matters. Whether any part of the jurisdiction of the former Court of Chancery in England in regard thereto is vested in the Superior Court of the province of Quebec by article 50, C.C.P., is, no doubt, much more doubtful, as there appears to be no law envisaging the "manner and form" of its exercise; and no other statutory provision conferring such jurisdiction was cited, nor was any instance of its attempted exercise referred to.

But whatever, and however strong, might be my personal views on these subjects, it would, in my opinion, be improper to determine that such functions exist as incidental to the office of the Attorney General for the province of Quebec in view of the doubts of my colleagues; and still more so to assert a jurisdiction in the Superior Court which they deny. In bringing these important questions to the attention of the law officers of the province and in suggesting that they should consider the advisability of legislation to provide clearly for the effectual supervision of the administration of public charitable trusts, and perhaps also of the property of persons *non sui juris,* we have probably done all that the circumstances of the case at bar now require.

DUFF J. concurred with Rinfret J.

MIGNAULT, J.—Je concours entièrement dans le jugement de mon collègue, M. le Juge Rinfret, et je n'aurais rien ajouté à son exposé des questions soulevées dans le procès, si, accessoirement à ces questions, il ne s'était présenté de nouveaux problèmes qui sont d'un intérêt considérable.

L'espèce même que nous avons à juger n'offre rien de bien anormal, si ce n'est qu'il s'agit d'une somme très élevée, au delà de $400,000, dont les pauvres bénéficieront si le legs du résidu est déclaré valable. Cependant, les questions de droit à résoudre seraient les mêmes, et elles mériteraient la même attention de notre part, si l'enjeu n'était que d'un faible montant, au lieu d'être de près d'un demi-million.

Madame Valois, la testatrice, n'avait pas d'enfants et laissait une fortune très considérable. Elle pouvait en disposer " sans réserve, restriction, ni limitation " (art. 831 C.C.). Elle jouissait donc de ce qu'on appelle la liberté illimitée de tester, et les seules entraves à ce droit sont les prohibitions du code et ce que défendent l'ordre public et les bonnes mœurs. Elle a fait des legs particuliers à des parents collatéraux, et elle voulait laisser le résidu de sa succession aux pauvres. C'était son droit.

Elle a donc fait un legs résiduaire pour des fins de bienfaisance tel qu'expressément autorisé par l'art. 869 C.C., c'est-à-dire par l'entremise d'un légataire fiduciaire ou simple ministre, M. de Boucherville. Mais elle a donné à ce dernier une discrétion absolue quant à la distribution de son legs à des pauvres individuels, et en cela elle ne faisait qu'exercer la liberté de tester telle que reconnue par le code.

Elle était encore dans les limites de son droit quand elle a déclaré que son légataire fiduciaire ne devrait compte qu'à sa conscience pour l'accomplissement de sa charge, " sans qu'aucune personne puisse lui en demander compte ou explication ".

En cela, elle ne dépassait pas les bornes de la liberté de tester, car pouvant donner ses biens à M. de Boucherville en toute propriété, elle pouvait le charger d'en distribuer une partie ou même la totalité aux pauvres. Aucun de ses héritiers légaux ne peut lui chercher querelle à cet égard.

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Du reste, la dispense de rendre compte est expressément autorisée par l'article 916 C.C., dont l'interprétation offre certaines difficultés. Ce qui paraît clair, cependant, c'est que le testateur peut exempter l'exécuteur testamentaire de l'obligation de faire inventaire et de rendre compte, et il peut aussi le constituer légataire de ce qui lui restera en mains après avoir acquitté les charges et payé les legs mentionnés au testament. Entre ces deux alternatives, il y en a une troisième, car l'exécuteur testamentaire peut être exempté de faire inventaire et de rendre compte, sans qu'il soit légataire du résidu qui demeure en sa possession. Alors, dit l'article, la décharge de faire inventaire et de rendre compte n'emporte pas décharge "de payer ce qui lui reste en mains". Pour déterminer quel montant "lui reste en mains", il est évident que les tribunaux permettront la preuve par tous moyens légaux. La décharge de rendre compte dans ce cas ne paraît être que de la procédure spéciale de l'action en reddition de compte, avec ses débats de compte et ses soutènements. Mais tout de même le compte véritable du résidu resté aux mains de l'exécuteur s'établira en justice s'il y a procès. Voilà l'interprétation raisonnable de l'article 916 C.C., et, ajoutons-le, cet article n'a rien d'extraordinaire, ni d'incompatible avec la liberté de tester, "sans réserve, restriction, ni limitation" de l'art. 831 C.C.

La question accessoire, mais de très grande importance, qui s'est soulevée devant cette cour est de savoir si le procureur général a qualité pour surveiller la distribution d'un legs pour des fins de bienfaisance comme celui de Madame Valois, et si la cour supérieure peut, au cas où M. de Boucherville ne ferait pas la distribution ordonnée, le forcer de distribuer, ou bien faire la distribution elle-même.

Je ne crois pas que le procureur général ait ce pouvoir en la province de Québec. Le statut invoqué (chap. 16 des statuts refondus de Québec, 1925) ne lui donne les pouvoirs du procureur général d'Angleterre qu'en tant qu'ils sont applicables en cette province. Or, on ne trouve, ni dans le code civil, ni dans le code de procédure civile, aucune disposition prévoyant une telle intervention du procureur général. Mais ce qui est décisif, c'est que le mécanisme pour une intervention efficace manque. La cour supérieure n'a pas la juridiction des cours de chancellerie en Angleterre. En

dehors des cas énumérés où elle exerce la juridiction gracieuse, elle n'a que la juridiction contentieuse, c'est-à-dire elle juge les procès instruits devant elle. Elle pourrait bien destituer un fiduciaire infidèle, elle ne peut elle-même faire la distribution qu'il refuse de faire.

Il est bien important, cependant, de dire que nous avons ici un fiduciaire qui ne demande pas mieux que de distribuer le résidu suivant les instructions de la testatrice, et qui a été empêché de le faire par ce procès. Dans un cas comme celui qui nous occupe, ni le procureur général, ni la cour de chancellerie n'interviendraient en Angleterre.

Cependant, je crois—s'il m'est permis de le dire respectueusement—qu'il serait sage de donner effet à la suggestion des codificateurs et de rétablir en la province de Québec quelque chose de semblable à l'ancienne juridiction des procureurs du roi, en augmentant au besoin les pouvoirs de la cour supérieure. Le besoin s'en fait sentir beaucoup moins dans un cas comme celui-ci, où nous avons un fiduciaire intègre qui ne demande qu'à accomplir son devoir, que dans les cas ordinaires où il s'agit de la protection des incapables, ou bien lorsqu'un fiduciaire essaie d'échapper à ses obligations. Quand il est question de vendre ou d'hypothéquer les immeubles d'un incapable, la consultation du conseil de famille est bien souvent une garantie insuffisante, car il est notoire que, contrairement aux articles 251-253 C.C., on appelle fréquemment à y siéger, comme amis, des gens qui ne connaissent même pas l'incapable. Et la décision est donnée, dans bien des cas, par un fonctionnaire, un député protonotaire, qui peut bien n'être pas un avocat, et non pas par un juge. Il est clair que la consultation obligatoire d'un ministère public ou d'un procureur du roi serait une garantie autrement sérieuse que celle qu'offre maintenant, sans une consultation semblable, le conseil de famille. Le danger serait moins grand si dans tous les cas où il s'agit des droits des incapables, le jugement, après consultation du conseil de famille, ne pouvait être rendu que par un juge.

Je renverrais donc l'appel avec dépens.

NEWCOMBE J. concurred with Rinfret J.

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RINFRET, J.—L'appelante attaque l'article quinzième du testament de Dame Philomène Valois, veuve de feu Paul Lussier, reçu le 8 mai 1913. Cet article se lit comme suit:

Je veux et ordonne que tous mes autres biens, soit personnels, soit provenant de la succession de feu mon frère, le Révérend Etienne Avila Valois, prêtre, ou d'autres sources, soient réalisés aussitôt que possible après mon décès par mes exécuteurs testamentaires, de la manière qu'ils l'entendront, sans le concours d'autres personnes et sans formalité judiciaire, et après avoir pourvu de la manière qu'ils jugeront convenable pour le paiement des legs aux institutions ci-dessus nommées et aux personnes n'appartenant pas à la famille Valois, et pour le paiement des annuités ci-haut mentionnées ainsi qu'au paiement de la rémunération ci-après stipulée en faveur de mes exécuteurs testamentaires, ces derniers devront remettre les produits desdits biens, au moment que tels produits seront disponibles, entre les mains dudit Joseph B. de Boucherville, avocat et conseiller du roi, de la cité de Montréal, que je nomme à cette fin mon légataire fiduciaire qui sera dès lors saisi des produits de mes tels biens pour être par lui seul employés et distribués comme il le jugera opportun en œuvres de charité, en œuvres pies, au soulagement des souffrances de l'humanité, à l'éducation de jeunes gens pauvres, voulant surtout qu'il affecte une somme de cinq mille piastres à la fondation d'une bourse perpétuelle dont le revenu servira à l'éducation d'un ecclésiastique pauvre au Collège Canadien, à Rome, dirigé par les prêtres de Saint-Sulpice, suivant le choix de monsieur le Supérieur du Séminaire de Montréal, et aussi qu'il verse entre les mains de la fabrique de la paroisse de la Nativité de la Sainte Vierge d'Hochelaga, une somme de cinq cents dollars dont le revenu sera employé à perpétuité au soutien des pauvres de ladite paroisse, le partage de ce revenu devant être fait par monsieur le curé de la paroisse.

Si, au moment de mon décès, je n'avais pas encore disposé de tous les effets ayant servi à l'usage personnel de mon frère ainsi que les objets religieux, ornements sacerdotaux, vases sacrés servant à ma chapelle, ainsi que les reliques et autres objets pieux ou religieux, je prie mes exécuteurs testamentaires de remettre sans délai ces choses à mon dit légataire fiduciaire qui devra faire don de ces choses à des prêtres pauvres ou à des communautés religieuses, suivant son jugement, car ces choses devront être données et non vendues.

En outre, je veux que le légataire fiduciaire ci-dessus nommé ne doive compte qu'à sa conscience pour l'accomplissement de sa charge, sans qu'aucune personne puisse lui en demander compte ou explication.

Arrivant le décès, disparition, refus ou incapacité d'agir de mon dit légataire fiduciaire, je veux et ordonne qu'il se nomme par acte authentique un remplaçant, et même je recommande à mon légataire fiduciaire de nommer à l'avance par acte authentique celui qui devra le remplacer, arrivant le cas de sa disparition, et tel remplaçant aura tous les pouvoirs que je confère à mon légataire fiduciaire ci-dessus nommé.

Comme rémunération pour telle charge de légataire fiduciaire ledit Joseph B. de Boucherville, mon légataire fiduciaire ci-dessus nommé, aura droit à une somme de deux mille dollars ($2,000) qu'il se paiera à même les montants qu'il aura reçus de mes exécuteurs testamentaires.

La testatrice a nommé des exécuteurs testamentaires qui ont réalisé les biens mentionnés dans l'article 15 et ont fait remise du produit à l'intimé, Joseph B. de Boucherville.

Il est admis qu'au moment du décès de dame Philomène Valois l'appelante était parente de la testatrice à un degré successible. L'intérêt qu'elle prétend invoquer n'est donc pas discutable. Elle allègue que le legs résiduaire contenu dans l'article 15

est nul, illégal et irrégulier, étant trop vague, incertain, et n'étant pas susceptible d'exécution forcée.

Elle demande, en conséquence, que la cour déclare que les biens mentionnés dans cet article font partie de la succession légale de dame Philomène Valois et que l'intimé, qui les a reçus, soit tenu d'en rendre compte à cette succession pour qu'ils soient distribués aux héritiers conformément à la loi.

La Cour Supérieure a envisagé cette partie du testament comme ayant l'effet de constituer l'intimé légataire et propriétaire des biens dont il est disposé dans cette clause; elle jugea que la testatrice avait le droit d'imposer à la conscience de l'intimé les charges qui y sont mentionnées et de stipuler que personne ne pourrait lui demander compte de l'accomplissement de ce fidéicommis; que la disposition testamentaire dont il s'agit ne violait aucune prohibition contenue dans le code civil et n'était contraire ni à l'ordre public, ni aux bonnes mœurs.

La Cour du Banc du Roi a unanimement confirmé le dispositif de ce jugement, sans admettre que monsieur de Boucherville était un légataire propriétaire. Elle a été d'avis que le legs résiduaire contenu dans le testament était permis en vertu de l'article 869 C.C.

La question est d'importance à cause de la portée générale des principes de droit qu'elle soulève. Elle l'est également par suite de la valeur des biens en litige qui, au moment de l'enquête, s'élevait à la somme de $497,436.79, à laquelle viendront s'ajouter les intérêts.

La disposition fondamentale de la loi de la province de Québec sur les testaments est contenue dans l'article 831 C.C. qui se lit comme suit:

831. Tout majeur sain d'esprit et capable d'aliéner ses biens peut en disposer librement par testament sans distinction de leur origine ou de leur nature, soit en faveur de son conjoint en mariage, ou de l'un ou de plusieurs de ses enfants, soit de toute autre personne capable d'acquérir et de posséder, sans réserve, restriction, ni limitation, sauf les prohibitions, restrictions et autres causes de nullité contenues en ce Code, et les dispositions ou conditions contraires à l'ordre public ou aux bonnes mœurs.

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Cet article prend sa source dans l'Acte de Québec de 1774 (14 Geo. III, c. 83, s. X) par lequel les entraves maintenues par les anciennes lois civiles françaises furent abolies dans les termes suivants:

Provided also, that it shall and may be lawful for every person that is owner of any lands, goods or credits, in the said province, and that has a right to alienate the said lands, goods or credits, in his or her life-time, by deed of sale, gift, or otherwise, to devise or bequeath the same at his or her death, by his or her last will and testament; any law, usage or custom heretobefore or now prevailing in the province, to the contrary hereof in any wise notwithstanding.

Ces dispositions ont été confirmées par le parlement du Bas Canada en 1801 par le statut XLI Geo. III, c. 4.

Il est convenu que l'article 831 C.C. accorde la liberté illimitée de tester ("sans réserve, restriction ni limitation"), sauf certaines "prohibitions, restrictions et autres causes de nullité". Mais c'est dans le code seulement, dit l'article, qu'il faut trouver ces "prohibitions, restrictions et autres causes de nullité", parmi lesquelles le texte de l'article range immédiatement "les dispositions ou conditions contraires à l'ordre public ou aux bonnes mœurs".

Le code donne effet, suivant des règles qu'il établit, aux

dispositions à cause de mort, soit de tous biens, soit de partie des biens, faites en forme légale par testament ou codicile, et soit en termes d'institution d'héritier, de don, ou de legs, soit en d'autres termes propres à exprimer la volonté du testateur * * * (art. 840 C.C.).

Les règles qui concernent les legs et les présomptions de la volonté du testateur, ainsi que le sens attribué à certains termes, cèdent devant l'expression formelle ou autrement suffisante de cette volonté dans un autre sens et pour avoir un effet différent. Le testateur peut déroger à ces règles en tout ce qui n'est pas contraire à l'ordre public, aux bonnes mœurs, à quelque loi prohibitive ou établissant autrement des nullités applicables, ou aux droits des créanciers et des tiers (art. 872 C.C.).

L'appelante ne prétend pas que la clause quinzième du testament contient une disposition ou une condition contraire à l'ordre public ou aux bonnes mœurs. Il lui faut donc trouver ailleurs dans le code la prohibition, la restriction ou la cause de nullité qui aurait pour effet de mettre à néant le legs résiduaire qu'elle demande à la cour d'annuler. Elle prétend la trouver dans l'article 838 du Code Civil, parce que, suivant elle, les bénéficiaires du legs ne sont pas désignés et identifiés d'une manière suffisante et que la disposition testamentaire dont il s'agit est faite en faveur de personnes indéterminées, à savoir:

en œuvres de charité, en œuvres pies, au soulagement des souffrances de l'humanité, à l'éducation de jeunes gens pauvres.

Il est à remarquer qu'elle ne se plaint pas du legs de $5,000

à la fondation d'une bourse perpétuelle dont le revenu servira à l'éducation d'un ecclésiastique pauvre au Collège Canadien, à Rome, dirigé par les prêtres de Saint-Sulpice, suivant le choix de monsieur le Supérieur du Séminaire de Montréal;

ni du legs qui doit être versé

entre les mains de la fabrique de la paroisse de la Nativité de la Sainte Vierge d'Hochelaga (d') une somme de cinq cents dollars dont le revenu sera employé à perpétuité au soutien des pauvres de ladite paroisse, le partage de ce revenu devant être fait par monsieur le curé de la paroisse;

non plus que de l'autre legs des

effets * * * objets religieux, ornements sacerdotaux, vases sacrés * * * reliques et autres objets pieux ou religieux

qui est fait par l'intermédiaire du légataire fiduciaire

à des prêtres pauvres ou à des communautés religieuses, suivant son jugement.

Ces trois derniers legs sont du même ordre que le legs résiduaire qui est attaqué. Nous soulignons le fait que l'appelante n'a pris aucune conclusion à leur égard, simplement afin d'expliquer pourquoi ils ne seront pas discutés dans la suite de ce jugement.

Les dispositions testamentaires en faveur de personnes indéterminées ont fait déjà l'objet de quelques décisions de nos tribunaux. Il convient cependant de nous borner à celles qui ont trait aux œuvres de charité et de bienfaisance, puisque ce sont les seules que l'on trouve dans la clause du testament en litige; et il importe donc de reproduire ici l'article du code sur lequel s'est basée la Cour du Banc du Roi:

869. Un testateur peut établir des légataires seulement fiduciaires ou simples ministres pour des fins de bienfaisance ou autres fins permises et dans les limites voulues par les lois; il peut aussi remettre les biens pour les mêmes fins à ses exécuteurs testamentaires, ou y donner effet comme charge imposée à ses héritiers et légataires.

La première cause en date est probablement celle qui a trait à la fondation de l'université McGill, à Montréal. Monsieur McGill avait légué à des légataires fiduciaires une terre de quarante-six acres pour être cédée à The Royal Institution for the advancement of learning, corporation qui n'était pas alors en existence, à la condition qu'elle érigerait, dans les dix ans, une université dont l'un des collèges porterait le nom de McGill. Ce legs fut reconnu

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valide par deux jugements: *The Royal Institution for the advancement of learning* v. *Desrivières* (1), confirmé par la Cour du Banc du Roi (20 novembre 1828) et par le Conseil privé (7 mai 1828); et *Desrivières* v. *Richardson* (2).

La note placée en tête du rapport résume suffisamment l'effet de ces décisions sur le point en discussion:

> The bequest of a sum of money to trustees for the benefit of a corporation not *in esse* but in apparent expectancy, is not to be considered a lapsed legacy.
>
> A similar bequest, to be applied towards defraying the expense to be incurred in the erection and establishment of a university or college upon condition that the same be erected and established within ten years from the testator's decease, such condition is accomplished if a corporate and political existence be given to such university or college by letters patent, emanating from the Crown, although a building applied to the purposes of such university or college may not have been erected within that period of time.

Vient ensuite la cause de *Freligh* v. *Seymour* (3). Le testateur y léguait ses biens "for ever upon trust" à un exécuteur testamentaire qui était chargé d'en payer les revenus à Dame Jane Freligh; et, après la mort de cette dernière,

> to apply the rents and revenues of the said real and personal property to the tuition and advancement or learning in the aforesaid village of Frelighsburg, wherein a Grammar School shall be established * * * and to and for no other use, intent or purpose whatsoever.

La cour décida "that a bequest in trust is valid in Lower Canada," mais ne se prononça pas sur la validité du legs pour les fins de l'école parce qu'elle fut d'avis que l'éventualité prévue par le testament ne s'était pas encore présentée. Monsieur le Juge Caron y exprima l'opinion que "le testament était valable même dans cette seconde hypothèse".

La fondation de The Fraser Institute à Montréal donna lieu à un autre procès où le jugement fut rendu par le Conseil privé le 26 novembre 1874, *Abbott* v. *Fraser* (4). L'une des objections qu'on faisait au testament était la même que celle qu'on avait soulevée dans le cas de l'université McGill. La société "The Fraser Institute", à qui le legs était fait, n'existait pas à la mort du testateur, et l'on en concluait que le legs était caduc. Le Conseil Privé donna son approbation à l'opinion exprimée, dans la cause

(1) Stuart K.B. 224.
(2) Stuart K.B. 218.
(3) [1855] 5 L.C.R. 492.
(4) [1874] 20 L.C.J. 197.

de *Desrivières* v. *Richardson* (1), par la Cour d'Appel que la méthode adoptée dans le testament McGill et dans le testament Fraser de léguer des biens à des légataires fiduciaires pour le bénéfice de futures institutions que les testateurs entendaient fonder était reconnue par la loi de la province de Québec et que l'article 869 C.C., qui n'était pas en force lors du testament McGill mais qui l'était lors du testament Fraser, " permits the appointment of fiduciary legatees for charitable and other lawful purposes " (2). Le Conseil Privé maintint le testament parce que c'était

a disposition for a lawful purpose within the meaning of article 869 C.C.; while as to the bequest in favour of a corporation to be thereafter formed, there was no restriction against it to be found in the Code.

Sir Montague Smith, qui prononça le jugement de la cour, fit le commentaire suivant, qu'il convient de reproduire dès maintenant et auquel nous aurons l'occasion de revenir plus loin:

It is evident that the charitable and lawful purposes mentioned in art. 869 C.C. were not meant to be confined to such trusts only as may be created for the benefit of some definite persons. The use of the word " purposes " indicates that bequests may be made to uses for general and indefinite recipients so long as the purpose be charitable or lawful, and the bequest be within the limits permitted by law.

En 1893, dans la cause de *Ross* v. *Ross* (3), la Cour du Banc de la Reine de la province de Québec décida que la disposition testamentaire conçue en ces termes:

I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for public protestant charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best

était valide et ne saurait être attaquée comme vague et incertaine, comme ne désignant pas suffisamment les bénéficiaires, ni comme laissée à la volonté du légataire Frank Ross.

Le jugement fut unanime. Il fut confirmé par la Cour Suprême (4), et il est important d'étudier ce dernier jugement avec soin, parce qu'il est (avec *Brosseau* v. *Doré* (5), auquel nous aurons à référer plus tard) le seul jugement de cette cour sur la question qui nous occupe, et parce que certains jugements rendus postérieurement dans la pro-

(1) Stuart K.B. 218.
(2) 20 L.C.J. 197, at p. 216.
(3) [1893] Q.R. 2 Q.B. 413.
(4) [1893] 25 Can. S.C.R. 307.
(5) [1904] 35 Can. S.C.R. 205.

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vince de Québec ont annulé des testaments, en prétendant suivre la doctrine exposée par cette cour dans *Ross* v. *Ross* (1).

Ross était un marchand demeurant à Québec. Se trouvant de passage à New-York, il fit un testament olographe conforme à la loi de la province de Québec. C'était en 1865, et avant la mise en force du Code civil; mais il est admis que le code n'a pas changé la loi. Nous avons donné le texte du testament en résumant la décision de la Cour du Banc de la Reine. L'action principale attaquait le testament parce qu'il n'était pas conforme aux lois de l'Etat de New-York où il avait été fait. On invoquait la maxime: " Locus regit actum ".

Trois personnes intervinrent dans la cause:

1. William Russell Ross, un cousin, qui allégua qu'il était parent et pauvre et réclama sa part en vertu du testament;

2. Morrin College, une institution destinée à l'éducation supérieure et plus spécialement à la préparation des jeunes gens au ministère dans l'Eglise presbytérienne du Canada. Les jeunes gens y étaient reçus gratuitement, et l'instruction y était gratuite ou était payée au moyen de bourses ou " scholarships ";

3. Finlay Asylum, une institution pour le soulagement des vieillards invalides, organisée sous la direction de l'Eglise anglicane.

Le légataire Frank Ross contesta les interventions en prétendant

that the whole estate and succession was absolutely his own and the bequests in favour of public protestant charities and poor relations were void for vagueness and uncertainty * * * and conferred no right whatever in favour of any charity or relations.

Il ajouta:

A testamentary bequest, to be valid, must be the expression of the will of the testator; he cannot make a legacy depend upon the will of a third person, nor can he leave the choice of the legatee to a third person.

La cour était composée de Sir Henry Strong, juge en chef, et des juges Fournier, Taschereau, Sedgewick et King. La majorité de la Cour Suprême (Sir Henry Strong, juge en chef, Sedgewick et King JJ.) déclara le testament valide, quoique fait à New-York, parce qu'il était en l'une des formes admises par la loi de la province de Québec.

(1) [1893] Q.R. 2 Q.B. 413.

Monsieur le juge Fournier concourut dans cette partie du jugement, quoique pour des raisons différentes de celles de la majorité. Monsieur le juge Taschereau fut seul d'opinion différente sur ce point. L'action principale en annulation du testament se trouva donc rejetée et le jugement de la Cour du Banc de la Reine sur cette action fut confirmé.

Quant aux interventions où Frank Ross, dans sa contestation, soulevait la nullité des legs pour fins de charité ou aux parents pauvres, voici ce que dit Sir Henry Strong, C.J., qui prononça le jugement de la majorité:

Then as to the interventions. As the principal action was to annul the will, and as that action is dismissed, we are not called upon to interpret the legacies to any greater extent than is rendered necessary for the purpose of disposing of the interventions, but to this extent we must interpret it in order to ascertain if the parties had any right to intervene.

Il examine ensuite chacune des trois interventions.

Il considère que celle de William Russell Ross, qui réclame une part du legs comme étant l'un des "poor relations" ne peut être accueillie. En premier lieu, ce n'est pas un legs absolu. La disposition confère au légataire Frank Ross la faculté de choisir parmi les parents pauvres. Le droit de William Russell Ross, même s'il appartenait à la classe de parents décrits dans le testament, serait donc subordonné au choix préalable de Frank Ross. Mais le juge en chef explique que William Russell Ross ne tombe pas dans la catégorie des "relations" et n'est pas un bénéficiaire en vertu du testament.

"Poor relations" (dit-il) must be interpreted as meaning "heirs-at-law". The word "poor" is too vague and uncertain to have any meaning attached to it, and must therefore be rejected. The word "relations", than standing alone, must be restricted to some particular class, for if it were to be construed generally as meaning all relatives it would be impossible ever to carry out the directions of the will. The line must therefore be drawn somewhere, and can only be drawn so as to exclude all except those whom the law, in the case of an intestacy, recognizes as the proper class among whom to divide the property of a deceased person who dies intestate, namely, his heirs.

William Russell Ross n'étant qu'un cousin du testateur, la cour en conclut qu'il n'était pas un héritier et, pour cette raison, rejeta son intervention avec dépens.

Il est vrai que l'on trouve dans le passage que nous venons de citer la phrase:

The word "poor" is too vague and uncertain to have any meaning attached to it, and must therefore be rejected;

mais, comme on le voit, ce n'est là qu'un *obiter dictum* qui n'était pas du tout nécessaire pour les fins du jugement.

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La *ratio decidendi* de l'intervention de William Russell Ross, c'est qu'il n'est pas une " relation " envisagée par le legs et que, par conséquent, il ne peut tirer aucun bénéfice de la disposition, bien que pauvre, parce qu'il ne fait pas partie de la classe bénéficiaire. On remarquera, que même si l'on attribuait à la phrase incidente sur le mot " poor " une portée qu'elle n'a pas eue sur la décision, le juge en chef n'a pas déclaré le legs nul par suite de l'emploi de ce mot " poor ", qu'il trouvait vague et incertain, mais il l'a tout simplement considéré comme non écrit.

L'intervention du Morrin College fut rejetée parce qu'on fut d'avis qu'il n'était pas une institution charitable dans le sens indiqué dans le testament.

L'intervention de Finlay Asylum fut maintenue.

Et, en conclusion, le juge en chef ajoute:

As I say above, I only interpret the will so far as is necessary for disposing of the interventions. I disclaim any intention of construing its provisions as to these legacies to poor relatives and charities beyond this. I therefore leave open for future consideration, and for a determination in some further action or proceeding if the parties cannot agree, the questions of how far Frank Ross's powers of selection go; whether he can give to some of the heirs and exclude others, or whether he must give something to all; and I would say the same with reference to the charities.

Ce fut là l'opinion de la majorité de la cour telle qu'elle a été exprimée par le juge en chef, qui parlait en son nom. Nous ne croyons pas que l'on puisse trouver là la doctrine qu'un legs ordonnant à un légataire fiduciaire de distribuer ses biens

en œuvres de charité, en œuvres pies, au soulagement des souffrances de l'humanité, à l'éducation de jeunes gens pauvres

est, suivant la loi de la province de Québec, trop vague et incertain pour être valide. Le jugement de *Ross* v. *Ross* (1) déclare qu'il ne se prononce pas sur cette question. On ne saurait s'autoriser pour cela de l'allusion à l'emploi du mot " poor " faite en passant par Sir Henry Strong et qui n'était pas nécessaire pour la décision de la cause. Nous croyons, au contraire, que le juge en chef a clairement indiqué qu'il n'entendait pas poser de principes de ce genre en déclarant formellement qu'il se bornait à l'interprétation du testament en autant qu'il le fallait pour juger les interventions; qu'il répudiait toute intention de se prononcer sur la validité des dispositions en faveur des parents pauvres et des œuvres charitables, et qu'il entendait laisser cette question

(1) 25 Can. S.C.R. 307

ouverte " for future consideration ". C'est dans ce jugement qu'ont concouru messieurs les juges Sedgewick et King.

Même la dissidence de Monsieur le Juge Fournier ne porte pas sur l'incertitude du legs à raison de l'emploi du mot " poor ". Il suffit de voir comment il pose la question dans son jugement:

Le legs aux parents pauvres est aussi nul pour cause d'incertitude. Que doit-on entendre par l'expression " poor relations " (parents pauvres)? Sont-ce les parents aux degrés successibles, ou seulement tous ceux qui pourraient tracer leur descendance d'un ancêtre commun, qui doivent être compris dans ce legs? Ces parents pauvres ne sont aucunement désignés et ne pourraient être reconnus par aucun événement indiqué par le testateur; l'expression vague et incertaine dont le testateur s'est servi rend leur identification impossible et doit être rejetée.

Comme on le voit, la difficulté entrevue par le savant juge ne provenait pas de l'emploi du mot " poor " mais de l'emploi du mot " relations ". Ce fait est à signaler parce que le legs fiduciaire de Madame Valois est pour des fins de charité et de bienfaisance. Nous verrons que la doctrine qui admet la nullité d'une disposition testamentaire pour cause d'incertitude a toujours fait exception en faveur des legs de charité et nous tenons à démontrer que le jugement de la majorité dans la cause de *Ross* v. *Ross* (1), et même le dissentiment de Monsieur le Juge Fournier, n'ont pas eu l'effet d'interpréter la loi de la province de Québec comme s'opposant à cette doctrine d'exception en faveur des legs pour des fins de charité ou de bienfaisance. Suivant nous, l'opinion de Monsieur le Juge Fournier est plutôt à l'effet que le legs dans *Ross* v. *Ross* (1) pèche par vice d'obscurité en ce qu'il est impossible de discerner à quels parents le testateur entendait léguer, et non pas à cause de l'incertitude de l'expression " poor ".

Il reste à remarquer que le maintien de l'intervention de Finlay Asylum était au moins une indication que l'opinion de la majorité de la Cour Suprême était favorable au legs contenu dans le testament pour fins de charité.

La cause de *Doré* v. *Brosseau* (2), qui vient ensuite, nous offre l'exemple d'un arrêt où la Cour du Banc du Roi a reconnu la validité d'un legs exprimé dans les termes suivants:

Si, après avoir fait instruire mes neveux et nièces comme susdit, il reste un surplus, je veux que ce surplus soit distribué à mes frères et

(1) 25 Can. S.C.R. 307. (2) [1904] Q.R. 13 K.B. 538.

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sœurs ou neveux et nièces qui auront le plus besoin, à la discrétion desdits légataires fiduciaires. Le testateur Brosseau avait procédé ici de la même façon que le testateur Ross. Il avait nommé des exécuteurs testamentaires chargés de réaliser ses biens et de les transmettre ensuite pour fins de distribution à des légataires fiduciaires qu'il nommait. La Cour du Banc du Roi ne trouva pas que les mots " qui auront le plus besoin " invalidaient la disposition pour cause d'incertitude. Elle n'accueillit pas, non plus, l'argument que le choix laissé à la discrétion des fiduciaires était contraire à la loi de la province de Québec. Elle invoqua sur ce point les arrêts de *Molsons Bank* v. *Lionais,* où la Cour Supérieure (1), la Cour du Banc de la Reine (2) et la Cour Suprême (3) s'étaient accordées pour admettre la légalité d'une disposition de ce genre. Elle invoqua également la décision du Conseil Privé dans la cause de *McGibbon* v. *Abbott* (4), où les lords admirent le même principe; et elle s'autorisa également du jugement alors récent de la Cour Suprême dans la cause de *Ross* v. *Ross* (5), dans lequel elle dit que le pouvoir de conférer ce droit d'élection aux fiduciaires avait été reconnu.

La Cour Suprême confirma le jugement de *Brosseau* v. *Doré* (6) et déclara la disposition valide. Monsieur le Juge Girouard, parlant au nom de toute la cour, dit que depuis la décision du Conseil Privé dans la cause de *McGibbon* v. *Abbott* (4) la question de savoir si un testateur peut conférer le pouvoir d'élire, qui divisait les commentateurs français, " n'est plus susceptible même d'un doute dans la province de Québec ". Il ajouta que la jurisprudence de la Cour Suprême était au même effet, comme le prouvait l'arrêt de *Ross* v. *Ross* (5). Sur la question d'incertitude, il déclara que les mots " qui en auront le plus besoin " constituaient une direction suffisante pour faire la distribution.

Nous trouvons ensuite, en 1907, l'arrêt de la Cour du Banc du Roi *re Stevens* v. *Coleman* (7), qui maintient comme valide une disposition conçue en ces termes:

(1) [1880] 3 L.N. 82.
(2) [1882] 26 L.C.J. 271, at p. 278.
(3) [1883] 10 Can. S.C.R. 526, at pp. 535, 551.
(4) [1885] 8 L.N. 267.
(5) 25 Can. S.C.R. 307.
(6) 35 Can. S.C.R. 205.
(7) [1907] Q.R. 16 K.B. 235.

that all my property real and personal be retained in trust for the maintenance of a manual labor school for girls

et confiait à deux personnes

to act as executors of my will and take charge of all property of all kinds which I may leave for the purposes contained or expressed in my will.

L'argument d'incertitude qu'on invoquait contre le legs fut écarté par la Cour du Banc du Roi, qui confirmait en cela la Cour Supérieure.

Le jugement de la Cour de Revision dans la cause de *Latulippe* v. *La fabrique de l'église méthodiste de Mégantic* (1) est basé sur des considérations d'ordre différent de celles qui ont fait l'objet des arrêts que nous avons étudiés jusqu'ici.

Le défunt, Louis Turgeon, avait fait un testament olographe par lequel il léguait tous ses biens

à la corporation protestante de la ville du Lac Mégantic à la condition que ce soit pour aider à la construction d'un hôpital protestant dans cette ville.

Ses héritiers attaquèrent le testament en prétendant que cette disposition était vague et incertaine et ne désignait pas suffisamment le bénéficiaire. Trois corporations protestantes contestèrent l'action des héritiers: La fabrique de l'église méthodiste de la ville de Mégantic; La fabrique de l'église presbytérienne de la ville de Mégantic; et La fabrique de l'église anglicane de la ville de Mégantic, chacune d'elles prétendant être la " corporation protestante " désignée dans le testament. Le jugement de la Cour de Revision, prononcé par Monsieur le Juge Delorimier, dit d'abord qu'il est reconnu et admis que " la corporation protestante de la ville de Mégantic n'existe pas et n'a jamais existé "; puis il ajoute qu'il est impossible de choisir entre les trois corporations protestantes qui réclament le legs, parce que la dénomination religieuse n'est pas indiquée dans le testament et qu'aucune d'elles " ni séparément ni collectivement " n'offre les conditions requises pour invoquer le bénéfice de la disposition.

D'après notre interprétation, ce jugement n'est rien autre chose qu'une application de l'exemple donné par Pothier (édition Bugnet, tome 8, n° 73) d'une disposition testamentaire qui serait nulle par vice d'obscurité " lorsqu'on ne

(1) [1913] Q.R. 43 S.C. 360.

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peut absolument discerner au profit de qui le testateur a voulu la faire." Il dit:

Si le testateur avait deux amis qui eussent l'un et l'autre le nom de Pierre, avec lesquels il eût vécu dans la même union, et qu'il eût légué en ces termes: *Je lègue une telle chose à mon ami Pierre*; s'il ne se rencontre aucune circonstance qui puisse faire présumer qu'il a voulu léguer à l'un des deux Pierre plutôt qu'à l'autre, aucun des deux ne pourra prouver que c'est à lui que le legs a été fait, ce qui est néanmoins nécessaire pour fonder sa demande, et par conséquent, le legs demeurera nul par vice d'obscurité.

Ici ni la fabrique de l'église méthodiste, ni la fabrique de l'église presbytérienne, ni la fabrique de l'église anglicane de la ville de Mégantic n'a pu établir de circonstances qui faisaient présumer que le testateur avait voulu léguer à l'une plutôt qu'à l'autre; et, dans l'impossibilité où la cour était de discerner celle des fabriques que le testateur avait en vue, la cour fut contrainte de déclarer le legs caduc.

C'est là, suivant nous, la véritable raison de cet arrêt. Cela est confirmé par les remarques suivantes que nous trouvons à la fin du jugement:

D'ailleurs il est à remarquer qu'il existe une différence notable entre les causes ci-dessus citées (N.B. Le savant juge vient de citer *Stevens* v. *Coleman* (1) et *Fraser* v. *Abbott* (2)) et la présente cause, par le fait que. dans toutes ces causes, le légataire fiduciaire y était nommé avec précision et certitude, et qu'il n'y avait, pour les tribunaux, qu'à le remplacer pour donner effet aux volontés clairement exprimées du testateur. Dans la cause actuelle, le cas est bien différent, puisque les corporations défenderesses ne sont aucunement mentionnées audit testament, ni comme légataires, ni comme fiduciaires, ni comme chargées de l'exécution du testament.

On peut donc en conclure que s'ils eussent été en présence d'une nomination de légataires fiduciaires précise comme dans le cas actuel, et s'ils avaient trouvé possible de discerner à laquelle des trois corporations protestantes de la ville de Mégantic le testateur avait entendu léguer ses biens, les mêmes juges en seraient venus à une conclusion différente.

Nous arrivons maintenant à l'arrêt *re Cinq-Mars* v. *Atkinson* (3), décidé par la Cour du Banc du Roi en 1915. La clause du testament était la suivante:

Je veux et ordonne qu'au décès de ma fille, les biens présentement donnés en usufruit soient distribués en œuvres de charité. par mon exécuteur testamentaire ci-après nommé, à sa discrétion.

La légataire universelle a intenté une action pour faire annuler cette clause comme vague et incertaine. L'exécu-

(1) Q.R. 16 K.B. 235. (2) 20 L.C.J. 197.
(3) [1915] Q.R. 24 K.B. 534.

teur testamentaire a contesté l'action et a soutenu la validité de cette disposition.

La Cour Supérieure (Monsieur le Juge Fortin) a maintenu la clause comme valide et légale en se basant sur l'article 869 C.C. La Cour de Revision (1) infirma ce jugement et annula la clause du testament, en déclarant que l'arrêt de la Cour Suprême dans *Ross* v. *Ross* (2) ne s'appliquait pas, et en paraissant s'appuyer sur l'arrêt de *Latulippe* v. *La fabrique méthodiste de Mégantic* (3) que nous venons d'analyser.

En Cour du Banc du Roi, nous avons les notes de Monsieur le Juge Lavergne (4), qui semble parler au nom de la cour, et de Monsieur le Juge Pelletier. Monsieur le Juge Lavergne s'appuie uniquement sur l'arrêt de *Ross* v. *Ross* (2), et Monsieur le Juge Pelletier donne surtout pour raison que

> la testatrice laisse à la discrétion de son exécuteur testamentaire le soin de distribuer les biens en question, en œuvres de charité, comme l'exécuteur le jugera opportun, à sa discrétion.

Nous sommes d'accord avec Monsieur le Juge Létourneau dans la présente cause pour dire que l'arrêt de la Cour Suprême *re Ross* v. *Ross* (2) n'a pas la portée que la Cour du Banc du Roi lui a donnée dans *Cinq-Mars* v. *Atkinson* (4), comme nous avons tâché de la démontrer par l'analyse que nous en avons faite.

Quant au motif invoqué par Monsieur le Juge Pelletier, il n'est par opportun de le discuter ici, puisque la clause, en ce qui concerne le légataire fiduciaire de Boucherville, est rédigée d'une façon différente de celle qui était contenue dans le testament Atkinson et ne nous paraît enfreindre aucune des prescriptions de la loi, surtout si l'on tient compte de l'article 916 C.C.

Il reste les deux jugements de la Cour Supérieure *re Lyman* v. *The Royal Trust* (5) et *Hastings* v. *MacNaughton* (6).

Dans la première cause, il y avait trois legs contestés. Le premier avait pour but d'aider "à Montreal public library". Il pourvoyait à un fonds de $25,000 dont on devait laisser accumuler le revenu annuel

(1) [1914] Q.R. 46 S.C. 226.
(2) 25 Can. S.C.R. 307.
(3) Q.R. 43 S.C. 360.
(4) Q.R. 24 K.B. 534.
(5) [1916] Q.R. 50 S.C. 450.
(6) [1916] Q.R. 51 S.C. 174.

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till such time as a sufficient amount has been subscribed and paid in to responsible trustees to make with the bequest not less than $1,000,000 when the amount of my bequest with all increment may be handed over to the said trustees.

Le testament ne nommait par les "responsible trustees" et il n'en existait pas. Le juge dit dans son jugement:

No such library exists or is in sight and there is no reasonable certainty that such a library will be established in Montreal within any reasonable time.

Ce cas était bien loin de celui du Fraser Institute, où les fiduciaires étaient nommés et la corporation destinée à administrer la bibliothèque était sur le point d'être organisée. En réalité, nous avons ici ce que les lords du Conseil Privé avaient envisagé dans cette cause du Fraser Institute (*Abbott* v. *Fraser* (1)), lorsqu'ils disent:

Their Lordships consider that an impossibility to apply the property in accordance with the will would in this case arise, if the trustees failed, after the lapse of a reasonable time, to obtain a charter or act of incorporation, and that in that event the property would pass to the heirs under the above article.

L'article en question est l'article 964 C.C. Ici, non seulement il n'y a pas apparence de la possibilité de mettre le legs à exécution dans un délai raisonnable; mais il n'y avait pas de fiduciaires à qui les exécuteurs pouvaient remettre le legs. Le jugement de la Cour Supérieure sur ce point a seulement fait l'application du principe posé par le Conseil Privé dans le passage que nous venons de citer.

Les deux autres legs contenus dans le testament étaient faits à la "Tuberculosis League, or similar works", et "for missionary purposes". La "Tuberculosis League" avait cessé d'exister, et la cour déclara le legs caduc. Quant aux mots "similar works" et "for missionary purposes", la cour les trouva trop vagues, en s'appuyant sur les arrêts de *Ross* v. *Ross* (2), de *Latulippe* v. *La Fabrique de l'Eglise méthodiste de Mégantic* (3) et de *Cinq-Mars* v. *Atkinson* (4). Ce que nous avons déjà dit de ces trois arrêts nous dispense de revenir là-dessus.

La clause en litige dans *Hastings* v. *MacNaughton* (5) se lisait:

The remainder of my estate to go to some derserving charity, the election of which I leave to my executors.

Elle fut rejetée du testament comme trop vague. Ce jugement a été rendu quelques mois après celui de *Lyman* (6)

(1) 20 L.C.J. 197, at p. 215.
(2) 25 Can. S.C.R. 307.
(3) Q.R. 43 S.C. 360.
(4) Q.R. 24 K.B. 534.
(5) Q.R. 51 S.C. 174.
(6) Q.R. 50 S.C. 450.

et s'appuie sur le même raisonnement et vraisemblablement sur les mêmes autorités que ce dernier arrêt.

Cela complète notre revue de la jurisprudence de la province de Québec sur la question qui nous est soumise. Ce qui s'en dégage est la tendance marquée d'envisager avec faveur les legs pour fins de bienfaisance et de charité et de donner l'interprétation la plus large possible à l'article 869 C.C. Dès que l'on trouve dans le testament la nomination d'un ministre, qu'il soit légataire fiduciaire, exécuteur testamentaire, ou qu'il soit héritier ou légataire tout simplement, à qui peuvent être remis les biens destinés à la charité et qui devra les administrer et les distribuer, les jugements se montrent disposés à maintenir le legs, même lorsque la volonté du testateur est exprimée dans les termes les plus généraux, pourvu qu'aucune ambiguïté ou obscurité n'empêche de discerner, entre plusieurs bénéficiaires possibles, à qui la description du bénéficiaire peut s'appliquer, et lequel est le véritable destinataire dans l'esprit du testateur.

Un moment seulement cette tendance a paru s'arrêter, lorsque la Cour du Banc du Roi, dans *Atkinson* v. *Cinq-Mars* (1), a cru devoir donner à la décision de la Cour Suprême dans la cause de *Ross* v. *Ross* (2) une interprétation et une portée que—comme nous croyons l'avoir démontré—elle ne comporte pas. En plus de tout ce que nous en avons déjà dit, il est important de faire remarquer que le juge en chef Strong, lorsqu'il a inséré dans son jugement,

> The word "poor" is too vague and uncertain to have any meaning attached to it and must therefore be rejected

s'adressait à l'expression du testament "poor relations". Il s'agissait donc là simplement d'un legs qu'on pourrait appeler, tout au plus, de charité privée. Or, la doctrine a toujours fait la distinction entre une disposition de charité privée et une disposition pour fins de charité, ou charité publique. C'est cette dernière seulement qui bénéficie de la faveur d'exception qui l'exclut de la règle rendant invalide les legs incertains ou indéterminés. Par conséquent, même en donnant à la phrase incidente du juge en chef Strong une portée qu'elle n'a pas dans le jugement de *Ross* v. *Ross* (2), cette opinion n'affecterait que les legs de cha-

(1) Q.R. 24 K.B. 534. (2) 25 Can. S.C.R. 307.

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rité privée, et non pas les legs de charité en général, comme l'indique bien d'ailleurs la façon différente dont le jugement traite l'autre partie de la clause testamentaire en faveur des " public protestant charities ".

Depuis la mise en vigueur du code, de même que dans le droit antérieur, la loi de la province de Québec a toujours été que les legs pour fins de charité en général ne peuvent pas être mis de côté pour cause d'incertitude, pourvu que l'exécution en fût possible. Les legs qui permirent la fondation du McGill College et du Fraser Institute, quoique aucune corporation n'existât pour les accepter lors de la mort du testateur, parurent susceptibles d'exécution par suite de la nomination de légataires fiduciaires qu'ils contenaient et furent maintenus par le Conseil Privé.

Nous ne saurions mieux définir la situation qu'en empruntant à Planiol, Droit civil, tome 3, n° 3344, le passage suivant:

3344. Quand on y réfléchit, on voit que l'obstacle qui empêche de réaliser *d'une manière directe* une fondation par testament, ne vient pas d'une *prohibition de la loi,* puisque cette même fondation aurait peut-être été approuvée avec empressement et encouragée par l'administration, si le fondateur avait voulu ou pu l'organiser de son vivant. L'obstacle vient de ce que, le jour de son décès, ses biens vont se trouver vacants et sans maître: ils ne seront pas encore la donation d'un établissement qui n'existe pas; ils ne sont à personne. Dès lors un moyen très simple s'offre non pas d'"éluder la loi", comme on le dit à tort, car la loi *ne défend* rien ici, mais de *tourner la difficulté*: c'est de charger quelqu'un de faire, *après la mort du testateur,* ce que celui-ci aurait pu faire de son vivant; cette personne sera, en quelque sorte, le *dépositaire* des biens destinés à la fondation et elle les possédera sous le titre de *légataire, tenu d'exécuter certaines charges* à lui imposées par le défunt.

Ce que Planiol dit d'une fondation particulière est également vrai des legs pour la charité en général.

Disposer de ses biens (dit Demolombe, vol. 22, n° 81), dans le sens élevé de ce mot n'est pas seulement les donner, c'est en commander un emploi quelconque reconnu par la loi et qui devra être fait après le décès du disposant *de eo quod quis, post mortem suam, fieri velit.*

C'est pour cela, avait-il dit antérieurement (vol. XXII, n° 2), que la loi permet

la nomination de l'exécuteur testamentaire par lequel le testateur se survit pour ainsi dire à lui-même dans ce mandataire de son choix, qui le représente, après son décès, pour procurer l'accomplissement de ses dernières volontés.

L'ancien droit français a toujours admis les legs pour des fins de charité ou de bienfaisance, quoiqu'ils fussent faits à des personnes indéterminées.

Furgole, Testaments (vol. 1), écrit en 1745:

L'incertitude ne rend pas non plus les dispositions nulles lorsqu'elles sont faites en faveur de l'église, de l'hôpital, des pauvres, des captifs * * * (p. 418).

Les dispositions testamentaires, générales ou particulières, en faveur des pauvres sont bonnes et valables, et l'on ne peut point les attaquer sous prétexte d'incertitude (24 Co. de Episcopis et Clericis: *id quod pauperibus testamenti, vel codicillis relinquitur, non sit incertis personis relictum evanescat*) ce qui a lieu quoiqu'un hôpital n'ait point été désigné, ni que l'on n'ait point exprimé la qualité des pauvres auxquels les libéralités sont faites, et dans ce cas les libéralités appartiennent aux pauvres du lieu où le testateur avait son domicile, etc. (p. 391).

Et Ricard, parlant des legs au profit des pauvres dans son Traité des donations, en 1652 (partie I, chapitre III, sect. XIII, n° 603, dit:

Les lois ont non seulement autorisé les donations et les legs faits à leur profit quoique en nom collectif; mais elles les ont même déclarés les plus favorables de toutes les dispositions.

Il réfère alors au même texte latin que Furgole et il poursuit:

Et pour éviter l'inconvénient qui procède de l'incertitude des personnes, entre lesquelles la distribution de semblables legs doit être faite, il se pratique de la laisser à la discrétion des exécuteurs testamentaires, ou des personnes publiques, si le testateur n'en a autrement disposé.

"Legs pieux" et "destinés aux bonnes œuvres" ont "plusieurs prérogatives" et "sont toujours valables", d'après Ferrière, dans son Dictionnaire du Droit, vol. II, page 109 (1749).

Nous n'avons pas d'ailleurs à insister sur la démonstration de ce principe. Pothier, dans son Traité des donations testamentaires (édition Bugnet, vol. 8, p. 251, n° 93) dit:

Les legs faits aux pauvres sont aussi valables, quoiqu'ils ne le fussent pas par l'ancien droit, les pauvres étant regardés comme personnes incertaines; car ce legs part d'un motif plausible qui est le motif de charité.

Quand Pothier parle de l'ancien droit, il va sans dire qu'il réfère au droit romain, où les règles étaient plus rigoureuses.

Toute cette question est résumée par Planiol dans son Traité Elémentaire de Droit Civil (8e éd., vol. 3) d'une façon que nous préférons reproduire parce qu'elle nous dispensera d'insister davantage:

Des libéralités faites aux pauvres.

A.—Aptitude légale des pauvres à recevoir des libéralités.

2991. Importance des legs charitables.—Depuis l'avènement du christianisme les libéralités au profit des pauvres ont été de tout temps très nombreuses. Dès le Ve siècle, les empereurs Valentinien et Marcien décidaient qu'un legs fait aux pauvres était valable (Code. liv. 1. tit. 3, loi 23)

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et il est probable que depuis longtemps des libéralités charitables étaient faites aux églises, à qui Constantin avait permis d'adresser des legs par une constitution de l'an 321 (*Code*. liv. 1. tit. 2, loi 1). Au moyen âge, un testateur n'aurait pas voulu écrire ses dernières volontés sans y insérer quelques legs pieux, destinés à de bonnes œuvres et au soulagement des pauvres. De nos jours encore rien n'est plus fréquent que de voir des libéralités souvent considérables faites aux pauvres par testament.

2992. Capacité de recevoir reconnue aux pauvres.—Les pauvres sont-ils des personnes incertaines? Le droit romain les considérait certainement comme tels, et s'il a permis de leur faire des legs, c'est en introduisant en leur faveur une véritable exception inspirée par l'influence chrétienne. Mais, comme on l'a vu plus haut (nº 2926), la prohibition ancienne de gratifier des personnes incertaines, au sens romain du mot, n'existe plus en droit français; il ne subsiste qu'un obstacle de fait tenant à *l'indétermination des bénéficiaires*. Or, il est permis d'adresser un legs à *toute une catégorie de personnes,* pourvu que cette catégorie soit elle-même déterminée, car le nombre des légataires appelés à bénéficier d'une libéralité n'est pas limité par la loi. Il ne reste donc plus qu'à rechercher si la catégorie des pauvres est suffisamment déterminée pour recevoir des legs. On ne saurait dire où commence et où finit la pauvreté; les limites de cette classe sont indécises; les pauvres ne se reconnaissent pas à des signes certains, comme le seraient des personnes habitant telle commune ou exerçant telle profession.

Néanmoins, il n'y a pas lieu de s'embarrasser du défaut de détermination, et cela pour une double raison.

1º. Si la classe des pauvres n'est pas déterminée par des limites tranchées, elle n'en a pas moins *une existence réelle,* et il serait aussi odieux qu'absurde d'empêcher des libéralités faites aux pauvres parce que la détermination des bénéficiaires pauvres pourra, dans certains cas, comporter une appréciation de fait par ceux qui seront chargés d'employer les fonds. Je dis "dans certains cas", car pour la grande majorité de ceux qui se présenteront l'état de détresse et de misère sera évident.

2º. En fait, la classe des pauvres est secourue par la charité tant publique que privée, et puisque des secours lui sont journellement distribués pour des sommes considérables, il est évidemment permis de contribuer volontairement à augmenter ces distributions par des legs. Le *droit* serait *la forme de l'injustice,* si ses principes aboutissaient à paralyser la charité.

2993. Etat des textes.—Du reste, la question n'est pas douteuse, l'aptitude des pauvres à recevoir n'a jamais cessé depuis le jour où les empereurs romains l'ont reconnue (Pothier, *Donations testamentaires,* nº 93), et le Code civil la suppose en réglant, dans ses art. 910 et 937, la façon dont doivent être acceptées les libéralités faites "aux pauvres d'une commune". Les auteurs qui écrivent sur le droit administratif disent couramment que les pauvres forment une "personne civile" (Tissier, nº 125). Formule inutile: je puis léguer mon bien à six personnes; pourquoi pas à cinq cents?

2994. Interprétation des dispositions vagues.—Les libéralités faites aux pauvres sont donc possibles, à une condition, toutefois, c'est que la catégorie de pauvres appelée à en bénéficier soit déterminée. Ordinairement, le disposant a soin de s'expliquer sur ce point. Quand il ne l'a pas fait, on n'annule pas pour cela la libéralité faite aux pauvres d'une manière vague: on cherche, par interprétation du testament, quels sont ceux que le disposant a entendu gratifier; ordinairement, ce sont les pauvres d'une région déterminée, par exemple, ceux de sa commune ou de sa paroisse.

Les legs faits aux pauvres sans autre détermination donnent lieu à des difficultés d'interprétation qui ont été résolues différemment. Jadis on les attribuait volontiers aux pauvres de la commune où le testateur se trouvait lorsqu'il a testé (Avis du Conseil d'Etat, du 12 août 1834). D'autres préfèrent le lieu de son domicile ou de sa résidence (Pothier, *Cout. d'Orléans,* introd. au tit. XVI, n° 38; Demolombe, t. XVIII, n° 812; Laurent, t. XI, n° 312; Metz, 10 mai 1844). Cela paraît avant tout une question de fait et le juge doit statuer selon les circonstances (Paris, 7 et 20 mai 1885, *Gazette des Tribunaux,* 24 juin 1885; Douai, 29 nov. 1893, D. 94, 599).

L'exposé que nous venons de faire de la doctrine reconnue par l'ancien droit français antérieurement au code de la province de Québec est utile pour nous aider à comprendre le sens de l'article 869 C.C. Le but de cet article est évidemment de permettre des legs à des personnes indéterminées pour des fins qui ne sont pas précisées autrement que par l'indication qu'elles seront affectées à la charité ou à la bienfaisance. C'est déjà ce qu'avait signalé le Conseil Privé, dans ce passage de son jugement *re Abbott* v. *Fraser* (1), qu'il est opportun de répéter ici:

It is evident that the charitable and lawful purposes mentioned in art. 869 were not meant to be confined to such trusts only as may be created for the benefit of some definite persons. The use of the word "purposes" indicates that bequests may be made to uses for general and indefinite recipients so long as the purpose be charitable or lawful, and the bequest be within the limits permitted by law.

Cela équivaut à dire qu'il est permis de faire des legs pour fins de bienfaisance ou fins analogues sans identifier les personnes avantagées, en en laissant le choix à un légataire fiduciaire, et qu'il suffit d'en indiquer la nature et le caractère (purpose)—fins de bienfaisance ou de charité—sans en préciser la description: églises, hôpitaux, hospices, institutions de charité, maisons d'éducation. S'il n'avait en vue que des bénéficiaires—individus *ou institutions*—qui seraient nommés dans le testament ou des fins de bienfaisanse qui y seraient déterminées, l'article 869 C.C. serait inutile. Les autres articles du code y pourvoient déjà.

L'appelante objecte que cette interprétation aurait pour effet de légaliser tous les legs incertains, parce que l'article ne mentionne pas seulement les "fins de bienfaisance" mais aussi "les autres fins permises". Les legs de Madame Valois sont des legs charitables. Ils sont donc couverts par l'expression: "fins de bienfaisance", qui comprend la charité mais qui nous paraît avoir un sens plus étendu. Il n'est donc pas nécessaire, en cette cause, de définir la portée

(1) 20 L.C.J. 197.

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des mots: " autres fins permises ". Une trop grande généralisation pourrait être empêchée par l'application de la règle *ejusdem generis*. Il nous suffit de savoir que l'article s'adresse à toutes fins semblables aux " fins de bienfaisance ", qui y sont expressément mentionnées. Cela nous est rendu bien clair par ce passage du Cinquième Rapport des Codificateurs (p. 189) qui réfère à l'article 869 C.C.:

> L'article 134 *bis* (c'est le numéro qui lui est donné dans le rapport), qui se trouve en son rang parmi les précédents, expose en abrégé la loi sur les legs pour des objets pieux, de charité, ou de bienfaisance; elle n'a pas été changée par la nouvelle législation sur les testaments, qui au contraire était de nature à l'étendre.

Voilà donc qui est très explicite. Les Commissaires ont voulu, par cet article, introduire dans le code la loi qui jusque-là régissait les legs pour des objets pieux, de charité ou de bienfaisance. C'est donc l'ancien droit en matière de charité, tel que nous venons de l'exposer et qui permettait des legs en faveur de personnes indéterminées, que l'article 869 C.C. reproduit. Par l'emploi des mots " ou autres fins permises ", l'article n'a pas voulu étendre à toutes les fins l'exemption à la règle d'incertitude. Les commissaires précisent que l'article expose " la loi sur les legs pour objets pieux, de charité ou de bienfaisance ". Cela confirmerait qu'il faut entendre les " autres fins permises " comme signifiant autres fins du même genre. Les commissaires eux-mêmes voulaient pourvoir aux cas des legs pieux, de charité et de bienfaisance. Ils ne mentionnent dans l'article que les fins de bienfaisance; les " autres fins permises " incluraient au moins les legs pieux et de charité.

Ils ne s'expliquent pas sur le sens de l'expression " dans les limites voulues par les lois ". Cette expression ne peut cependant être interprétée comme excluant les legs de bienfaisance à des personnes indéterminées, par application de l'article 838 C.C. Ce serait là enlever à l'article 869 C.C. tout son effet qui est précisément, en matières de bienfaisance et autres du même genre, de permettre ces sortes de legs. Cette expression a trait aux restrictions exposées dans le code relativement à la substitution, à la capacité de recevoir par testament, plus particulièrement sans doute à la capacité des corporations de mainmortes qui, en vertu de l'article 836 C.C.

> ne peuvent recevoir par testament que dans la limite des biens qu'ils peuvent posséder.

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On remarquera que l'article 836 C.C. emploie le même mot ("limite") que l'article 869 C.C. Que ce soit là ce que les commissaires avaient en vue lorsqu'ils ont proposé le texte: "dans les limites voulues par la loi", nous paraît la chose la plus vraisemblable lorsque l'on songe à la préoccupation retracée chez les commentateurs du Code Napoléon et la plupart des auteurs antérieurs de prévenir la fraude à la loi en empêchant les corporations de mainmortes de posséder par des moyens indirects ou détournés des biens d'une valeur supérieure à la limite qui leur était imposée par les lois.

Nous nous contenterons, sur ce point, de référer à Pothier, éd. Bugnet, vol. 1, page 412, et surtout peut-être à Laurent, vol. 11, nos 317 à 328.

Après le passage que nous venons de citer dans le Cinquième Rapport, les commentateurs continuaient:

Il est à remarquer que dans certains cas des dispositions de cette nature, bien que tout à fait permises, pourraient se trouver sans effet parce que d'après les technicalités du testament il ne se trouverait personne d'habile à exercer le droit. Il en est de même de beaucoup d'autres intérêts légitimes qui apparaissent et qui cependant ne sont pas et ne peuvent être protégés d'après notre pratique judiciaire, par exemple, dans le cas de non-nés, de mineurs, d'absents. Sous l'ancien droit de hauts fonctionnaires de l'ordre judiciaire représentaient devant les tribunaux ceux qui ne pouvaient y agir autrement; en ce pays ce fonctionnaire était appelé le procureur du roi. Sans vouloir que les cours prennent d'elles-mêmes l'initiative pour l'exercice des droits particuliers, sans requérir davantage dans toutes les causes comme autrefois l'intervention et les conclusions du ministère public, il serait peut-être important de rétablir à cet effet à certains égards les fonctions de l'ancien procureur du roi, soit en commettant des devoirs de surveillance et d'action à une personne préposée exprès, ou aux officiers en loi qui ordinairement représentent la Couronne, soit même en chargeant les tribunaux d'ordonner que communication de la cause leur soit faite lorsque la justice le requerra. Sous les lois anglaises la cour de chancellerie et ses membres exercent de tels pouvoirs protecteurs. Les Commissaires ne se sont pas crus autorisés à recommander dans le code le rétablissement d'une organisation qui tient de si près à l'ordre public, mais ils signalent le sujet à l'attention des autorités compétentes. Les dispositions adoptées pourraient ensuite être intercalées dans le code de procédure.

Que devons-nous déduire de ce qui précède? A quoi nous conduit ce rapprochement fait par les commissaires entre l'article 869 C.C., qu'ils introduisent dans le code, et la législation française et anglaise sur le même sujet?

La conclusion irrésistible, c'est que, en rédigeant l'article 869 C.C., ils ont voulu reconnaître la validité de legs en faveur de personnes indéterminées et pour des fins de cha-

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rité ou de bienfaisance d'une façon aussi étendue que la chose était permise sous l'ancien droit et qu'elle est admise en Angleterre. Un legs de la nature de celui qui se trouve dans le testament de Madame Valois n'offrait aucune difficulté en France, même avant l'organisation des bureaux de bienfaisance. De même, en Angleterre, on ne songeait jamais à mettre un pareil legs de côté, même avant l'adoption des " charitable trust acts " et des autres lois relatives aux " charities ".

Et ce que les commissaires disent dans leur explication, c'est que, par le moyen de l'article 869 C.C., ils entendent permettre ces mêmes legs indéterminés qui étaient bons et reconnus valides en France et en Angleterre, que dans ces derniers pays un mécanisme existait, que dans la province de Québec ce mécanisme n'existe pas, qu'ils ne le créent pas dans le code, mais qu'ils signalent à l'attention des autorités compétentes l'opportunité de le créer plus tard. Les mêmes legs qui seraient valides en France et en Angleterre sont donc valides dans le Québec par l'article 869 C.C., avec la différence qu'en France et en Angleterre un mécanisme de procédure existe, tandis que dans le Québec ce mécanisme n'existait pas, au moins lorsque le code a été adopté. Nous aurons à examiner plus loin s'il existe maintenant; mais nous insistons sur le point que la validité de ce genre de legs n'a pas été, dans l'article 869 ou dans la loi du Québec, subordonnée à la création du mécanisme.

A cause de l'existence dans le code français actuel des articles 810 et 837, qui sont plutôt des lois prohibitives, et à cause de l'organisation spéciale relativement aux libéralités faites aux pauvres, nous croyons que, pour les fins de notre discussion, il ne peut résulter aucun avantage d'une comparaison avec la doctrine et la jurisprudence modernes en France.

Par suite de tout ce que nous venons de dire, nous sommes donc d'avis que l'article quinzième du testament de Madame Valois est valide en vertu de l'article 869 du Code civil. Nous croyons que les termes de cette clause

en œuvres de charité, en œuvres pies, au soulagement des souffrances de l'humanité, à l'éducation de jeunes gens pauvres

tombent suffisamment dans le cadre du teste de l'article 869 C.C., " fins de bienfaisance ou autres fins permises", suivant le sens que les commissaires ont eu en vue, d'après l'explica-

tion qu'ils donnent dans leur *Quatrième Rapport*. Les expressions " œuvres de charité ", " œuvres pies ", sont celles-là mêmes qui sont employées dans le rapport. " L'éducation de jeunes gens pauvres " a toujours été considérée comme rentrant dans la catégorie des œuvres de charité ou de bienfaisance. L'expression " soulagement des souffrances de l'humanité " est apparemment plus indéfinie; mais il faut l'entendre dans le sens général de la disposition. Il est clair que la testatrice avait en vue la charité en général. La règle invariable est que ce genre de legs doit recevoir l'interprétation la plus large et la plus favorable. On l'a vu dans Planiol: toute difficulté d'interprétation est considérée avant tout comme " une question de fait sur laquelle le juge doit statuer selon les circonstances ". Par tous les moyens possibles, les tribunaux, en pareils cas, cherchent à mettre à exécution la volonté du testateur et n'acceptent l'invalidité ou la caducité du legs que lorsqu'ils y sont contraints par l'impossibilité de satisfaire à ses conditions.

Il reste à répondre à l'objection que le testament n'est pas susceptible d'exécution forcée, ou, en d'autres termes, que le légataire fiduciaire ne pourra être contraint à exécuter la volonté de la testatrice.

Dans la clause du testament Ross, le légataire fiduciaire était chargé de faire la distribution aux " public protestant charities * * * as he may judge best ". On fit la même objection. Sir Alexandre Lacoste, prononçant le jugement de la Cour du Banc de la Reine (1), n'a vu là aucune difficulté d'ordre légal. Cette situation est bien exposée par Planiol, *Droit Civil*, vol. 3, n° 3021:

> 3021. Cas où il y a charge sans obligation envers personne. Jusqu'ici nous avons supposé que la charge apposée à une libéralité profitait à un tiers que l'on pouvait considérer comme créancier. C'est une condition qui n'est pas toujours réalisée; il se peut que le donataire ou le légataire tenu de la charge n'ait devant lui personne qui puisse lui en réclamer l'exécution. Ceci peut se produire de deux façons différentes:
>
> 1°. Il est possible que le légataire soit chargé de faire fonctionner une *œuvre* qui ne sera pas revêtue de la personnalité civile et qui ne constituera pas un établissement distinct. Ainsi un legs à un évêché, à charge d'entretenir un orphelinat, a été validé (Amiens, 16 févr. 1893, D. 94, 2, 67, S. 93, 2, 253). L'orphelinat n'était pas reconnu d'utilité publique; c'était une œuvre privée entretenue par l'évêché; il n'y avait donc pas, aux yeux de la loi, une *personne* bénéficiaire de la charge.

(1) Q.R. 2 Q.B. 413, at pp. 420, 421, 422.

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2°. Il se peut que la charge dont le légataire est grevée ne constitue pas pour lui une *obligation* proprement dite et juridiquement définie. Le disposant se contente parfois d'exprimer un *désir*, ou de demander à son légataire un simple *engagement d'honneur*, dont la réalisation est laissée à sa discrétion. Voyez Cass., 7 janv. 1902, D. 1903. 1.302. Il n'y a alors qu'un simple fidéicommis non obligatoire, qui est possible (Paris, 17 juin 1892, D. 92.2.381), mais dont la loi n'a pas à s'occuper.

Dans la première hypothèse, la seule sanction qui puisse forcer le légataire ou le donataire à exécuter les charges est l'*action en résolution* qui appartient au disposant ou à ses représentants. Dans la seconde hypothèse, il n'y a pas de sanction du tout.

On se rappelle que les codificateurs ont envisagé cette possibilité. Dans le passage de leur rapport que nous avons cité, ils ont prévu que

> des dispositions de cette nature, bien que tout à fait permises, pourraient se trouver sans effet, parce que, d'après les technicalités du testament, il ne se trouverait personne d'habile à exercer le droit.

Cela ne les empêche pas de dire que les dispositions de ce genre sont tout à fait permises et de maintenir le texte de l'article 869 C.C. qu'ils proposaient, nonobstant la crainte de cette possibilité. Il faut en conclure que la loi, telle qu'elle a été adoptée par la mise en vigueur du code et de l'article 869 C.C., considérerait ce genre de legs comme valide, même s'ils devaient rester sans effet.

Dans le testament de Madame Valois, cependant, il semble que cette question ne doive pas nous préoccuper, car la testatrice paraît avoir consenti d'avance aux risques de sa disposition testamentaire et avoir accepté les conséquences qui pourraient en résulter. Nous venons de voir qu'elle pouvait, en vertu de l'article 869 C.C., établir Monsieur Joseph B. de Boucherville légataire seulement fiduciaire pour les fins qui sont mentionnées dans la clause 15, vu qu'elles étaient des fins de charité et de bienfaisance. La testatrice stipule, en outre, que

> les produits de ces biens (seront) par lui seul employés et distribués comme il le jugera opportun,

mais, bien entendu, dans le cadre que le testament indique. Cette discrétion laissée au légataire fiduciaire est admise par la doctrine, reconnue par la jurisprudence et n'est couverte par aucune prohibition, restriction, ou cause de nullité contenues dans le code (831 C.C.). En outre, la testatrice déclare expressément:

> Je veux que le légataire fiduciaire ci-dessus nommé ne doive compte qu'à sa conscience pour l'accomplissement de sa charge, sans qu'aucune personne puisse lui en demander compte ou explication.

Il est impossible de dire que cette clause est contraire au Code civil de Québec. Les six juges de cette province qui ont entendu cette cause avant nous ont été d'accord sur ce point, et nous partageons leur opinion. Nous n'y pouvons voir aucune restriction ou cause de nullité prévue par le code; et, au contraire, nous trouvons la justification de cette disposition de la testatrice dans les articles 831, 840, 916 et 921 C.C. Nous avons déjà reproduit les articles 831 et 840 C.C. Voici le texte des articles 916 et 921 C.C.:

916. Le testateur peut limiter l'obligation qu'a l'exécuteur testamentaire de faire inventaire et de rendre un compte de l'exercice de sa charge, ou même l'en dispenser entièrement.

Cette décharge n'emporte pas celle de payer ce qui lui reste entre les mains, à moins que le testateur n'ait voulu lui remettre la disposition des biens sans responsabilité, le constituer légataire, ou que les termes du testament ne comportent autrement la décharge de payer.

921. Le testateur peut modifier, restreindre, ou étendre les pouvoirs, les obligations et la saisine de l'exécuteur testamentaire et la durée de sa charge. Il peut constituer l'exécuteur testamentaire administrateur des biens en tout ou en partie, et même lui donner pouvoir de les aliéner, avec ou sans l'intervention de l'héritier ou du légataire en la manière et pour les fins par lui établies.

L'article 916 C.C. ne laisse pas de doute sur le pouvoir de Madame Valois d'effectuer son legs fiduciaire à Monsieur de Boucherville en la forme qu'elle a exprimée, et l'article 872 C.C. nous dit que

les règles qui concernent les legs et les présomptions de la volonté du testateur, ainsi que le sens attribué à certains termes, cèdent devant l'expression formelle ou autrement suffisante de cette volonté.

Après tout, les tribunaux n'ont pas d'autre chose à faire qu'à chercher la volonté du testateur et à lui donner effet, dans les limites imposées par la loi.

Il est possible que, comme conséquence de la dispense de faire inventaire et de rendre compte, de la décharge de payer, du fait qu'un testateur remet "la disposition des biens sans responsabilité", de la discrétion laissée au fiduciaire et de sa soustraction voulue à tout contrôle quelconque, il en résulte que, dans certains cas, la fiducie n'existe que de nom (Mignault, Droit Civil, vol. 5, p. 171). Mais l'on ne peut éviter d'admettre que ces dispositions et ces décharges sont autorisées par le code. Après tout, la loi du Québec comporte la liberté illimitée de tester, restreinte seulement par le code. Dans le cas qui nous occupe, les biens qui font l'objet de la disposition contenue dans la clause 15 appartenaient à la testatrice. Elle a voulu en disposer comme elle l'a fait. Elle n'a voulu subordonner

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son légataire fiduciaire à aucun contrôle. Elle s'en est rapportée à sa discrétion et a déclaré qu'elle avait en lui une confiance absolue. S'il ne distribue pas les biens suivant les indications contenues dans la clause 15, il trahira cette confiance; mais, d'après les termes mêmes du testament, " il n'en devra compte qu'à sa conscience ". Les tribunaux n'ont pas à s'immiscer là dedans. Ils ne doivent pas respecter à moitié seulement la volonté de la testatrice. Pourvu qu'elle soit légale, ils doivent la respecter dans son intégrité.

La clause 15 du testament Valois n'offre vraiment pas une grande différence avec " l'engagement d'honneur " dont parle Planiol, dans le passage cité plus haut (n° 3021) ou avec un legs en pleine propriété, suivant la décision de la Cour Supérieure. Même le paragraphe de la clause qui pourvoit à un remplaçant et celui qui attribue un salaire au légataire fiduciaire ne faisaient pas nécessairement obstacle à cette intervention, puisque cette cour, dans la cause de *Masson* v. *Masson* (1), a fait reposer la propriété des biens de la succession Masson sur la tête de légataires fiduciaires au remplacement de qui le testament pourvoyait et qui étaient, eux aussi, indemnisés pour leurs services. Au cours du jugement rendu en cette cause par Sir Charles Fitzpatrick, on trouve les deux passages suivants exprimant des vues qui ont également été adoptées par la majorité de la cour:

On the other hand, the Quebec law says that a testator may name legatees who shall be merely fiduciary, or simply trustees for charitable or other lawful purposes within the limit prescribed by law, and by taking advantage of that provision it was open to the testator to vest his estate in the appellants, (fiduciary legatees), who are merely heirs for a special purpose, and to charge them, as mere trustees, to administer his property and to employ it, in accordance with his will. And that is what, in my opinion, the testator has done.

* * *

Then, after having provided for the appointment of their successors, he proceeds to say in the following paragraph:

" Auxquelsdits fidéicommissaires, remplaçants ou successeurs je donne et lègue, à titre de fidéicommis, tous mesdits biens meubles et immeubles, propres, etc., etc."

that is to say, the universality of his estate. By those words, the whole estate of the deceased—the universality in capital and revenue—was vested in the fiduciary legatees, as such, to administer and hold indefinitely, or as long as the law will permit; so that, on the death of the testator, they were seized alone of the property, rights and actions of the deceased.

(1) [1912] 47 Can. S.C.R. 42, at pp. 73, 74, 89.

Mais nous sommes d'accord avec M. le Juge Létourneau pour dire que,

dans l'espèce, l'intention qui se dégage de la clause 15 du testament est * * * exclusivement en faveur de "fins de bienfaisance" et de "fins de charité"; la testatrice y a recours à l'intimé, plutôt qu'elle ne songe à le favoriser. Elle prend la responsabilité de s'en remettre à lui, parce qu'elle est certaine qu'il accomplira la mission qu'elle lui confie.

Nous adoptons donc la position prise par la Cour du Banc du Roi.

Nous rendons ce jugement après avoir entendu le procureur général de la province de Québec à qui la cour, à la suite d'une première audition de la cause, avait fait parvenir le mémoire suivant:

After consideration the court is of the opinion that this appeal should not be disposed of without the Attorney General of the Province of Quebec being notified of its pendency and of the nature of the questions presented and given an opportunity, if so advised, to intervene.

Inasmuch as the respondent, while admitting his moral obligation, asserts a right to receive the property in question as a personal bequest and free from any legal obligations, as a trustee or otherwise, to distribute the same among the charitable objects of the bounty of the testatrix, it would seem reasonably clear that he cannot adequately represent those prospective beneficiaries.

The validity of the bequest in their favour is contested and an intestacy as to the subject of such bequest is asserted by the appellant as one of the heirs of the testatrix.

Has the Attorney General of Quebec, under R.S.Q., 1925, c. 16, s. 5 (1), or otherwise, a status to intervene in these proceedings; and has he an obligation to protect the interests of the undefined beneficiaries of the charitable disposition of the testatrix similar to that which attaches, under like circumstances, to the office of the Attorney General of England?

Has the Superior Court jurisdiction under Article 50 C.C.P., or any other provision of the law of the province of Quebec, to supervise the execution of the charitable bequest of the testatrix, or to compel its being carried out either by holding the respondent accountable to it, or to its officers, or otherwise?

It will be realized that if the foregoing questions are determined in the negative, the testatrix's charitable purpose may fail; and, if so, the result in law may be either an absolute gift to the respondent, or an intestacy as to the subject of the bequest.

Such are the points to which the Court deems it proper that the attention of the Attorney General of Quebec should be drawn. To permit of his dealing with the matter by intervention, or otherwise, as he may be advised, the court directs that a copy of this memorandum be transmitted to him, that this appeal shall stand over to be re-argued at the February term and that it be placed for that purpose on the docket for that term at the head of the list of cases from the province of Quebec.

A la suite de cet avis, le procureur général a demandé à intervenir et a soutenu devant nous la validité du legs qui faisait l'objet du litige. Sur ce dernier point, notre jugement est donc conforme aux vues qu'il a exprimées.

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Voici maintenant les autres conclusions qu'il a prises dans son intervention:

(1) That he may be permitted to intervene in this cause in order to exercise the prerogative right of the Crown to seek the enforcement of the charitable trust contained in the said will;

(2) That the trustee be ordered within a delay to be fixed by the court to complete the distribution of the moneys entrusted to him by the testatrix for the said charitable purpose;

(3) That in default of the trustee making such distribution within such delay the said trustee be removed and replaced by the court, or such other appropiate remedy may be applied as to this honourable court may seem fit.

L'appelante a déclaré que la question de l'intervention du procureur général ne l'intéressait pas. Si la clause du testament était annulée, il n'y avait pas lieu à cette intervention. Si, au contraire, la clause était déclarée valide, elle cessait personnellement d'avoir aucun intérêt dans la façon dont les biens seraient distribués.

Le légataire fiduciaire a pris la position que l'intervention du procureur général serait au moins prématurée, et il a versé au dossier la déclaration suivante:

If the Attorney General has a right of supervision and control, that right cannot be exercised by way of intervention before this Honourable Court nor at this time. At the present moment the legatee is no way in fault and all the defendants have scrupulously fulfilled all the obligations imposed by the said will, and if the moneys donated to charity have not been distributed it is because the ownership of these moneys has been challenged.

The legatee avers that he never for one moment thought of appropriating to his own use the moneys which he is charged to distribute, and that he always recognized the obligation he was under of making the distribution in the manner indicated. If the defendants in answer to the plaintiff's action did, among other grounds, plead that the will creates a legacy with a moral obligation only to the legatee, they did so because to the best of their belief it was the true construction to put upon the will. It is a pure question of law. The legatee, as representing those to whom the moneys will be ultimately distributed, considered to be his duty to put his views or their views before the courts.

The legatee sincerely declares that it is indifferent to him whether or not the Attorney General has in this matter a right of supervision or control. Even if the Attorney General has no such right, the legatee invites the Attorney General to come as often as he may deem fit and look over and examine all the books, receipts and all other documents relating to the said estate, and to the distribution of the moneys. And the same invitation is made to all those who may desire to do so. The legatee will be anxious to show how that distribution to charity will be made.

The legatee has already made a similar offer to the plaintiff in his plea and hereby renews that offer.

Cette déclaration donne à l'affaire un aspect qu'elle n'avait pas au moment où la cour a cru devoir informer le

procureur général du litige pendant devant elle. On peut voir que les seules conclusions expresses du procureur général ont été, en dehors de l'affirmation de son droit d'intervention, de demander à la cour de fixer un délai pour l'emploi des deniers de la testatrice aux fins de charité et de bienfaisance, et d'ordonner qu'à défaut par le fiduciaire d'avoir complété sa distribution dans ce délai, il soit destitué et remplacé par la cour.

A l'audition, Monsieur Lafleur, qui représentait le procureur général, n'a pas pris de conclusions additionnelles. Il a admis formellement que la Cour Supérieure de la province de Québec n'avait pas le pouvoir de légiférer et qu'il ne trouvait rien dans les lois de cette province qui donnât aux tribunaux le droit de procéder eux-mêmes à faire la distribution des deniers prévue par le testament. Il a avoué qu'il n'existait aucun mécanisme semblable à celui qui fonctionne en France et en Angleterre, et que, depuis le quatrième rapport des commissaires, aucune législation n'avait été adoptée pour introduire un mécanisme de ce genre dans la province.

Nous croyons sur ce point devoir accepter les vues du procureur général; et d'ailleurs nous ne trouvons rien dans les lois de la province de Québec qui nous permette d'adopter un point de vue différent. L'article 50 C.P., qui donne à la Cour Supérieure et à ses juges un droit de surveillance et de réforme sur les autres tribunaux, personnes, corps politiques et corporations dans la province, à l'exception de la Cour du Banc du Roi, est limité par la prescription que ce pouvoir de contrôle doit s'exercer "en la manière et la forme que prescrit la loi". La loi ne prévoit nulle part une manière ou une forme qui permette à la cour de procéder à une distribution de deniers en vertu d'un testament. Déjà ce fut l'opinion exprimée par Monsieur le Juge Fournier dans la cause de *Ross* v. *Ross* (1) et par la Cour du Banc du Roi dans la cause de *Cinq-Mars* v. *Atkinson* (2). Mais, dans l'état actuel de la législation, le contrôle des tribunaux se borne au pouvoir de destitution et de remplacement prévu par les articles 917, 924, 981 (c) et 981 (d) C.C., nous pensons, comme l'intimé, qu'il n'est pas à propos dès maintenant que cette cour donne des ordres à cet égard.

(1) 25 Can. S.C.R. 307, at p. 342. (2) Q.R. 24 K.B. 534.

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Rinfret J.

Pour la justifier d'agir dans ce sens, il faudrait qu'il fût démontré que le légataire fiduciaire a donné lieu à l'application de ces articles. Ce n'est pas à ce sujet que le litige s'est engagé; et il n'est nullement question de cela dans cette cause où le moindre soupçon n'est pas même soulevé contre l'intégrité du légataire fiduciaire. Ce n'est pas ici, mais devant la Cour Supérieure, et à la suite d'allégations formelles suivies d'enquête établissant des faits qui le justifieraient, qu'un ordre tel que celui qui est demandé par le procureur général pourrait émaner.

Nous obéirons davantage à la volonté de la testatrice en laissant le légataire fiduciaire procéder à l'exécution du testament librement et sans entraves et en réservant à ceux à qui il appartient le droit de se plaindre régulièrement devant les tribunaux s'il ne remplit pas la charge qui lui a été confiée par la testatrice, comme il le promet et comme il le doit. Tout ordre immédiat de la nature de celui qu'on nous demande serait certainement prématuré.

Il ne reste donc plus dans l'intervention que la question de savoir si, comme elle le prétend, la Couronne a ici des prérogatives qui autoriseraient le procureur général à intervenir.

Cette question soulève des points de la plus haute importance et il faudrait l'envisager tant au point de vue des droits de la Couronne que des pouvoirs du procureur général; sans compter, en l'espèce, qu'il faudrait tenir compte de la discrétion absolue que la testatrice a conférée à son légataire fiduciaire. Comme nous venons de conclure que cette intervention ne saurait pour le moment apporter aucun avantage efficace, il n'y a aucun intérêt à aborder et à discuter ici le droit d'intervention de la Couronne. C'est une règle sage qui veut que les tribunaux se bornent à trancher les points de droit qui sont nécessaires à la solution des litiges qui leur sont soumis.

Dans cette cause, il s'agissait de savoir si le legs fiduciaire était valide, et nous avons donné notre solution à cette question.

Comme conséquence de l'ordre interlocutoire de la cour, il s'agissait, en plus, de savoir si la loi de la province de Québec autorisait le procureur général à s'immiscer dans l'exécution du legs fiduciaire et permettait à la Cour Supérieure de surveiller et de contrôler cette exécution, ainsi

que, au besoin, de procéder elle-même, à la distribution des deniers.

Nous constatons que ces pouvoirs n'existent pas, mais qu'ils se bornent au droit de destitution dans les cas où le fiduciaire dissipe, gaspille ou dilapide les biens reçus ou néglige de mettre à exécution les dispositions du testament. Nous avons vu que cette raison d'intervenir n'existe pas dans le moment. Il n'est pas démontré que l'intervention, à cette phase de l'affaire, pourrait amener d'autres résultats immédiats. Il n'y a donc aucune utilité pour cette cour à se prononcer sur le droit abstrait de la Couronne.

Ce point important pourra être tranché lorsque sa solution sera nécessaire à la décision d'un procès et susceptible d'apporter des résultats d'ordre pratique. Tel n'est pas le cas ici où nous pouvons juger la cause sans entrer dans ces considérations. Le but de la cour a été atteint; le procureur général est informé de la situation; il pourra prendre en temps et lieu les procédures qui pourront s'imposer; et tous ses droits à cet égard seront expressément réservés par le jugement, qui n'entend se prononcer en aucune façon sur la nature de ses pouvoirs et de ses attributions en la matière. La cour désirait savoir si, dans son jugement, qui a pour effet de confirmer la saisine des biens au légataire fiduciaire, elle pouvait, dans les limites permises par la loi, insérer des mesures qui auraient garanti et assuré davantage l'exécution de la volonté de la testatrice. Ces pouvoirs ne paraissent pas exister. C'est au procureur général qu'il appartiendra de juger si, en s'inspirant des suggestions faites par les commissaires du Code civil, il y a lieu d'adopter plus ample législation pour l'avenir.

L'appel est rejeté avec dépens; et la cour déclare qu'il n'y a pas lieu pour le moment de recevoir l'intervention du procureur général, mais lui réserve tous ses droits à cet égard pour l'avenir.

LAMONT J. concurred with Rinfret J.

SMITH J.—I agree with what has been written by my brother Rinfret, and with the observations added by My Lord the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Geoffrion & Prud'homme.*
Solicitor for the respondents: *Joseph B. de Boucherville.*
Solicitor for the Atty. Gen. of Quebec: *Charles Lanctot.*

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STINSON-REEB BUILDERS SUPPLY COMPANY AND OTHERS ..... } APPELLANTS;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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

Criminal law—Combine—Restraint of trade—Injury to the public—Business interests—Sections 496, 497, 498 Cr. C.

The proper test in a prosecution under section 498 of the Criminal Code, which deals with "restraint of trade," is the injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine. *Weidman* v. *Shragge* (46 Can. S.C.R. 1) foll.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, dismissing the appellants' appeal from a conviction and sentence rendered on the 29th January, 1926, when the trial judge, Wilson J., found the appellants guilty of a charge laid under section 498 of the Criminal Code and fined each of the appellants the sum of $2,000.

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

Aimé Geoffrion K.C. and *W. F. Chipman K.C.* for the appellants.

Ernest Bertrand K.C. for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—Stinson-Reeb Builders' Supply Co., Limited, W. & F. P. Currie & Co., Limited, and Ontario Gypsum Co., Limited, appeal from a judgment of the Court of King's Bench affirming their conviction on an indictment laid against them under section 498 of the Criminal Code. This indictment contains the following counts:—

For having

at the city of Montreal, during the years 1924 and 1925, doing business together with other unknown persons, conspired, combined, agreed and arranged with each other and other persons unknown with view to unduly limit the facilities for producing, manufacturing, supplying and dealing in

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

that certain commodity or article known as gypsum products, which said products are the subjects of trade and commerce;

For having

at the same time and place, conspired, combined, agreed and arranged with each other and with other persons unknown to restrain, injure trade and commerce in relation to such gypsum products;

For having

at the same time and place, unduly prevented and lessened competition in the purchase, sale and supply of such commodity and enhanced the price of the said commodity commonly known as gypsum products.

The appellants, with their consent, were tried before a judge (Mr. Justice Wilson) without a jury, were found guilty on the three counts and were sentenced to pay a fine of $2,000 each.

They appealed from their conviction to the Court of King's Bench on questions stated to be questions of law alone, and on questions stated to be questions of mixed law and fact. These appeals, heard before Howard, Bernier and Rivard, JJ., were dismissed. Leave having been given to pronounce separate judgments, Mr. Justice Howard delivered a dissenting judgment, and the appellants now appeal on his grounds of dissent. They had also applied for special leave to appeal to this court on the question of the constitutionality of section 498, but, as no conflict was shewn between the judgment of the court below and the judgment of any other court of appeal, the application was dismissed (1). The validity of section 498 Cr. C., therefore, is not in issue in this case, the only question submitted on the appeal, as I conceive it should be expressed, being whether there was evidence on which a jury properly directed or a judge sitting without a jury could convict the appellants on the charges laid against them. This is of course a question of law, and it is on this point that Howard J. dissented.

Section 498 of the Criminal Code—and we are concerned merely with its effect—is in a subdivision of the code bearing the title "Offences connected with trade and breaches of contract." It will be convenient to cite here sections 496, 497, 498 Cr. C., which together form a group dealing with what is known as "restraint of trade."

496. A conspiracy in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

(1) [1928] S.C.R. 402.

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497. The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of the last preceding section.

498. Every one is guilty of an indictable offence and liable to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to two years' imprisonment, or, if a corporation, is liable to a penalty not exceeding ten thousand dollars, and not less than one thousand dollars, who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company,—

(*a*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade and commerce; or,

(*b*) to restrain or injure trade or commerce in relation to any such article or commodity; or,

(*c*) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or,

(*d*) to unduly prevent or lessen competition in the production, manufacturing, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property.

2. Nothing in this section shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees.

These provisions, and more especially section 498 Cr. C., were construed by this court in *Weidman* v. *Shragge* (1), which, although not a criminal case, is authority with regard to their meaning. I may quote what was stated by Mr. Justice Duff at p. 37:—

I have no hesitation in holding that as a rule an agreement having for one of its direct and governing objects the establishment of a virtual monopoly in the trade in an important article of commerce throughout a considerable extent of territory by suppressing competition in that trade, comes under the ban of the enactment.

And Mr. Justice Anglin (as he then was), discussing the meaning of the expression "unduly" in section 498 Cr. C., said at p. 42:—

The prime question certainly must be, does it (the agreement alleged to be obnoxious to section 498), however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition the benefit of which is the right of every one?

In view of this statement of the rule, it will be unnecessary to refer to any of the English cases on which the appellants rely. What we have to determine is whether there is evidence bringing this case within the statute.

(1)(1912) 46 Can. S.C.R. 1.

There does not appear to be any dispute as to the material facts.

About the end of 1913 an association called "the plasterers' association" was formed between certain manufacturers of gypsum products and certain dealers in these commodities. It was composed of two branches, the manufacturers and the dealers. There were four manufacturers: The Albert Manufacturing Company, Limited, of Hillsborough, N.B.; The Windsor Plaster Company, Limited, of Windsor, N.S.; The Iona Gypsum Company, Limited, of Iona, N.S., and The Ontario Gypsum Company, of Paris, Ontario. There were originally six dealers, all of Montreal: Alex. Bremner, Limited; Stinson-Reeb Builders' Supply Co., Limited; Wm. McNally & Co., Limited; Webster & Sons, Limited; W. and F. P. Currie & Co., Limited, and Hyde & Sons.

Almost from the beginning and at all the times with which we are concerned, one Alfred E. Balfry of Montreal was the secretary of the association and practically its factotum, being paid by the manufacturers and the dealers, and he also acted as chairman at the occasional meetings of the association held in Montreal at his office, for the renting of which, and other expenses, the members paid. There were also meetings of the dealers alone, and at these Balfry presided, besides acting as secretary. Minutes of proceedings at meetings were kept by Balfry. The association was not incorporated.

I think there is no doubt that the forming of this association was an advantage to its members. From the manufacturers' point of view the question of freights, and of the quantities of gypsum products to be shipped to Montreal, was a material consideration. The freight rates were equalized, by taking as a basis the rate from Hillsborough, N.B., to Montreal. The manufacturers fixed their sale prices to the dealers, and also the price at which the latter would sell their products on the Montreal market, and no sales could be made for a lesser price. As far as concerned the Montreal market, the manufacturers agreed to sell to the dealers exclusively, and the dealers could buy only from the manufacturers. Orders by dealers for goods were handed by them to Balfry who distributed these orders among the manufacturers. The testimony shews that, as matters stood, the trade in Montreal

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could get these products only from the dealers, and through the latter from the manufacturers. Shipments by other and more distant manufacturers to Montreal were impracticable on account of the freight rates and because, if a large quantity of products was shipped to Montreal, it would have to be stored, which would increase its selling price. That a monopoly of the trade in Montreal in gypsum products was secured by the plasterers' association does not appear to be open to doubt.

It may be emphasized here that the advantage thus obtained by the manufacturers and dealers of the association is not the proper test. What is the true test was laid down by this court in *Weidman* v. *Shragge* (1) as above stated. Injury to the public by the hindering or suppressing of free competition, notwithstanding any advantage which may accrue to the business interests of the members of the combine, is what brings an agreement or a combination under the ban of section 498 Cr. C.

This injury is shewn by what occurred in January, 1925. The six dealers met on January 13, passed a resolution dissolving their association, and very shortly afterwards reformed it with five members instead of six, Hyde & Sons, who say they did not vote on the question of dissolution, being excluded. Of the forming of what he called a "family of five" Balfry immediately advised the manufacturers. The effect of the exclusion of Hyde & Sons was soon painfully apparent to the latter. They booked with Balfry orders for gypsum products which they required to fill contracts that they had made with builders. These products they were unable to procure either through Balfry or by applying directly to the manufacturers. They were told to go to one of the five dealers, which meant purchasing the goods at a considerably higher price, about $2 per ton more than the selling price of the manufacturers to the dealers. This rendered it impossible for them to fulfil their contracts and carry on their business. Balfry is very frank as to the policy adopted towards Hyde & Sons. He is asked:—

Q. What objection had you to this plaster coming to Montreal—what business had you in that—what interests had you in that?

A. To see that Hyde did not get any plaster in Montrea.

(1) 46 Can. S.C.R. 1.

Q. Why did you not want Mr. Hyde to have plaster in Montreal?
A. Because I had made arrangements to supply it only to the five other firms.

Counsel for the appellants contend that this is merely a case of a manufacturer freely choosing or changing his selling agents. It is very much more. It is a combination of manufacturers and dealers to control an important market wherein the goods in which they deal can be obtained only through them and at prices which they determine, free competition by others in the same market being suppressed.

This was clearly shewn in the case of one O'Neil who, shortly before the exclusion of Hyde & Sons, had brought to Montreal and stored there a large shipment of plaster. When he attempted to compete with the dealers, the latter reduced their prices, this operation being repeated several times, as O'Neil reduced his, so that eventually O'Neil was forced out of the market and constrained to sell the balance of his stock to one of the dealers. This is represented by the appellants as being merely a rate war brought about by O'Neil's action in underselling the dealers. I think it shews that the association had rendered competition impossible in the Montreal market. The evidence demonstrates that the manufacturers controlled the price at which these goods were sold by the dealers to the public. Just one quotation from the testimony of Balfry will establish this:—

Q. Dealers, as members of the association, after having bought, under your control, from the manufacturers, were not at liberty to sell to the public at whatever price they liked. Were they bound to sell at a fixed price, and at fixed terms?
A. They were compelled at the price the manufacturers thought right to charge the public.
Q. The dealers were not at liberty to sell to suit their convenience?
A. I suppose, if they got into collaboration with the manufacturers. they might be able to induce the manufacturers to do what they wanted.

By Mr. Bertrand, K.C.:

Q. They had to sell at a fixed price?
A. Yes.

By the Court:

Q. Not only the price, but the terms also?
A. Yes.

The prosecution here is against two of the dealers and one of the manufacturers. I think these three companies

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agreed to all that was done, and it is no objection that the others were not charged under the same indictment.

My conclusion is that there was evidence on which the learned judge could find the appellants guilty of an offence against section 498 of the Criminal Code, subsections (*a*), (*b*) and (*d*).

The appeal should therefore be dismissed.

Appeal dismissed.

Solicitors for the appellants: *Brown, Montgomery & McMichael.*

Solicitor for the respondent: *Ernest Bertrand.*

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*Feb. 5.

DAVID GARSON AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

CANADIAN CREDIT MEN'S TRUST ASSOCIATION (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Sale of goods—Stock in trade—Sale in bulk—Non-compliance with Bulk Sales Act—Assignment of the vendor—Resale by the transferee to a bona fide purchaser—Right of the trustee in bankruptcy to compel the transferee to account—Bulk Sales Act, R.S.N.S. (1923), c. 202—Assignments Act, R.S.N.S. (1923), c. 200.

In January, 1928, one C. sold all the stock in trade and assets of his business to the appellants for $1,600. On March 17, 1928, C. made an authorized assignment in bankruptcy, and his statement showed liabilities amounting to $4,395.55 with cash assets of $706. The sale of the stock in trade to the appellants was a sale in bulk under the *Bulk Sales Act*, but there was no compliance whatever with the provisions of that Act. At the time of the sale the appellants paid the purchase money to C. in cash and they resold the goods for $2,000 before the respondent, as trustee in bankruptcy, moved to set aside the sale to them from C. The $2,000 were not ear-marked and have been disposed of by them in the ordinary course of their business.

Held that the respondent, on behalf of the creditors, was entitled to have the appellants account for the $2,000 received by them on the resale of the goods. The creation in the *Bulk Sales Act* of a presumption of fraud on the part of both purchaser and vendor as against the vendor's

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

creditors, indicates a legislative intention to put a sale in bulk made without compliance with that Act in the same category as sales made with an intention to defraud the vendor's creditors. This presumption of fraud has the effect of bringing into play all other statutes passed for the protection of creditors against a fraudulent sale of his goods by a debtor to the prejudice of his creditors, and the right to recover from a fraudulent transferee the proceeds of goods coming into his possession by an invalid transfer, and resold by him, is given by s. 21 (1) of the *Assignments Act* (R.S.N.S. (1928), c. 200).

APPEAL, by special leave of this court (1), from the decision of the Supreme Court of Nova Scotia *en banc*, affirming the judgment of Carroll J. and maintaining the respondent's action.

The material facts of the case are fully stated in the above head-note.

V. J. Pottier and *A. C. Hill K.C.* for the appellants.

W. C. MacDonald K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—The material facts in this appeal are few, and are not in dispute. In October, 1927, one Wellsley G. Crouse commenced business as a retail merchant in Middleton, N.S. In January, 1928, he sold all the stock in trade and assets of his business to the appellants for $1,600. On March 17, 1928, he made an authorized assignment in bankruptcy, and his statement shewed liabilities amounting to $4,395.55, with cash assets of $706. The sale of the stock in trade to the appellants was a sale in bulk under the *Bulk Sales Act*, but there was no compliance whatever with the provisions of that Act. At the time of the sale the appellants paid the purchase money to Crouse in cash, and they resold the goods for $2,000 before the respondent, as trustee in bankruptcy, moved to set aside the sale to them from Crouse. The $2,000 received by the appellants when they resold the goods were not ear-marked, and have been disposed of by them in the ordinary course of their business. The matter was brought before the court by way of stated case, in which it was agreed that no objection was to be taken to the status of the trustee, and the following questions were submitted to the court:—

1. Whether said sale was and is fraudulent and absolutely void under the *Bulk Sales Act* as against the creditors of said Wellsley G. Crouse in existence at the time of such assignment.

(1) [1928] S.C.R. 419.

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2. Whether said creditors are entitled to be paid by Garson & Lipwich the sum of $2,000, being an amount equal to the amount realized on the resale of said stock-in-trade.

3. Whether the costs of this case should be paid by the trustee or by Garson and Lipwich.

Mr. Justice Carroll, before whom the matter came in the first instance, answered questions 1 and 2 in the affirmative, and directed the costs to be paid out of the bankrupt estate by the trustee. On appeal, the judgment of Carroll J. was affirmed by the Nova Scotia Supreme Court *en banc,* that court being of opinion that the trustee was entitled to recover the value of the property from the appellants under ss. 29 and 33 (now ss. 60 and 66) of the *Bankruptcy Act.*

Garson and Lipwich now appeal to this court.

The *Bulk Sales Act* defines the duty of both vendor and purchaser where a purchase is made for cash or on credit of any stock of goods, wares and merchandise, in bulk. S. 2 requires the vendor to furnish a statement, verified by statutory declaration, setting out the names and addresses of his creditors, and the amount due to each. It also requires the purchaser to obtain such statement before closing the purchase and paying to the vendor any part of the purchase price. S. 3 requires that the agreement to purchase shall be in writing, and shall be filed in the Registry Office within ten days after execution thereof, and that no part of the purchase price or any security therefor shall be delivered within thirty days next after the execution of the agreement. S. 4 provides that if a purchase be made, and any part of the purchase price or any security therefor be paid or delivered to the vendor by the purchaser before receiving the vendor's statement, as required by s. 2, or without filing the agreement, as required by s. 3, the sale shall be deemed to be fraudulent, and shall be absolutely void as against the creditors of the vendor, unless the proceeds of such sale are sufficient to pay the vendor's creditors in full, and are, in fact, actually applied in or towards payment of their claims. S. 5 provides that the purchaser, upon obtaining such statutory declaration from the vendor, must either obtain the written consent to his purchase, of creditors representing at least fifty per cent. in number and value of the claims, as shewn by the statutory declaration, or notified to the purchaser, or,

if the purchase price is sufficient to pay the creditors in full, must pay the whole of the purchase price or deliver the securities therefor into the hands of a trustee for distribution *pro rata* among the creditors; and, in default of so doing, the sale shall be deemed fraudulent, and be void.

It is now common ground between the parties that in the *Bulk Sales Act* the word "void" means "voidable" only and that a sale made without compliance with the Act is valid unless and until the creditors of the vendor elect to have it set aside. The fact that the Act avoids the sale only as against the vendor's creditors indicates an intention on the part of the legislature that on the sale the property in the goods shall pass, subject to the right of the creditors to have the sale set aside as fraudulent against them.

It is also common ground that if the goods are resold by the fraudulent transferee to a *bona fide* purchaser for value without notice, before the creditors challenge the validity of the sale, such purchaser has a valid title to the goods and the creditors cannot recover them. The question before us therefore is, are the creditors entitled to have the appellants account for the $2,000 received by them on the resale of the goods?

For the appellants it is contended that the question should be answered in the negative because (1) the appellants were not debtors of the creditors or any of them, and (2) as they had resold the goods at a time when the sale was still a valid one, the goods themselves in their hands were not clothed with any trust in favour of the creditors and consequently no trust could be impressed upon the proceeds thereof; that in the absence of an indebtedness on the part of the appellants, or of a trust in favour of the creditors, the appellants cannot be called upon to account for any proceeds received by them.

It is, no doubt, true that the appellants were not, in the ordinary sense of the term, debtors of the creditors, nor, unless made so by the Act, were the proceeds of the sale imposed with any trust in the creditors' favour. That, however, in our opinion, is not conclusive in favour of the appellants.

The object of the *Bulk Sales Act* is to prevent a trader from making a sale in bulk of his stock-in-trade, goods and merchandise without the consent of his creditors

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thereto or the payment of their claims. To effect this object the Act imposes a duty upon any intending purchaser not to complete the purchase or pay any part of the purchase price without complying with the provisions of the Act. If he fails to perform that duty the Act declares that the sale

> shall be deemed to be fraudulent and shall be absolutely void as against the creditors.

"Deemed to be fraudulent" here means that although the purchaser may not in fact have been guilty of fraud, yet the sale is to be considered as one based upon the existence of actual fraud and carrying with it all the consequences of a fraudulent sale. *The Queen* v. *County Council of Norfolk* (1).

As a consequence of such a sale the Act provides that the creditors may have it declared void and set aside.

The appellants contend that this is the creditors' only remedy and that the effect of setting aside the sale as invalid is merely to remove the impediment standing in the way of the enforcement of the creditors' executions against the goods sold, and they cited a number of authorities to the effect that where a fraudulent sale was set aside the creditors could follow the proceeds if the fund could be found *in specie,* or if it was so ear-marked that it could be traced; but that if it could not be found *in specie,* or was not so ear-marked, the creditors could not compel an accounting thereof. *In re Mouat* (2); *Ross v. Dunn* (3); *Davis* v. *Wickson* (4). In our opinion the removal of the impediment which intercepted the action of the creditors' writs of execution was not the only effect which it was intended the legislation should have. Had that been the only effect intended there was no necessity whatever for enacting that the sale should be deemed fraudulent. The setting aside of the sale as invalid would, without branding it as fraudulent, have been sufficient to remove the impediment to the operation of the writs of execution. The creation of a statutory presumption of fraud on the part of both purchaser and vendor as against the vendor's creditors, indicates, in our opinion, a legislative intention to put a sale in bulk made without compliance with the

(1) (1891) 60 L.J.Q.B. 379.

(2) [1899] 1 Ch. 831.

(3) (1889) 16 Ont. App. Rep. 552.

(4) (1882) 1 Ont. Rep. 369.

Bulk Sales Act in the same category as sales made with an intention to defraud the vendor's creditors. Such intent the Act presumes to exist, and this presumption of fraud has the effect of bringing into play all other statutes passed for the protection of creditors against a fraudulent sale of his goods by a debtor to the prejudice of his creditors. So that if, in any such statute, the legislature has given to the creditors any remedy in addition to their right to have the sale set aside as invalid, the creditors of a fraudulent debtor under the *Bulk Sales Act* are entitled to claim the benefit of such remedy, provided, of course, that all the conditions precedent to the right to claim the remedy have been fulfilled. One such remedy, namely, a right to recover from a fraudulent transferee the proceeds of goods coming into his possession by an invalid transfer, and resold by him, is given by the *Assignments Act* (R.S.N.S. 1923, c. 200), which in part reads:—

4. (1) Every transfer of property made by an insolvent person

(*a*) with intent to defeat, hinder, delay or prejudice his creditors, or any one or more of them:

Shall as against the creditor or creditors injured, delayed, prejudiced or postponed, be utterly void.

21. (1) In the case of a transfer of any property which in law is invalid against creditors, if the person to whom the transfer was made shall have sold or disposed of, realized or collected, the property or any part thereof, the money or other proceeds may be seized or recovered in any action by a person who would be entitled to seize and recover the property if it has remained in the possession or control of the debtor or of the persons to whom the transfer was made and such right to seize and recover shall belong, not only to an assignee for the general benefit of the creditors of the said debtor, but in case there is no such assignment shall exist in favour of all creditors of such debtor.

That Crouse was insolvent is not disputed. The sale and delivery of his goods to the appellants was a transfer of property which in law was invalid as against his creditors. If the goods had remained in the hands of the appellants the creditors, on setting aside the sale, would have been entitled to recover them as goods belonging to the debtor. The appellants having resold the goods the creditors are, by s. 21, expressly given the right to recover the proceeds thereof from them. This right the creditors now seek to enforce, and, in our opinion, they are entitled to enforce it. As the *Assignments Act* has made provision for the very remedy which the creditors through the plaintiff seek to enforce, it is unnecessary to consider whether or

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not the *Bulk Sales Act* alone, or with the aid of the *Bankruptcy Act*, would entitle the creditors to the same remedy, and upon that question we express no opinion.

When Crouse assigned the only asset which he turned over to the respondent was $706 in cash. It is not shewn in the stated case whether or not this was part of the $1,600 paid to Crouse by the appellants. If it was, the respondent, having received that part of the purchase price of the goods, would not be entitled to have it paid over again. If, therefore, the appellants so desire they may have an inquiry to ascertain if the $706 received by the respondent constituted a part of the purchase money received by Crouse. Such inquiry, however, will be at their own expense.

The appeal should therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *V. J. Pottier.*

Solicitor for the respondent: *W. C. McDonald.*

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*Nov. 30.
*Dec. 3.

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*Feb. 5.

ZIBA GALLAGHER (PLAINTIFF).....APPELLANT;

AND

J. E. MURPHY AND F. T. GILROY (DEFENDANTS) ..... } RESPONDENTS.

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

Promissory note—Consideration for note—Consideration alleged to be purchase money for interest in patent right—Bills of Exchange Act, R.S.C., 1927, c. 16, s. 14—Endorsement operating as an "aval"—Bills of Exchange Act, s. 131.

G. owed T. Co. $2,000 for royalties accrued under an agreement by which T. Co. had granted G. certain rights to manufacture under a tube patent owned by T. Co. Being pressed for payment, G. got M. to sign and hand to him a promissory note for $2,000 payable to T. Co., which G. endorsed and delivered to T. Co., which accepted it, reserving its rights for payment of the royalties if the note was not paid. After maturity T. Co. transferred the note for value to plaintiff who sued M. and G. upon it. Defendants, among other things, pleaded s. 14 of the *Bills of Exchange Act*. At the trial it was dis-

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Rinfret and Lamont JJ.

closed (neither T. Co. nor plaintiff having had any previous knowledge thereof) that M. had purchased from G. an interest in a certain tire patent (in which T. Co. had no interest). It was held by the Appellate Division, Ont., that the money owing by M. to G. on said purchase was the consideration for which the note was given, and, as the words "Given for a patent right" were not written across it, the note was void under s. 14 of said Act.

Held (Lamont J. dissenting): The note was not void. The consideration was not purchase money for a patent right or interest therein. Consideration must move from the payee (*Forsyth* v. *Forsyth,* 13 N.S. Rep. 380; *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge & Co. Ltd.* [1915] A.C. 847); the consideration for M.'s promise by the note to pay T. Co. could not be a debt due by M. to G., although that debt might have been the motive inducing M. to hand it to G. Nor, in the circumstances, could it be said that the consideration consisted in the royalties due by G. to T. Co.; the note was not taken in satisfaction of that claim; there was no novation. The real consideration given by the payee was the extension of time to G. for payment of the royalties due by him. The fact that M., who owed nothing to T. Co., made the note to it, must have conveyed to him that, at G.'s request, he was undertaking to pay T. Co. for some consideration moving from it (even if unknown to him) in which G. was interested, and to enable G. to obtain which he was accommodating G., and implied a request from M. to T. Co. to accord such consideration. (*Craig* v. *M. & L. Samuel, Benjamin & Co.,* 24 Can. S.C.R. 278, dist.)

Royalties for a license to manufacture under a patent are not purchase money of a patent right. (*Johnson* v. *Martin,* 19 Ont. A.R. 593, explained).

Held also (as to G.'s contention, invoking s. 131 of said Act, that he was not really an endorser of the note because he was not the holder when he signed it and did not sign it for the purpose of negotiation, and that plaintiff could recover against him only if he was a holder in due course) that G.'s endorsement on the note before T. Co. took it had the effect of an "aval", and made G. liable to T. Co. and its assignee, the plaintiff—*Robinson* v. *Mann,* 31 Can. S.C.R. 484; *Grant* v. *Scott,* 59 Can. S.C.R. 227. (Moreover, as pointed out in *Steele* v. *McKinley,* 5 A.C. 754, "it is not a collateral engagement, but one on the bill," this disposing of any contention of G. under the *Statute of Frauds*). *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.,* [1926] A.C., 670, which laid down the general proposition that "holder in due course" does not include a payee, had not the effect of overruling *Robinson* v. *Mann.* It cannot be said that, by force of s. 131 of the *Bills of Exchange Act,* one who signs a bill otherwise than as drawer or acceptor incurs liability only towards a holder in due course. The concluding words of s. 131, "and is subject to all the provisions of this Act respecting endorsers," distinguish it from the corresponding English section, and make clear the intention to introduce into our law the principle of the "aval."

Judgment of the Appellate Division, Ont., (34 O.W.N. 204) reversed (Lamont J. dissenting).

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APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which allowed the defendants' appeal from the judgment of Riddell J. at trial (2), who held that the plaintiff was entitled to recover against the defendants upon a certain promissory note. The material facts of the case, and the questions in issue, are sufficiently stated in the judgments now reported, and are indicated in the above head-note. The plaintiff's appeal was allowed with costs in this Court and the Appellate Division and the judgment of the trial Court was restored. Lamont J., dissented.

R. S. Robertson K.C. for the appellant.

J. M. Bullen for the respondent Murphy.

T. Delany for the respondent Gilroy.

The judgment of the majority of the court (Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.) was delivered by

RINFRET J.—The action is upon a promissory note for $2,000, dated June 28, 1926, made by Murphy and payable to the order of Travellers Rubber Company, Limited, six months after date. The note was endorsed by Gilroy before its delivery to the Travellers Company. It was transferred for value, but after maturity, to Gallagher, who does not claim to stand in any higher position than the company.

Murphy and Gilroy filed separate statements of defence, each containing a variety of reasons why the action should not be maintained. At the trial, none of these reasons prevailed. The Appellate Division, however, held that the consideration for the note consisted of the purchase money of an interest in a patent right, within the meaning of section 14 of the *Bills of Exchange Act*, and that the note was void because the words "Given for a patent right" were not "written or printed * * * across the face thereof."

We adopt as correct the following statement of the circumstances under which the note was given:

In June, 1926, Gilroy owed the Travellers Company $2,000 for royalties accrued under an agreement by which the company had granted Gilroy certain rights to manufacture under a patent owned by the company upon an

(1) (1928) 34 Ont. W.N. 204. (2) (1927) 32 Ont. W.N. 357.

inner tube for an automobile tire. Gilroy was pressed for payment, but was unable to pay. He stated, however, that he had a "friend," Murphy, from whom he could get a note. He accordingly got Murphy to make the note in question payable to the company. He then put his own signature as endorser on the back of the note and delivered it to the company. The company accepted it, reserving its rights for the payment of the royalties due under the agreement, if the note was not paid; and both Murphy and Gilroy were so notified by letter. Murphy replied on July 16, 1926, that he would take up the note before maturity, on the last day of November, and that the company could depend upon this.

The note was dishonoured at maturity and the company sued Murphy upon it. Murphy filed an affidavit of merits. Gallagher, who was acting as the company's solicitor, finding that there was some dispute about his retainer, discontinued the action; but, as the company was indebted to him, he secured an assignment to himself of the note and of the company's claim in respect thereof. The present action was thereupon brought against Murphy and Gilroy. At the trial, it was unexpectedly disclosed that Murphy had acquired an interest in a patent owned by Gilroy, not the tube patent in respect of which royalties were owing by Gilroy, but a tire patent in which the company was not interested.

Neither the company nor Gallagher had any knowledge of this transaction between Gilroy and Murphy. They never heard of it until the evidence was given at the trial. Up to that time Murphy had always been put forward as maker of the note for Gilroy's accommodation. In the affidavit of merits filed in answer to the action brought by the company, he swore that "the promissory note upon which the plaintiff has entered action herein was given by (him) for accommodation only." No mention was there made of his having purchased from Gilroy an interest in a patent right.

In the statements of defence, the note was referred to by both Gilroy and Murphy as having been given "for accommodation only; or, if for consideration, then such consideration was an interest in a patent right"; but the "interest in a patent right" to which it was intended to refer

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in these pleadings was not Murphy's purchase of a half interest in Gilroy's tire patent (which, as already stated, was brought out fortuitously at the trial) but the overdue royalties in respect of the license to manufacture granted by the company to Gilroy under the tube patent. Nevertheless, the purchase money owing by Murphy to Gilroy for this half interest in Gilroy's tire patent right was, in the opinion of the Appellate Division, the consideration for which the note in question was given. For that reason, as the words "*Given for a patent right*" were not written across it, the note was held void and the action was dismissed.

With respect, we are unable to agree with this view.

Consideration must move from the payee. (*Forsyth* v. *Forsyth* (1); *Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge* (2)).

The note was a promise by Murphy to pay $2,000 to the Travellers Rubber Company, Limited. The consideration for such a promise could not be a debt due by Murphy to Gilroy; that would afford no reason why Murphy should promise to pay the Travellers Company.

Then if Gilroy, as endorser, paid the note at maturity, Murphy's debt to him would not be extinguished. If Murphy paid it, this debt would be extinguished *pro tanto*, only through the process of set off and not directly because he paid the note. Murphy's debt to Gilroy may have been the motive inducing Murphy to hand over the note to Gilroy; but it was not the consideration for the note between Murphy and the company.

If we should say that the consideration consisted in the royalties due by Gilroy to the company in respect of the license to manufacture under the tube patent, that statement would be more plausible. But the note was not taken in satisfaction of that claim. There was no novation. The company expressly stated in its letter of July 6 that the note was taken "towards payment of the royalties due" but that it "reserved its rights under the agreement in case the note is not paid at maturity." *Currie* v. *Misa* (3).

In final analysis, the real consideration given for the note by the company (the payee) was the extension of time

(1) (1880) 13 N.S. Rep. 380. (2) [1915] A.C. 847.
(3) (1875) L.R. 10 Exch. 153; (1876) 1 A.C. 554.

which it thereby gave to Gilroy for the payment of the royalties due by him. (Chalmers—Bills of Exchange, 9th ed., p. 96, note n.). The company was pressing him. He replied that he had no money but could get a note from a friend. He got the note, endorsed it, and gave it to the company. Having that note, the company agreed to grant a further delay of six months for the payment of the royalties but did not give up its claim for them and did not release Gilroy. The real consideration moving from the company when it accepted the note was, therefore, the extension of time granted to Gilroy.

The following passage from Byles on Bills (18th ed., p. 127) well expresses our views on the point just discussed:

> A subsisting debt due from a third person is a good consideration for a bill or note, at least if the instrument be payable at a future day, for then it amounts to an agreement to give time to the original debtor, and that indulgence to him is a consideration to the maker.

True it is that Murphy professes not to have known at the time that he was accommodating Gilroy, although he has since treated the note as one given for accommodation in an affidavit of merits and in his statement of defence. But the form of the note, in the light of the facts, speaks for itself. Murphy owed nothing to the Travellers Company; yet he was making this note to the order of that company. This fact must have conveyed to him that, at the request of Gilroy, he was undertaking to pay the company for some consideration moving from the latter (even if unknown to him) in which Gilroy was interested and to enable him to obtain which he was accommodating Gilroy, and implied a request from him to the company to accord such consideration.

This case must be distinguished from *Craig* v. *M. & L. Samuel, Benjamin & Co.* (1). There, the makers were not sued as accommodation parties and the payees were cognizant of all the circumstances. In fact, the note had been made payable to their order by their own "contrivance." Further, Mr. Justice Gwynne, speaking for the majority of the court (page 281), says:

> The plaintiffs gave no consideration whatever to Fairgrieve and Craig, or to Craig, or to Fairgrieve, which can support their claim to recover against Craig upon the notes sued upon, and that is the sole question on this appeal.

(1) (1895) 24 Can. S.C.R. 278.

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In *Johnson* v. *Martin* (1), the court was not called upon to decide whether the case was within the statute. The judgment was predicated upon the fact, assumed by court and counsel, that the notes had been given for the purchase money of a patent right. Osler J.A., begins his judgment thus: "The consideration given for the notes in question admittedly was a patent right sold," etc. This judgment, therefore, did not decide that royalties for a license to manufacture were the purchase money of a patent right. If it did, it would have to be overruled, for royalties are not purchase money. They are rather in the nature of rents. Nor is a license to manufacture an interest in a patent. The licensee has no property in the patent. (Fletcher Moulton on Patents, page 240.)

We think, for these reasons, that "the consideration" for the note given by Murphy was not wholly or in part purchase money for an interest in a patent right. The note was not void; the action was rightly maintained against him and the judgment of the trial court should be restored.

In the case of Gilroy, however, a further point remains to be considered, which was raised for the first time at the argument before this court. It was claimed that Gilroy was not really an endorser of the note because he was not the holder when he signed it and he did not sign it for the purpose of negotiation. Section 131 of the *Bills of Exchange Act* was invoked, and it was urged that under it Gallagher could recover against Gilroy only if he was a holder in due course.

Section 131 reads as follows:

131. No person is liable as drawer, endorser or acceptor of a bill who has not signed it as such: provided that when a person signs a bill otherwise than as a drawer or accepter he thereby incurs the liabilities of an endorser to a holder in due course, and is subject to all the provisions of this Act respecting endorsers.

It will be remembered that Gilroy endorsed the note before he delivered it to the Travellers Rubber Company. He did so for the evident purpose of becoming liable on the note to the company; in fact, no other purpose has been suggested. Moreover, under the proviso to s. 131, the case is concluded against him by the judgment of this court in

(1) (1892) 19 Ont. A.R. 592.

Robinson v. *Mann* (1). Gilroy contended that the recent decision of the House of Lords in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (2) had the effect of overruling *Robinson* v. *Mann* (1). We do not think so. *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (2) lays down the general proposition, already contained in the judgment of Lord Russell in *Lewis* v. *Clay* (3), that the expression "holder in due course" does not include a payee. And it is argued that, as a result, the Travellers Rubber Company, not being a holder in due course, neither it nor its assignee Gallagher can recover against Gilroy.

We do not accept the proposition that, by force of s. 131, one who signs a bill otherwise than as drawer or acceptor incurs liability only towards a holder in due course, nor do we understand the decision in *Robinson* v. *Mann* (1), to have depended upon the ground (although that view is no doubt expressed) that the payee was looked upon as a holder in due course. The decision was this:

George T. Mann, the respondent, endorsed a note signed by W. Mann & Co., and payable to the Molsons Bank. It was contended that he was an endorser and as such liable to the Bank to which the note so endorsed was delivered. Sir Henry Strong C.J., delivering the judgment of the court, said that "by force of the statute, the endorsement operated as what has long been known in the French Commercial Law as an 'aval'", and that the statute had adopted that "form of liability." (See the explanation of Lord Blackburn in *Steele* v. *M'Kinlay* (4)).

The corresponding section in the English Act does not contain the words "and is subject to all the provisions of this Act respecting endorsers." Ever since *Robinson* v. *Mann* (1) was decided, it has been considered that this addition was made in our Canadian statute with the "intention of adopting the principle of the 'aval', as already in force in the province of Quebec." (Byles on Bills, 18th ed., pp. 163 and 164.)

There is no doubt that, in the light of that decision, the endorsement of Gilroy on the note before the Travellers Rubber Company took it had the effect of an "aval," and made Gilroy liable towards the company and its assignee,

(1) (1901) 31 Can. S.C.R. 484.
(2) [1926] A.C. 670.
(3) [1897] 67 L.J.Q.B. 224.
(4) (1880) 5 A.C. 754, at p. 772.

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Gallagher. Moreover, as was pointed out by Lord Blackburn in the case of *Steele* v. *M'Kinlay* (1) already referred to: "It is not a collateral engagement, but one on the bill"; and this disposes of any argument of Gilroy under the *Statute of Frauds.*

The principle in *Robinson* v. *Mann* (2) was unanimously reasserted in *Grant* v. *Scott,* a later decision of this Court (3), where it was referred to in this way by Sir Louis Davies, the then Chief Justice:—

> It has remained now for many years unquestioned and been accepted throughout Canada as law. I see no reason for raising any doubt now upon its correctness.

To which the present Chief Justice added:—

> That decision has been uniformly accepted as the law of Canada in the provincial courts and by text writers of repute.

And the late Mr. Justice Brodeur said, at p. 229:—

> This section [s. 131] contains an important addition to the corresponding section of the Imperial Act and it would not be advisable then to follow the British decisions.

It is the addition of the concluding words of s. 131 which distinguishes the Dominion from the corresponding English section and makes clear the intention to introduce into our law the principle of the "aval." That we understand to have been the view taken in this court both in *Robinson* v. *Mann* (2) and *Grant* v. *Scott* (3); and, notwithstanding the suggestion made by the distinguished author of "Falconbridge on Banking and Bills of Exchange" (4th ed.), at p. 753, we do not regard those decisions as open for reconsideration here merely because of the holding by the House of Lords in *R. E. Jones Ltd.* v. *Waring & Gillow Ltd.* (4), that the payee of a note is not a holder of it in due course.

The consequence is that the appeal should be allowed, the judgment of the trial judge restored and the action maintained against both respondents with costs throughout.

LAMONT J. (dissenting).—As I am differing with the other members of the court in this case I naturally advance my own views with great hesitation, but I cannot escape the conviction that on the evidence before us the

(1) (1880) 5 A.C. 754, at pp. 772-3.
(2) (1901) 31 Can. S.C.R. 484.
(3) (1919) 59 Can. S.C.R. 227
(4) [1926] A.C. 670.

conclusion arrived at by the Court of Appeal was right. The important question here is one of fact: Did the defendant, Murphy, give the note in question to the defendant, Gilroy, as a payment on account of an indebtedness which arose from the purchase by Murphy of a half interest in a patent owned by Gilroy?

The circumstances under which the note was given are as follows:—

John Schwab was the original owner of patent no. 230027, which was an invention for improving automobile tubes. In December, 1923, he agreed to assign the patent to Gilroy who was to form a company with a capital stock of $300,000 divided into 10,000 preference shares and 20,000 ordinary shares, all of $10 each. Gilroy covenanted that upon the company being organized he would cause 2,500 fully paid up ordinary shares to be allotted to Schwab, and that he would sell 5,000 preference shares as soon as possible, out of which Schwab was to be paid $25,000. Gilroy also covenanted that the company would employ Schwab as superintendent of the manufacturing of tubes under the patent at a salary of $250 a month. A company called the Travellers' Rubber Company was formed and to it Gilroy transferred the patent, and was to receive therefor $25,000 and 20,000 ordinary shares (fully paid up and non-assessable) of the company's capital stock.

On April 24, 1924, Gilroy, Schwab and the company entered into an agreement by which the company agreed to pay to Schwab the $25,000 due him from Gilroy, and Schwab released Gilroy from any liability in reference thereto. The shares of the company would not sell. Only 7 ten-dollar preference shares were ever subscribed for, and $65 was all the money ever received by the company from the sale of its shares (Ex. 7). The company, having no money to manufacture tubes, on January 2, 1925, granted to Gilroy and one Macdonald the exclusive license to manufacture tubes under the patent subject to payment of a royalty of $1,000 for the first year and $2,000 for the second year, and after that 50 cents a tube. At that time Gilroy owned another patent for an improvement in automobile tires.

Some time prior to giving the note in question in this action, Gilroy sold a half interest in the tire patent to

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Murphy for $7,500, and received $3,000 of the purchase money. On June 28, 1926, Gilroy, being indebted to the company for royalties in the sum of $2,000, went to see Murphy (who was an old man seventy-seven years of age) and the note in question, which was made payable to the company, was signed by Murphy. Gilroy endorsed his name on this note and then handed it to the plaintiff on behalf of the company of which he was manager de facto as well as solicitor. At the trial Gilroy gave the following evidence:—

Mr. TOOGOOD: What arrangement was made with Murphy whereby he gave this note?—A. The arrangement with Murphy was that he was to have an interest in my tire patents.

Q. Was that the consideration between yourself and Murphy?—A. Was an interest in my tire patents.

* * * * *

CROSS-EXAMINED BY MR. BULLEN:

Q. You sold Mr. Murphy an interest in a patent?—A. Absolutely.

Q. And he paid you some money on that interest?—A. Yes.

Q. I have a cheque here from Mr. Murphy to Mr. Gilroy for $3,000, endorsed by you?—A. Quite right.

Q. And then subsequently he gave you this note sued on in this action as a further payment?—A. As a further payment.

Q. In connection with the same patent?—A. Yes, and when it came due I was to renew it if he could not pay it.

* * * * *

CROSS-EXAMINED BY MR. ROBERTSON:

Q. On your examination you did say that you never discussed with Murphy the question of an interest in the patents?—A. I did not on the tube patents.

Q. Here is what you say, question 17 * * * "Now what interest in the patent right was he to receive?—A. Never discussed." Is that correct?—A. Quite correct it has never been discussed with Murphy and I, anything in connection with the tube patents.

Q. That is this patent here that this company is interested in?—A. No, this company is not interested.

Q. It was some other patent, was it?—A. Yes, my tire patent.

Q. And you had some dealings with him. As a matter of fact he was going to take an interest in your business?—A. No, in my tire.

Q. Well, in your tire business?—A. Yes.

Q. And question 113 you were asked: "When you were getting Murphy to sign the note did you tell him it was for an interest in a patent right?—A. No." And it was not, was it?—A. An interest in the patent right certainly, it was my tire patent.

Q. Why did you make that answer?—A. It is not in the tube, Murphy is not in the tube patent, in the tire patent.

Q. Some other patent you had. You have not any other agreement in writing with him?—A. No.

Q. And he was to get something and he gave you a note on account?—A. Yes.

HIS LORDSHIP: Mr. Gilroy has given a perfectly straightforward and apparently honest account of the transaction. He owed the company some money, Gallagher wanted to get that money, Gilroy had a deal with Murphy, Murphy gave him this note on account and Gilroy endorsed it over to Gallagher for the company.

* * * * *

BY MR. BULLEN:

I see the note is made payable to the Travellers' Rubber Company, Limited, by Mr. Murphy.—A. Yes.

Q. Why was that done?—A. To give it to the company as royalties.

Q. Mr. Murphy was not in any way indebted to the Travellers' Rubber Company?—A. No.

Q. There was no consideration passing from the Travellers' Rubber Company to Murphy?—A. No.

Q. And the sole consideration was the interest in the patents to you?—A. Yes.

And Murphy testified as follows:—

Q. Who did you give that note to (Exhibit No. 1) It says pay to the order of Travellers' Rubber Company, Limited, $2,000. Who did you give the note to?—A. I presume to Mr. Gilroy, I am not sure.

Q. Now try and think, and don't presume. You gave it to whom?—A. Mr. Gilroy.

Q. Why?—A. For a half interest in his—what is it?

HIS LORDSHIP: For a half interest in what?—A. Tire wasn't it?

MR. BULLEN: For a half interest in a patent to make a tire was it?—A. A tire, yes.

Q. How much was it, how much did you pay for it?—A. $7,500.

Q. And you paid how much in cash at the time you made the agreement?—A. It was $3,000.

* * * * *

CROSS-EXAMINED BY MR. ROBERTSON:

Q. You gave the note to Mr. Gilroy made payable to the Travellers' Rubber Company in order that Gilroy should pay the debt he owed that company, you knew that?—A. I did not know anything about it.

In answer to a question by His Lordship, Gilroy admitted that the body of the note was in his handwriting.

In his judgment, the learned trial judge said:—

The defendant Gilroy owed the T. R. Co. a considerable sum for the right to use a certain patent—he was owed by the defendant Murphy a considerable sum as balance of purchase price of a share in his venture.

* * * * *

When this note was given, the purchase by Murphy of a share in Gilroy's venture had been completed, but Murphy owed a certain part of the purchase money as an ordinary debt—nevertheless the original consideration was the interest in Gilroy's venture. I do not think that the right to manufacture under a patent is an interest in a patent, and *a fortiori* a right to share in the exercise by another of a right to manufacture under the patent cannot fairly be said to be an interest in the patent itself—within the meaning of the statute.

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This, in my opinion, is a clear finding that Murphy gave the note in part payment of the interest which he had purchased from Gilroy. That interest the learned trial judge thought was a share in Gilroy's "venture," meaning, as I understand his language, in the manufacture of tubes under patent no. 230,027. This, I think, was a misconception, as Murphy had purchased no interest in the manufacturing venture, his purchase was a half interest in the tire patent. On the evidence of Gilroy and Murphy, which the learned trial judge accepted, and on the finding, it seems to me impossible to reach any other conclusion than that Murphy gave the note sued on to Gilroy in part payment of the purchase price of a half interest in the tire patent.

Section 14 of the *Bills of Exchange Act* reads as follows:—

14. Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words *Given for a patent right.*

2. Without such words thereon, such instrument and any renewal thereof shall be void, except in the hands of a holder in due course without notice of such consideration.

The plaintiff was not a holder in due course, as he took the note after maturity and with knowledge that Murphy claimed that it was given for an interest in a patent right. The note not having the words "given for a patent right" written or printed thereon, is therefore void. *Craig* v. *M. & L. Samuel, Benjamin & Co.* (1).

It was, however, argued that as the note was made payable to the company to whom Murphy was not indebted it must be deemed to be an accommodation note and Murphy must be deemed to be an accommodation party within the meaning of s. 55 of the Act. That section reads as follows:—

55. An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or endorser, without receiving value therefor, and for the purpose of lending his name to some other person.

It was admitted by counsel for the appellant that it was only as an accommodation maker that Murphy could be held liable on the note. To be an accommodation maker Murphy must not have received any consideration therefor

(1) (1895) 24 Can. S.C.R. 278.

and he must have signed it for the purpose of lending his name to Gilroy. Now it may well be said that Murphy received no consideration from the company, but can it be said that he gave the note for the purpose of lending his name to Gilroy? In my opinion it can not. Both he and Gilroy have sworn to the contrary and their evidence has not been contradicted. The only ground upon which the contention that the note was made for Gilroy's accommodation can be based is that the company's name appears therein as payee. This fact, it is said, supports an inference that Murphy in giving the note was lending his name to Gilroy. The probative force to be given to this inference is not, in my opinion, sufficient to override the positive testimony of Murphy and Gilroy that the note was given as a payment on account of an interest in the patent right. The cross-examination of these witnesses as to why the company's name was inserted as payee was most meagre. Practically all the information we have is that Gilroy drew up the note in that form and that Murphy signed it; but Murphy has testified that when he signed it he did not know that Gilroy intended to use it to pay a debt of his own to the company. Counsel for the appellant urged that Murphy had been put forward to the appellant and to the company as maker of a note for Gilroy's accommodation, and reference was made to the evidence of Gilroy in which he testified to a conversation he had with the appellant in which he told the appellant, who was pressing him for payment of the royalties, that he had a friend from whom he might get a note. In answer to this contention it is sufficient to point out that in his testimony the appellant swore positively that no such conversation had ever taken place and that he had never suggested the obtaining of a note by Gilroy. Whether the appellant or the company thought they were getting an accommodation note is, in my opinion, immaterial. They are presumed to know the law and to know that if the note handed to the appellant by Gilroy was in fact given as part payment of an interest in a patent right, the same was void under s. 14, above quoted.

It was argued that Murphy in his pleadings set up that the note was an accommodation note. It does so appear, but whoever drafted his statement of defence evidently set up every defence he could think of. The plea, however, on

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which Murphy relies is clearly set out in paragraph 9, and reads as follows:—

> 9. The defendant, J. E. Murphy, claims that the note sued upon is void, because to the knowledge of the plaintiff it was given for an interest in a patent right without having endorsed thereon the words "given for a patent right."

Then it is said that the testimony of Gilroy and Murphy should not be believed because, on his examination for discovery, Gilroy stated that he had never discussed with Murphy the question of an interest in the patent right. This Gilroy explains, and I think reasonably, by pointing out that his answer was absolutely true as regards the tube patent, which was the patent under discussion in the examination.

It was also pointed out that Gilroy had stated that at the time he obtained the note in question no mention was made of its being for an interest in a patent right. Why should such mention be made? The patent right had been discussed at the time Murphy bought his half interest. When the note was taken there was no occasion for discussing it, the interest had been purchased and the note was merely payment on account.

Our attention was also called to the fact that in a former proceeding Murphy had made an affidavit that the note had been given by him for accommodation only. This affidavit was not in evidence at the trial and it comes before us only by the consent of Murphy's counsel that it might be filed and read. I am at a loss to understand why such consent should be given in the absence of any explanation by Murphy as to how he came to make the affidavit or as to what he understood by making a note for accommodation only. The affidavit not being before the trial court, Murphy, of course, was not asked to explain how he came to make it or what he understood by it. As the trial judge found Murphy's evidence given in court to be credible, I do not think the affidavit can be held to be conclusive against him in the absence of any opportunity on his part to explain it.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Fasken, Robertson, Atchison, Pickup & Calvin.*

Solicitors for the respondent Murphy: *Clark & Brant.*

Solicitor for the respondent Gilroy: *W. A. Toogood.*

L'ABBÉ ÉMILE WARRÉ (PLAINTIFF).....APPELLANT;

AND

ALBERT BERTRAND AND ANOTHER (DEFENDANTS) ..... } RESPONDENT.

1929

*Feb. 21.
*Mar. 20.

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

Contract—Agreement—Mandate—Exclusive agency for the sale of goods —Revocation—Consent of both parties—Art. 1756 C.C.

When in an agreement a person binds himself to buy and advertise the goods of a proprietor of patent medicines for a certain period and within a defined territory and is also appointed his sole agent and representative, such an agreement cannot be revoked at the will of the proprietor without the consent of the other party, article 1756 C.C. respecting the termination of mandate not being applicable in such a case.

Judgment of the Court of King's Bench (Q.R. 44 K.B. 453) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Surveyer J. and dismissing the appellant's action.

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

R. Langlais K.C. for the appellant.

P. Lacoste K.C. for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—L'appelant, qui demeure en France où il fabrique des médicaments et des produits alimentaires, a fait, dans l'automne de 1922, un contrat avec les intimés, qui résident à Montréal, pour la vente de ses produits.

D'après ce contrat, il est convenu que les intimés achèteront au comptant, et en quantités pour au moins 1,000 francs l'achat simple, les produits de l'appelant aux prix stipulés dans une lettre de ce dernier. Ils achèteront également au comptant et en lots à leur convenance le livre "La Santé" publié par l'appelant, et cela aux prix mentionnés dans la même lettre. Enfin, ils s'engagent à dépen-

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith JJ.

(1) (1928) Q.R. 44 K.B. 453.

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ser en publicité, annonces, etc., au moins $1,000 par année, à commencer un an après la signature du contrat.

De son côté, l'appelant nomme les intimés ses agents, représentants et dépositaires exclusifs pour la vente de ses produits pour tout le Canada et les Etats-Unis, durant vingt années à compter de la signature du contrat. Il les autorise à faire enregistrer au Canada et aux Etats-Unis le livre "La Santé", à en faire publier une traduction anglaise, et à se servir pour toutes fins commerciales et enregistrer comme raison sociale le nom "Les Warrécures-Canada", de même que le mot "Warrécures" pour toutes autres fins de publicité.

Quelques mois plus tard l'appelant révoqua le contrat qu'il avait avec les intimés. Puis il intenta contre eux la présente action, où il demanda l'annulation du contrat, alléguant que les intimés n'en avaient pas rempli les obligations, notamment quant au paiement au comptant du montant de leurs commandes de marchandises.

La Cour Supérieure ne s'est pas prononcée sur les griefs invoqués par l'appelant contre les intimés, mais envisageant le contrat comme un mandat révocable au gré du mandant aux termes de l'article 1756 C.C., elle a décidé que la révocation de l'appelant était effective et, pour ce seul motif, elle a maintenu l'action.

La Cour du Banc du Roi a infirmé ce jugement. Elle a été d'avis que l'article 1756 C.C. ne s'applique pas à un tel contrat qui est synallagmatique de sa nature et fait pour l'avantage des deux parties. Elle a trouvé mal fondés les griefs que l'appelant invoque, et elle a renvoyé son action.

L'appelant se pourvoit maintenant devant nous en appel de ce jugement.

Le jugement de la Cour du Banc du Roi nous paraît entièrement bien fondé. Le contrat en question est d'un type bien connu en ce pays. Il comporte le droit exclusif, dans le Canada et les Etats-Unis, de vendre les produits de l'appelant que les intimés doivent acheter de lui en quantités représentant au moins 1,000 francs la commande. Les marchandises que les intimés achètent et qu'ils paient comptant avant l'expédition leur appartiennent. Ils les vendent comme ils le veulent et n'en sont pas comptables envers l'appelant. La clause qui les nomme les agents et

représentants de ce dernier, n'est un mandat que de nom, car les intimés ne gèrent aucune affaire pour l'appelant (art. 1701 C.C., définition du mandat), et malgré que la clause dise que les intimés sont les agents de l'Abbé Warré pour la vente de ses produits, ils ne peuvent obtenir ces produits qu'en les payant d'avance, et alors c'est leur propre marchandise qu'ils vendent. Même si on envisageait cette clause comme contenant un véritable mandat, ce mandat serait une stipulation accessoire ou une condition d'un contrat synallagmatique entre l'appelant et les intimés, et partant serait irrévocable par le mandant seul (Aubry et Rau, 5 éd., t. 6, 185). Le droit de révocation que la Cour Supérieure reconnaît à l'appelant n'existe donc pas dans l'espèce, et l'article 1756 C.C. est hors de cause.

Nous sommes également d'avis que l'appelant n'a prouvé aucune inexécution par les intimés de leurs obligations contractuelles. Il est possible qu'il reste dû à l'appelant une somme très minime, mais ce n'est pas là une cause suffisante d'annulation du contrat, et l'appelant peut réclamer ce solde de compte dans une autre action, si les intimés ne le lui paient pas.

Les intimés avaient soulevé la question de juridiction, prétendant qu'il n'y avait en litige aucun montant suffisant pour les fins de l'appel à cette cour. Vu le doute qui existait sur la question de savoir si le droit de révocation qu'invoque l'appelant peut être évalué à au delà de $2,000, la motion pour casser l'appel a été continuée à l'audition au mérite. Cette audition ayant démontré que l'appel est visiblement mal fondé, il n'est pas nécessaire de se prononcer sur ce point.

L'appel sera renvoyé avec dépens, mais chaque partie payera ses frais sur la motion pour casser l'appel.

Appeal dismissed with costs.

Solicitors for the appellant: *Langlais, Godbout & Tremblay.*

Solicitors for the respondents: *Lacoste & Lacoste.*

1929
*Feb. 7.
*Mar. 20.

IN RE ESTATE OF PETER DONALD, DECEASED

M. EDITH BALDWIN (PLAINTIFF).....APPELLANT;

AND

WILLIAM T. MOONEY AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH, SASKATCHEWAN

Will—Construction, as to beneficiaries—Share of person predeceasing testator to go to such person's "children"—Adopted child—Effect of foreign law declaring rights of child adopted under that law.

A testator, who died April 17, 1922, domiciled in Saskatchewan, by his will provided for division of part of his estate equally among seven persons, including S., and directed that "should any of the parties mentioned * * * predecease me, the share which such party would have received had he or she survived me is to be divided equally between the children of the party who would have received said share." S., who was domiciled in the State of Washington, predeceased the testator, leaving only a child whom he and his wife had adopted under the laws of Washington, by which laws such child is declared to be to all intents and purposes the child and legal heir of his adopter, entitled to all rights and privileges and subject to all the obligations of a child of the adopter begotten in lawful wedlock.

Held: The child did not take under the will. No principle was applicable from the rule applied to determine the legitimacy of children born before their parents' marriage. The question was not one of status, but was whether the adopted child was a person such as described in the bequest. There being nothing in the will or the circumstances to indicate its use otherwise than in its ordinary sense, the word "children" (under Saskatchewan law as it stood at the time in question) did not include an adopted child (1).

Judgment of Bigelow J. (23 Sask. L.R. 111; appealed from *per saltum*) affirmed.

APPEAL (*per saltum*, by leave of the Court of Appeal for Saskatchewan (2)) from the judgment of Bigelow J. (3) dismissing the appellant's (plaintiff's) application,

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) *Reporter's Note:—The Adoption of Children Act, 1922* (Sask., 1921-22, c. 64. See now *The Child Welfare Act, 1927*, c. 60) came into force on May 1, 1922, after the testator's death. See the reference to the Act in the judgment of Bigelow J., [1928] 2 W.W.R. 636, at p. 637, and in the judgment of Haultain C.J.S., [1928] 3 W.W.R. 388, at pp. 389-390.

(2) [1928] 3 W.W.R. 388.

(3) 23 Sask. L.R. 111; [1928] 2 W.W.R. 636.

made by way of originating notice, in the Court of King's Bench, Saskatchewan, for an order directing the executors of the will of the late Peter Donald, deceased, to pay to the appellant, as guardian of the estate of James W. Speedie, an infant, all moneys at the commencement of the proceedings or thereafter during the minority of said James W. Speedie payable to him out of said deceased's estate.

The following facts were, for the purpose of the appeal, admitted by the parties:

1. [Nature of the proceedings, as above set out].

2. The said Peter Donald died on April 17, 1922, domiciled in the province of Saskatchewan, having made his last will and testament bearing date April 26, 1920, letters probate whereof were granted to the respondent executors out of the Surrogate Court, Judicial District of Kindersley, in the province of Saskatchewan, on August 12, 1922.

3. The said Peter Donald by his said will directed his executors to divide one-twelfth of the residue of his estate excepting one section of land equally share and share alike among seven persons, one of whom was Andrew Speedie, of Seattle, Washington, U.S.A.

4. The said Andrew Speedie died on August 20, 1920, domiciled in the State of Washington, U.S.A.

5. That the said Peter Donald, deceased, by his will provided as follows:

> Should any of the parties mentioned in this my will, except the said Margaret Fleming, predecease me, the share which such party would have received had he or she survived me is to be divided equally between the children of the party who would have received said share.

6. That at the commencement of these proceedings the estate of said Peter Donald, deceased, had been partially distributed and that the share of the portion distributed which the said Andrew Speedie would have received had he survived the testator was at the commencement of these proceedings approximately $980, which sum is held in reserve by the respondent executors, and that the value of the estate of said deceased undistributed at the commencement of these proceedings was approximately $332,000.

7. That the said Andrew Speedie died leaving surviving him James W. Speedie, an adopted child, adopted under the laws of the State of Washington, U.S.A., who was born on May 2, 1909, and no other child or children.

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8. That the appellant is guardian of the person and estate of said James W. Speedie under letters guardianship issued out of the Superior Court of the State of Washington on October 18, 1927.

9. That the said James W. Speedie was adopted by the said Andrew Speedie and his wife the appellant (then named Mary E. Speedie) as their son in accordance with the laws of the State of Washington and that the order of adoption under such laws was made on June 15, 1914, in the Superior Court of the State of Washington. The said order provides as follows:

It is hereby ordered that the said minor child be adopted by said petitioners and from this day he is to all intents and purposes the child of the petitioners Andrew Speedie and Mary E. Speedie and that his name be changed to James Waterbury Speedie.

10. That at the time of said adoption the said Andrew Speedie and James W. Speedie were and the said James W. Speedie still is domiciled in the State of Washington, U.S.A.

11. That the said Order of adoption was made pursuant to section 1698 of Remington's Compiled Statutes of Washington, which section is as follows:

Upon the compliance with the foregoing provisions, if the court shall be satisfied of the ability of the petitioner or petitioners to bring up and educate the child properly, having reference to the degree and condition of the child's parents, and shall be satisfied of the fitness and propriety of such adoption, the court shall make an order setting forth the facts and declaring that from that date such child, to all legal intents and purposes, is the child of the petitioner or petitioners, and that the name of the child is hereby changed.

12. That the effect of the said order of adoption according to the laws of the State of Washington is as set forth in section 1699 of the said Compiled Statutes, which section is as follows:

By such order the natural parents shall be divested of all legal rights and obligations in respect to such child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and shall be, to all intents and purposes, the child and legal heir of his or her adopter or adopters, entitled to all rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock: Provided, that on the decease of parents who have adopted a child or children under this chapter and the subsequent decease of such child or children without issue, the property of such adopting parents shall descend to their next of kin, and not to the next of kin of such adopted child or children.

13. That the said sections 1698 and 1699 were in force on and for some time prior to June 15, 1914, and are now

in full force and effect as laws of the said State of Washington.

14. That under the laws of the State of Washington the guardian of an infant domiciled and resident therein and appointed by the courts of such State has power to receive and give legal discharges for all moneys payable to such infant whether the same be payable by persons residing within or beyond the said State and that under the laws of said State it is the duty of such a guardian to collect all debts and demands due to his ward.

Bigelow J. (1), following *Burnfiel* v. *Burnfiel* (2), which he held was applicable and binding upon him, held that the said James W. Speedie did not take under the will as a "child" of the said Andrew Speedie.

G. W. Forbes for the appellant.

Avery Casey K.C. for the respondents.

The judgment of the court was delivered by

SMITH J.—Peter Donald died domiciled in Saskatchewan on 17th April, 1922, having made his will dated 26th April, 1920, which was duly probated in Saskatchewan.

By this will the testator directed his executors to divide one-twelfth of the residue of his estate, excepting one section of land, equally among seven persons, one of whom was Andrew Speedie, of Seattle, Washington, U.S.A. Another clause of the will provided as follows:

> Should any of the parties mentioned in this my Will, except the said Margaret Fleming, predecease me, the share which such party would have received had he or she survived me is to be divided equally between the children of the party who would have received said share.

Andrew Speedie died on the 20th day of August, 1920, leaving surviving him James W. Speedie, adopted as a child under the laws of the State of Washington, but no other child. The statute of this State authorizes the court, upon compliance with its provisions, to make an order declaring that from and after that date such child, to all legal intents

(1) 23 Sask. L.R. 111; [1928] 2 W.W.R. 636.

(2) (1926) 20 Sask. L.R. 407.

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and purposes, is the child of the petitioner or petitioners, and such an order was made, declaring the child James W. Speedie to be the child of said Andrew Speedie and his wife Mary E. Speedie. The statute declares that by such order the child shall be,

> to all intents and purposes, the child and legal heir of his or her adopter or adopters, entitled to all rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock.

Andrew Speedie having died before the testator, the question is: Does the adopted child James W. Speedie, under the clause of the will quoted above, take the share that Andrew Speedie would have taken had he survived the testator? The appellant, as guardian of the infant James W. Speedie, on an originating notice in chambers applied to the Court of King's Bench in the Judicial District of Regina for an order directing the executors to pay to her as such guardian the moneys payable to the infant in respect of the share of Andrew Speedie, which motion was dismissed on the ground that the infant James W. Speedie was not entitled to the share bequeathed to Andrew Speedie as his child under the clause quoted.

By reason of conflicting decisions in the various provinces on the point in question, an appeal from the order in chambers is taken direct to this Court by leave obtained from the Court of Appeal of Saskatchewan.

The appellant submits that the principle adopted in the English cases cited, in reference to children made legitimate according to the law of the domicile of the father, applies to children adopted as in this case. It is admitted that there is no direct authority for this proposition in this court, nor in English decisions, but four cases decided in our provincial courts are cited, viz.: *Re Throssel* (1); *Robertson* v. *Ives* (2); *Purcell* v. *Hendricks* (3); *In Re McAdam* (4). These cases are at variance with the decision of the Court of Appeal for Saskatchewan in *Burnfiel* v. *Burnfiel* (5).

The law in relation to the status of a child by legitimation is reviewed in *In re Andros* (6). The following are extracts from the judgment by Kay J.:

(1) (1910) 12 W.L.R. 683 (Alta.).
(2) (1913) 15 D.L.R. 122 (P.E.I.).
(3) 35 B.C. Rep. 516; [1925] 2 W.W.R. 689 (B.C.).
(4) 35 B.C. Rep. 547; [1925] 2 W.W.R. 593 (B.C.).
(5) (1926) 20 Sask. L.R. 407.
(6) (1883) L.R. 24 Ch.D. 637.

This will being an English will must, of course, be construed according to English law. That law requires that all who take under a gift to sons of a named father should be legitimate offspring.

* * * * *

A bequest in an English will to the children of A. means to his legitimate children, but the rule of construction goes no further. The question remains who are his legitimate children. That certainly is not a question of construction of the will. It is a question of status. By what law is that status to be determined. That is a question of law. Does that comity of nations which we call international law apply to the case or not?

He reviews the cases, and concludes that, owing to the conflict of authority, he must decide the matter for himself, and holds that a bequest of personalty in an English will to the children of a foreigner means to his legitimate children and that by international law, as recognized in this country, those children are legitimate whose legitimacy is established by the law of the father's domicile. In the case before him, an English will bequeathed property to the sons of T. E. Andros, who died domiciled in Guernsey. The plaintiff was a son of T. E. Andros, born in Guernsey in 1860, before his marriage there to plaintiff's mother, which was in 1865. The subsequent marriage of his parents legitimated the plaintiff under the law of Guernsey. Applying the rule laid down, it was held that the plaintiff was to be deemed a legitimate child under the terms of the will and entitled to take. The rule, however, as stated is wider than the decision, and has been finally settled in more restricted form. Dicey's Conflict of Laws, 4th ed., at p. 903, states the rule in terms, which the author says may now be laid down with confidence, as follows:

Our Courts hold that under the common law the question of a child's legitimacy is to be determined by the law of the father's domicil at the time of the child's birth, taken together with the law of the father's domicil at the time of the subsequent marriage of the child's parents, and, when a person is legitimated under these two laws, fully admit his legitimacy.

This rule, first applied in case of a bequest of personalty, was applied to a devise of real estate in *In re Gray's Trusts* (1), but it was held in *Birtwhistle* v. *Vardill* (2), that it does not apply to inheritance of real estate.

It is the principle of the rule quoted above that, it is argued, applies here to the case of this adopted child. It will be noted that the rule does not apply to all illegitimate children legitimated by the law of the domicile, but only to

(1) [1892] 3 Ch. 88.

(2) (1835) 2 Cl. & F. 571; (1839) 7 Cl. & F. 895.

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IN RE ESTATE OF PETER DONALD, DECEASED.

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those born in the domicile and legitimated by subsequent marriage of the parents in that domicile, as is illustrated by *In re Goodman's Trusts* (1).

D., an unmarried woman domiciled in England, died intestate, leaving as her sole next of kin the children of two deceased brothers, one of whom had by Charlotte Smith three illegitimate children born in England. In 1870 he changed his domicile to Holland, where he had another illegitimate child by the same woman. He subsequently married this woman in Holland, whereby, under the law of that country, all these children became legitimate. It was held that the child born in Holland before the marriage was to be deemed legitimate and entitled to take as next of kin, but that those born in England were not next of kin.

It seems clear that there is no principle in the rule referred to that can be applied to an adopted child. The limitation as to parents marrying in the country of domicile can have no application in such case, and it was not suggested that the adopted child must be born in the domicile of the party adopting.

The bequest in this case is to "the children" of Andrew Speedie, and there is nothing in the will or the circumstances to indicate that these words "the children" were used otherwise than in their ordinary sense. The judgment in *In re Andros* (2), as stated above, lays it down that "English law (which is Saskatchewan law) requires that all who take under a gift to sons of a named father should be legitimate offspring."

Saskatchewan law therefore requires that the parties who take under this bequest to the children of Andrew Speedie shall be the legitimate offspring of Andrew Speedie, and the simple question is, does this adopted child come within that description? It seems perfectly clear that he does not, for the reason that he is not in fact the offspring of Andrew Speedie. It is not a question of status, but a question of whether this adopted child is a person such as mentioned and described in this bequest.

It is, of course, quite possible that the word "children," as used in a will, may include adopted children or illegitimate children where the language of the will, coupled with

(1) (1881) L.R. 17 Ch. D. 266. (2) (1883) L.R. 24 Ch.D. 637.

the circumstances, indicates that the testator used the word in that sense, but there is nothing of that kind in this case.

The appeal must be dismissed.

In view of the decisions in the courts of three provinces being in conflict with the decision of the courts in Saskatchewan on the point in question, the appellant was not unreasonable in submitting her rights to the court, and in bringing them directly, as has been done, to this court. The costs, therefore, of the appeal and of the proceedings below of all parties as between solicitor and client will be out of the estate.

Appeal dismissed.

Solicitors for the appellant: *Cross, Jonah, Hugg & Forbes.*

Solicitors for the respondents: *Casey, Dawson & Co.*

FRANK J. FARRELL AND ANOTHER (DEFENDANTS) ..... } APPELLANTS;

AND

DAME CHARLOTTE LLOYD (PLAINTIFF) ..... } RESPONDENT.

1929
*Feb. 27.

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

Contract—Resiliation—Fraud—Error—Exchange of debentures for stocks of minor value—Arts. 991, 992, 993 C.C.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Sir F. Lemieux C.J., and maintaining the respondent's action.

The action was to annul several transfers of stocks whereby the respondent would have given to the appellants shares and debentures to the value of $9,405.55 and received from them in exchange other stocks having a value of about $1,400.

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*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1928) Q.R. 44 K.B. 508.

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FARRELL v. LLOYD.

At the conclusion of the argument for the appellants, and without calling on counsel for the respondent, the judgment of the Supreme Court of Canada was orally delivered by the presiding judge, dismissing the appeal with costs.

Appeal dismissed with costs.

J. C. Martineau for the appellant.

F. Choquette for the respondent.

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*Oct. 29.

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*Feb. 5.

WINNIPEG, SELKIRK AND LAKE WINNIPEG RAILWAY COMPANY (DEFENDANT) ..... APPELLANT;

AND

PAUL PRONEK (PLAINTIFF) ..... (RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Street railways—Negligence—Tramcar at night overtaking and striking sleigh on track—Degree of care required of railway company—Duty as to power of headlight.

Defendant operated a street railway between Winnipeg and Selkirk, its line running along the west side of a highway. Between the railway and the main travelled road there was a ditch. The ties and rails were above the ground level. There were built up crossings across the ditch and railway. Plaintiff was driving along the road after dark on January 2, 1926, when his horses ran away. They turned over one of said crossings on to the prairie, made a circuit and came back to the crossing and turned and ran along the railway where they were, further on, overtaken and struck by defendant's tramcar, the motorman, who was going at 30 miles an hour, not having seen them in time to stop before hitting them. Plaintiff sued for damages. The headlights used on defendant's cars were the standard equipment of similar cars on this continent. But the motorman testified that he had had trouble on his trip that evening from Winnipeg to Selkirk with dimness of the light; he had changed the carbon at Selkirk, but still had trouble with dimness on the trip back to Winnipeg, on which the accident happened; when the light was working with full efficiency he could see about seven "pole lengths" ahead; he had made emergency stops in about three pole lengths; he did not see plaintiff's outfit until he was about one pole length away. Evidence was given that after the accident the light was tested and found in good condition. An expert testified that in all arc lights there is a variation in brightness, due to automatic adjustment in the carbon, causing momentary dimness, and to the light being affected by line volt-

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*PRESENT:—Anglin C.J.C. and Newcombe, Rinfret, Lamont and Smith JJ.

age. The jury found defendant negligent in "not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident"; but this finding being deemed unsatisfactory in view of the pleadings, the jury, after further directions, added: "as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident." Plaintiff recovered judgment, which was sustained by the Court of Appeal (37 Man. R. 320).

Held (Anglin C.J.C. and Lamont J. dissenting): The judgment below should be reversed, and the action dismissed.

Per Newcombe and Smith JJ.: Defendant had no obligation to keep a man on duty at Selkirk; moreover, plaintiff had not alleged failure to do so as a ground of negligence. As to the added clause, it did not, in view of the evidence and the judge's charge, imply a finding of excessive speed; nor did it imply that the headlight in question had some particular defect causing it to function less effectively than defendant's headlights ordinarily functioned—there was no evidence on which a jury could reasonably so find, and they had not found any such defect in terms; the only negligence found was failure in a duty which, in the jury's opinion, as indicated by their finding, was on defendant, to have a headlight sufficiently powerful to enable the motorman to see plaintiff in time to stop before hitting him; and defendant's duty in law did not go that far; it was bound to operate its cars with the care that a reasonably prudent person would exercise under the circumstances; in view of the position and construction of the railway it had no reason to anticipate that a person might be going along on the railway with his team; and it was not bound to use such a degree of care as to insure against accident under such extraordinary circumstances as had placed the plaintiff in such a situation. Its duty to use reasonable care required it to have a headlight of reasonable efficiency, having regard to the state of the art, and such duty was complied with.

Per Rinfret J.: The added clause indicated no intention of introducing a new and independent finding of negligence; it left the verdict as it stood formerly, except that it disclosed the reason for the original answer. It did not improve the unsatisfactory finding. But, looking upon it as a separate finding of negligence—if it meant that defendant was under the duty to have on its cars headlights of sufficient power to illuminate the track so as, under all circumstances, to avoid an accident, the verdict was without legal grounds to maintain it; if it meant that the headlight on this particular car was insufficient, the answer was twofold: (1) the uncontradicted evidence was that it was the best type of light to be found; (2) there was no evidence that the headlight was out of order. The dimness which, for some reason not explained, temporarily existed, and which was not common to the type nor due to any defect in the particular light, might have been a reason for finding the motorman at fault in driving at that rate of speed under the circumstances; but that was not the finding; moreover, the question of speed had been withdrawn from the jury. In view of the position and construction of the railway, defendant could not reasonably be held to have been bound to anticipate what occurred.

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Per Anglin C.J.C. and Lamont J. (dissenting): The jury found, in effect, that, under the circumstances, defendant was negligent in not having on the car a headlight functioning with sufficient power to enable the motorman to see objects on the track in time to stop before hitting them. Whether defendant's common law duty to exercise "that care which a reasonably prudent man would exercise under the circumstances" was complied with, was a question of fact; and there was evidence to justify the jury in finding that it was not complied with; that the particular headlight in question was inadequate, considering the hour, place, and speed of the car. Plaintiff had a right to be on the track (having regard to the relevant statutes and the agreement between defendant and the municipalities through which its line ran), subject only to obligation to give right of way. Defendant had reason to anticipate that the public might go on its track. The supplying by defendant to its cars of headlights of such power, when at full efficiency, as it did supply, was most cogent evidence against it as to what a proper headlight should do, and this standard of care established by defendant itself might well have been taken by the jury to be that which a reasonably prudent man would have adopted under the circumstances. Also, the statutory requirement to "provide adequate equipment" for the "efficient working and operation of the railway" would include an effective headlight. The jury's finding that the headlight would not illuminate the track far enough ahead for safety, was sufficient, without a finding of any particular defect. Also, it could not be said that defendant discharged its full duty by equipping the car with a standard headlight, if that headlight, for some reason or other, did not function; its duty was to supply an adequately functioning headlight. (Anglin C.J.C. held also that, should the jury's finding be deemed insufficient to support a judgment for plaintiff, there should be a new trial, because of misdirection on the issue of excessive speed and insufficiency of a question put to the jury).

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) dismissing its appeal from the judgment ordered by Curran J. to be entered, upon the verdict of a jury, for the plaintiff for the sum of $2,354.25 and costs. The action was for damages for personal injuries to the plaintiff and damage to his property caused by the defendant's street car colliding with the plaintiff's sleigh through, as alleged, the defendant's negligence.

The material facts of the case are sufficiently stated and discussed in the judgments now reported, particularly in the judgments delivered by Lamont J. and Smith J., and are indicated in the above headnote. The questions put to the jury and the answers thereto are set out in the judgment of Smith J. The defendant's appeal to this Court was

(1) 37 Man. R. 320; [1928] 1 W.W.R. 857.

allowed with costs here and in the Court of Appeal, and the action dismissed with costs. Anglin C.J.C. and Lamont J. dissented.

W. N. Tilley K.C. for the appellant.

D. Campbell K.C. for the respondent.

ANGLIN C.J.C. (dissenting).—I have had the advantage of reading the opinions prepared by my brothers Lamont and Smith. While fully concurring in the conclusions of the former and in the reasoning on which they are based, there are a few observations which it seems to me desirable that I should make.

The ditch alongside the tramway and the unlawful height of the tracks—six or eight inches above the highway level—were much relied on by the appellant as affording strong ground for supposing that there would not be vehicular traffic along the tramway rails. At other seasons that might be the case. But we are here in the presence of midwinter conditions (January 2nd), when, normally, the line of demarcation would almost disappear, and no serious obstacle would be presented to the driving of a team of horses and a sleigh on to, and along, the part of the highway on which the tramway is laid. This bears on the question whether there was any reason for the company to anticipate that there might be vehicular traffic on that part of the highway.

The jury's answer to the sixth question indicates their purpose to hold the motorman, McLeod, blameless. They probably accepted his statement that he was obliged to make schedule time and that this required him to run his car at thirty miles an hour or upwards. Otherwise they might well have found him at fault, notwithstanding the misdirection of the trial judge on that question, in driving at that rate of speed while his headlight was, for one reason or another, functioning so poorly that he could not distinguish objects on the track more than seventy feet ahead.

In the light of McLeod's evidence, the finding of the jury in answer to the second question means that, the motorman being required to maintain a speed of not less than thirty miles per hour, the duty of the company was to provide him with a headlight which would always enable

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him to discern objects on the track at least 420 feet ahead, that being the shortest distance within which his car running at that speed could be stopped; and that it was negligence to fail to furnish such a headlight—from whatever cause, whether inherent defect, loose connections, or lack of power, it failed so to function. The only alternative, on the evidence which the jury seems to have accepted, would be a finding of fault, amounting to recklessness, on the part of the motorman in maintaining, under the circumstances, the speed he did.

But if, for any reason, the jury's finding in answer to the second question should be deemed insufficient to support a judgment for the plaintiff, a new trial would, I fear, be inevitable, because of misdirection on the issue of excessive speed and also because of the insufficiency of the sixth question and of the direction in regard to it. That question should have read as follows:—

> Might the defendant's servants, after the position of the plaintiff became apparent (or should have been apparent to the motorman), by the exercise of reasonable care have prevented the accident?

The part in brackets was omitted, and the charge of the learned trial judge did not remedy the deficiency. No doubt the motorman, as the jury found, did all he could after the position of the plaintiff was apparent, i.e., when he was about sixty feet ahead; but it was then too late. Had the part of the question (as above stated) in brackets been included, who can say that the jury, properly instructed, would not have found that the motorman should have seen the plaintiff's danger when he was over 500 feet away, and should in that case have stopped his car in time to avoid running him down? Such a finding would entail liability of the defendants; and the jury were not given the opportunity to make it.

Finally, the case of *Brenner* v. *Toronto Railway Co.* (1), referred to by my brother Smith, and part of the judgment of the Divisional Court in which was approved by the Judicial Committee in *British Columbia Electric Ry. Co. Ltd.* v. *Loach* (2), was alluded to in the course of the argument only because the judgment in the Divisional Court had followed an earlier decision in *Preston* v. *Toronto Ry. Co.* (3), where it was held that a rule (or

(1) (1907) 13 Ont. L.R. 423.
(2) [1916] A.C. 719.
(3) (1905) 11 Ont. L.R. 56, at p. 59; 13 Ont. L.R. 369.

practice) of the railway company concerning the safety of persons using the streets affords evidence, as against the company, of a standard of reasonableness in regard to the subject covered by it upon which a jury may act. The *Brenner* case (1) has no other bearing upon the matter now before us.

I am unable to understand why, having regard to the conditions under which the appellant's tramcars are operated, a headlight functioning effectively should not be deemed part of the "adequate equipment" which "every railway company" is required by the *Manitoba Railway Act* (s. 40) "at all times" to provide "for the efficient working and operation of the railway." If it is, there was here a breach of statutory duty by the defendants which the jury has found to have been negligence causing the injuries of which the plaintiff complains. If not, then to cause a heavy tramcar to rush along a dark highway, where it has not an exclusive, but merely a preferential, right-of-way, at 30 miles per hour, with a headlight functioning so ineffectively that it only enables the motorman to see objects 60 or 70 feet ahead, instead of at a distance of 800-1,000 feet, as a headlight functioning at full efficiency would enable him to do, imports a reckless indifference to the rights of others and a criminal disregard of the safety of those who may be on such highway utterly inconsistent with the duty "to operate their cars with the care that a reasonably prudent person would exercise under the circumstances," which, it is common ground, the common law imposed upon the defendants.

In setting up, in explanation of their failure to have an adequate headlight, the improbability of there being any vehicular traffic on the tramway tracks because of their excessive height above the highway, the defendants are, in effect, invoking a consequence of their own illegality to excuse the non-observance of what would otherwise have been their plain duty.

NEWCOMBE J. concurs with Smith J.

RINFRET J.—I do not think the verdict can stand.

The first answer of the jury was that the company was at fault for "not having any man on duty at Selkirk cap-

(1) (1907) 13 Ont. L.R. 423.

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able of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident." This was considered unsatisfactory by the trial judge and counsel on both sides. All seemed to agree that, more particularly in view of the pleadings and the course of the trial, no judgment could be entered on such ground. The jury were accordingly requested to reconsider their answer. They did not change it; they only added to it the following words: "as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident." The wording of this additional answer indicated, on the part of the jury, no intention of introducing a new and independent finding of negligence against the company. It left the verdict as it stood formerly, except that it disclosed the reason for the original answer. It did not improve the unsatisfactory finding.

Should we, however, look upon the additional answer as a separate finding of negligence, the difficulty is to understand its true meaning. If the meaning be that the railway company was under the duty to have on its cars headlights of sufficient power to illuminate the track so as, under all circumstances, to avoid an accident, I do not see upon what legal grounds such verdict can be maintained.

If the meaning be that the headlight on this particular car was insufficient, the answer is two-fold:—

1. The uncontradicted evidence is that it is the best type of light that can be found. It is in use on 90% of the lines on the North American continent. At full efficiency, it will show an object about 700 feet ahead, which is far more than what would be required to meet the duty of the company, even if we should accept the standard laid down by the jury according to the widest interpretation that can be given to its verdict.

2. There is no evidence that the headlight was out of order. During the previous trip from Selkirk to Winnipeg, the dimmer was used and gave no trouble. Coming back from Winnipeg to Selkirk, "the bull's eye * * * was working good." Tests were made daily. One was made on this particular headlight before it was put on the car. After the accident, the headlight was again tested, when it was brought back to Selkirk, and found in good condition.

So that the charge of negligence against the company:

> 5b. In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop.

was without foundation.

The headlight which the company supplied and maintained was sufficiently powerful to meet the exigencies of the jury, even if such duty was cast upon the company.

True it is that, in the course of operation, for some time previous to the accident, and for some reason not satisfactorily explained, the lamp flickered and the light became dim. That was not common to that type of headlight, nor due to any defect in the particular light then in use. It was a temporary condition unknown to any official, agent or employee of the company, outside of the motorman. It might have been a reason for the jury to find the motorman at fault in driving at that rate of speed under the circumstances. But that is not what the jury found. On that point, moreover, it should not be overlooked that the question of speed had been withdrawn from them by the trial judge, who told them that they should disregard it altogether.

That the motorman was held blameless is not inconsistent with the view that he could not anticipate such an unusual occurrence as the finding of a team and sleigh on this railway, constructed as it was with ties and rails above the ground level, and separated from the travelled highway by a "wide road ditch."

It may be that the special Act of incorporation of the company did not authorize the railway to be so constructed. But the jury were faced with the conditions as they were. The trial judge, in his address, had said to them:

> There is no doubt about it that the railway was properly and legally constructed.

It seems evident that, wrongly or rightly, the company had taken unto itself the exclusive use of its right of way. The wide ditch and the other circumstances favoured this course of action. The public appears to have assented to it. It did not, in fact, travel upon the right of way. Any vehicular traffic over it was out of the question, on account of the lay-out, of the ties and of the protruding rails. The railway had been thus in operation for a good many years. The plaintiff himself did not contend that, at the time of the accident, he happened to be on the right of way in the

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exercise of a right. He took pains to explain that he was driven there through a course of events absolutely beyond his control. No doubt he was found guilty of no contributory negligence; but the evidence was that the horses became unmanageable and that fact would be a sufficient explanation of that part of the verdict.

In my view of the case, that point is not concluded by the statutes and the Act of incorporation. It has to be considered in the light of the actual facts and the existing conditions and that was a matter essentially for the jury. I do not think, upon the answers, the plaintiff was entitled to a judgment in his favour.

I would allow the appeal and would concur in the dismissal of the action.

LAMONT J. (dissenting).—In this case the facts are as follows:—

On January 2, 1926, the respondent (plaintiff) who is a farmer, left Winnipeg for his home, about sixteen miles north, with a team and sleigh. He had proceeded along the highway some twelve miles when he met a large covered truck, the canvas of which was flapping in the wind. This so frightened his horses that they got beyond control and ran away. They ran north a short distance, then turned to the left, crossed the appellant's line of railway and entered a field adjoining the railway track to the west. While endeavouring to check the speed of his horses, the respondent dropped the left rein. He continued to pull on the right rein, which had the effect of bringing the horses around in a circle. When they got back to the appellant's track the horses, instead of crossing the track to the east, ran south along it towards Winnipeg. One horse ran between the rails and the other just outside of the west rail. When they had gone at full gallop for half a mile they were overtaken and run down by the appellant's electric car, which smashed the sleigh, severely injured the respondent, killed one horse and injured the other. To recover damages for his injuries and the loss he sustained the respondent brought this action, in which he claims that his injuries and loss were occasioned solely by the negligence of the appellant, its servants and agents. Among other acts of negligence alleged was the following:

(b) In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop.

The appellant denied negligence on its part or that of its servants; pleaded the statute authorizing its incorporation and operation; and alleged that the accident was due to negligence on the part of the respondent.

The evidence shews that the appellant operates an electric railway between Winnipeg and Selkirk. The car line is located on the highway, occupying the most westerly part thereof. The car which ran down the respondent was in charge of Motorman W. H. McLeod and Conductor Johnston. McLeod testified that his car was equipped with a headlight which, when in good condition, i.e., at full efficiency, would illuminate the track six or seven pole lengths ahead of the car, and that he could then distinguish a person at five pole lengths. According to him a pole length varied from 125 to 150 feet; but Hawes, the appellant's superintendent, fixed it at about 140 feet.

McLeod left Winnipeg for Selkirk at 5.30 p.m., and arrived at Selkirk at 6.20 p.m. He testified that he had trouble with the headlight on his way up. The light flickered and was very dim. He thought the trouble was with the carbon, so, on reaching Selkirk, he got a new carbon and put it in the headlight. At 6.30 p.m. he left Selkirk for Winnipeg. The new carbon did not effect any improvement in the light. Instead of the track being illuminated, as it should have been, for six or seven pole lengths, the light was shewing ahead for only one pole length, and he could not distinguish objects on the track until they were within 70 or 75 feet of the car. The result was that, running on schedule time (30 miles per hour), which McLeod said he was supposed to do, he could not see the stations where intending passengers were waiting, in sufficient time to stop before going by them. This actually happened at least twice between Selkirk and the place of the accident. As the new carbon gave no better light than the former one, McLeod concluded that the trouble was not with the carbon. Twice between Selkirk and the place of the accident he got out and examined the headlight and he noticed that the felt around the door was worn away, letting the wind blow in. He thought this might be the cause of the flickering. The second examination was at McLennan. Two miles farther on the accident happened.

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The track at the place where the accident happened was straight and level for a mile each way.

The jury found that the appellant had been guilty of negligence which caused the respondent's injuries and that the respondent had not been guilty of any negligence. In answering the question: In what did the defendant's negligence consist? The jury said:

> Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident.

To understand that answer, further reference to the evidence is necessary. The testimony shews that the appellant kept at Selkirk a barn foreman whose duty it was to superintend the equipment, including the headlights, and keep it all in good working order. He, however, left the barn each day at 6 p.m., after which time the appellant had no one at the barn except the night watchman, who knew nothing whatever about repairing headlights, and had no duties in connection therewith. When, therefore, McLeod brought his car with the headlight which he thought defective to Selkirk at 6.20 p.m., there was no one there who could repair it. In view of these facts, which were undisputed, and the fact that the appellant's car was running on the unlighted highway at a rate of speed of at least 30 miles an hour, the answer of the jury in my opinion, amounts to a finding that, under the circumstances, the appellant was negligent in not having on this car a headlight functioning with sufficient power to enable the motorman to see objects on the track in time to avoid running over them. The first part of the answer suggests that had the appellant had a man at Selkirk on the night of the accident who could have remedied any defect in the headlight, the track, on the return trip, would have been illuminated ahead for six or seven pole lengths and, as McLeod could stop his car in three pole lengths, the accident would not have happened. The jury having found that the accident resulted from the use of an insufficient headlight, the next question is, was the appellant under any obligation to supply the car with a headlight functioning adequately having regard to the speed at which it was necessary to operate the car to maintain schedule time.

In the first place it is to be noted that the respondent was injured on the highway where he had a right to be unless there was some statutory provision limiting his right.

The statutes applicable are: c. 78, Statutes of Manitoba, 1900 (the appellant's special Act of Incorporation), as amended by c. 90 of the Statutes of 1904 (Private); and the *Manitoba Railway Act* which is incorporated therein.

The material provisions are sections 38 and 40 of the Railway Act; section 13 of c. 78, and clause (*d*) of the agreement entered into between the appellant and the various municipalities through which the appellant's line ran. In part they read as follows:

38. No person other than those connected with or employed by the railway company shall walk along the track thereof, except where the same is laid across or along a highway, and not even then if the track be laid on a separate and distinct part of such highway and it be so expressed or understood between the company and the municipal council in whose territory such highway is comprised * * *.

40. Every railway company shall at all times provide adequate equipment and motive power for the efficient working and operation of the railway.

13. The rails of the railway, when the railway is constructed along the street or highway as aforesaid, shall be laid flush (as nearly as practicable) with such street or highway and the railway track shall conform to the grades of the same, so as to offer the least possible impediment to the ordinary traffic of the said streets and highways, consistent with the proper working of said railway.

(*d*) All cars and trains shall have the right-of-way on the said tracks and highways, and any vehicle, horseman or foot passenger on said track shall, on the approach of any car, give such car right-of-way.

There is nothing in these sections which interferes with the respondent's right to use the highway. Had the municipalities, in their agreements with the appellant, consented to have the public excluded from walking on that part of the highway covered by the appellant's track, s. 38 of the Railway Act, in the absence of s. 13 of c. 78, would be operative, and walking on the track prohibited. For two reasons, however, I am of opinion that no such prohibition existed. In the first place, the municipalities did not, either expressly or impliedly, consent thereto. On the contrary, clause (*d*) above quoted recognizes the right of pedestrian or vehicular traffic to use the portion of the highway covered by the track, subject only to giving a right of way to the appellant's cars. In the second place, s. 13 is impliedly inconsistent with the existence of any restriction on

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the right of the public to use every part of the highway. Section 13 requires the rails to be laid as nearly as practicable flush with the highway, "so as to offer the least possible impediment to the ordinary traffic" on the highway. This clearly contemplates that traffic may be carried on along that part of the highway on which the rails are laid. Section 13 is part of a special Act into which the provisions of the Railway Act—which is a general Act—have been incorporated. In Maxwell on the Interpretation of Statutes, 6th ed., page 328, the learned author says:—

> When a general Act is incorporated into a special one, the provisions of the latter would prevail over any of the former with which they were inconsistent.

As section 13 impliedly leaves the whole of the highway open for use by the public, it would prevail over any restriction on that use provided for by s. 38 of the Railway Act. The respondent had, therefore, a right to be upon that part of the highway occupied by the appellant's tracks, but, on the approach of the appellant's car, he was under obligation to give it the right of way. This obligation implies that he would be made aware of the approach of the car in time to get off the track. He was not made aware of its approach until it was impossible for him to leave the track and, under the circumstances, he probably would not have been able to vacate the track even had he been aware of the car's proximity.

For the appellant it was contended that neither the statute nor the agreement it made with the municipalities requires the appellant to equip its cars with a headlight of any particular intensity or, indeed, with any headlight at all, and that, having complied with all the statutory requirements, it owed no duty to the respondent other than not to wilfully injure him. It is, no doubt, true that the statute does not in terms prescribe that a headlight shall form part of the necessary equipment, but it does require the appellant at all times to provide adequate equipment for the efficient operation of its railway. Such adequate equipment in the case of a tram car driven at high speed along a dark highway at night, in my opinion, certainly includes an effective headlight. But even if headlights should not be included in the term "adequate equipment," it is well established law that although a railway company has not violated any statutory provision, yet it may be

found guilty of negligence by reason of its failure to perform an obligation imposed upon it by common law. This is made clear by the language of the Privy Council in *Rex* v. *Broad* (1), where their Lordships say:

> The making of general regulations and the particular compliance with them still left those in charge of the working of the traffic bound to exercise whatever measure of care might in law be their appropriate duty upon the occasion in question.

It is also well established law that statutory authority to operate a railway does not authorize its operation in a negligent manner or in a manner which unnecessarily causes damage to others. *C.P.R.* v. *Roy* (2).

Apart, therefore, from any statutory requirement, as the respondent had a right to be on the highway, there was a duty imposed upon the appellant at common law to exercise such care as the law calls for to prevent injury to him, since without negligence on his own part, he found himself upon the railway track and unable for the moment to get out of the way of the approaching car. The degree of care which the law calls for is "that care which a reasonably prudent man would exercise under the circumstances." Whether or not the appellant's motorman, under the circumstances as known to him, acted as a reasonably prudent man in running his car on schedule time without a better light than he had, is a question of fact as to which no legal rules can be laid down. The jury had before it two pieces of evidence from which an inference could be drawn that he did not. The first of these is that the appellant anticipated that the public might frequent its tracks. This is shewn by its having inserted in the agreement a clause requiring that "any vehicle, horseman or foot passenger on said track shall, on the approach of any car give such car right of way." The second is that the appellant, by itself furnishing a headlight, which, when at full efficiency, would illuminate the track for six or seven pole lengths, had shewn what in its opinion was an adequate headlight for the efficient operation of its cars and the safety of the public. The supplying of such a headlight to its cars was most cogent evidence against the appellant as to what a proper headlight should do, and this standard of care established by the appellant itself may well have been taken by the

(1) [1915] A.C. 1110, at p. 1114. (2) [1902] A.C. 220.

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jury to be that which a reasonably prudent man would have adopted under the circumstances.

I am therefore of opinion that there was evidence to justify the jury in finding that a headlight, which illuminated the track for one pole length only, was totally inadequate where the car was being driven at night on the country highway at a speed of thirty miles per hour.

We were not referred to any Canadian or English case similar to the one before us, but the American case of *Gilmore* v. *Federal Street & Pleasant Valley Passenger Ry. Co.* (1), seems in point. At page 33 of the report the court says:—

> The degree of care to be exercised must necessarily vary with the circumstances, and therefore no unbending rule can be laid down, but there is no difficulty in saying that it is negligence to run a car along a narrow and unlighted alley in a dark night at a rate of speed that will not permit its stoppage within the distance covered by its own headlight.

On the argument a number of cases were cited in which individuals had been injured by steam railways. There can be no analogy between the duty owed to a person on its track by a railway company, the cars of which are run over the company's own private property where the public, generally speaking, have no right to be, and where the company is not called upon to anticipate their presence, and the duty owed by the appellant to the respondent in this case, where the cars were run upon the highway, from no part of which the public were excluded and where the appellant had reason to anticipate some persons might be.

Counsel for the appellant contended that the verdict could not stand because the jury had not found the particular defect in the headlight which caused its dimness. In my opinion this contention cannot be supported. The jury found that the headlight on that car would not illuminate the track far enough ahead for safety. Why it would not do so was a matter into which they did not inquire; nor were they called upon to do so. Whether it arose from the wind getting into the headlight, as McLeod seemed to think, or because the connection between the headlight and the electric wire became deranged, or because the voltage was lowered by overloading the line, as the appellant's superintendent suggested, is immaterial; the duty was upon the appellant to keep its car equipped with a headlight

(1) (1893) 153 Penn. St. R. 31.

which would properly illuminate the track, and if any of these suggested causes interfered to prevent adequate illumination, the appellant should have removed the interfering cause. To rush along an unlighted highway at 30 miles an hour with the headlight as it was amounts, in my opinion, to sheer recklessness; and the jury has in effect so found.

It was also suggested that the appellant had done its whole duty as far as the headlight was concerned, when it equipped the car with a standard type of headlight which was largely used in Canada and the United States. Surely it is idle to contend that the appellant discharged its full duty by equipping the car with a standard headlight, if that headlight, for some reason or other, did not function. It is an adequately functioning headlight that it is the appellant's duty to supply.

Counsel for the appellant further contended that the finding of the jury, carried to its logical conclusion, "would impose upon the defendant the duty of operating its cars and trains at such a speed that if any object is on the track the car could be brought to a stop without colliding with the object, and under all circumstances, such as fog, rain, sleet, snow, wind and snow and track curves," etc. This, in my opinion, is entirely beside the question. The jury were not dealing with conditions of fog, sleet, track curves, etc.; what they held, and all that they held, was, that, given the hour, place and speed at which the car was being driven at the time of the accident, it was negligence so to run that car with a headlight which did not permit the motorman to see objects within the distance in which it could be stopped. I agree that the appellant is not an insurer of the public. Its duty is to have its cars operated with due care for the public safety. But how it can be said that to drive a car, at night along a dark highway which the public have a right to frequent, at thirty miles an hour with a light which reflects only 140 feet ahead, and enables the motorman to distinguish objects only at 70 feet ahead, when the car cannot be stopped in less than 420 feet, was taking that reasonable care for the safety of the public which it is common ground it was the duty of the appellant to take, passes my comprehension. If the appellant had blindfolded its motorman at Selkirk and told him to drive to Winni-

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peg at thirty miles an hour and a person on the track was injured, could it be contended that the appellant was not negligent if the accident occurred by reason of the inability of the motorman to see in front of him? Yet to my mind that is practically the situation existing here. The motorman was not blindfolded, but he was given a car with a headlight which did not enable him to distinguish objects beyond 70 feet, although required to run at a schedule rate such that he could not stop the car in less than 420 feet, and the accident occurred because he could not see far enough ahead to stop his car before running over the respondent.

In my opinion the judgment of the Manitoba Court of Appeal was right and should be affirmed. I would dismiss the appeal with costs.

SMITH J.—The respondent (plaintiff) at the trial by jury recovered judgment against the appellant (defendant) for damages sustained through being struck by one of the appellant's cars. An appeal to the Court of Appeal for Manitoba was dismissed, and the appellant now appeals to this Court.

From Winnipeg north to Selkirk, a distance of nineteen miles, there is a highway called Main street, 132 feet wide, on the westerly side of which is located the appellant's line of railway. Between the railway and the main travelled highway there is a ditch, the depth and width of which are not described in the evidence, but which is marked on the plan as being on the space about 35 feet wide, extending from the easterly side of the railway to the westerly side of the main travelled road. There is another ditch along the east side of the main travelled road, and then a dirt road east of the latter ditch. The appellant's railway is located where it is under statutory authority and agreement with the municipalities, and is constructed like an ordinary railway line, having ties laid on the surface with ballast between, the rails on top projecting upwards their full depth above the ties and ballast, so that both ties and rails are above the ground level. Built-up crossings were therefore necessary, to enable traffic to cross both ditch and railway, and were provided where required.

The respondent was driving in his sleigh with a team of horses from Winnipeg northerly along the main travelled

road referred to, after dark on the evening of the second day of January, 1926, and, at a point about ten miles north of Winnipeg, met a motor truck, at which his horses became frightened, and ran away. They turned to the left over one of the crossings of the railway which led on to the prairie at the west. Here respondent says he lost one of the reins, and, pulling on the other, caused the horses to make a circuit, which brought them back on to the crossing, from which they turned south along appellant's railway line. About half a mile south of the crossing, the horses, still running along the track, one on each side of the westerly rail, were overtaken by defendant's car, which struck with force respondent's outfit, smashing it, killing one of the horses, and injuring the other and the respondent himself.

The following are the questions submitted to the jury, and the answers:—

1. Were the defendants guilty of negligence? Yes.

2. If so, in what did this negligence consist? Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident.

3. If the defendants were negligent, was the injury to the plaintiff caused by their negligence? Yes.

4. Was the plaintiff guilty of contributory negligence? No.

5. If so, in what does such negligence consist? None.

6. Might the defendant's servants, after the position of the plaintiff became apparent, by the exercise of reasonable care have prevented the accident? No, none from the evidence submitted. The motorman did all in his power to avoid the accident.

7. At what sum do you assess the plaintiff's damages? Special $354.25. General damages $2,000.

Plaintiff's counsel requested the Judge to direct the jury to make a more explicit finding in regard to question no. 2. After argument, His Lordship again addressed the jury, and referred to questions 1 and 2, and proceeded:—

I merely point out to you that in enumerating the particulars of negligence or negligent acts charged in the pleading against the defendant, the answer that you have given was not one of these particulars. There is no allegation in the statement of claim that the defendants were negligent in not having a man on duty at Selkirk capable of making adjustments to the lights and so on. The allegation was that the light, that the system itself, was defective. The allegation was——

Mr. GUY: My Lord, I don't think your Lordship should suggest what the answer might be to the question. They heard all this before.

After some discussion, His Lordship proceeded:—

The allegation of negligence with regard to lights is this: In failing to supply and maintain sufficient and adequate lights to enable the motor-

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man to see the plaintiff in time to stop. Now, that is the allegation of negligence that the plaintiff makes against the defendant. Have you any finding in respect to that. They don't say in their particulars that the defendant was negligent because he did not have a capable man at Selkirk barn and so on. They don't say that at all. They say they were negligent in failing to supply ample and sufficient and adequate lights to enable the motorman to see the plaintiff in time to have stopped. So I would be quite willing to give to you an opportunity to reconsider or more fully consider that question and the answer in the light of what I have read to you as containing what the plaintiff complains of.

The jury retired, and defendants' counsel renewed an objection that he had previously made, that the allegation just read to the jury as constituting negligence was not in point of law negligence, but His Lordship replied that he had explained the law to the jury the best he was able.

The jury returned and said they had added to their former answer to question no. 2, so as to now make it read as follows:—

Answer: Not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident, as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident.

The learned judge's exposition of the law to the jury that he referred to in answer to Mr. Guy's objection was in general terms, namely, that to create liability there must be a duty on the defendant to protect the plaintiff, a breach of that duty, and damage to the plaintiff resulting from that breach through a natural and continuous sequence of events uninterruptedly connecting the breach of duty with the damage. This, of course, did not enlighten the jury as to whether, as a matter of law, it was the duty of the defendant to have a headlight sufficiently powerful to enable the motorman to see the plaintiff in time to stop. The jurymen were left to decide the point for themselves, and found that there was such duty, and also a duty to have had a man at Selkirk on the night of the accident capable of making adjustments to the lights and other equipment to the car before it left Selkirk, and a breach of both these duties.

As to the neglect to have a man on duty at Selkirk, it seems clear that there was no such obligation on the defendants. Their duty to the public as to the condition and equipment of the car was in operating it, to have it in a

condition to be operated without undue danger to the public, and, whether or not they had a man on duty capable of putting it in such condition would make no difference. This ground of negligence was not alleged or attempted to be proved, and counsel for plaintiff urged the trial judge to point this out to the jury, as he did. The plaintiff's case therefore rests entirely on the finding that defendants were under a duty to have on the car a headlight sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident. An attempt has been made to read into the answer some other meaning. One of the learned judges in the court below reads it as a finding of too great speed, which he gives as thirty to thirty-five miles per hour. The only evidence as to speed was by plaintiff's witness, the motorman, who said: "I was going possibly thirty miles an hour." The learned judge, in the course of the trial, remarked that to say this rate was negligence was absurd, and in his charge told the jury that they might disregard this element, which they did, inasmuch as they have not said a word about speed. It has also been urged that this answer implies a finding that the particular lamp on this car was out of order at the time of the accident. The answer, to my mind, plainly indicates that in the opinion of the jury it was the duty of the defendants to have a headlight of the brilliancy they mention, regardless of whether it was functioning properly or not. An attempt was made to prove that this particular light was out of order, but the evidence to that effect, if it could be considered as evidence, of a defect that caused the dimness of the light, was of the most vague and feeble character. The motorman said the light was dim, and he thought the carbon was bad. He got a new carbon, and found he was mistaken, as the new carbon made no improvement. He then makes another guess, and says the felt against which the door of the lamp shuts was worn, which allowed the wind to get in and make the lamp flicker. He says he does not know anything about electricity, and would not know how to adjust one of these lamps.

The expert witness for the defendants says that a certain amount of flickering is inherent in all arc lights, by reason of the way the carbon burns, the arc gradually moving round the outer edge of the carbon, and that there is a variation in

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the brightness in any particular direction; firstly, because brightness in that direction depends on whether the arc is at the front, the side or the back of the carbon; secondly, because the voltage on the power line of a railway varies with the varying load it is called on to carry. Again, he says that when the carbon is automatically adjusting itself, the light will almost go out for a moment. He further shows, by production of the lamp, that the outer casing projects back beyond the felt referred to, so as to carry the current of air back beyond this felt, and that, in any case, air entering there would not cause the light to flicker.

The motorman says that, leaving Winnipeg for Selkirk at 5.30 that evening, this light "was working good," but says it became dim, and he changed the carbon at Selkirk, and had trouble with dimness on the trip back to Winnipeg, on which the accident happened. He does not, however, confine his complaint at all to this particular headlight, but says all the headlights were bad. He says: "I have never had satisfaction with these headlights." "Well, the headlight, I am speaking generally, the whole bunch of headlights, they are never satisfactory to my way." "The headlights are all bad."

A boy named Parchinko testified that he was proceeding north along the highway and was standing up in his sleigh, and heard the crash of the collision right across on his left, looked round, and then saw the car lighted up inside, but had not seen any lights or the car till attracted by the crash. The headlight, the motorman says, was lit all the time, and illuminating the track for 150 feet ahead, and the car was lit up inside, and this boy, facing it as it approached on a parallel course 35 or 40 feet away never even became aware of its presence till attracted by the crash at his left hand. He had some power of vision, because he says after the crash he saw the car and lights inside. If he states the truth, the only explanation is that he was not looking in the direction of the car, and, never having seen the headlight at all, he could tell nothing about its brightness.

I think there was no evidence on which a jury could reasonably find that there was in the headlight in question some particular defect that caused it to function less effectively than it and the other similar headlights used by

defendants ordinarily function. The only evidence as to the condition of the headlight after the accident is that it was in good condition and has been in use as usual ever since. It had gone out because the collision had pulled the plug of the cord from its socket, thus severing the connection and cutting off the current. The jury has not found any such defect in terms, and I do not think we can read such a finding by implication into the answer. If such had been the intention of the jury, it would have been easy to say so in direct and simple language. The jury was urged, at request of plaintiff's counsel, to say whether or not the defendants were negligent by failing in their duty to have a light sufficiently powerful to enable the motorman to see an object on the track sufficiently far off to enable him to stop before hitting it, and, in my opinion, that and nothing else is the negligence found by the added clause.

The whole question, therefore, is whether or not the defendants were under legal obligation to carry a headlight of the power mentioned. If not, then the negligence found was failure to do what there was no legal obligation to do, which, of course, would not support the verdict.

No case has been cited that goes the length contended for here. We must simply apply the general rule that defendants had a duty towards the plaintiff to operate their cars with the care that a reasonably prudent person would exercise under the circumstances. Plaintiff was carried on to the railway by his runaway team, and the jury has found that he was not guilty of negligence in being there, or when there. The defendants, however, had no reason to anticipate such an unusual occurrence. The construction of the railway, as described, was such that nobody would voluntarily attempt to drive a team and sleigh along it, and in addition it was separated from the travelled highway by a ditch.

The Railway Act requires a railway line on a highway to be on a level with the road, with the top of the rails not more than one inch higher, and it is not shown why this was departed from in this instance. It is, however, not important here whether or not defendants were legally entitled to construct their railway above the road surface level as they did, because the condition actually existed,

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so that it would be quite out of reason to say that it might have been anticipated that some one might be driving his team along the railway. Under these circumstances, I think it cannot be said that defendants were bound to use such a degree of care as would insure against such an unusual and unforeseen occurrence. The possibility of a person walking on the track might, perhaps, be anticipated, but in that case he would also be required to take reasonable care, and the light, even if as dim as the motorman claims, could be seen far enough away to enable him, if keeping a reasonable lookout, to step out of the way. This would also apply to animals on the track, because the owner would also be required to take reasonable care. We are dealing here with a special and unusual case, where the plaintiff was, by no fault of his own or defendants, deprived of the power of exercising the care that would be exercised under ordinary circumstances. Were, then, the defendants bound, as a matter of law, to provide means of insuring against accident under such extraordinary circumstances? The Court of Appeal holds that they were. Fullerton J.A., speaking of defendants' duty to take reasonable care, says,

> that a company operating cars at night could not possibly discharge this duty without being able to stop on the appearance of danger.

Trueman J.A., says,

> that at night the speed of the car shall be governed by the power of the headlight, so that when an object on the track is seen, the car can be stopped in time. A lookout, to be worth the name, must be subject to this condition.

One of the passengers testifies that it was snowing and stormy at the time of the accident, but respondent says it was a nice, clear night.

These judgments, however, go the full length of obliging defendants to insure the public against damage by any collision, quite regardless of conditions. If there is a curve in the track, a heavy snow storm or a fog, the speed must be regulated accordingly. If the conformation of the ground along the track, trees, buildings or other objects, obstruct the view, even in the daytime, speed would have to be regulated in the same way.

I am not in accord with these views. I think the obligation on defendants to use reasonable care would require them to have a headlight of reasonable efficiency, having regard to the state of the art of artificial lighting at night

of cars operating as defendants' cars do. They were, perhaps, not under obligation to have the very latest and most efficient headlights made, but according to the evidence they had, in fact, the very best lights in use for the purpose. These lights are the standard equipment of similar cars all over this continent, according to the only evidence offered. Plaintiff's witness, the motorman, thinks they are not bright enough, but neither he nor any other witness says that any brighter or better lights are available. There is, in my opinion, as I have stated, no finding that the particular light in use on this occasion was ineffective by reason of being out of order. I am therefore of opinion that the defendants in having on the car a headlight of the power and efficiency in general use for the purpose on this continent according to the uncontradicted evidence in the case, discharged their duty to have a headlight of reasonable efficiency under the circumstances.

The numerous cases cited in respondent's factum as to the respective functions of judge and jury, and as to interfering with the finding of fact by a jury, seem to me to have no application, because the jury's finding that is questioned is not as to the fact that the headlight was not sufficiently powerful to enable the motorman to see plaintiff in time to stop. It is their finding, or assumption, that as a matter of law defendants had a duty to have a light of this efficiency. It is conceded that if there was such a duty, the finding of fact as to its breach cannot be questioned. If the jury's finding of negligence is based on the assumption that defendants had a legal duty to supply a light of the efficiency they mention, the verdict cannot stand if, as a matter of law, the defendants had not a legal duty to take such a degree of care. Many authorities are cited in the appellant's factum that support the view I have indicated above as to the degree of care respecting headlights that it was defendant's duty to take (1). Beven on Negligence, 3rd ed., p. 614:

> The unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business.

(1) *Reporter's Note*:—The authorities cited on the point included: Beven on Negligence, 3rd ed., p. 614; *Zuvelt* v. *C.P.R.*, 23 Ont. L.R. 602, at pp. 606, 610; *Higgins* v. *Comox Logging & Ry. Co.* [1927] S.C.R. 359; [1927] 2 D.L.R. 682; *Elliott* v. *Toronto Transportation Commission*, 59 Ont. L.R. 609; 32 Can. Rly. Cas. 200; *Carnot* v. *Matthews* [1921] 2 W.W.R. 218.

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All the evidence in this case shows that defendants fully complied with the ordinary usage of the business as to headlights, taking it, as I do, that there is no finding of a special defect in the condition of the particular light: *Zuvelt* v. *C.P.R.* (1), is much in point as to the principles involved here.

An interesting point is raised in the appellant's factum as to the effect of section 21 of the *Public Utilities Act*, R.S.M. (1913), c. 166, which places in the hands of a Commission the power to make orders regarding equipment, appliances and safety devices in carrying out a franchise involving the use of public property.

Mallory v. *Winnipeg Joint Terminals* (2), decided under the statute, is referred to. In view of what I have said above, I think it is not necessary to deal with this point.

The King v. *Broad* (3), was referred to as discussing the principle, but as it deals with a case of accident at a highway and railway intersection, where people were expected to be crossing, I think nothing can be gathered from it applicable to this case.

Brenner v. *Toronto Ry. Co.* (4), deals with ultimate negligence where the defendant's servant, by anterior negligence, deprived himself of the power to avoid the consequences of plaintiff's negligence, which he otherwise would have had. Here plaintiff was found not to have been negligent, and it does not seem to me that this case helps.

It has been suggested that the answers of the jury are unsatisfactory, and that therefore there should be a new trial. The plaintiff in his statement of claim alleges negligence, as follows:

(*a*) A dangerous rate of speed.

(*b*) "In failing to supply and maintain sufficient and adequate lights to enable the motorman to see the plaintiff in time to stop."

(*c*) Defective brakes, and failure to apply the brakes and slow down in time.

As I have pointed out, there is no finding of excessive speed under (*a*), and there was no real attempt by plain-

(1) (1911) 23 Ont. L.R. 602, at p. 606.
(2) (1915) 25 Man. R. 456; 53 Can. S.C.R. 325.
(3) [1915] A.C. 1110.
(4) (1907) 13 Ont. L.R. 423.

tiff to prove excessive speed. I have referred above to the only evidence as to speed and to the judge's charge regarding it. There was no objection to this, though, after the jury had first brought in their answers, plaintiff's counsel in a long argument asked the trial judge to give further directions to the jury. Further directions were given along the lines requested, but there was no request for a change of directions on this particular point, nor for a direction to the jury to make a finding with reference to it.

As to (*c*), the plaintiff proceeded at the trial to show, by his evidence, that the brakes were not defective, and that there was no negligence on the part of the motorman. There is no finding of defective brakes, the only evidence on the point being that of plaintiff's witness, that they were not defective; and there is a finding, in accordance with the evidence of plaintiff's witness, that defendants' servants were not negligent.

The plaintiff therefore, at the trial, grounded his whole case on the proposition of law that there rested on defendants a duty toward plaintiff to the extent set out in (*b*), and the judgment appealed from is grounded on that proposition of law, which, as I have stated, is, in my opinion, unsound. If I am correct in that view, then plaintiff at another trial would have to try some new ground. He has had one chance before a jury on the question of excessive speed, and has failed to get such a finding. He practically acquiesced in withdrawing that ground of complaint from the jury, and I can see no reason for submitting that question to another jury. In fact, I agree with the trial judge that it would be absurd to call 30 miles an hour on a track where there was no reason to expect any person to be travelling, excessive.

It would, I think, be unreasonable to allow plaintiff a new trial to prove that the brakes were defective, or that the motorman was negligent, after having proved at the former trial that the brakes were not defective and the motorman was not negligent. The only other point would be as to a defect in the particular headlight in use at the time of the accident. No such express ground of negligence was alleged in the pleadings, the allegation being that the light was insufficient, not because the particular light was defective, but regardless of whether it was defective or not.

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There was no request to have the jury make a finding as to whether or not there was a defect in this particular light. All the evidence that plaintiff can possibly get on this point was offered at the trial, and amounted to a statement by a witness that it was one of a bad lot in use by defendants. He, however, admitted that he had no knowledge of electricity, and was incompetent to explain defects in such lamps or to adjust them, and that the guess he made as to the carbon being defective was all wrong.

On the question of the strength of the light, he says he saw plaintiff a pole length in front, which would be 125 or 150 feet. There is nothing to indicate that the jury believed that he could not see further than 150 feet, and it is quite possible that they did not believe it. The same witness stated that it required about three pole lengths, about 450 feet, to come to a stop from a speed of 30 miles per hour, and all that the answer of the jury implies is that the light was not strong enough to enable the motorman to see that far. If it was a bright night, as plaintiff says, were the jury likely to believe that a large dark object like plaintiff's team and sleigh with a big box could not be seen on the snow more than 150 feet away, even if there had been no light? The jury had all the evidence before them on this point that can be offered now, and did not see fit to say that the particular light had any defect or was out of condition, nor did plaintiff's counsel ask the trial judge in his second charge to direct the jury to make a finding on that point. I think, therefore, that plaintiff is not entitled to another chance with another jury of getting a finding of a defect in the particular light.

The appeal should be allowed, and the action dismissed, with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Anderson, Guy, Chappell & Turner.*

Solicitors for the respondent: *Lamont & Bastin.*

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SHAWINIGAN ENGINEERING COMPANY (DEFENDANT) ..... } APPELLANT; *Feb. 21. *Mar. 20.

AND

LOUIS N. NAUD (PLAINTIFF) ..... RESPONDENT.

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

Evidence—Expert witnesses—Value of their evidence before the courts—Workmen's Compensation Act—Changes between earlier and existing law—Onus upon the injured to prove accident and its connection with his sickness or incapacity.

The law makes no distinction between the evidence given by experts and that given by ordinary witnesses: the testimony of experts must be appreciated and weighed by the courts in the same manner as that of any other witness. A judgment would therefore be wrong, if based upon the sole fact that the successful party had a greater number of experts testifying on his behalf.

Notwithstanding the enactment of the Workmen's Compensation Act, the evidence, in actions for accidents to workmen under that Act, remains subject to art. 1203 C.C. The element of fault alone has been eliminated from the earlier law and the theory of the professional risk has been substituted for it. The onus is still upon the claimant to prove that the accident occurred by reason of, or in the course of, the work and to establish the connection between the accident and his sickness or incapacity.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Belleau J. and maintaining the respondent's action *in toto*.

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

A. Savard K.C. for the appellant.

R. Blanchet for the respondent.

The judgment of the court was delivered by

RINFRET J.—L'intimé était à l'emploi de l'appelante comme journalier travaillant à la construction d'un barrage.

Le 14 janvier 1927, le soir, en allant boire, il glissa sur une pièce de bois, tomba d'une hauteur de cinq à six pieds sur le bord d'un mur en ciment et roula à la rivière.

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith JJ.

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Il fut retiré de cette position; et, le lendemain matin, il tenta de se remettre à l'ouvrage, mais il dut abandonner le travail. Il fut alors traité par le médecin de la compagnie, le docteur Desjardins, et fut examiné aux rayons X par le docteur Fortier. Durant les deux mois qui suivirent l'accident, il passa trente-huit jours au lit; et lorsque, le 30 novembre 1927, il poursuivit l'appelante en vertu de la loi des accidents du travail de la province de Québec, il était encore incapable de travailler.

C'est ce que la Cour Supérieure a reconnu en lui accordant une indemnité pour incapacité temporaire absolue jusqu'à une date postérieure à l'institution de l'action.

La compagnie a acquiescé à cette décision et a payé cette indemnité.

Mais la Cour Supérieure a refusé d'accorder la réclamation de l'intimé pour incapacité partielle permanente. La majorité de la Cour du Banc du Roi a infirmé ce jugement et a reconnu le droit de l'intimé à une rente dont elle a fixé le capital à $2,687.04. C'est dans ces circonstances que la cause nous est soumise.

Il est admis que l'intimé souffre de périgastrite. Il s'agit de décider si cette condition est le résultat de l'accident. Deux médecins tiennent pour l'affirmative; trois médecins tiennent pour la négative. Aucun d'eux n'a traité l'intimé à la suite de sa chute. Ils se prononcent après un ou deux examens faits un grand nombre de mois après l'accident. Les docteurs Desjardins et Fortier, qui l'ont soigné dans la période qui a immédiatement suivi, n'ont pas été appelés à rendre témoignage. Leur absence de l'enquête n'est pas expliquée. La tâche du juge de première instance n'en a donc été que plus difficile. Dans ses notes de jugement, que nous avons lues avec beaucoup d'attention, il réfère presque exclusivement aux opinions des cinq médecins entendus et il dit:

> On ne doit pas s'attendre que je prenne parti entre deux opinions diamétralement opposées l'une à l'autre, et formulées par des professionnels d'expérience et de compétence reconnues, et dont je n'ai pas raison de suspecter la droiture et la sincérité.
>
> D'après la règle ordinaire d'appréciation de la preuve, les témoignages des trois médecins, qui nient catégoriquement que la périgastrite dont souffre le demandeur ait aucune relation avec l'accident qu'il a subi, doivent l'emporter sur le témoignage du seul médecin qui l'affirme et cela règle la question d'indemnité pour incapacité partielle permanente.

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Il faut reconnaître le grand embarras où les tribunaux se trouvent parfois placés par le manque d'accord entre les professionnels qui expriment des vues différentes en matière scientifique; et, comme il est arrivé en particulier dans l'espèce actuelle, en matière médicale. Mais—sauf peut-être le cas où la question leur a été référée en expertise (art. 391 et suiv. C.P.C.), sur lequel nous n'avons pas à nous prononcer ici—la loi ne fait aucune distinction entre les professionnels et les autres témoins. Leurs témoignages doivent être appréciés comme les autres, et le tribunal est tenu de les examiner et de les peser comme toute autre preuve faite dans la cause (*The Tobin Manufacturing Company* v. *Lachance* (1). Nous croyons donc respectueusement que le savant juge de première instance a fait erreur en posant comme " règle ordinaire d'appréciation de la preuve " que la théorie de la défense devait l'emporter parce qu'elle était défendue par un plus grand nombre de médecins.

En outre, lorsque, comme ici, tout un ensemble de faits et de circonstances que ont précédé, accompagné ou suivi l'accident a été mis en preuve, il est essentiel que le juge leur accorde toute la considération nécessaire. Sans doute, il doit les envisager à la lumière de la preuve médicale; mais il ne saurait en abandonner exclusivement l'appréciation aux médecins, et c'est à lui qu'il incombe de les contrôler souverainement et de se prononcer en dernier ressort. Le jugement de la Cour Supérieure omet de nous donner cette appréciation personnelle. Il paraît s'en rapporter exclusivement à celle des médecins. Puis, comme les opinions de ceux-ci sont partagés et qu'il évite de choisir entre elles, le jugement arrive en définitive à un résultat négatif, parce qu'il ne comporte pas de décision sur les faits.

La question restait donc complètement ouverte lorsque la cause a été portée devant la Cour du Banc du Roi. A son tour, cependant, cette cour, pour infirmer le jugement de la Cour Supérieure, déclare se baser non pas sur l'appréciation des faits, mais sur une prétendue présomption légale qui, en vertu de la loi des accidents du travail, imposerait au patron le fardeau de la preuve. Voici comment le jugement s'exprime:

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Considering that the plaintiff has proved that, whilst employed by the company defendant as a workman at the time and place and in the manner above mentioned, an accident happened to him in the course of his work which caused him physical injury;

Considering that this proof entails a presumption of responsibility in favour of the workman, which the defendant must rebut by establishing that the accident is due to a cause which has no relation to the work at which the plaintiff was engaged when the accident happened;

Considering that the burden of making such proof rests upon the employer, and that the defendant has not discharged itself of this burden which the law imposed upon the company defendant, to show that the accident resulted solely from a cause which has no connexity with the work at which the plaintiff was employed at St. Alban in January, 1927;

Considering that the defendant has failed to prove that the perigastritis from which the plaintiff suffers results from a cause which has no connexity with the work which the plaintiff was doing at the time the accident happened;

Il est peut-être juste d'ajouter que ces motifs se retrouvent seulement dans les notes de l'un des deux juges qui ont formé la majorité de la Cour du Banc du Roi; mais il n'en reste pas moins que la *ratio decidendi* est ainsi formulée dans le jugement de la cour.

C'est avec raison, suivant nous, que l'appelant a combattu cette doctrine. Les accidents du travail, après l'adoption de la législation spéciale qui les concerne, ont continué d'être soumis, au point de vue de la preuve, à l'article 1203 du Code civil. Seul l'élément de faute a été éliminé et la théorie du risque professionnel lui a été substituée. C'est à l'accidenté qu'il incombe de démontrer qu'il y a eu accident du travail et de faire la preuve de la relation existant entre cet accident et la maladie ou l'incapacité (Loubat, *Traité sur le risque professionnel*, 3ème édition, n° 546; Sachet, *Traité sur les accidents du travail*, 7ème édition, vol. 1, n° 439). Sans doute, cette preuve est susceptible d'être établie par les moyens ordinaires, y compris les présomptions; mais le fardeau n'en a pas été déplacé; et, à l'exception de l'élément de faute, la preuve à faire sous la loi des accidents du travail est régie par les mêmes règles que dans toute autre cause.

Il nous faut donc écarter le motif du jugement de la Cour du Banc du Roi; mais un examen critique de la preuve nous conduit à la même conclusion que celle qui a été adoptée par cette cour.

L'appelant avait toujours été en excellente santé jusqu'au moment de l'accident. A partir de ce moment, il a souffert de l'estomac, à l'endroit où il a reçu le coup. Dès

les premières heures qui ont suivi sa chute, et toujours depuis, il a ressenti "des déchirements d'estomac" qui, dans les premiers jours, se manifestaient "toutes les quinze, vingt minutes". Le traitement du docteur Desjardins était pour l'estomac. C'est cet organe que le docteur Fortier a examiné aux rayons X. Les médecins qui ont été entendus de la part de l'intimé s'accordent pour dire que la périgastrite dont il souffre peut être provoquée par un accident comme celui qu'il a subi. En se basant sur les faits dont l'accidenté et son père ont témoigné à l'enquête, et principalement sur la circonstance qu'il n'avait jamais auparavant souffert de l'estomac, ces deux médecins déclarent que la lésion qui est constatée dans l'estomac de la victime est "rattachable à l'accident", et que "l'accident seul peut expliquer tout".

D'autre part, les trois médecins qui ont été appelés par la compagnie appuient trop évidemment leur témoignage sur une version de l'accident et de l'historique du cas qui est consignée dans un rapport qu'ils ont préparé ensemble à l'époque où ils ont fait l'examen de la victime, mais qui ne s'accorde pas sur des points essentiels avec la preuve faite sous serment au cours de l'enquête en cette cause. Cela, et le fait que, tout en soutenant que la maladie de l'intimé n'est pas le résultat de sa chute, ils se déclarent incapables d'en découvrir une autre cause, affaiblit la valeur probante de leur opinion. L'affirmation contraire nous paraît mieux s'accorder avec l'enchaînement logique des circonstances et la succession des symptômes qui se sont manifestés. Ces circonstances et ces symptômes sont suffisamment graves, précis et concordants pour nous permettre de décider que l'intimé a fait la preuve, qui lui incombait, de la relation entre la maladie dont il souffre et l'accident qu'il a subi, surtout lorsque cette conclusion est d'accord avec celle de deux médecins "d'expérience et de compétence reconnues" et dont nous n'avons "pas raison de suspecter la droiture et la sincérité", suivant le témoignage accordé par le juge du procès à tous les médecins qui ont été entendus en cette cause.

L'appelante n'a pas contesté le degré d'incapacité permanente dont l'intimé est atteint, non plus que l'indemnité qui lui a été accordée par la Cour du Banc du Roi; elle s'est contentée de nier la relation de cause à effet entre cette

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incapacité et l'accident. Comme nous sommes d'avis que cette relation a été prouvée, nous devons donc, avec les restrictions que nous avons indiquées, confirmer avec dépens les conclusions du jugement de la Cour du Banc du Roi.

Appeal dismissed with costs.

Solicitors for the appellant: *Savard & Savard.*

Solicitors for the respondent: *Blanchet, Bilodeau & Roy.*

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* Feb. 25
* Apr. 30

RÉV. JOSEPH ST-DENIS AND ANOTHER (PLAINTIFFS) ..... } APPELLANTS;

AND

DAME OLIVINE THIBODEAU AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Notary—Drawing of will—Clause directing his employment to execute the will—Impropriety—Notary receiving instructions from beneficiary—Consent given by testator after reading of the will—Serious possible difficulties arising out of such action.

There is impropriety, to say the least, for a notary to insert in a will passed before him a clause by which the testator directs that the executors and the heirs shall employ him for the execution of the will. It is consonant to sound legal principle, and even to public order, that a deed passed before a notary do not contain any stipulation in his favour.

Comments upon the serious difficulties that may be created through the action of a notary who, after receiving instructions for the drawing of a will from the wife of the testator, she being favoured by its terms, merely registers the consent of the testator given after the reading of the will to him.

Judgment of the Court of King's Bench (Q.R. 44 K.B. 207) aff. (1).

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* PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith JJ.

(1) *Reporter's Note.*—The head-note contained in the report of this case (Q.R. 44 K.B. 207) is founded on the opinion of Mr. Justice Cannon, which was not concurred in by the other judges, and counsel for the appellants submitted no such ground in their argument before this court. For those reasons, that point was not discussed in the judgment now reported.

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

An action was brought by the appellants asking for the annulment of two wills and two codicils made by the late Edouard St-Denis who died on the 25th of March, 1926, the statement of claim alleging undue influence and mental incapacity.

L. E. Beaulieu K.C. and *Armand Mathieu K.C.* for the appellants.

O. P. Dorais K.C. for the respondents.

The judgment of the court was delivered by

MIGNAULT, J.—L'appelante, Emma Saint-Denis, épouse d'Edouard Marceau, était la fille de feu Edouard Saint-Denis, ancien marchand de Montréal, décédé le 25 mars 1926 à l'âge de 92 ans et quelques mois. Outre l'appelante, feu Edouard Saint-Denis laissait un fils, l'abbé Joseph Saint-Denis, qui mourut lui-même quand cette cause était pendante devant la cour du Banc du Roi, nommant par son testament olographe sa sœur comme sa légataire universelle, et Emma Saint-Denis a repris, au nom de son frère, l'instance qu'elle poursuivait conjointement avec lui. Edouard Saint-Denis s'est marié trois fois; la première fois avec Dame Mathilda Mailloux, la mère de Joseph et Emma Saint-Denis, la deuxième fois avec Dame Emma Sancer, et la troisième fois, en décembre 1913, alors qu'il avait près de 80 ans, avec l'intimée, Dame Olivine Thibodeau, qui, elle, avait 70 ans environ. Il n'a eu d'enfants qu'avec sa première femme, la mère des demandeurs.

Quelques semaines après la mort d'Edouard Saint-Denis, Joseph et Emma Saint-Denis intentèrent cette action demandant l'annulation, pour cause de suggestion et d'incapacité testamentaire, de deux testaments et de deux codicilles d'Edouard Saint-Denis, laissant en vigueur un premier testament qui avait été reçu devant Mtre Eustache Prud'homme le 26 avril 1918. Il faut dire ici que par son contrat de mariage avec l'intimée, Edouard Saint-Denis avait conféré à celle-ci certains avantages, notamment la

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propriété des meubles-meublants dans la résidence des époux, la jouissance d'une rente annuelle de $300 pendant le mariage, et l'usufruit, après le décès du futur époux, de la somme de $5,000.

A l'occasion de ce procès pour annulation de dispositions testamentaires, les parties ont donné libre cours aux griefs qu'elles avaient les unes contre les autres, et il en est résulté une très longue enquête. De tout cela nous n'avons que faire. Les seconds mariages de vieillards sont rarement chanceux, soit pour les époux eux-mêmes, soit pour les enfants issus d'un mariage précédent. Dans ce cas, l'histoire s'est répétée une fois de plus, et elle l'a fait à satiété. Il n'importe guère de dire qui a raison et qui a tort. Probablement il y a eu des torts des deux côtés. Encore une fois, cela ne nous intéresse pas. Il n'y a qu'une question de validité de testaments à juger.

Les dispositions testamentaires attaquées sont: 1° un testament du 23 septembre 1921, devant le notaire Lionel Trempe; 2° un testament du 9 mai 1923, devant Eustache Prud'homme, N.P.; 3° un codicille du 10 mars 1924, P. G. Coupal, N.P.; 4° un codicille du 15 mars 1926, devant le notaire Isidore Coupal, dix jours avant le décès du testateur.

Les moyens d'annulation invoqués sont la suggestion et l'absence de capacité testamentaire. La preuve volumineuse au dossier ne nous autoriserait pas à dire que l'intimée a exercé une pression directe sur le testateur, mais la question de suggestion, telle que l'appelante la formule, se confond plutôt avec celle de la capacité de tester. En d'autres termes, le testateur, qui est mort d'une urémie dont il souffrait depuis environ cinq ans, avait-il suffisamment d'intelligence, d'entendement et de mémoire, et aussi de liberté, pour pouvoir disposer de ses biens?

Prenons d'abord le testament Trempe, fait près de cinq ans avant le décès d'Edouard Saint-Denis. Absolument rien ne démontre que le testateur n'eût pas alors le plein usage de ses facultés mentales. Et le testament a été si peu suggéré par l'intimée, que cette dernière n'en a eu connaissance qu'après sa confection. D'ailleurs, le testament Trempe importe peu, car il a été révoqué par le testament Prud'homme.

Le testament Prud'homme est en date du 9 mai 1923. Edouard Saint-Denis jouissait alors de toutes ses facultés, et n'a été l'objet d'aucune suggestion. Le témoignage du notaire Prud'homme, vieil ami du testateur et âgé de plus de 80 ans, supporte pleinement ce testament, et le fait que le Dr Georges Dupont, dont il sera question plus loin, a servi de témoin testamentaire, prouve bien que dans son opinion le testateur pouvait alors tester. Saint-Denis a discuté longuement avec le notaire la rédaction de ce testament. Il voulait empêcher son gendre, Marceau, de se mêler de l'administration de ce qu'il donnerait à sa fille, et, d'après le conseil de M. Prud'homme, il a décidé de créer une substitution portant sur la part de Mme Marceau. Tout démontre qu'il avait alors pleine capacité testamentaire, et l'intimée n'a rien eu à faire avec la préparation du testament, M. Prud'homme ayant eu soin de l'écarter quand il s'agissait des instructions que le testateur lui donnait pour ce testament.

La période plus douteuse commence quelques mois après ce testament. M. Saint-Denis avait dit au notaire Prud'homme qu'il voulait laisser une vingtaine de mille dollars pour des œuvres de charité, et le notaire lui avait exposé que, pour éviter des procès, il fallait nommer les institutions bénéficiaires du legs, ce que Saint-Denis promit de faire. Celui-ci se transporta au bureau du notaire pour lui donner ce renseignement, mais à peine rendu il avait oublié le nom des institutions qu'il voulait favoriser, et M. Prud'homme en conclut que Saint-Denis n'avait plus de mémoire et que son esprit n'était pas suffisamment lucide pour pouvoir tester. Il déclina donc de recevoir un codicille pour lui, et sur les conseils et par l'initiative d'un père oblat qui le visitait, Saint-Denis fut mis en rapports avec un jeune notaire, P. C. Coupal, qui reçut le codicille du 10 mars 1924, auquel son frère, Isidore Coupal, alors étudiant, comparut comme témoin.

Tout ce que ce codicille ajoute au testament Prud'homme, c'est le legs en faveur de l'intimée d'une maison sur la rue Chambord, à Montréal, d'une valeur, dit-on, d'environ $5,000. Il n'est pas douteux que depuis un certain temps Saint-Denis songeait à donner cette maison à sa femme, car il en avait parlé au notaire Prud'homme. C'était deux ans avant le décès de Saint-Denis, qui sortait

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encore en voiture, et il n'y a aucune preuve de pression ou de suggestion frauduleuse de la part de l'intimée. D'après le notaire et les personnes qui l'ont vu, le testateur comprenait bien ce qu'il faisait. Ces témoignages ont été acceptés par le juge du procès et par la cour d'appel.

Venons-en au dernier codicille, celui reçu dix jours avant le décès du testateur par Isidore Coupal, qui depuis peu avait été admis à l'exercice de la profession de notaire, et qui visitait souvent les époux Saint-Denis. Ce codicille contient deux clauses. La première dispense l'intimée de l'obligation de rendre compte aux héritiers du testateur des sommes qu'elle aurait reçues du testateur ou qu'elle aurait dépensées provenant de ses fonds. La seconde exprime la volonté du testateur que ses héritiers et son exécuteur testamentaire se servent du notaire instrumentant pour l'entière exécution de ses dispositions testamentaires.

Cette dernière clause a-t-elle été suggérée au testateur par le notaire instrumentant? Celui-ci l'explique en affirmant que Saint-Denis lui avait souvent dit qu'après sa mort, il (le notaire) devrait avoir soin de Mme Saint-Denis, qu'il serait, à cause de sa situation à Montréal, celui le plus en vue pour avoir soin de ses affaires. On ne peut cependant se défendre de penser que le notaire lui-même n'a pas été étranger à l'insertion de cette clause au testament. Il y avait inconvenance, pour dire le moins, pour le notaire instrumentant, de stipuler ainsi, ou de laisser stipuler, en sa faveur dans un testament qui se faisait par son ministère.

M. Coupal était alors un tout jeune notaire, et on peut facilement croire qu'il manquait d'expérience. Le code civil (art. 846) ne met pas de côté le testament qui contient un legs en faveur du notaire instrumentant, mais se contente d'annuler le legs lui-même. La stipulation au bénéfice de M. Coupal n'est pas précisément un legs, mais c'est une clause qui était censée lui conférer un certain avantage, partant une clause à l'insertion de laquelle il avait intérêt. Il est de principe, et nous pourrions ajouter presque d'ordre public, que l'acte reçu par un notaire ne contienne pas une stipulation en sa faveur. La loi défend au notaire de recevoir un acte ou contrat dans lequel il est une des parties

contractantes (S.R.Q. 1925, c. 211, art. 38). Il est impossible, donc, de ne pas regarder comme une circonstance aggravante l'insertion d'une telle clause dans le deuxième codicille, mais il n'en résulte pas que le codicille lui-même soit nul si le testateur qui y a consenti avait alors une capacité testamentaire suffisante pour le comprendre. Et quant à la clause elle-même, elle ne peut plus avoir d'effet, car le délai pour exécuter le testament est expiré depuis longtemps. Il serait donc inutile maintenant de l'annuler, bien que cette annulation ait été demandée par l'appelante.

Nous pouvons faire une autre observation au sujet de ce deuxième codicille. Le notaire paraît avoir reçu ses instructions pour la préparation de ce codicille de l'intimée, et tout ce qu'il peut dire dans son témoignage, c'est que le testateur y a pleinement consenti, quand il lui a lu le codicille. C'était, pour dire le moins, un moyen d'agir très périlleux, et si le codicille avait contenu une disposition importante des biens du testateur, l'objection aurait pu être très grave. Mais il s'agit ici d'un testateur qui avait déjà disposé de ses biens par un testament et un premier codicille que nous croyons inattaquables. On lui rappelle qu'il y a danger que sa femme soit troublée après sa mort par une action en reddition de compte à raison de transactions d'argent qu'elle a eues avec lui. Si le testateur, même dans son état très affaibli, pouvait comprendre l'opportunité de soustraire sa femme à de tels ennuis, nous ne croyons pas qu'on doive mettre de côté la clause en faveur de l'intimée, alors même que nous serions d'avis que le testateur n'aurait pu alors faire une disposition importante de ses biens.

Il y a une autre considération. Une telle décharge était très raisonnable dans les circonstances. La preuve constate que Saint-Denis et sa femme se prêtaient mutuellement des fonds quand l'un ou l'autre en avait besoin. L'intimée avait un petit capital. Elle avait probablement aussi le goût de la spéculation, sur une échelle d'ailleurs bien modeste. Elle payait toutes les dépenses de la maison, y compris les médecins et la garde-malade. Saint-Denis lui a fait de temps à autre des avances d'argent qu'elle dit avoir employées pour des dépenses de maison, ou qu'elle lui aurait remboursées. Tout se faisait comme d'ordinaire

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entre mari et femme, sans que ni l'un ni l'autre ait tenu des livres ou exigé des reçus. Dans ces circonstances, il était éminemment raisonnable que le mari mourant ait voulu éviter à sa femme l'ennui d'une poursuite en reddition de compte de la part de ses enfants, poursuite que les relations très tendues entre l'intimée et les demandeurs rendaient assez facile à prévoir. Il n'y avait en cela rien de compliqué, ni de difficile à comprendre, même pour un homme très affaibli par la maladie, s'il n'était pas d'ailleurs en état d'alliénation mentale.

Nous pouvons en dire autant de tous les legs que l'intimée a reçus par les deux testaments et le premier codicille attaqués. Ces legs étaient raisonnables tant par leur montant que par les biens qui en étaient l'objet. L'intimée était très vieille, et Saint-Denis laissait une succession qu'on évalue à $150,000, dans laquelle, s'il n'y avait eu aucun testament, l'intimée aurait été héritière pour un tiers (art. 624*b* C.C.). Les biens que reçoit l'intimée sont des maisons, la résidence des époux et une autre maison, dont le revenu lui permettra de vivra. Son mari lui lègue, en outre, tout le contenu de la résidence commune, son automobile, et une somme de $300 pour son deuil, et tous ces legs ont été faits à la condition expresse qu'elle renonce aux avantages stipulés en son contrat de mariage. L'ensemble légué se monte à une somme d'environ $25,000, et on ne saurait regarder une telle somme comme déraisonnable.

Reste la question de savoir si le testateur avait, à la date du dernier codicille, une capacité testamentaire suffisante pour accorder à sa femme la dispense de rendre compte, car il serait téméraire de lui nier cette capacité aux autres dates dont il est question ici, surtout en vue des jugements des deux cours qui ont expressément reconnu l'existence de cette capacité.

Sous ce rapport, nous constatons ici—chose assez ordinaire d'ailleurs—une opposition marquée entre le témoignage des experts médicaux et autres, et les dires des personnes qui ont vécu avec le testateur, ou qui l'ont fréquemment rencontré dans les affaires usuelles de la vie.

La preuve médicale, celle des docteurs Georges Dupont, Adonias Lussier et Eugène Virolle,—et on peut assimiler à

la preuve médicale le témoignage de la garde-malade, Mme Pilon,—est défavorable à l'existence chez le testateur de la capacité de tester à l'époque du second codicille. Saint-Denis est tombé malade de sa dernière maladie en novembre 1925, mais depuis cinq ans il était atteint d'urémie. Le Dr Dupont dit que le testateur, lors du dernier codicille, n'avait pas la capacité de tester, qu'il était devenu enfant, qu'il se croyait pauvre, ne se rappelait pas où il avait mal, et que sa volonté était presque nulle. Le Dr Dupont avait refusé de servir de témoin au dernier codicille. Les autres témoins médicaux disent à peu près la même chose, mais le Dr Virolle reconnaît que dans cette maladie, l'urémie, il y a des poussées aiguës et des intervalles d'accalmie, et que dans ces intervalles le malade peut reprendre son intelligence et comprendre les choses, surtout lorsqu'elles sont simples.

Par contre, le Père Legault (celui-là même qui l'avait mis en rapports avec les MM. Coupal) visitait Saint-Denis plusieurs fois par année. Il l'a vu quelques jours avant sa mort et il dit qu'il n'a constaté aucune différence quant à son état mental, qu'il a conversé avec lui et que Saint-Denis a parfaitement compris tout ce qu'il lui avait dit. Rousseau, un voisin, a vu le testateur à peu près un mois avant sa mort, et il lui a paru absolument normal comme d'habitude. Marchildon, aussi un voisin, a visité le testateur dans sa dernière maladie, et trois ou quatre jours avant sa mort celui-ci, en réponse à une question de Marchildon de savoir s'il le connaissait, a dit " oui ", et il s'est mis à épeler son nom. Rivard, son chauffeur, le voyait tous les jours jusqu'à sa mort, et il affirme que le testateur a toujours eu sa lucidité d'esprit, d'après ce qu'il a pu voir.

Il y a bien aussi le témoignage du notaire Isidore Coupal et des témoins instrumentaires. Ces derniers, bien que médecins, n'ont fait aucun examen médical du testateur. Cependant, leur témoignage, ainsi que celui du notaire, ont été accueillis favorablement par le premier juge.

Dans les circonstances, le témoignage de gens absolument désintéressés qui ont vu le testateur durant sa dernière maladie ayant été accepté par la cour supérieure et la cour du Banc du Roi, il est difficile pour cette deuxième cour d'appel de ne pas en tenir compte. Il s'agissait pour

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le testateur d'une chose bien simple, dispenser sa femme de l'obligation de rendre compte à ses héritiers des fonds qu'elle avait reçus de lui au cours de la vie commune. La preuve acceptée par les deux cours permet de dire que le testateur pouvait comprendre la portée d'une telle décharge.

Encore une fois, il ne s'agit ici que d'une question de fait. Les deux cours sont d'accord pour déclarer que les demandeurs n'ont pas prouvé leurs allégations de suggestion frauduleuse ou d'absence de capacité testamentaire, et, dans un tel cas, même s'il pouvait y avoir des différences d'opinion dans l'appréciation des faits, cette cour n'a pas l'habitude d'intervenir, pas plus que le Conseil privé d'ailleurs. Voy. *Robins* v. *National Trust Co.* (1).

L'appel est renvoyé, mais ayant égard à toutes les circonstances de cette cause nous ne croyons pas devoir accorder de frais à l'intimée devant cette cour.

Appeal dismissed without costs.

Solicitor for the appellants: *Armand Mathieu.*

Solicitors for the respondents: *Dorais & Dorais.*

HIS MAJESTY THE KING.....APPELLANT;

1929
*Feb. 5.
*Mar. 20.

AND

F. J. BAKER.....RESPONDENT.

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

Criminal law—Charge of negligence in performance of duty, causing grievous bodily injury—Cr. Code, ss. 284, 247—Momentary diversion of attention—Conduct not amounting to criminal negligence.

Respondent was in charge of hoisting machinery in a mine shaft. When a descending cage was nearing the bottom he was required to arrest it and give warning to workmen below (a precaution required by the mining regulations). A dial enabled him to follow the cage's descent. There was also a buzzer which operated at a certain point to warn him, but on the occasion in question it was out of order. His attention to the dial was momentarily diverted by a violent noise behind him from "clapperboards" (any defective working of which it was his duty to report), and when his attention was restored it was too late to arrest the cage and it struck a workman below. Respondent

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) [1927] A.C. 515.

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was experienced and conscientious in his duties. He was convicted under s. 284, *Cr. Code,* of causing grievous bodily injury "by doing negligently or omitting to do an act which it was his duty to do."

Held: While the arresting of the cage was indisputably one of those duties contemplated by ss. 247 and 284, *Cr. Code,* yet the respondent's act, almost involuntary, in yielding, in the special circumstances, to the impulse to turn his eyes to the source of the disturbance behind him, was not an act of such culpability as falls within the category of criminal negligence.

McCarthy v. *The King,* 62 Can. S.C.R., 40, discussed and explained. The decision therein did not attempt to lay down an abstract rule for determining the incidence of criminal responsibility for negligence.

Judgment of the Appellate Division, Ont., (63 Ont. L.R. 275) setting aside the conviction, affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1), setting aside the conviction of the respondent by J. S. McKessock, Esq., Police Magistrate for the District of Sudbury, for that the respondent

at the Town of Frood, in the District of Sudbury, on or about the 23rd day of September, A.D. 1928, while acting as hoistman in the mine of the International Nickel Company, by doing negligently or omitting to do an act which it was his duty to do, did cause grievous bodily injury to the person of Nestor Peltola, contrary to section 284 of the Criminal Code of Canada.

The appeal to the Supreme Court of Canada was brought under s. 1025 of the *Criminal Code,* leave to appeal being granted by Smith J. The application for leave to appeal was made, on behalf of the Attorney General for Ontario, on the ground that the judgment appealed from conflicted with the judgment of the Court of Appeal for Saskatchewan in *Rex* v. *McCarthy* (2).

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed.

E. Bayly K.C. for the appellant.

J. J. O'Connor for the respondent.

The judgment of the court was delivered by

DUFF J.—There is no material dispute as to the primary facts. On the day the offence is alleged to have been committed, the hoisting machinery in one of the shafts of the

(1) (1928) 63 Ont. L.R. 275.

(2) [1921] 1 W.W.R. 443; affirmed, 62 Can. S.C.R. 40.

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Frood Mine was in operation raising muck from the bottom of the shaft. The accused was the hoistman in charge of this machinery. There were two cages or skips raised and lowered simultaneously, at the same rate of speed, by the same machinery. Part of the duty of the hoistman was to arrest the machinery as the descending skip was nearing the bottom of the shaft, to give warning of its approach to the workmen engaged there. On the occasion in question, this precaution was not observed, and one of the workmen, caught unawares, was struck by the skip and killed.

There was a dial which showed the position of the skips at any moment, and a buzzer which, when working, announced the arrival of the skips at points 100 feet from the top and bottom respectively. On the occasion with which we are concerned, the buzzer was out of order.

It was the duty of the hoistman to follow the ascent and descent of the skips, and for this purpose to give close attention to the dial; but on the occasion in question, the attention of the accused was diverted for a moment, and during that moment, the descending skip reached a point so near the bottom of the shaft, that when his attention to the dial was restored, he was too late, with the means at his command, to bring the skip to rest and avert the tragedy.

The Mining Regulations require the arrest of the descending skip for the protection of workmen engaged below, and the duty to conform to the regulation is a duty of the strictest order. It is indisputably one of those duties contemplated by sections 247 and 284 of the *Criminal Code*. The question to be considered, is whether the momentary inattention of the hoistman involved, under the circumstances, a breach of duty of the kind that entails criminal responsibility.

The accused was an experienced hoistman, and admittedly had been most conscientious in the performance of his duties. His explanation of his conduct is that his attention was attracted by a violent noise proceeding from some appliances known as "clapperboards," situated behind him, which appear to be groups of electrical contactors controlling the hoisting apparatus. It was the duty of the hoistman to report any irregularities in the working of the

machinery, and these "clapperboards" had been reported upon, but there had been some difficulty in precisely identifying the nature of the defect. There were two sets of such appliances, and there had been some doubt as to which of these was the seat of the trouble. With this in his mind, on hearing the noise on the day of the accident, his attention was immediately attracted with more than usual force to the "clapperboards." It is conceded that when these "clapperboards" are out of order, the noise proceeding from them may be of a violent and disturbing nature. The official inspector and the mining officials agree that this noise might be expected to produce some distraction of the hoistman's attention; that in the situation of the accused, only a man of very steady nerves would be proof against the impulse to turn his eyes to the source of the disturbance.

The almost involuntary act of the accused, in yielding, in the special circumstances, to this impulse, does not appear to be an act of such culpability as falls within the category of criminal negligence. On this point the decision of the court below is manifestly right.

The contention advanced on behalf of the Attorney General is, that, by force of sections 247 and 284 of the *Criminal Code,* criminal responsibility ensues when there is neglect of a duty to exercise reasonable care in the control of a thing, which, in the absence of such care, may endanger human life; and that—at least where (as here) no question of skill is involved—neglect of such a character as to give rise to civil responsibility gives rise to criminal responsibility also. In support of this proposition, the decision of this court in *McCarthy* v. *The King* (1) is cited.

This is a misapprehension of the effect of *McCarthy's* case (1). Two of the judges who took part in that decision expressed the view now advocated by the Attorney General, but that was not the ground of the decision. In that case the court had to consider the charge of a trial judge in a prosecution for manslaughter in these circumstances: the accused, driving an automobile in a frequented street at about twelve miles an hour, ran into a workman working in a manhole in the street and killed him. The manhole was covered by a tarpaulin tent about three or

(1) (1921) 62 Can. S.C.R. 40.

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four feet wide at the bottom, five or six feet high and several feet long. The vision of the accused was obstructed owing to the dirty condition of his windshield, and for this reason, he said that from time to time he looked out from the side of the car, but failed to observe the tarpaulin covering the manhole. The trial judge instructed the jury that if the death of the deceased was due to "some want of ordinary care which an ordinary prudent man would have observed in the driving of the car," it was their duty to convict. He directed their attention to the distinction between the degree of negligence required to affect a defendant with liability in a civil case, and the culpable negligence required to justify a conviction in a criminal case; he presented to them, as the cardinal issue, the question whether the accused was maintaining a "proper lookout"; and he told them, if they were convinced that the accused, if he "had been looking ahead at all as a driver of a motor car should have looked ahead," would have seen the obstruction in the street, they would be justified in finding him guilty of "culpable negligence." The trial judge reserved a question as to the correctness of his instruction touching "the negligence which under the circumstances of the case would render the accused guilty of manslaughter."

The question so stated was the subject of the enquiry in this court, and that inquiry involved an examination of the effect of the sections of the *Criminal Code* above mentioned, as applied to the facts in evidence and the charge of the trial judge. The court was unanimous in the view that failure to maintain a "proper lookout" amounted, in the circumstances, to culpable negligence within the contemplation of the criminal law, and that, speaking more generally, a want of ordinary care in circumstances in which persons of ordinary habits of mind would recognize that such want of care is not unlikely to imperil human life, falls within that category. But the decision does not attempt to lay down an abstract rule for determining the incidence of criminal responsibility for negligence.

This is all that is necessary for the disposition of the appeal. We think it right to add that we see no reason to differ from the view expressed by Sedgwick J., speaking for the majority of this court, in *Union Colliery Co.* v. *The*

Queen (1), that s. 247 (then s. 213) of the *Criminal Code* is a "mere statutory statement of the common law."

The appeal should be dismissed.

Appeal dismissed.

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Solicitor for the appellant: *E. Bayly.*

Solicitor for the respondent: *J. J. O'Connor.*

THE SHIP *ROBERT J. PAISLEY* (DEFENDANT) ..... APPELLANT;

AND

JAMES RICHARDSON & SONS, LIMITED (PLAINTIFF) ..... RESPONDENT.

1928
*Dec. 5, 6.
1929
*Feb. 5.

THE SHIP *ROBERT J. PAISLEY* (DEFENDANT) ..... APPELLANT;

AND

CANADA STEAMSHIP LINES LIMITED (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA (TORONTO ADMIRALTY DISTRICT)

Shipping—Collision—Ship in tow colliding with and damaging a moored ship—Whether tow in fault—Liability of tow for fault of tug.

The steamship *P.*, in winter quarters in Owen Sound harbour, with its engines and steering gear laid up, while being moved (under contract) by a tug to an elevator dock for unloading, went past the dock and collided with the moored steamship *S.* The owners of the *S.* and her cargo brought action *in rem* against the *P.* for damages sustained.

Held (1): Upon the facts and circumstances as disclosed by the evidence there was not, during the progress of the towing, any act or omission by those on board the *P.* constituting a fault causing or contributing to the accident.

(2.): Although the *S.* might not have sustained the damage which occurred if the *P.'s* anchor had not been in the position in which it was, and although the *P.'s* ship-keeper had encouraged the tug's captain to leave it in that position, yet the position of the anchor, if it were a fault, was not the fault of the *P.'s* owners; they had put the tug in

(1) (1900) 31 Can. S.C.R. 81, at pp. 87 and 88.

*PRESENT:—Anglin C.J.C. and Mignault, Newcombe, Lamont and Smith JJ.

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charge, and their ship-keeper had no authority to direct the stowage of the anchors, for the purposes of the tug; and, moreover, the anchor did not cause or contribute to the collision, and its position did not create liability on the part of the owners, upon well-known principles discussed in *Admiralty Commissioners* v. *S.S. Volute* [1922] 1 A.C. 129.

(3): Assuming, as was justified on the evidence and the course of the trial, that the tug was competent to the service for which it was engaged, the owners of the *P.* were justified in permitting it to be moved from its moorings to the elevator under the power, direction and control of the tug, and, being not otherwise guilty of any fault, had incurred no personal liability. Further, having regard to the facts (as found by this Court) that, in the towing, the governing and navigating authority was solely with the tug, that the *P.* had no power to assist either in the way of furnishing power or directing her course, that no one on the *P.* had any authority or duties which were unfulfilled with regard to the navigation, and all orders from the tug were duly executed, the *P.* was not liable to the plaintiffs for the damage which, in the circumstances, was sustained by reason of the negligence of the tug. *The Devonshire,* [1912] P. 21, at p. 49; [1912] A.C. 634, at p. 647; *Sturgis* v. *Boyer,* 24 How. 110, at pp. 121-123; *The Quickstep,* 15 P.D. 196, at p. 201; Marsden on Collisions at Sea, 8th ed., p. 195; *River Wear Commissioners* v. *Adamson,* 2 App. Cas. 743, at pp. 767-8, referred to. It could not be said that, although the tow was innocent of any fault in itself, a maritime lien nevertheless attached to it, as being the instrument which, by reason of the tug's negligence, caused the injury (*The "American" and The "Syria",* L.R. 6 P.C. 127; *The "Utopia",* [1893] A.C. 492).

APPEAL by the defendant ship *Robert J. Paisley* from the judgment of Hodgins J., Local Judge in Admiralty, for the Toronto Admiralty District, of the Exchequer Court of Canada, in favour of the respondents, and condemning the appellant, in both of the actions herein, for the damages sustained by the plaintiffs as the result of a collision between the said defendant ship and the steamship *Saskatchewan* in the harbour at Owen Sound, Ontario, on January 18, 1927. The steamship *Saskatchewan* was owned by the plaintiff Canada Steamship Lines Limited, and its cargo was owned by the plaintiff James Richardson & Sons, Limited. Each plaintiff brought an action *in rem* to recover damages, and the actions were tried together as to the question of liability. When the collision occurred the defendant ship, which was in winter quarters in the harbour, with its engines and steering gear "laid up," was being moved (under contract with the owners of the tug) by a tug to an elevator dock for unloading, and the defendant ship claimed that the collision was not caused by

any negligence on its part, or on the part of its owners or those on board or in charge of it, and that responsibility for what happened did not lie upon it.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs, and the actions dismissed with costs.

R. I. Towers K.C. and *F. W. Bartram* for the appellant.

A. R. Holden K.C. and *F. Wilkinson* for the respondent Canada Steamship Lines, Ltd.

S. Casey Wood K.C. and *G. M. Jarvis* for the respondent James Richardson & Sons, Ltd.

The judgment of the court was delivered by

NEWCOMBE J.—The steamship *Saskatchewan,* owned by the Canada Steamship Lines, Ltd., while lying moored in the harbour of Owen Sound, Georgian Bay, laden with grain, on 18th January, 1927, sustained damage in collision with the defendant steamship, *Robert J. Paisley,* in consequence of which, on the following day, she sank at her moorings, and her cargo, which belonged to James Richardson & Sons, Ltd., was also thereby damaged. The owners of the ship and cargo respectively brought these two actions *in rem* in the Exchequer Court in Admiralty, to recover their damages against the *Paisley.* The actions were, by consent, tried together, as to the question of liability. There are some differences, though not, I think, very material, upon the facts, and there is also a question of law to be determined, arising out of the fact that the *Paisley* was, at the time, being navigated by the tug *Harrison,* which belonged to and was under the direction of John Harrison & Sons, Ltd.

The *Paisley* is of 3,762 tons gross, length 266 feet, beam 50 feet, and moulded depth 28 feet, registered at Fairport, Ohio; and she was, at the time, engaged in the Canadian grain trade. It would appear that her owners had entrusted the management of the vessel to the Cleveland Cliffs Iron Company, of Cleveland, Ohio, of which Albert E. R. Schneider was the general manager, and that, on 6th November, 1926, William Richards, the superintendent of the Great Lakes Elevator Co., Ltd., which has a grain elevator at Owen Sound, wrote to the Cleveland

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Cliffs Company, referring to a telephone conversation of the previous day, and informed the company that John Harrison & Sons, Ltd., of Owen Sound, had a good tug, and would write the Cleveland Cliffs Company in connection with the handling of any steamers which the latter company might send to the elevator. Mr. Richards represented that ice conditions were favourable at Owen Sound, that harbour being usually the last to freeze over and among the first to open in the spring; that the handling would be cheaper there than at other ports, and that every assistance possible would "be given steamers, and if you can see your way clear to favour us with a share of this business, we feel that we can take care of same to your entire satisfaction, and that it will turn out to be a mutual benefit." Following this, upon the same date, Harrison & Sons wrote the Cleveland Cliffs Company, at the suggestion of Mr. Richards, and further correspondence ensued. On 2nd December, the Harrison Company wrote Mr. Schneider that they were interested in the Elevator Company, and were anxious to give satisfactory service at Owen Sound, "so that you will be disposed to charter for this port more frequently," and they put forward their views "as to the cost of handling your three steamers to and from the elevator," and suggested delay in fixing the charges until the last of the winter fleet should have arrived. By letter of 11th December, the Harrison Company wrote Mr. Schneider, stating that,

> Now that the winter storage fleet has been chartered with fair prospects of all being able to get here, we are prepared to undertake the moving of your steamers with storage cargoes to and from the elevator here at a flat average rate of one-quarter cent (¼c.) per bushel, as per Lake Bills (that is on a Bushel Basis), to include keeping the ice clear as long as possible.
>
> This must be subject to immediate acceptance by owners of *all* storage cargo vessels in this Port; otherwise, we cannot undertake it.
>
> In event of any of the steamers being on the bottom and requiring lightering, there will of course have to be an extra charge for this, but we do not anticipate anything of this kind.
>
> We have already incurred considerable expense keeping Harbour open and notwithstanding the cold weather we have had, the Harbour is to-day entirely free of ice.
>
> It is understood this work will be done at owner's risk and that your Ship-keeper will direct the mooring of Steamers after being unloaded, the Harbour Master to settle any dispute as to location.
>
> If all concerned are willing to give us instructions to undertake this work on above basis, we intend keeping Tug in commission and the Har-

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bour clear of ice as late as possible. If any of the Owners are not satisfied with this offer, we will lay up the *Harrison* immediately.

Be good enough to telegraph us one way or the other not later than Tuesday, the 14th, and upon receipt of the acceptance of all the Owners, we will confirm this arrangement promptly.

There was some further discussion as to the rate, but by telegram of 13th December, Mr. Schneider accepted the Harrison Company's offer of ¼ cent per bushel, and on 20th December, the Harrison Company wrote him as follows:

We duly received your telegram accepting our offer to have tug *Harrison* keep harbour clear long as possible and move your steamers to and from elevator, for which we thank you.

The harbour is clear of ice and your steamer *Presque Isle* is under the leg to-day. Do not know whether they will be able to take all the cargo out at this time or not.

Presume your Charter covers that Shippers of Cargo will pay expense of more than one move. Please send us copy of your Charters, for our information, with reference to this and also give your wheat capacity of each Steamer for our records and oblige.

All owners have accepted this arrangement, with exception of Paterson Steamship Line; they have only one small boat here, and we think surely they will be satisfied to come in.

It was upon the terms so disclosed that the towing operations were undertaken and carried out by the Harrison Company.

The owners of the *Paisely* having received the assurances and made the arrangements set out in the correspondence, the *Paisley* took up her winter quarters at Owen Sound, and was moored on the east side of the harbour, and somewhat to the southward of the elevator, which was situate on the opposite side of the harbour; her bow pointing southerly, or inwards, and immediately below her several other ships were lying moored, alongside of each other. The *Paisley's* engines and steering gear were "laid up"; the ship was generally put into condition for the winter; the officers and crew were discharged, and left the ship.

On 14th January, Mr. Schneider telegraphed the owners of the tug,

Elevator ready to unload steamer *Paisley*. Place accordingly and notify A. R. Penrice, Ship-keeper.

Mr. Telliard, the chief engineer of the *Paisley*, who was the last of her officers to leave, and who quitted the ship on the morning of 15th January, tells us that, on 13th or 14th January, Captain Waugh, of the tug, came on board

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the *Paisley* to find out about raising her anchors. Mr. Telliard unlocked the windlass room and explained how it was fitted and cleared, and how the windlass should be worked with steam power supplied by the tug, and gave him further requisite information. Captain Waugh then left the ship, and, on the 15th, the ship-keeper arrived, and the engineer went home.

The ship-keeper was Alvin Roy Penrice. He was employed by the owners of the *Paisley* and, according to their agreement, which was dated 22nd December, 1926, and sets forth the terms under which he was acting from the time he took charge as ship-keeper, he was to receive $65 per month, and his regular duties were to look after the boat he lived on, which was the *Paisley,* as well as other vessels of the company, that might be near him,

> to sound all tanks, peaks and engine room well; record all movements of vessel and work done in connection with loading or unloading storage cargoes; get vessel ready to inspection or fumigation; look after repairs, and perform such work as chipping, scraping rust, painting, removing snow from hatches, as well as any other work called on to do, without extra compensation.

And he was to report in writing to the Cleveland Cliffs office, at Cleveland, every Monday morning; the contract to terminate at any time the owners or their representatives were not satisfied with his services or conduct.

Mr. Richards, the superintendent of the elevator, had informed Penrice that "the *Paisley* would be the next boat to go to the elevator."

Captain Waugh, with his tug, came alongside on the afternoon of 15th January, and raised the *Paisley's* anchors, supplying the power from the tug and using the ship's winch in the manner which had been explained by her engineer. The tug had a crew of three or four men, and Penrice assisted with the anchors. Both anchors were brought up into their hawse-pipes, but there was trouble with the stowing of the port anchor, and Captain Waugh considered that it projected so far as to interfere with the navigation of the tug, and it was accordingly lowered again, and permitted to remain suspended and partially submerged.

Penrice gives the following evidence as to the commencement of the towing operation, about which there is no dispute:—

Q. Now you have told us about the anchors being hove up on the 15th January. Then what was your next communication about shifting the vessel?

A. On Tuesday, January 18.

Q. Yes?

A. The tug came over in the forenoon and Captain Waugh came aboard bringing with him a short piece of chain and said he was going to shift us to the elevator that morning.

By His Lordship:

Q. What do you mean by a short piece of chain? One you had never seen before?

A. I had never seen this piece of chain before. I went with Captain Waugh to the stern of the *Paisley* and he put this chain around the bitts on the stern of the *Paisley*.

Q. Where was the bitt?

A. On the fan tail of the stern of the *Paisley*. I asked Captain Waugh what the chain was for.

Q. You had no idea, I suppose?

A. I didn't know what he was going to use that for. He said that was to hook his towing cable into. He made the chain fast. The cable was pulled aboard from the tug, the towing cable, and made fast to this chain.

By Mr. Towers:

Q. Was that in the forenoon?

A. It was before noon, January 18.

Q. Had you any men besides yourself on board then?

A. I had one man when the tug came. Shortly after the tug arrived my other two men.

By His Lordship:

Q. The towing cable from the tug was made fast to this chain?

A. Made fast to the chain.

Q. Then what was done with the chain, left on the bitts?

A. Left on the bitts. After that was done the lines were taken in; that is, the mooring lines.

Q. That is, of the *Paisley*?

A. On the *Paisley*.

Q. That means she was afloat then, does it?

A. Yes, sir.

By Mr. Towers:

Q. You said you had some other men on board. Who were they?

A. Mr. Sykes and Mr. Holmes and Mr. Bechard.

By His Lordship:

Q. Employed under you?

A. I arranged to have them.

Q. Employed under you?

A. Yes, sir.

By Mr. Towers:

Q. For what purpose did you have them?

A. To assist me in handling lines, taking off hatches and principally to sweep out the boat when she arrived into the elevator, and was being unloaded.

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By His Lordship:

Q. Were they aboard this morning?

A. They were.

By Mr. Towers:

Q. Well, then once you were afloat, what happened?

A. The tug pulled our stern out away from the dock and then straightened us out and pulled us down the harbour, that is northward.

By His Lordship:

Q. Stern first, I suppose?

A. Stern first.

At this point, according to the chart in evidence, the general direction of the harbour, going inward, is south-westerly, and the direct distance from the *Paisley*, as she lay at her moorings, to the elevator on the opposite side of the channel, is about 700 feet. The course was unobstructed, but, owing to the fact that other vessels were lying at the stern of the *Paisley*, the master of the tug found it advisable to tow her out in a northerly direction, and so he made fast to his cable, which he had attached to the chain affixed to the stern bitts of the *Paisley*, and proceeded outwards on a northerly course for a distance of about 1,000 feet, which brought the ship to a position about mid-channel, or perhaps somewhat closer to its western side, and to the northward of the elevator, where those on the ship, by the tug's direction, cast off the cable from the ship's stern, and the tug passed upward between the western shore and the starboard side of the ship, and sent up a cable to Sykes, one of the men on board, to make fast to her bow. There was some unimportant delay here, because Sykes attached the cable to the *Paisley's* starboard bitts, whereas the tug master desired to use the bitts on her port bow, and, this direction having been executed, the tug proceeded, towing the ship southwesterly by a tow-line the length of which, as between tug and tow, is stated to have been fifteen feet, and with the intention, no doubt, of bringing the ship in some manner to the elevator. At the same time, Mr. Richards, who was in charge at the elevator, sent out four of his employees, who were engaged at storage, to attend to what would be necessary upon the part of the elevator in securing lines and in the mooring of the tow, when she came to her station alongside of the dock. It is here that a difference develops in the testimony as between the tug master and his mate, on the one

hand, and those at the dock and on board the ship, on the other hand.

Captain Waugh had given no directions to the ship-keeper, and there was no arrangement or understanding between him and Penrice, or any of the men on the ship, as to the mooring of the ship when she was brought to the dock; but Penrice seems to have supposed that it would be his duty to see to the mooring, and he had his mooring lines and cables on deck, ready for the purpose. There is no apparent reason why the tow should not have been brought directly up to the dock, as her course was nearly parallel with the dock's face, and the lines would then naturally have been passed over to the elevator employees, who were waiting on the dock to receive them. Captain Waugh, who was the plaintiffs' witness, indeed, says, in answer to the question, "Where were you intending, on that dock, to land the *Paisley*?—A. I was intending to land her along the dock. Q. How far along? You must have had some definite idea where you were going?—A. We were supposed to put her right at the elevator." What happened, however, according to Captain Waugh, was this:—

Q. Now how close in to the dock did you get the *Paisley* before she was abreast of the elevator? You didn't measure it, but tell His Lordship as near as you can what the distance was from the nearest part of the *Paisley* to the face of the dock just before she got to the elevator?

A. When she was immediately northeast of the elevator she was within thirty feet of the dock as closely as I could go, or judge.

By His Lordship:

Q. Within thirty feet of that dock when she was northeast of the elevator?

Mr. WOOD: When her bow was, my Lord.

Q. That is her bow?

A. Her bow.

By Mr. Holden:

Q. How near does a ship like that need to be to get her line ashore, with the heaving line first and so on?

A. Well, I think it is practicable for—Well I shouldn't say I think; I know it is practicable for a man to get a heaving line ashore from a greater distance than that from the dock.

Q. How great a distance?

A. Some men can put a heaving line further than others. They should be able to put a heaving line a hundred feet.

Q. Then did the *Paisley* get her line ashore when she was thirty feet off, about, before reaching the elevator, as you intended? Did she get a line ashore there?

A. She didn't get a line ashore.

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There was, at the time, no order or gesture by the tug that any attempt should be made to heave a line, although the tug master says that

I kept on ahead with the steamer till we got past the elevator, expecting that he was getting a line out.

Then, having passed the elevator, the tug manoeuvred in the following manner:—

Q. And then what happened, Captain?

A. I put the wheel hard aport, swung her stern out to clear the steamer, and backed up on her.

Q. Swung her stern out, that is the tug's?

A. The tug's.

Q. And then you backed up on the tug?

By His Lordship:

Q. Swung the tug's stern out and backed up. For what purpose? What was your object in that?

A. We were supposed to back up and put her nose against the steamer and push her in to her moorings to the elevator.

Q. Well, where did you push her in, at the bow or stern?

A. Well, it would depend on——

Q. What did you do?

A. I didn't—I backed up and I saw that they didn't have a line out and the man on the bow of the *Paisley*—when I backed up our men carried their line forward on the tug—

Q. Well?

A. And Jimmy was going to let go our line.

By Mr. Holden:

Q. That is Jimmy Sykes on the *Paisley*.

A. Yes. and I saw they hadn't a line on the dock, when I got back far enough I saw there was no line on the dock and that the tow had to be stopped some way.

By His Lordship:

Q. So what did you do?

A. So I sung out to Jimmy to not throw the line off; I told the mate to take a turn on the timber head forward on the tug.

Q. Do what?

A. Take a turn on the line.

By Mr. Holden:

Q. When you say you sang out, this is your line on the tug?

A. Yes.

Q. That is your own mate?

A. Yes.

Q. And then——?

A. I backed up on the tug to check the *Paisley*.

Q. The *Paisley* was still going ahead, not enough to run ashore?

A. The *Paisley* was still going ahead.

By His Lordship:

Q. And you backed up on the tug in order to put a pull on her?

A. To stop her.

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Mr. HOLDEN: You see, my Lord, as she drifted ahead she was pointing right for the *Saskatchewan*.

By Mr. Holden:

Q. And then what happened? When you tried to stop her what happened?

A. Well, I backed up on the line; the line commenced to slip on the timber head on the tug.

By His Lordship:

Q. The what?

A. The timber head. It is a snubbing post. I went ahead on the tug again to give the mate a chance to make fast—The line by this time had all run out but about 4 feet.

Q. Yes?

A. The mate—there was an eye on the inside end and he threw the eye over the timber head.

Q. Yes?

A. I backed up on the tug again.

Q. Yes?

A. And when she got the line tight—taut is a more nautical way of putting it—I rang up for full speed astern.

Q. Yes?

A. And the line parted.

In consequence, the tow, detached from the tug and deprived of power and steering capacity, pursued her course, and, although another line was substituted and made fast, it was too late to prevent the collision, the *Saskatchewan* being moored, as depicted on the chart, not more than 350 feet above the elevator, and, as was said in one of the above extracts, directly athwart the *Paisley's* course, as set by the tug. There is a suggestion that they were rather slow on the tow in receiving or making fast the substituted line, but Captain Waugh answered, in his examination in chief, that the collision and the consequent breach in the *Saskatchewan's* bow could not have been prevented, even if the delay which he alleges had not occurred.

The evidence of Mathewson, the mate of the tug, who was also the plaintiffs' witness, is in substantial accord with that of his captain, although he says he could not see very well, as he was standing low, at the stern of the tug. He says that when they cast off from the stern of the *Paisley*, and commenced to tow her forward by the port bitts, she was stationary, and that "it looked to me as if it would be an easy job to take her to the elevator"; that at that time their course was due west, two points south, which would bring them almost directly to the land; that he thinks the *Paisley's* bow came within thirty feet

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of the elevator dock when she was less than half way in to the elevator, heading southwest, her stern being further out than her bow, and that he did not know whether she changed that course before striking the *Saskatchewan*. He makes the following important statement, however, which is consistent with his captain's evidence:—

Q. After the tug had passed the elevator, then what happened?

A. Well, I had been standing right at the tow post.

Q. Yes?

A. Watching after my own work. I was expecting a call from the Captain to carry the line up, to move the line off the tow post. At that time I thought they were getting a line out on the *Paisley*.

Q. And then what happened?

A. Well, they got orders to carry the line up, the Captain told me he was going to throw his stern out and back down on the port side of her.

Q. What for?

A. To get back in place ready to shove her into the dock.

Q. And then what happened her?

By His Lordship:

Q. The Captain said he was going to do what?

A. The Captain said he was—he told me to be ready to—He was going to back the tug down on the port side of her and told me to be ready for to carry the tow line up forward to the forward timber head.

By Mr. Towers:

Q. Where was the Captain, up at the bow of the tug?

A. The Captain was up in the wheelhouse.

Q. A hundred feet away from you?

A. He could stand out there and call to me; I can go up any time he calls.

Q. Did he call you?

A. I happened to walk up the side.

Q. I thought you said you were at the bitts?

A. I did, but I walked up the side knowing that we had the *Paisley* up in its place.

Q. When you had the *Paisley* up to its place, what did you have to walk up the side for?

A. To find out if the Captain—to get my orders to move this line.

Q. To get your orders to move the line. You knew what you would have to do with the line if you were up at your place, the same as you always do?

A. I knew what I had to do with it, but I wouldn't do it until I was ordered.

In addition, Captain Waugh gives the following answers in his cross-examination:—

Q. Well then, had there been no slipping on your forward bitts, would you have taken the way off?

A. Well, if the line hadn't parted.

Q. You think you would?

A. Yes.

Q. And then, when you did get a strain on her, if the line hadn't parted, do you think you would have held it from going down on the *Saskatchewan?*

A. I think we could have stopped her.

* * * * *

By His Lordship:

Q. Do you think you could have stopped her if the line had not parted, but the slip had occurred, before that?

A. Independent of the slip?

Q. Yes?

A. The slip—I think we could have stopped before she hit the *Saskatchewan* if the line had of held, hadn't of parted.

Q. A slip before wouldn't have prevented you stopping if the line hadn't parted?

A. No, it would give us probably a couple of minutes.

It seems, therefore, to be a necessary inference that, from the beginning, the project must have been to stop the progress of the tow by reversing the tug, and that this manoeuvre was adopted, not by reason of any emergency, nor because of any failure of anticipated action by the tow to put her mooring lines ashore, but because it was a part of the towing operation, as deliberately designed and attempted by the tug, that the towing should be reversed when the tow had reached the point beyond the elevator where the tug master had directed his mate to shift the tow-line. Admittedly neither he nor his mate knew, nor had tried to ascertain, whether or not any line had been put ashore by the tow, nor had either of them made the ship-keeper aware of any intention or desire on the part of the tug that the ship should, in the circumstances, endeavour to heave a line.

Now, as to the distance at which the *Paisley* passed the elevator dock going southerly, and as to whether those on board could reasonably have been expected to put a line ashore in the circumstances, and at that distance, the appellants called the elevator employees, who, when the tug and tow were approaching, had been sent out by their superintendent to attend to the mooring. There were four of them: Dault, Colquette, Ney and Yeo. And, in considering their testimony, it should be remembered that, according to the correspondence, the tug was interested in the elevator company, and had been recommended by the superintendent of the elevator, and, of course, both tug and elevator were concerned in the success of the towing operation and the mooring of the tow.

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Dault, as he testifies, came out of the elevator when the *Paisley* was to the north of it, coming southwest; "too far out to look for a line," and during her passage she remained still too far away. The dock was in course of construction at the time, and had been completed only to, or for a very short distance above, the southern side of the elevator. Beyond that there was piling, and Dault walked along, opposite the ship, as she passed. Ultimately a line was thrown, which landed upon a cluster of piles, from which it was recovered, but not in time to be of any use, for, if for no other reason, it was 65 feet out from the nearest post to which a cable could be fastened. Dault was asked,

Q. What do you say now as to whether it would have been any use or not to try to get a cable to stop the boat there?

A. Well, at the distance the boat was away from the first piling, I don't think they could have done it.

He says that the piling upon which the heaving line fell was about 100 feet south from the south side of the elevator.

Colquette testifies that, when he came on the dock, the *Paisley's* bow was to the south of the elevator, possibly about 75 feet, and that he did not expect a line, because she was further out than usual; that in practice the tow comes right up against the dock, or within a few feet.

Ney, the foreman at the elevator, who went out with Dault, says that when the vessel passed, he did not expect a line, because she was too far out, and that, when the line was actually thrown, she was "around in the neighbourhood of 150 feet, I would say," from the south end of the elevator, and that, as a rule, the tow is brought right in to the centre of the elevator, to touch the dock.

Yeo came out of the elevator on the south side, and then the ship was passing the elevator, and the pilot house of the *Paisley* was in view. Asked whether, when he got to the dock, he expected a line to be thrown, he answers:—

No, we weren't looking for one just then.

Q. Why not?

A. Well, the boat was out further than usual.

He is the man who recovered the line that was thrown from the ship to the piles south of the elevator.

These are the witnesses from the elevator, called by the defence. Then comes the testimony of Penrice and his assistants on board the tow, Sykes, Bechard and Holmes.

Penrice tells us that the *Paisley* passed the elevator dock too far away to land a heaving line with which to pull a cable ashore by hand. He estimates the distance at 100 feet, and, according to other evidence, that is a long cast, under favourable circumstances. He had been aft, on the starboard side of the *Paisley*, and came forward to the forecastle. His testimony in the record, at pages 162, line 9, to 165, line 28, and, in cross-examination, at page 183, lines 9 to 24, is worth quoting.

A. I looked at the winch to make sure that the forward line was ready for mooring purposes.

Q. Where had you got to? You only said you came forward up the starboard side. Where did you get to?

A. I came forward to about No. 1 hatch, between No. 1 and No. 2.

By Mr. Towers:

Q. Where was your forward windlass?

A. My forward windlass was in the windlass room and the mooring winch was between No. 1 and No. 2 hatch.

Q. The mooring winch?

A. Yes, sir.

By His Lordship:

Q. That is the one you looked at, is it?

A. Yes, sir.

By Mr. Towers:

Q. What did you look at it for?

A. To make sure the line was ready to heave a line for mooring purposes.

Q. And was it there?

A. It was.

Q. Did the situation cause you any thought——?

His LORDSHIP: Why suggest that to him? Just get what was done. If he was under any apprehension that is what he will tell you.

Q. We have got the mooring line there; you saw it was all right, did you?

A. Yes, sir.

Q. What next?

A. Went from there onto the forecastle, onto the bow.

Q. What did you see there?

A. Saw the tug pulling on us.

Q. At that time?

A. At that time.

Q. Pulling in which direction?

A. Well, I don't quite understand that question.

Q. Well, in which direction was the tug pulling you?

By His Lordship:

Q. Towards the elevator or away from it?

A. Well, he was pulling us about like that. (Indicating).

Q. That is parallel to the dock line, is it?

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A. Practically parallel.

By Mr. Towers:

Q. Well how long did that continue?

A. Oh, maybe two or three minutes.

Q. And did you stay there during that time?—A. I did.

By His Lordship:

Q. Did you say anything to anybody on the tug?

A. I remember of—as the bow of the *Paisley* at this time was past the elevator, considerably past—

Mr. HOLDEN: Past the south side?

A. (Cont'd.): The south side of the elevator, and I passed the remark that it was time——

Q. I know, did you pass it to the men on the tug?

A. No.

Q. I don't care what you talked among yourselves.

A. That was amongst ourselves. I had no communication with the tug whatsoever.

By Mr. Towers:

Q. Up to that time had you made any attempt to get a line ashore?

A. I had not.

Q. Why?

A. I couldn't. It was too far away.

Q. Had any other man on board, to your knowledge, made such attempt?

A. They had not.

By His Lordship:

Q. Did you give any instructions to the men at this time? You saw the mooring winch was all right and the mooring line was there and you saw the tug pulling you along and you said something to them on board. Did what you said include any order to them?

A. No order to the tug at all.

By Mr. Towers:

Q. To any of your men on the boat?

A. No, it did not include any orders.

Q. Well then, what happened?

A. The tug stopped pulling and backed across our bow, that would be from the starboard bow to the port, slackening up his tow line.

Q. Did you see that?

A. I saw that.

By His Lordship:

Q. She backed across your bow?

A. Across our bow, and the men on the tug disconnected the tow line from the stern of the tug and carried the bight of it forward on the tug.

Q. Did you see that?

A. I saw that operation.

Q. You saw it perfectly. With any difficulty or without difficulty?

A. They got the bight of the line forward and they seemed to have trouble in getting sufficient turns on it; the speed of the *Paisley* going and the tug going astern they didn't have enough slack in their line to make it fast around the bitts, it was surging or rendering on them.

By His Lordship:

Q. The tug was backing, the *Paisley* going on, is that right?

A. Correct.

Q. And the result?

A. The men could not handle the tow line.

Q. They could handle it all right; you said something about they couldn't get sufficient turns?

A. Sufficient turns on the snubbing post forward.

Q. That is what you saw, or was that what you thought?

A. Well I saw that, and they also had trouble carrying the line past the stays on the side of the tug.

Q. Past what?

A. The stays.

By Mr. Towers:

Q. Well then, what, if anything, did you do?

A. When I saw them having trouble getting the line by I left the forecastle and went down on deck where my mooring line was on the forward winch.

By His Lordship:

Q. That is the main deck?

A. Main deck.

By Mr. Towers:

Q. You went to the mooring winch?

A. Well, down to the starboard side, that would be abreast of the mooring winch, picked up a heaving line and endeavoured to pass it ashore.

By His Lordship:

Q. What did your endeavour consist of, throwing it?

A. Throwing it.

By Mr. Towers:

Q. What distance would you say you threw it?

A. Oh, I threw it 75 feet.

A. And where did it light?

A. The end of the line lit on these spring spiles, the furthest spiles to the south'ard on the dock.

By His Lordship:

Q. Did you pay it out then?

A. Well I had no more to pay out, sir. I had the end of the line in my hand.

By Mr. Towers:

Q. Well then would the *Paisley* going ahead carry it off at once?

A. Well it would tend to do that but I walked down the *Paisley* towards amidships so it wouldn't be pulled off these spring spiles.

Q. I show you Exhibit C-2 where "Piles where Yeo got heaving line" are shown. Is that correct?

A. That is correct.

Q. Then what?

A. One of the elevator men secured the end of the line; by this time I was nearly amidships on the *Paisley;* I called for another heaving line, intending to tie the two of them together and make it fast to the cable.

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By His Lordship:

Q. Whom did you call to?

A. One of the two men I had on the boat, Mr. Bechard.

Q. For another heaving line?

A. Yes.

Q. And——?

A. He was bringing me the heaving line and I sized up the situation and decided I couldn't get a line ashore, that is a cable ashore.

Q. Yes, and——?

A. And I told Mr. Yeo on the dock to let it go.

By Mr. Towers:

Q. Had you seen anything more of the tug in the meantime?

A. I had not; I was busy endeavouring to get that line out.

Q. And why did you decide you couldn't do it?

A. Oh it was impossible for——

By His Lordship:

Q. Yes, but why? Why was it impossible? You must have had some reason for making up your mind?

A. Well, the winches were dead, had no steam, I couldn't pull them out; I had experience with that with the other boat.

Q. Well, but I thought you said the winch was all right, the mooring winch?

A. It was ready; what I mean by that, sir, the cable was out and through the chock and on the deck to take a heaving line there, but to get that line out you have to pull it out by man power.

Q. Yes, well?

A. And that is a very slow operation when there is no steam on a winch.

By Mr. Towers:

Q. Those were the conditions under which you started, were they?

A. They were.

Q. Now you say that you sized up the situation and decided you couldn't get a cable ashore. Now just elaborate the reasons that made you come to that conclusion?

A. Well it was too far off, firstly.

Q. Yes?

A. To pull a cable and get it to a spile.

Q. Yes. Next?

A. And the fact the winches were dead, it is a very slow operation getting the cable out.

Q. Yes?

A. And also the amount of cable I would have had to put out to reach a spile would be a considerable heft.

By His Lordship:

Q. A great weight, I suppose?

A. A great weight, and would take a long time to pull it out there.

Q. And other factor? Any other reason?

A. Well, that is about all I know of.

By Mr. Towers:

Q. How close was the nearest spile it could be put on?

A. Oh it would be 125 or thirty feet from the line.

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By His Lordship:

Q. From where?

A. From the mooring cable that I had ready.

By Mr. Towers:

Q. You don't mean that these piles are the ones that the mooring cable was to be put on?

A. No. You couldn't put that on them, they were no good.

Q. And the other one was no good?

A. Yes; 65 or 70 feet from that.

Q. Now you had this mooring cable ready and passed through the chock and lying on deck, you say?

A. Correct.

Q. How did you expect to manoeuvre the boat when you left your other berth?

A. Well, I expected the tug would put us right to the dock and I would pass the eye of the cable on the dock.

By His Lordship:

Q. You expected the tug to do what?

A. To put the *Paisley* alongside of the dock.

Q. Without any lines being thrown from your ship?

A. Without throwing any heaving lines, yes, sir.

* * * * *

Q. When you did go forward, her stem then being a little south of the south wall of the elevator, what instructions did you then give to your three men?

A. I came forward and went up on the forecastle and——. Oh, there was a conversation; I don't remember anything definitely, only I do remember this: That I passed the remark: He has got us going pretty fast. He had better check us pretty soon now. It was more speaking my own mind out loud than anything else.

Penrice says also, in another place, that he had two wire cables and two manilla lines, "ready to put ashore," and "for tying up the *Paisley* when she arrived at the dock."

Sykes was examined; he says nothing as to the possibility of putting a line ashore, except that "If we were close enough, we might have got a line ashore, and checked the vessel." Bechard says the tow was too far out. Holmes was also called, but he does not testify as to the distance at which the *Paisley* passed the elevator. His impression of the accident is naively summed up in the following answers. He had assisted Sykes in putting the towing line on the port bitts:—

Q. Then after that what happened?

A. Well, I couldn't just say.

Q. How long a line was that? How long was it pulled up? After you put it on the port bitts what distance ahead did the tug go?

A. Well, I couldn't exactly say that either.

Q. Well, about how far?

A. Well, I should say about a hundred feet.

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Q. And then what happened?
A. Well, I think he backed up, if I am not mistaken, and while they was backing up they was trying to make for to bring the line up to the forward snubbing post on the tug and it busted.
Q. The line busted?
A. Yes, sir.
Q. Then, where did the vessel go?
A. I think the vessel went towards the amidships.
Q. On what?
A. Towards the amidships of the *Paisley*.
Q. You mean the tug went?
A. The tug.
Q. Where did the *Paisley* go after the line bust?
A. The *Paisley* went on ahead.
Q. And where did she pull up?
A. She pulled up against another boat.

As to the rate of speed at which the tug and tow passed up on their southwesterly course opposite to the elevator dock, there are various estimates by the observers, running from half a mile an hour to two or three miles, and there seems to be no doubt that it was involved in the operation, as designed by Captain Waugh, that, at some point beyond the elevator, he would cast off the tow-line from the tug's stern, carry it forward and make it fast at her bow, and, by reversing the tug and backing up on that line, check the speed of the tow, so as to enable him to push her into place by bringing the tug into contact with the side or bow of the ship; or, as described in the evidence, by "nosing" the ship into place, a manoeuvre which did not in any wise depend upon any action on the part of Penrice, or any of his men, in the way of landing a cable, to be made fast on the dock for the purpose of checking the *Paisley's* speed.

The trial judge finds for the plaintiffs, upon the ground that the tug and tow were jointly negligent, and he says,

> I accept the stories of Waugh and Mathewson that they got the bow of the *Paisley* within thirty feet of the dock, and that the course taken would throw the stern in, and I have no doubt that had those on her been ready, and proper arrangements made to have men at the dock to receive them, they could have got their lines out in time to have helped to check the steamer and, with the shoving of the tug, to safely dock her.

Now, with all due respect for the learned judge's finding, and with full realization of the difficulties, if any, involved in the case, I am persuaded, upon the whole testimony and the attendant circumstances, that the judge is mistaken, both in his finding and in permitting that finding

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to influence his determination of the case. The evidence of Waugh and Mathewson, as to the distance of 30 feet, depends upon the assumption that the tug, after making fast to the forward port bitts of the *Paisley*, directed her course at a very broad angle to the face of the elevator dock, or towards the west shore of the harbour. It is not less than 175 feet from the north side of the elevator, to the place where, on the chart, Captain Waugh put the encircled cross, to which he says he headed the tug, and, if he did that, and continued in that direction, the tug would, of course, have been ashore long before the tow got within thirty feet of the dock, or any distance approximating to it. Therefore, if the tug, after shifting her line to the *Paisley's* bow, really set out upon the course which her captain says she did, she must immediately have swung considerably to the southward, because she seems to have passed the elevator dock with her tow about parallel with the dock, and on her course to collide with the *Saskatchewan*. Captain Waugh says he was immediately northeast of the elevator, when the *Paisley's* bow came within thirty feet of the dock, "as closely as I could go or judge," but the *Paisley* was being brought to the elevator in order immediately to discharge her cargo, and the intention evidently was that she should lie with her starboard side to the dock, and under the leg of the elevator. Captain Waugh, with the interest which his owners had in the elevator, and his experience in towing vessels there, knew perfectly well what should be done, and he says, "We were supposed to put her right at the elevator"; and the suggestion that he anticipated that the ship-keeper would put his lines ashore from the ship's bow to the northward of the elevator, even if he could, is impossible to accept, especially when it is evident that Captain Waugh did not intend to cast off, reverse and nose the tow in, until he had reached the point beyond the elevator where that process was attempted, and failed. Moreover, Captain Waugh never gave any order or instruction for the handling of the lines, thus shewing, since he was in charge of the enterprise, that no action on the part of the tow was at the time expected or anticipated; and, indeed, it would have been a very imprudent and perhaps hazardous step on the part of the ship-keeper and those on the dock, without direction from the tug, to have attempted

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to check the speed of the tow while the tug was still deliberately moving her forward.

Penrice seems fully to have realized that, if a line were to be put ashore from the ship, he would be the one to do it, and the elevator employees were on the dock for no other purpose than to receive and make fast the mooring cables when landed; but not one of them considered that the vessel was within reasonable distance for that; and it is most unlikely that any of these men, who were at the time responsible for the mooring, and not unaccustomed to that service, would be apt to misjudge the situation, which was perfectly simple—unobstructed sea room, adequate tug power, an experienced master in absolute control, men at hand to execute his order. The idea of a long, flying shot, without orders, in the absence of any emergency, in the hope of checking the vessel before the tug had made known its plan and method of approach, and without any direction from the tug, can, I think, be suggested only to be rejected. It was when, in pursuance of the captain's project, he had cast loose from the tow and was endeavouring to move his tow-line to his forward bitts, and when it was discovered that the mate was having trouble with the lines, that Penrice, as a forlorn hope, made the cast which fell on the piles at a distance of 75 feet from the ship, and where the line was 65 feet from the nearest snubbing post on the dock.

These are the facts and circumstances, as disclosed by the proof, and I can only regard the tug master's testimony as an effort on the part of the tug to excuse her own faulty navigation by alleging neglect of the tow to land her mooring lines; it is an excuse for which there is no justifiable foundation in fact. I cannot discern that, during the progress of the towing, the ship-keeper did or omitted to do anything which caused or contributed to the accident, and I see no reason to charge the owners of the *Paisley* with any fault relating to the navigation, after the *Paisley* was taken by the tug from her moorings.

Even supposing that the tug did, at one stage of her progress, bring the bow of the *Paisley*, at a speed of one-half mile an hour, to within 30 feet of the elevator dock, as the speed and distance are estimated by the tug master and his mate, that cannot, I think, be considered as completing the movement of the ship to the elevator, and it

still remaind for the tug to bring the ship alongside, where she could be moored, and where her cargo could be discharged. Penrice, the ship-keeper, had no authority, either from his owners or from the tug, to exercise independent judgment as to anything concerned with the navigation, or as to when, so long as the ship was in charge of the tug, good seamanship required that he should cast a line or perform any service connected with the movement of the ship. He was not employed by the owners of the ship for that purpose, and he had no order or authority from the tug master. It certainly did not seem to him that the time had come for mooring, and the towing or moving to the dock had not been completed when the *Paisley,* on her southerly course, was passing the dock, even if her bow were, at one stage of that passage, only thirty feet from the dock.

With regard to the port anchor, there is no doubt that Penrice, on 15th January, when the tug master objected to the position to which he had raised the anchor in its hawse-pipe, encouraged Captain Waugh to leave it in the position in which it was at the time of the accident, and, perhaps, the *Saskatchewan* would not have sustained the damage which occurred, if the anchor had not been there, but the position of the anchor, if it were a fault, was not the fault of the owners of the *Paisley;* they had put the tug in charge, and their ship-keeper had no authority to direct the stowage of the anchors, for the purposes of the tug; and moreover the anchor did not cause or contribute to the collision, and its position does not create liability on the part of the owners, upon well-known principles, which were recently discussed in the case of *Admiralty Commissioners* v. *S. S. Volute* (1).

For similar reasons, the evidence as to the manner in which Penrice had placed or employed his three men upon the ship during the passage, for the purpose of providing facilities and expedition for the mooring of the vessel, at the elevator, does not affect the case, because, even if Penrice had actually complied with all the conditions which the plaintiffs suggest, it is obvious that the accident would nevertheless have occurred as and when it did. I do not consider, however, that the plaintiff has succeeded

(1) [1922] A.C. 129.

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in attributing any fault to the ship-keeper or his men in this particular.

It may, I think, be fairly and safely assumed, having regard to all the evidence and the course of the trial, that the tug was competent to the service for which she was engaged; and, upon this assumption, the owners of the *Paisley* were, in my view, justified in permitting their vessel to be moved from her moorings to the elevator, as they did, under the power, direction and control of the tug, and, being not otherwise guilty of any fault, have incurred no personal liability; but the question remains whether the ship itself has become liable to the plaintiffs for the damage which, in the circumstances, the latter sustained by reason of the negligence of the tug.

Now it is evident that, in the towing of the *Paisley*, the governing and navigating authority was solely with the tug, and that the ship, in the condition in which she was, had no power to assist in the operation, either in the way of furnishing power or of directing her course. It was not contended at the hearing that the tug was in any wise the servant of the tow. Neither the ship-keeper, nor the three men whom he had employed to assist on board and at the dock in the discharge of the vessel's cargo, had any authority or duties which were unfulfilled with regard to the navigation; the ship-keeper appears to have been prepared and willing to give effect, so far as possible, to any order which he might receive from the tug master, and all such orders were in fact duly executed; it is observable, too, in this connection, that, by the Harrison Company's letter of 11th December, the only service to be rendered by the ship-keeper for which the tug stipulated was to "direct the mooring of steamers *after being unloaded*." The case therefore falls within the rule stated by Fletcher Moulton, L.J., in *The Devonshire* (1), where he says, referring to the towing of barges or other craft of the like kind,

> In such cases the tow has no control over those navigating the tug. The tug is in the position of an independent contractor who performs the service of towing the barge to its destination, and who chooses for himself how he shall perform that service. I can see no reason why the misconduct of such an independent contractor should be imputed to the innocent tow, who is, in fact, no party to the wrongful act. So to impute it would be inconsistent with the general principles of our common law, and I should decline to do so unless I found a well-settled principle of admir-

(1) [1912] P. 21, at p. 49.

alty jurisprudence evidenced by a course of consistent decisions which required me to do so. When the decisions are examined, the contrary is found to be the case.

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And he proceeds to consider those decisions.

In *Sturgis* v. *Boyer* (1), an Admiralty action *in rem*, which originated in the United States District Court, Clifford, J., pronouncing the judgment, upon appeal to the Supreme Court of the United States, used the following language:—

> Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined where the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management, of the master and crew of the tow. * * * But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; * * * Assuming that the tug is a suitable vessel, properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel properly manned and equipped for the enterprise * * *.

These passages are quoted and adopted by Butt, J., sitting with Sir James Hannan, in *The Quickstep* (2); and in Marsden on Collisions at Sea, 8th ed., at p. 195, the learned author makes the following comments:—

> The extent of the liability of a shipowner for engaging an unseaworthy tug does not appear to have been fully considered in this country (as to liability for employing tugs of insufficient power, see *The Bristol*

(1) (1860) 24 How., 110, at pp. 121-123.

(2) (1890) 15 P.D. 196, at p. 201.

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City (1)); in other respects this statement seems to be a correct exposition of the principles upon which the respective liabilities of tug and tow are to be determined.

If, as I conclude, the *Paisley's* owners were not guilty of any fault, it follows that they have not incurred any personal obligation. *River Wear Commissioners* v. *Adamson* (2), per Lord Blackburn; *The Devonshire* (3).

It is suggested, however, that a maritime lien nevertheless attaches to the tow, although innocent of any fault in itself, seeing that it was the instrument which, by reason of the tug's negligence, caused the injury. The cases were reviewed by Hill, J., in *The Sylvan Arrow* (4); but the question is, for the purposes of this appeal, in principle ruled against the plaintiff by the decisions of the Judicial Committee in *The "American" and The "Syria"* (5), and particularly in the case of *The "Utopia"* (6). In the latter case the judgment was pronounced by Sir Francis Jeune, who says, at p. 499:—

> It was suggested in argument that, as the action against the *Utopia* is an action *in rem*, the ship may be held liable, though there be no liability in the owners. Such contention appears to their Lordships to be contrary to principles of maritime law now well recognized. No doubt at the time of action brought, a ship may be made liable in an action *in rem*, though its then owners are not, because, by reason of the negligence of the owners, or their servants, causing a collision, a maritime lien on their vessel may have been established, and that lien binds the vessel in the hands of subsequent owners. But the foundation of the lien is the negligence of the owners or their servants at the time of the collision, and if that be not proved no lien comes into existence, and the ship is no more liable than any other property which the owners at the time of collision may have possessed. In the recent case of *The Castlegate* (7), in the House of Lords, language used by the present Master of the Rolls in the case of *The Parlement Belge* (8), which expresses the above view, was quoted with an approval which their Lordships desire to repeat.

The appeals should, in my opinion, be allowed, and the actions should in each case be dismissed, with costs.

Appeals allowed with costs.

Solicitors for the appellant: *Galt, Gooderham & Towers.*

Solicitors for the respondent James Richardson & Sons, Limited: *Casey Wood & Co.*

Solicitors for the respondent Canada Steamship Lines Limited: *Rowell, Reid, Wright & McMillan.*

(1) (1921) 37 T.L.R. 901.
(2) (1877) 2 App. Cas. 743, at pp. 767, 768.
(3) [1912] A.C. 634, at p. 647.
(4) [1923] P. 220.
(5) (1874) L.R. 6 P.C. 127.
(6) [1893] A.C. 492.
(7) [1893] A.C. 38, at p. 52.
(8) (1880) 5 P.D. 197, at p. 218.

THE MONTERAL LIGHT, HEAT & POWER COMPANY (PLAINTIFF)... } APPELLANT;

AND

QUINLAN & ROBERTSON, LIMITED (DEFENDANT) ..... } RESPONDENT.

1928
*Nov. 16.
1929
*Feb. 5.

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

Negligence—Crown—Lease of property by the Crown—Clause denying any claim by the lessee against "His Majesty, His servants or agents" —Contractor performing government work on leased property—Damages suffered by the lessee—Liability.

The respondent company entered into a contract with the Minister of Railways and Canals, as representing the Crown, for the enlargement of the Lachine Canal, near Montreal. The appellant company had obtained under a lease from the Government the right to lay and maintain a gas main across the solum of the canal. Clause 6 of the lease stipulated that, in the event of its gas main being from any cause injured, the appellant company was to have no claim or demand against "His Majesty, His servants or agents." During the execution of the contract, a break occurred in the gas main; and the appellant company claimed damages alleging negligence of the respondent company in dredging the bed of the canal.

Held, reversing the decision of the Court of King's Bench (Q.R. 44 K.B. 230), that the respondent company was not a "servant" or an "agent" within the contemplation of clause 6 of the lease and was therefore liable in damages. *Kearney* v. *Oakes* (18 Can. S.C.R. 148) foll.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J., and dismissing the appellant's action.

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

Aimé Geoffrion K.C. and *O. S. Tyndale K.C.* for the appellant.

J. L. Perron K.C. and *J. H. Michaud* for the respondent.

The judgment of the court was delivered by

DUFF J.—The appellant company appeals from the judgment of the Court of King's Bench, dismissing an appeal from the judgment of Mr. Justice Surveyer, who dis-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

(1) Q.R. 44 K.B. 230.

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missed the appellant's action and incidental demand, by which he claimed $15,000 odd, as damages alleged to have been suffered in consequence of a break in the company's gas main, where it crosses the solum of the Lachine Canal. The appellant company's right to lay and maintain the gas main was derived from a lease of the year 1910, from the Minister of Railways and Canals. In April, 1913, the gas main was lowered, as the result of correspondence between the appellant company and the Quebec Superintendent of Railways and Canals, in order to allow for the enlargement of the canal then projected. This work was begun in the spring of 1914, and in May of that year the appellant company delivered to the respondent company, which had contracted with the Government to do the work, a blue print showing the position of its main and electric conduits, in order to enable the respondent company to take the necessary precautions to avoid injuring them in the execution of its contract. On the 28th of May, 1914, the gas main was broken; with the result that the supply of gas in a considerable section of Montreal was interrupted and the appellant company incurred heavy damages. The appellant company alleges that this break was caused by the negligence of the respondent company in dredging the bed of the canal, as part of the contract work; and the issue arising out of this allegation was one of the issues presented in the action.

The appellant company's action was instituted in January, 1915. The respondent company in its defence, in addition to denying responsibility for the injury to the main upon the facts, set up and relied upon clause 6 of the above-mentioned lease. The tenor of clause 6 is that in the event of its gas main being from any cause injured, the appellant company is to have no claim or demand against His Majesty, His servants or agents, therefor. The respondent company alleged that, in executing the work contracted for, it was, under the terms of the contract, constituted the servant or agent of His Majesty, and is consequently exempt in virtue of clause 6 from all liability to indemnify the appellant company. To this defence effect is given, both by the learned trial judge and by the Court of King's Bench, who unanimously held that under the terms of the respondent company's contract the department was entitled to exercise such a degree of con-

trol over the manner of the execution of the work, as to bring the respondent company within the category of agents or servants. The appellant company attacks this position, first, by denying that, in point of law, the respondent company has a status to set up the stipulations of clause 6, and second, by denying that the respondent company is a servant or agent within the contemplation of that clause.

On the first-mentioned contention no opinion is expressed.

The clauses in the contract upon which the respondent company relies are clauses 5, 7, 10, 11, 13, 14, 15, 16, 22, 29, 34 and 36, the effect of which is, according to the respondent's contention, that it was merely constituted "a workman and at most a foreman." By these clauses, the engineer is made sole judge of the work as to quantity and quality; the work is to be commenced, carried on, and prosecuted to completion by the contractor, in such manner and at such points and places as the engineer shall from time to time direct, and to his satisfaction. The contract repeatedly stipulates for direction and control by the engineer, for example in clauses 7 and 11, which require that all his orders and directions shall be properly and efficiently obeyed to his satisfaction. A competent foreman is to be kept on the ground, to receive the orders of the engineer, and this foreman may be discharged by him for incompetence or improper conduct; books, invoices and pay-lists are subject to inspection and control by the engineer.

It was held by the learned trial judge that, His Majesty having thus retained supervision of the work to be performed by the contractor, the relation of master and servant or principal and agent was constituted by the contract. In the Court of King's Bench some stress is laid upon section 9 of 35 R.S.C., by which it is provided that the Minister shall direct the construction, maintenance and repair of canals, and that the public canals are to be under the Minister's management and control.

It should first be observed that when this contract is looked at as a whole, it has few of the badges of hire and lease of services. Paragraphs 1, 3, 30, 37 and 48 may be mentioned specifically, as shewing that what the respondent company undertook under its contract was to execute

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a given work and supply materials of quantity and character ascertained or to be ascertained, and not to hire its servants to the department. The stipulations which the respondent company affirms have the effect of imparting to the contract the character of a contract of hire of services are precisely those usually found in contracts for the construction of extensive works.

In this court the controversy, on this branch of the appeal, seems to be concluded by a previous decision, *Kearney* v. *Oakes* (1). The defendants, the respondents in that case, had a contract with the Minister of Railways and Canals, by which they undertook to construct a branch line of the Intercolonial Railway at Dartmouth, N.S. One defence to the action was based upon section 109 of the Government *Railway Act* of 1881, which provided that "no action shall be brought against any officer, employee or servant" of the department, for anything done in virtue of his office, service or employment, except upon notice in writing. No notice had been given. Ritchie, C.J., who dissented, reviews carefully the provisions of the contract, which, as appears from that review, contained clauses corresponding to those now relied upon by the respondent company; in most cases, framed in identical terms, and in others, in equivalent terms. The majority of the court held that notwithstanding these provisions, the respondents were not officers, servants or employees of the department.

There is also the decision of the Court of Exchequer in *Reedie* v. *The London and North Western Railway Co.* (2). It was there held that the presence in a contract of a clause reserving to a railway company the power of dismissing the contractor's servants for incompetence had not the effect of clothing the contractors themselves with the character of servants, or of making the railway company responsible for the acts of the contractor's servants.

In *Kearney* v. *Oakes* (3), the decision turned upon the question whether the respondents, having contracted to construct the branch railway, were acting as "employees" of the Minister in entering upon the appellant's land for that purpose. Patterson J., who delivered the

(1) (1890) 18 Can. S.C.R. 148. (2) (1849) 4 Ex. 244.
(3) 18 Can. S.C.R. 148.

principal judgment of the majority, held that the word "employee," in section 109, was used in the sense of servant, and this he considered was decisive in favour of the respondents. That contractors, under such a contract, were not servants, he regarded as not susceptible of dispute. It does not appear to have been suggested, even by the dissentient minority, that, under such a contract, the contractors are servants in a sense which would make the owners of the railway responsible for their collateral acts of negligence.

This was a decision upon a contract of 1884, with the Minister of Railways and Canals, which, in all pertinent respects, appears to have been the same as that now before us. And the decision, pronounced in 1890, necessarily involves the point that contractors, under such a contract, are not servants or employees.

We have to construe a stipulation in an instrument of 1910 executed by the Minister of the same department, and to determine whether under the contract of 1913, also executed by the Minister of the same department, and expressed in terms equivalent to those of the contract of 1884, the contractors are "servants" or "agents" of His Majesty.

We should be taking liberties with the language selected by the parties to express their mutual stipulations, if, in pronouncing upon that question, we disregarded the decision or the judgments in *Kearney* v. *Oakes* (1).

For these reasons, in my opinion, the defence to which effect has been given in the courts below, cannot be sustained. The issues of fact have not been passed upon and, in pursuance of the intimation given on the argument, the case will be remitted to the Superior Court to be dealt with conformably to the decision of this court on the question of law.

The appellant company should have the costs of the appeals in the Court of King's Bench, and in this court. The costs of the abortive trial should abide the ultimate result of the litigation. *Appeal allowed with costs.*

Solicitors for the appellant: *Brown, Montgomery & McMichael.*

Solicitors for the respondent: *Beaubien & Lamarche.*

(1) 18 Can. S.C.R. 148.

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*Nov. 29.
1929
*Feb. 5.

LÉOPOLD GRONDIN (PLAINTIFF).....APPELLANT;

AND

VITAL CLICHE (DEFENDANT).....RESPONDENT

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

Sale of land—Deed with warranty of "franc et quitte"—Description of the lot—Error as to the cadastral number—Clear title—Rights of the buyer—Arts. 1065, 1507, 1535, 2098, 2172, 2173, 2176 C.C.

The respondent sold to the appellant, with warranty of *franc et quitte*, a lot of land erroneously described in the deed of sale as the northwest part of lot no. 107 instead of as lot no. 107A. The appellant, alleging such error and also that the property was not clear of encumbrances, brought an action for the resiliation of the sale and the reimbursement of the purchase price and damages.

Held that, seeing the stipulation of warranty of *franc et quitte* contained in the deed of sale, the appellant had the right to have a property free of all encumbrances that may appear in the entry books of the registry office (*page blanche*) and that, owing to encumbrances registered upon lot no. 107, the appellant had not a clear title to the property sold to him. But the Court gave the option to the respondent, upon condition of paying all costs, to rectify the titles and have them registered, a certificate of search to be filed with the registrar on or before the 1st of May, showing due performance of this obligation; and, in case of his failure to do so, the sale would be annulled and the purchase price reimbursed to the appellant.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Letellier J. and dismissing the appellant's action.

The material facts of the case are fully stated in the judgment now reported.

Louis Morin K.C. for the appellant.

P. H. Bouffard K.C. for the respondent.

The judgment of the court was delivered by

MIGNAULT J.—L'appelant, qui avait eu gain de cause en première instance, se plaint d'un jugement de la Cour du Banc du Roi qui a renvoyé son action contre l'intimé. Les faits de la cause sont assez compliqués, et il vaut mieux les relater avant de discuter le mérite de la demande de l'appelant.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Lamont JJ.

Le 15 mars 1921, par acte passé devant Gosselin, notaire, l'intimé a vendu à l'appelant, avec la garantie de "franc et quitte", une terre de trois arpents de front sur trente arpents de profondeur, située en la concession Saint-Antoine sud-ouest, en la paroisse de Saint-Frédéric de Beauce, laquelle terre fut décrite par tenants et aboutissants, avec mention qu'elle était la partie nord-ouest du lot nº 107 du cadastre de cette paroisse. L'intimé déclara à l'acte que cet immeuble lui appartenait pour l'avoir acquis de Hilaire Roseberry, suivant acte du 31 mai 1902 devant le même notaire, dûment enregistré à Beauce. La vente fut faite à charge de la rente constituée seigneuriale et pour le prix de $5,000, lequel prix a été depuis complètement payé.

Cette terre appartenait originairement au père de l'intimé, Richard Cliche, qui, le 30 octobre 1885, l'a vendue à Jean Roseberry pour $2,100, dont $500 à payer à Ephrem Jacques, $500 à Thomas Lambert, et $1,100 payable au vendeur, à termes. Richard Cliche était aussi propriétaire alors d'un terrain voisin, au sud de la terre vendue.

Cette vente s'est faite avant le cadastre de la paroisse de Saint-Frédéric, qui est entré en vigueur le 25 février 1888. Autant qu'on peut le constater, toute la propriété de Richard Cliche, y compris le terrain voisin au sud, a reçu au cadastre le numéro 107, et dès ce moment les trois arpents par trente, dont il s'agit en cette cause, devaient, d'après la loi, se décrire comme la partie nord-ouest du lot 107. Il n'est pas question dans cette cause du terrain voisin au sud, soit la partie sud-est du lot originaire 107 donnée par Richard Cliche à son fils, l'intimé, le 16 février 1899, et vendue par ce dernier à un tiers.

Plus tard, par un amendement au cadastre, le lot originaire 107 fut subdivisé en deux parties. La partie sud-est a conservé le numéro 107 et la partie nord-ouest, savoir la terre que l'intimé a vendue à l'appelant, a reçu le numéro 107A. Cet amendement au cadastre est entré en vigueur le 11 novembre 1890.

Cependant, malgré l'amendement, on a continué dans les actes à désigner la terre de l'appelant tantôt comme la partie nord-ouest du lot 107, c'est ainsi que la décrit la vente du 15 mars 1921, tantôt comme la moitié côté nord du lot 107. Pareillement la partie sud-est de la propriété

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Mignault J.

originaire de Richard Cliche est appelée la moitié sud-est ou bien la moitié sud du lot 107, et cela sans égard à l'amendement du cadastre. Il est évident que les notaires n'ont tenu aucun compte de la subdivision du lot 107, et c'est leur négligence à cet égard qui a donné lieu à ce procès.

La première vente de la terre en question, celle de Richard Cliche à Jean Roseberry, étant antérieure au cadastre, Richard Cliche, après l'entrée en vigueur de ce cadastre, s'est conformé aux articles 2168 et 2172 du code civil en donnant au régistrateur un avis, enregistré le 22 février 1890, portant que cette terre était alors connue comme étant la moitié nord-ouest du lot 107. A cette date-là, cette désignation était exacte, mais elle ne l'était plus après l'entrée en vigueur de l'amendement au cadastre, le 11 novembre 1890.

Il faut suivre maintenant cette terre depuis l'achat qn'en a fait Jean Roseberry, le 30 octobre 1885. Nous nous guiderons pour cela sur les constatations du certificat de recherches, ou état hypothécaire, que les parties acceptent comme preuve du contenu des actes y mentionnés.

Jean Roseberry est décédé le 8 novembre 1893, instituant par son testament son épouse, Archange Vachon, sa légataire universelle. Le 15 août 1894, Archange Vachon a donné cette terre, désignée comme "la moitié côté nord dudit lot 107", de même qu'un autre immeuble non décrit, à son fils Hilaire Roseberry. Cette donation comportait les charges suivantes: 1° de payer les rentes constituées (probablement les rentes seigneuriales); 2° de livrer à sa sœur, Eugénie Roseberry, certains meubles et de lui payer $300; 3° d'acquitter envers la donatrice une rente viagère et alimentaire composée de diverses obligations mentionnées à l'acte, et une rente annuelle de $150, s'il y a lieu (l'état hypothécaire ne fait pas voir si cette rente annuelle de $150 remplaçait la rente viagère et alimentaire). Le donataire s'est de plus obligé à payer toutes les dettes tant hypothécaires que chirographaires de la donatrice, et aussi à acquitter

toutes les charges mentionnées en faveur de Jean Roseberry, père du donataire, dans l'acte de donation qu'il a consenti à feu Jean Roseberry, devant Legendre N.P., le 25 octobre 1869. Le tout sous hypothèque des dits immeubles.

Le 31 mai 1902, Hilaire Roseberry vendit à l'intimé la terre en question en la décrivant comme " la partie nord-ouest dudit lot 107 ", à la charge de la rente constituée seigneuriale et

pour le prix de $3,050, payable comme suit: $50 dans le cours de l'été; $500 au 1er novembre, prochain, * * * et la balance payable à termes. Le tout sous l'hypothèque dudit immeuble.

On a enregistré de plus: un testament par Clara Poulin, l'épouse de l'intimé, instituant ce dernier son légataire universel; une déclaration d'hérédité par l'intimé exposant que Clara Poulin, son épouse, est décédée le 12 juillet 1919, et que parmi les biens transmis à l'intimé par ce testament, " se trouve ledit lot 107 et autre immeuble "; un certificat du percepteur du revenu provincial du district de Beauce constatant qu'il n'y a pas de droits exigibles, *re* Succ. Clara Poulin, " sur moitié indivise dudit lot 107 " (probablement Clara Poulin n'avait que son droit comme commune en biens); la vente susmentionnée par l'intimé à l'appelant; enfin un avis par l'intimé que dans la déclaration d'hérédité ci-dessus

il y a eu erreur, que parmi les biens transmis se trouvait la motié indivise du dit lot 107, au lieu de tout le lot 107.

Probablement, par moitié *indivise,* on voulait dire la moitié appartenant à Clara Poulin comme commune en biens; car, à l'époque du décès de Clara Poulin, l'intimé était propriétaire de tout le lot originaire 107, mais, encore une fois, le notaire instrumentant n'a tenu aucun compte de l'amendement au cadastre.

De toutes les hypothèques mentionnées au certificat de recherches, une seule, celle consentie par l'appelant pour garantir le paiement de son prix de vente, paraît avoir été radiée. Et ces hypothèques, à l'exception de celle créée par la vente de Richard Cliche à Jean Roseberry, sont toutes subséquentes à l'entrée en vigueur de l'amendement au cadastre. Pour le cas au moins des charges mentionnées à son titre d'acquisition, l'intimé sait si ces charges ont été acquittées, et, si elles l'ont été, il est en mesure, plus que personne, à en faire faire la radiation.

L'appelant avait déjà acquitté son prix de vente lorsqu'il découvrit l'erreur de désignation de l'immeuble qu'il avait acheté. Il mit alors l'intimé en demeure, par une lettre de son procureur en date du 4 décembre 1926, de lui donner un bon titre de propriété, de régulariser ses titres, et d'en

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acquérir (*sic*), le tout à ses frais et dépens. L'intimé ne s'étant pas conformé à cette mise en demeure, l'appelant institua une action contre lui, le 16 décembre 1926, concluant à la résiliation de la vente et réclamant le remboursement du prix de vente, $5,000, et de plus $1,000 de dommages-intérêts. Dans sa déclaration, l'appelant se dit prêt, cependant, mais sans préjudice à ses droits, à suspendre son action pendant un mois, afin que l'intimé ait le temps nécessaire pour régulariser ses titres, de donner un bon titre à l'appelant, et de libérer l'immeuble des hypothèques et privilèges, et alors l'appelant se déclare prêt à maintenir la vente, à condition que l'intimé paie tous les frais.

Après l'institution de cette action, l'appelant et l'intimé se rendirent devant le notaire André Taschereau, de St-Joseph de Beauce, et par un acte en date du 21 décembre 1926, produit au dossier, rectifièrent l'acte de vente du 15 mars 1921, en déclarant que la description du terrain vendu par l'intimé à l'appelant était erronée,

et que ledit lot vendu était et est encore connu au cadastre de Saint-Frédéric comme étant le lot cent sept A (107A), et les parties font ladite rectification pour valoir ce que de droit.

Cet acte de rectification fut enregistré sur le lot 107A, et les parties admettent que c'est la seule entrée au bureau d'enregistrement au sujet de ce lot.

L'intimé, cependant, ne voulant pas faire davantage, l'appelant continua son action que l'intimé contesta au fond. Le jugement de la cour supérieure (Letellier, J.) a maintenu les conclusions de l'appelant quant à la résiliation de l'acte de vente et au remboursement du prix, $5,000, mais il a accordé à l'intimé l'option de rectifier tous les titres et de libérer la propriété de toutes les hypothèques et charges, pourvu qu'il le fît dans le délai de deux mois à compter de ce jugement.

La cour du Banc du Roi a infirmé ce jugement, et l'appelant nous demande de le rétablir.

Une considération me paraît dominer ce litige, c'est que la vente dont il s'agit comporte de la part du vendeur la garantie de franc et quitte. Cette modification de la garantie légale—et les parties peuvent ajouter aux obligations que cette garantie impose au vendeur (art. 1507 C.C.)—nous vient de l'ancien droit, où l'on enseignait que même lorsque le vendeur fait la déclaration de franc et

quitte de bonne foi (s'il était de mauvaise foi, c'était un stellionat), il n'en est pas moins tenu civilement de faire décharger les biens des hypothèques, ou de souffrir la résiliation du contrat avec dommages et intérêts (Guyot, Répertoire, vol. 7, p. 548, col. 2. Voyez aussi l'opinion de Casault, J., dans *Beaudette* v. *Cormier* (1), et la décision du juge Davidson dans *Millar* v. *Gohier* (2). Voyez encore Laurent, t. 24, n° 325; Huc, t. 10, n° 165 *in fine*, p. 228).

Il est d'ailleurs superflu d'insister, car on lit dans le jugement de la Cour du Banc du Roi le " considérant " qui suit:

Considérant que, vu la garantie de franc et quitte qui se trouve dans le titre d'acquisition du demandeur, ce dernier a droit à une propriété qu'aucune charge ou hypothèque n'affecte dans les livres du bureau d'enregistrement.

Et le juge Tellier dit:—

A cause de la garantie de franc et quitte qui se trouve dans son titre d'acquisition, le demandeur a droit à une page blanche, ou libre de tout embarras, au bureau d'enregistrement.

Le même savant juge a également exposé la même doctrine dans la cause de *Langlois* v. *Chaput* (3).

L'appelant a-t-il cette page blanche? je ne le crois pas.

Et d'abord le jugement de la Cour du Banc du Roi, parlant de la vente du 30 octobre 1885, par Richard Cliche à Jean Roseberry, dont l'enregistrement a été renouvelé après le cadastre, reconnaît qu'il y a là une créance hypothécaire pour balance du prix de vente de $2,100, rien ne démontrant si cette créance a été payée, ou est encore due, et que l'hypothèque résultant de l'enregistrement de l'acte de vente ne paraît pas avoir été radiée.

Il y a aussi les charges stipulées à la donation du 15 août 1894, par Archange Vachon à Hilaire Roseberry, l'auteur de l'intimé. Il est vrai que la désignation de l'immeuble comme étant " la moitié côté nord dudit lot 107 " est défectueuse, car alors le cadastre amendé était en vigueur, mais quelle serait la position de l'appelant si on demandait à faire rectifier cette désignation, en supposant que les charges de cette donation n'aient pas été acquittées?

On peut en dire autant de l'hypothèque créée par la vente de Hilaire Roseberry à l'intimé. Rien ne démontre au bureau d'enregistrement que le prix d'acquisition ait été payé.

(1) [1890] 16 Q.L.R. 69, at p. 71. (2) [1901] 7 R. de J. 396.
(3) [1921] Q.R. 32 K.B. 178, at p. 196.

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La Cour du Banc du Roi, qui paraît avoir reconnu que l'appelant n'a pas la page blanche à laquelle il a droit, a néanmoins écarté son action pour deux raisons que nous croyons mal fondées.

La première raison, c'est que la comparution de l'appelant à l'acte de rectification par lequel son titre d'acquisition a été corrigé, et son acceptation de cet acte, sans aucune restriction ni réserve, comportent de sa part un abandon ou désistement de sa demande en résolution, vu qu'il y a incompatibilité absolue entre cette demande et ledit acte de rectification.

Il me paraît impossible de soutenir que l'acceptation de cet acte de rectification comporte abandon par l'appelant du droit d'obtenir la radiation des entrées qui paraissent au bureau d'enregistrement. Nul n'est censé renoncer à un droit, et il semble élémentaire d'ajouter que, pour valoir, une renonciation doit être non équivoque. Du reste, il n'y a certainement pas incompatibilité entre la demande et un acte de rectification qui n'a satisfait qu'à un seul des chefs de cette demande. Autant vaudrait dire que l'intimé, en signant l'acte de rectification, aurait renoncé au droit de contester les autres conclusions de l'action qui était alors pendante. Cette raison paraît donc dénuée de fondement.

L'autre raison est une fin de non-recevoir, dit l'appelant, que la Cour du Banc du Roi a d'office opposée à sa demande, sans que l'intimé l'eût en aucune façon invoquée. Il appert à l'état hypothécaire que, subséquemment à son acquisition, l'appelant a hypothéqué l'immeuble pour garantir un prêt de $1,400. Or, dit la Cour du Banc du Roi, l'appelant n'est pas en position de rendre cet immeuble à l'intimé dans le même état qu'il l'a reçu de ce dernier (art. 1065 C.C.).

Cependant, l'appelant, dans son factum devant nous, dit que si l'intimé eût invoqué ce moyen, il aurait pu faire voir que ce prêt avait été remboursé A l'audition, il avait la quittance du prêt et il l'a exhibée en cour. Il n'a pas été nécessaire, cependant, de lui accorder la permission de produire cette quittance au dossier, car l'avocat de l'intimé, ni dans son factum, ni dans sa plaidoirie orale, n'a invoqué le moyen sur lequel la Cour du Banc du Roi s'est basée. Il a pris connaissance de la quittance à l'audition, et il n'a jamais prétendu que le prêt en question n'avait pas été

remboursé. Il faut donc ne tenir aucun compte de la deuxième raison de la Cour du Banc du Roi.

Ne pouvant faire valoir ni l'une ni l'autre de ces raisons, l'avocat de l'intimé, à l'audition, a prétendu que toutes les charges qui paraissent à l'état hypothécaire sont maintenant non avenues parce que leur enregistrement n'a pas été renouvelé au désir de l'art. 2172 C.C.

Il faut remarquer que toutes les charges non radiées qui apparaissent à l'état hypothécaire ou certificat de recherches ne sont pas dans la même situation.

Les charges créées par la donation d'Archange Vachon à Hilaire Roseberry ainsi que par la vente d'Hilaire Roseberry à l'intimé sont subséquentes au cadastre et à son amendement. Pour elles, la question du renouvellement de l'enregistrement ne peut se soulever, mais l'immeuble hypothéqué est par erreur déclaré être dans un cas "la moitié nord", et dans l'autre cas "la moitié nord-ouest" du lot 107, alors que c'était le lot 107A qu'il aurait fallu dire. Cette erreur (on peut même dire qu'il y a eu, dans toutes les transactions qui paraissent à l'état hypothécaire, erreur commune) peut-elle se corriger maintenant? Je ne crois pas que nous devrions nous prononcer sur ce point, car notre jugement pourrait affecter les droits de tiers qui ne sont pas devant nous. Et s'il y a nullité de l'hypothèque par suite de cette erreur, n'est-ce pas à l'intimé à débattre cette question avec les créanciers de ces charges, car il a garanti que l'immeuble était franc et quitte?

L'enregistrement des charges créées par la vente de Richard Cliche à Jean Roseberry (antérieure au cadastre) a été renouvelé une fois après l'entrée en vigueur du cadastre, mais il n'y a pas eu un autre renouvellement après l'amendement du cadastre. Le défaut de ce dernier renouvellement annule-t-il l'hypothèque par application des articles 2172, 2173, 2176 du code civil que l'intimé invoque? C'est encore une question à débattre entre l'intimé garant et les créanciers; la résoudre dans ce procès serait, si l'intimé a raison, affecter les droits de tiers qui ne sont pas en cause.

Même sous l'empire de l'article 1535 du code civil, on décide que ce n'est pas à l'acquéreur à discuter si une charge qui apparaît au bureau d'enregistrement existe réel-

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lement, mais le seul fait de l'inscription hypothécaire suffit pour lui ouvrir le recours de cet article.

Ainsi, dans la cause de *Parker* v. *Felton* (1), cour d'appel, le juge-en-chef Dorion disait:—

This court has already decided in the case of *Jobin* v. *Shuter* (2), that the buyer was not obliged to establish a clear right of action against the property purchased, nor to assume the risk of a lawsuit. It was sufficient if there appeared a reasonable cause of *trouble*. Now it has been repeatedly held in France that the existence of *inscriptions hypothécaires* was a sufficient cause of *trouble* to entitle the purchaser to retain the price of sale * * * and this jurisprudence has always been followed here.

Voy. aussi *Malbœuf* v. *Leduc* (3), cour de revision.

S'il en est ainsi sous l'article 1535 C.C., à plus forte raison doit-il en être de même lorsque la vente est faite avec la clause de franc et quitte (voy. les autorités citées plus haut), car l'article 1535 C.C. n'envisage que le cas de garantie ordinaire.

L'intimé dit encore que l'appelant a la jouissance paisible de cette terre et que personne ne le trouble. Ce n'est pas une raison pour ne pas donner effet à la clause de franc et quitte. Si l'appelant a la jouissance paisible de cette terre, peut-on dire qu'il en a un titre indiscutable qui lui permette d'en disposer, ou d'emprunter en l'hypothéquant?

Un dernier argument de l'intimé, c'est que l'appelant ayant payé son prix n'a aucun recours contre lui tant qu'il ne sera pas évincé. Cet argument serait bien fondé si nous nous trouvions dans l'hypothèse prévue par l'article 1535 C.C. Mais il est certain que dans le cas de la garantie de franc et quitte, l'acheteur peut demander l'annulation de la vente si l'immeuble n'est pas franc et quitte, et n'est pas obligé d'exercer le recours de l'article 1535 C.C. Je renvoie ici aux autorités citées plus haut.

Il me paraît indiscutable que l'intimé doit faire enregistrer son titre d'acquisition sur le lot 107A pour permettre à l'appelant d'enregistrer le sien (art. 2098 C.C.).

Ma conclusion est de maintenir l'appel avec les dépens de toutes les cours contre l'intimé. L'appelant a droit à un jugement résiliant la vente du 15 mars 1921 et condamnant l'intimé à lui rembourser le prix de vente, $5,000, avec intérêt de la date de ce jugement. Je n'accorderais pas l'intérêt à compter de l'institution de l'action, car, pendant le procès, l'appelant a eu la jouissance de la terre. Sur

(1) [1877] 21 L.C.J. 253, at p. 255.
(2) [1876] 21 L.C.J. 67.
(3) [1900] Q.R. 19 S.C. 67.

paiement de cette somme, l'appelant devra rétrocéder cette terre à l'intimé, aux frais de ce dernier, libre de toute charge qui procèderait de son chef, et l'acte de rectification du 21 décembre 1926 et son enregistrement seront alors non avenus.

Cependant la cour supérieure ayant donné à l'intimé l'option de faire rectifier tous les titres et de faire disparaître toutes les hypothèques et charges sur l'immeuble, et d'éviter ainsi la résiliation de la vente et l'obligation de rembourser le prix, je suis d'opinion, à titre d'indulgence, d'accorder cette option à l'intimé aux conditions suivantes:

Dans un délai de 15 jours de ce jugement l'intimé devra, par une déclaration déposée au greffe de cette cour, et dont copie sera signifiée au procureur de l'appelant, dire s'il entend accepter cette option.

Dans les 15 jours de l'acceptation de l'option, l'intimé devra payer au procureur de l'appelant ses frais taxables dans toutes les cours.

Si l'intimé n'accepte pas cette option ou si, l'ayant acceptée, il ne paie pas les frais dans le délai susdit, il y aura jugement résiliant la vente et condamnant l'intimé à rembourser le prix, $5,000, avec intérêt tel que susdit, et les frais de toutes les cours.

Au cas d'acceptation de l'option et du paiement des frais, cette cause restera ajournée au premier jour de mai prochain, et l'intimé procèdera avec toute diligence possible à faire rectifier tous les titres depuis, et y compris, la vente de Richard Cliche à Jean Roseberry jusqu'à la vente par Hilaire Roseberry à l'intimé inclusivement, en faisant corriger la désignation erronée qui s'y trouve, et, après correction, il fera enregistrer tous ces titres sur le numéro 107A. De plus, il fera radier au bureau d'enregistrement toutes les charges et hypothèques qui apparaissent au certificat de recherches comme affectant la terre qu'il a vendue à l'appelant. Au premier jour de mai, ou à toute date ultérieure que la cour, pour cause suffisante, pourra fixer à la demande de l'intimé, ce dernier devra produire au greffe de cette cour un certificat de recherches constatant l'accomplissement de ces conditions.

Appeal allowed with costs.

Solicitors for the appellant: *Morin & Vézina.*
Solicitors for the respondent: *Bouffard & Bouffard.*

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*Feb. 29.
*Mar. 20.

HARRY RABINOVITCH (DEFENDANT).....APPELLANT;

AND

MEYER CHECHIK (PLAINTIFF).....RESPONDENT.

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

Exemplification of judgment obtained in another province—Defence raised in that province—Cross-demand in this province based on similar grounds—Inscription in law—Arts. 211, 212, 217 C.C.P.

Where, upon action brought in the province of Quebec for exemplification of a judgment obtained in another province, the grounds set up in a cross-demand are in substance those of a defence raised, or which could have been raised, by the defendant in the original action, such cross-demand will be dismissed on inscription in law.

The Supreme Court of Canada will not interfere with the decision of the provincial court to the effect that, in order to adjudicate upon the inscription in law, the Court may take into consideration all the documents filed in support of the statement of claim.

Comments upon the case of *Lingle* v. *Knox* ((1925) S.C.R. 659) where art. 217 C.C.P. had to be interpreted, while this case requires the interpretation of arts. 211 and 212 C.C.P.—The judgment appealed from is not in contradiction with the above decision, but is rather in conformity with it.

Judgment of the Court of King's Bench (Q.R. 45 K.B. 129) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) reversing the judgment of the Superior Court, Bruneau J. and maintaining an inscription in law filed by the respondent.

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

P. St-Germain K.C. and *M. M. Sperber K.C.* for the appellant.

A. Chase Casgrain K.C. and *J. J. Spector* for the respondent.

The judgment of the court was delivered by

RINFRET, J.—L'intimé Chechik a intenté contre l'appelant Rabinovitch, à Montréal, dans la province de Québec, une poursuite au montant de $329,727.79 basée sur un jugement rendu dans la province de Nouvelle-Ecosse.

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

(1) (1928) Q.R. 45 K.B. 129.

La déclaration allègue, mais ne reproduit pas, le jugement de la Nouvelle-Ecosse. Elle se contente de référer à l'exemplification de ce jugement qui fut mise au greffe du tribunal, comme exhibit, en même temps que furent produits le bref et l'exploit d'assignation (Arts. 151-155 C.P.C.). Elle allègue, en outre, que devant la cour de la Nouvelle-Ecosse l'appelant a comparu, a lié contestation et que le jugement y fut rendu après enquête et audition de part et d'autre. Cette dernière affirmation apparaît au jugement lui-même; et, d'ailleurs, elle n'est pas contestée.

Devant la Cour Supérieure de la province de Québec, Rabinovitch comparut et fit motion pour que Chechik reçût l'ordre

to produce the original or an authentic copy of the record in the said case no. 5908 of the records of the Supreme Court for the province of Nova Scotia in the city of Halifax in the said province, wherein the present plaintiff is plaintiff and the present defendant is defendant.

Cette motion fut accordée et Chechik s'y conforma en déposant au greffe tous les documents du dossier de la Nouvelle-Ecosse.

Rabinovitch produisit alors une défense et une demande reconventionnelle. Chechik plaida en droit, par voie d'inscription, à la défense et à la demande reconventionnelle.

Le juge de première instance a laissé en suspens l'inscription en droit à l'encontre de la défense, mais il a rejeté l'inscription en droit à l'encontre de la demande reconventionnelle, en déclarant qu'il s'appuyait sur les articles 211 et 212 du code de procédure civile et sur l'arrêt *re Knox* v. *Lingle* rendu par la Cour du Banc du Roi (1) et confirmé par la Cour Suprême du Canada (2).

La Cour du Banc du Roi a infirmé ce jugement en donnant pour motifs que l'arrêt *re Lingle* v. *Knox* (2) n'avait pas d'application en l'espèce, que la demande reconventionnelle n'était qu'une répétition de la contestation qui avait été produite devant la cour de la Nouvelle-Ecosse et que l'inscription en droit qui en demandait le rejet était donc bien fondée et devait être maintenue.

Rabinovitch se pourvoit maintenant en appel devant cette cour en niant l'identité de la contestation dans la cause de la Nouvelle-Ecosse et dans celle de Québec et en

(1) (1924) Q.R. 38 K.B. 325. (2) [1925] S.C.R. 659.

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prétendant, à tout événement, que les raisons invoquées par Chechik ne pouvaient faire l'objet d'une inscription en droit parce que les faits sur lesquels elles s'appuyaient n'apparaissaient pas dans la déclaration elle-même et que la Cour du Banc du Roi les a trouvés dans les documents qui ont été produits au soutien de cette déclaration, ce qu'elle n'avait pas le droit de faire.

Nous n'entendons nous occuper de cette cause que pour voir si un principe de justice a été violé par le jugement qui nous est soumis et si l'arrêt concordant rendu par la Cour du Banc du Roi et par cette cour dans la cause de *Lingle* v. *Knox* (2) contredit le jugement dont il y a maintenant appel; car, pour le reste, il s'agit d'une question de procédure dans laquelle nous considérons que la décision du plus haut tribunal de la province de Québec doit être respectée.

Cette province accorde la finalité aux jugements rendus dans les autres provinces du Canada lorsqu'il y a eu " assignation personnelle ", ou si le défendeur " a comparu lors de l'action originaire " (arts. 211 et 212 C.P.C.). Voici comment se lisent ces articles:

211. La défense qui aurait pu être faite à l'encontre de l'action originaire, peut être opposée à la poursuite basée sur un jugement rendu dans une autre province du Canada, s'il n'y a pas eu d'assignation personnelle dans cette province ou s'il n'y a pas eu de comparution du défendeur.

212. Semblable défense ne peut être faite, si le défendeur a été assigné personellement dans cette province, ou s'il a comparu lors de l'action originaire, sauf dans les cas où il s'agit de décider d'un droit affectant un immeuble situé dans cette province, ou de la juridiction d'une cour étrangère concernant ce droit.

Il ne s'agit pas ici

de décider d'un droit affectant un immeuble situé dans cette province ou de la juridiction d'une cour étrangère concernant ce droit.

Il reste donc seulement à s'enquérir si la demande reconventionnelle contre laquelle Chechik a inscrit en droit est une

défense qui aurait pu être faite à l'encontre de l'action originaire.

Si cette condition existe, il y avait lieu à inscription en droit, d'après les termes mêmes de l'article 212 C.P.C. " Semblable défense ne peut être faite " ici parceque Rabinovitch " a comparu lors de l'action originaire ". Il s'agit bien alors purement et simplement d'une question de droit: la défense, dans ce cas, ne peut plus être faite; Rabinovitch n'a pas le droit de produire telle défense.

A la vue de la déclaration, des documents produits, et surtout des jugements rendus par la cour de la Nouvelle-Ecosse, il est absolument évident que la contestation que Rabinovitch prétend engager au moyen de sa demande reconventionnelle est exactement la même que celle qui a été débattue en Nouvelle-Ecosse.

L'instance originaire était une action *pro socio* où Chechik demandait:

(*a*) That the partnerships existing between Plaintiff and Defendant be dissolved and decreed to be at an end.

(*b*) The appointment of a receiver of the real and personal property and assets of the partnership.

(*c*) An accounting of the partnership dealings between the Plaintiff and Defendant, and a winding-up of the affairs of the partnership.

Après enquête et audition des parties, la Cour de la Nouvelle-Ecosse a rendu un jugement préliminaire

7. That an account be taken by said Charles F. Tremaine, special referee, of all dealings and transactions of defendant with or concerning or relating to the partnerships between the plaintiff and defendant from 1st of August, A.D. 1919, down to the commencement of this action, and of dealings and transactions between the plaintiff and defendant during the same period; and that what, upon the taking of such account, shall be due from either of the parties to the other of them, shall be certified by said special referee.

8. That the said referee shall have the same powers as the judge or a court in the conduct of proceedings before him, including, without restriction to the generality of the foregoing, the power to subpoena witnesses for attendance before him, with or without documents, etc.; to issue commissions, etc., for the examination of witnesses abroad; to rule on all questions of evidence; to proceed to any place or places in or out of the province of Nova Scotia to hear evidence, and in all things in connection with this action and the issues and accounts referred to him for inquiry and report, to have the same powers as could or might be exercised by the court or a judge.

Le "special referee", après avoir accompli ce qui lui était ordonné par ce jugement, fit un rapport à la suite de quoi le jugement final fut rendu déclarant

that the partnerships at any time existing between the plaintiff and defendant are, and each of them is, dissolved;

et, comme conséquence du rapport du "referee", Rabinovitch fut condamné à payer à Chechik $309,229.99 représentant le solde qu'il lui devait à la suite du débat de compte.

Ce jugement et ce rapport portaient sur toutes les transactions des sociétés qui ont existé entre Rabinovitch et Chechik depuis le 1er août 1919 jusqu'au 28 juin 1924. Ce sont exactement les mêmes transactions que Rabino-

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vitch entend remettre en question et au sujet desquelles il prétend rouvrir les débats de compte au moyen de la demande reconventionnelle qu'il produit maintenant. Il est donc clair que la contestation qu'il veut soulever est absolument la même que celle qui a été tranchée par la cour de la Nouvelle-Ecosse.

Il n'est même pas nécessaire d'aller aussi loin; et il suffirait de se demander si la contestation offerte par cette demande reconventionnelle est celle " qui aurait pu être faite à l'encontre de l'action originaire "; car c'est là tout ce que les articles 211 et 212 du code de procédure exigent.

Nous constatons que le litige en Nouvelle-Ecosse était une action *pro socio* où les sociétés existant entre les parties ont été déclarées dissoutes et des débats de comptes ont été ordonnés pour liquider et fixer l'avoir de chacune des parties. Il s'ensuit que c'est lors de ces débats de comptes que Rabinovitch aurait dû faire valoir les moyens qu'il invoque maintenant dans sa demande reconventionnelle. Il n'est pas nécessaire de constater s'il l'a fait, mais simplement de savoir s'il aurait pu le faire. La Cour du Banc du Roi a décidé dans l'affirmative et nous sommes en tous points de son avis.

La question est différente de celle qui s'est posée dans la cause de *Lingle* v. *Knox* (1).

Le présent litige exige une interprétation des articles 211 et 212 du code de procédure. *Lingle* v. *Knox* (1) comportait plutôt une interprétation de l'article 217 C.P.C. Il s'agissait là d'une action basée sur un jugement rendu dans la province de la Colombie-Britannique. Knox Brothers, sans produire de défense, offraient à l'encontre de la demande principale une demande reconventionnelle réclamant compensation judiciaire pour une somme supérieure à celle de la demande principale.

Lingle, feignant d'ignorer la demande reconventionnelle, avait inscrit *ex parte* pour jugement sur la demande principale. La Cour Supérieure condamna Knox Brothers par défaut de plaider à payer à Lingle la somme réclamée, sans tenir aucun compte de la demande reconventionnelle " dont elle ne paraît pas avoir soupçonné l'existence ". On peut voir par les notes des juges de la Cour du Banc du Roi que

(1) [1925] S.C.R. 659.

la principale question qui s'est débattue a été de savoir si la Cour Supérieure avait le droit de rendre jugement par défaut de plaider sans prendre en considération la demande reconventionnelle. Par là, la cour fut amenée à décider la portée de l'article 217 du code de procédure, qui se lit comme suit:

217. Le défendeur peut exercer par demande reconventionnelle toute réclamation qui résulte en sa faveur de la même source que l'action principale, et qu'il ne peut faire valoir par défense.

Dans le cas où la demande principale tend à une condamnation en deniers, le défendeur peut aussi former une demande reconventionnelle pour une réclamation de deniers qu'il peut avoir résultant d'autres causes; mais cette demande reconventionnelle est distincte de l'action principale et ne peut la retarder.

Lorsque le tribunal adjuge sur les deux demandes en même temps, il peut déclarer qu'il y a compensation.

La demande reconventionnelle produite par Knox Brothers, d'après le rapport de l'arrêt, était une réclamation qui résultait en leur faveur " de la même source que l'action principale ". Il fallait donc décider si une réclamation de ce genre incorporée dans une demande reconventionnelle retardait l'action principale. La Cour du Banc du Roi fut d'avis que seule, en vertu de l'article 217 C.P.C., la " demande reconventionnelle pour une réclamation de deniers * * * résultant d'autres causes " est distincte de l'action principale et ne peut la retarder. Elle décida que cette prescription, qui se trouve seulement dans le deuxième paragraphe de l'article, ne s'applique pas à la demande reconventionnelle prévue par le premier paragraphe, lequel a trait à une réclamation résultant de " la même source que l'action principale ". (*Lepitre* v. *The King* (1), *International Land & Lumber Company* v. *Martel* (2). Il s'ensuivait que, d'après le sens de l'article 217 C.P.C., une demande reconventionnelle contenant une réclamation qui résulte de la même source que l'action principale retarde cette action, et que la Cour Supérieure n'aurait pas dû rendre jugement sur l'action principale de Lingle sans tenir aucun compte de la demande reconventionnelle de Knox Brothers.

C'est ce qui ressort absolument du jugement de la Cour du Banc du Roi, qui n'est pas reproduit dans le rapport de cette cause (3) et qui se lit en partie comme suit:

(1) (1900) Q.R. 9 Q.B. 453. (2) (1923) Q.R. 36 K.B. 378.
(3) [1925] S.C.R. 659; Q.R. 38 K.B. 325.

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Considérant que l'appelante par sa demande reconventionnelle, réclamant des dommages des intimés par suite de l'inexécution par les intimés de leurs obligations de vendeurs, exerce aux termes de l'article 217 C.P. "une réclamation de la même source que l'action principale" laquelle l'appelante ne pouvait faire valoir par défense, suivant les règles de notre droit civil, qui n'admet la compensation légale que dans les cas où la réclamation opposée en compensation est claire et liquide;

Considérant que les intimés au lieu de lier contestation avec l'appelante sur le mérite de cette demande reconventionnelle l'ont ignorée, en inscrivant purement et simplement la cause pour jugement *ex parte* sur la demande principale et que le tribunal pareillement en ne rendant jugement que sur l'action principale a ignoré la demande reconventionelle dont il ne paraît pas avoir soupçonné l'existence, d'où il est résulté qu'il n'a statué que sur une partie du litige, privant ainsi l'appelante de son droit d'être entendue sur sa demande reconventionnelle en même temps que les intimés seraient entendus sur leur action principale, afin de faire prononcer la compensation judiciaire par elle réclamée au cas où les allégations de la demande reconventionnelle seraient prouvées.

C'est ce jugement qui a été confirmé par la Cour Suprême, qui fut d'avis que le texte de l'article 217 C.P.C. seems clearly to be open to the interpretation adopted by the Court of King's Bench; and, on the whole, there appears to be no solid ground for differing from this view.

La discussion sur la nature de la demande reconventionnelle produite par Knox Brothers, dans les notes des juges, n'était pas tant pour décider si une demande reconventionnelle peut être considérée comme rentrant dans la catégorie des défenses "qui auraient pu être faites à l'encontre de l'action originaire", au sens des articles 211 et 212 du code de procédure, que pour savoir s'il s'agissait d'une demande reconventionnelle "résultant de la même source que l'action principale" et qui retardait cette action, ou une demande reconventionnelle "résultant d'autres causes" et qui ne pouvait la retarder.

L'effet de l'arrêt *re Lingle* v. *Knox* (1) a été que la demande reconventionnelle de Knox Brothers "résultant de la même source" et se trouvant au dossier, la Cour Supérieure avait commis une erreur en la traitant purement et simplement comme inexistante. Elle n'en pouvait être séparée et le tribunal devait en disposer en même temps que de l'action principale. (Voir notes de M. le Juge Tellier et de M. le Juge Guérin, pp. 328 et 330). Le dossier devait donc être retourné à la Cour Supérieure pour que l'on y dispose de la demande reconventionnelle en même temps que de l'action principale. Mais cela ne

(1) [1925] S.C.R. 659.

voulait pas dire que cette demande reconventionnelle constituait réellement une contestation qui n'aurait pu être faite à l'encontre de l'action originaire en Colombie-Britannique. La Cour Supérieure, à qui le dossier fut retourné, conservait, suivant nous, le droit de la rejeter de ce chef. C'est bien ce qui est indiqué par ce passage du jugement de notre collègue, Monsieur le Juge Duff, parlant au nom de la cour:

A question may arise whether the claim under par. 5 of the cross-demand is not one which, in substance (as a claim in respect of diminution in value resulting from breach of the contract of sale), might, on the principle of *Mondel* v. *Steele* (1), have been set up, in whole or in part, as a defence to the British Columbia action; see *Bow McLachlan & Co.* v. *The Ship "Camosun"* (2). From this point of view, the relevancy of art. 212 C.P.C., as respects this claim, may have to be considered; but it seems more convenient that any such question should be reserved for the trial.

Dans la cause actuelle, le jugement de la Cour du Banc du Roi, pour une cause de droit, dispose de la demande reconventionnelle avant d'adjuger sur l'action principale. Cette méthode de procéder, loin de lui être contraire, est absolument conforme au principe posé *re Lingle* v. *Knox* (3).

Il reste que la Cour du Banc du Roi, pour maintenir l'inscription en droit, ne s'est pas appuyée uniquement sur les allégations de la déclaration et de la demande reconventionnelle, mais qu'elle a pris en considération les pièces produites au soutien de la déclaration. Elle paraît, en cela, avoir tranché une question de procédure qui était jusqu'ici controversée.

La jurisprudence de la Cour Suprême est d'intervenir dans les

questions of practice (only) when they involve substantial rights or the decision appealed from may cause grave injustice.

Ferrier v. *Trépannier* (4); *Lambe* v. *Armstrong* (5); *Eastern Townships Bank* v. *Swan* (6); *Higgins* v. *Stephens* (7); *McKay* v. *Academy Apartment* (8).

L'appelant n'a pu nous démontrer que le jugement dont il se plaint enfreint "the rules of natural justice" ou que, suivant l'expression connue et qu'il a employée, "he had not had his day in court".

(1) (1841) 8 M. & W. 858.
(2) [1909] A.C. 597, at pp. 610, 611.
(3) [1925] S.C.R. 659.
(4) (1894) 24 Can. S.C.R. 86.
(5) (1897) 27 Can. S.C.R. 309.
(6) (1898) 29 Can. S.C.R. 193.
(7) (1902) 32 Can. S.C.R. 132.
(8) (1922) Cameron's S.C. Pract., 3rd Ed., 88.

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Il a prétendu qu'en se servant des exhibits pour décider l'inscription en droit la Cour du Banc du Roi s'était appuyée sur des documents dont l'authenticité n'avait pas été établie. C'est lui-même qui, par sa motion, a demandé la production de ces documents avant de produire sa défense et sa demande reconventionnelle. Le jugement qui fut rendu sur cette motion ordonnait qu'on verse au dossier

> the original or an authentic copy of the record in the said case no. C 5908 of the records of the Supreme Court for the province of Nova Scotia in the city of Halifax in the said province.

Ce sont ces documents authentiques qui paraissent avoir été produits. Ils faisaient preuve *prima facie* de leur contenu sans qu'il soit nécessaire de prouver le sceau ou la signature apposée par l'officier qui en avait la garde légale (art. 1220 C.C.). S'il en contestait l'authenticité, l'appelant devait se pourvoir en vertu de l'article 209 du Code de procédure. Il ne l'a pas fait. Au contraire, il a tenu tous ces documents pour exacts, puisqu'il a considéré que l'ordre de la cour qui avait ordonné la mise au dossier de " copies authentiques " avait été obéi et qu'il a procédé à produire sa défense et sa demande reconventionnelle. Il n'a pas songé à soulever ce prétendu défaut d'authenticité avant d'être rendu devant la Cour Suprême. D'ailleurs, il n'affirme même pas que ce défaut existe; il se contente de dire que la chose serait possible. Il a eu plus que le temps nécessaire pour s'en assurer avant de venir ici et pour adopter les procédures nécessaires, s'il y avait lieu, pour faire rejeter ces pièces du dossier. Rien n'indique qu'il a émis ce doute devant la Cour du Banc du Roi où la question s'est débattue telle qu'elle a été jugée. Il nous est impossible de découvrir la moindre injustice pour l'appelant dans la façon dont la procédure a été conduite. Par conséquent, nous déclarons ne pas devoir intervenir dans le jugement de la Cour du Banc du Roi qui a décidé que, pour les fins de l'inscription en droit, elle pouvait prendre en considération les pièces produites au soutien de la déclaration; et, sur tous les autres points, nous confirmons ce jugement avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Weinfield & Sperber.*

Solicitors for the respondent: *Bercovitch, Cohen & Spector.*

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF THE COMBINES INVESTIGATION ACT, R.S.C., 1927, CHAPTER 26, AND OF SECTION 498 OF THE CRIMINAL CODE.

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*March 11, 12, 13.
*April 30.

Constitutional law—Validity of the Combines Investigation Act, R.S.C., 1927, c. 26, and of s. 498, Cr. Code—Dominion jurisdiction as to criminal law, trade and commerce, etc.—Provincial jurisdiction as to property and civil rights, matters of merely local or private nature in the province, imposition of punishment, etc.—B.N.A. Act, ss. 91, 92.

The *Combines Investigation Act*, R.S.C., 1927, c. 26 (providing for investigation of alleged combines, creating and punishing the offence of assisting in the formation or operation of a combine, providing for reduction or abolition of customs duties which facilitate disadvantage to the public from an existing combine, and providing for revocation of patents in certain cases, etc.) and s. 498 of the *Criminal Code* (creating and punishing offences for combining, etc., to limit facilities for transportation, production, etc., restrain commerce, lessen manufacture or competition, etc.) are *intra vires* the Parliament of Canada.

The *B.N.A. Act*, s. 91 (especially heads 27, 2) and s. 92 (especially heads 13, 15, 16) discussed as to their bearing and effect on the question.

Atty. Gen. for Ontario v. *Hamilton Street Ry. Co.*, [1903] A.C. 524; *Liquor Prohibition case*, [1896] A.C. 348; *Rex* v. *Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128; *Nadan* v. *The King*, [1926] A.C. 482; and other cases, referred to and considered. *Atty. Gen. for Canada* v. *Atty. Gen. for Alberta*, [1916] 1 A.C. 588; *Board of Commerce* case, [1922] 1 A.C., 191; *Atty. Gen. for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328; *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, discussed and explained, and legislation therein dealt with distinguished.

REFERENCE by the Governor General in Council to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of s. 55 of the *Supreme Court Act*, R.S.C., 1927, c. 35, of the following questions:

1. Is the *Combines Investigation Act*, R.S.C., 1927, chapter 26, *ultra vires* the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars or to what extent?

2. Is section 498 of the *Criminal Code ultra vires* the Parliament of Canada, and, if so, in what particular or particulars or to what extent?

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*PRESENT:—Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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N. W. Rowell K.C., A. R. McMaster, K.C., and *F. P. Varcoe* for the Attorney General of Canada.

E. Lafleur K.C. and *J. C. McRuer* for the Proprietary Articles Trade Association.

Aimé Geoffrion K.C. for the Attorney General of Quebec.

E. Bayly K.C. for the Attorney General of Ontario.

W. F. O'Connor K.C. for Amalgamated Builders Council and Amalgamated Clothing Industries Council.

On behalf of the Attorney General of Canada, it was contended that the legislation in question was *intra vires,* being justifiable as having been enacted in relation to criminal law, the regulation of trade and commerce, patents of invention (as to s. 30 of the *Combines Investigation Act*), and the peace, order and good government of Canada, under jurisdiction given to the Dominion by s. 91 of the *B.N.A. Act.*

On behalf of the other parties appearing, it was contended that the legislation in question was wholly *ultra vires;* that the subject matter of the legislation was assigned to the exclusive jurisdiction of the province under heads 13 (property and civil rights in the province), 14 (administration of justice in the province), and 16 (generally all matters of a merely local or private nature in the province) of s. 92 of the *B.N.A. Act,* and was not assigned to the Parliament of Canada under any of the enumerations in s. 91 of the *B.N.A. Act,* or under the initial residuary provision of s. 91.

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

DUFF J.—The scope of the 27th head of section 91 of the *British North America Act* under these words, "The Criminal Law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters," has been described in sweeping terms by the judgment of the Privy Council in *Attorney General for Ontario* v. *Hamilton Street Railway Co.* (1). The Lord Chancellor (Lord Halsbury), in delivering the judgment there, said:

(1) [1903] A.C., 524, at pp. 528 and 529.

The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sect. 91, subs. 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of Courts of criminal jurisdiction." It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of Courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.

The question for consideration in that case was the competency of the Ontario Legislature to pass an enactment respecting the observance of Sunday, and the subject of the paragraph just quoted is the exclusive jurisdiction of the Parliament of Canada.

Nevertheless, some limitation upon the general words of s. 91 (27) is necessarily implied by (1) the fact itself that co-ordinate exclusive authority in respect of a variety of subjects is vested in the provincial legislatures, and executive authority of the same order in the provincial governments, and (2) character of the enactments of s. 92. This has been recognized in a series of cases, the *Dominion License Acts Reference* (1), the *Board of Commerce* case (2); *Attorney General for Ontario* v. *Reciptoral Insurers* (3); *Attorney General for Canada* v. *Attorney General for Alberta* (4); *Toronto Electric Commissioners* v. *Snider* (5).

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(1) *Reporter's Note:* The reference is to the decision of the Judicial Committee of the Privy Council in *In re Liquor License Act, 1883, and Act Amending* (known as the McCarthy Act Reference), which was given without written reasons. See Cassels, S.C. Dig. 1875-86, at pp. 279-280, 545. See references to the decision in *Atty. Gen. for Canada* v. *Atty. Gen. for Alberta,* [1916] 1 A.C. 588, at p. 596; *In re Board of Commerce Act,* etc., (1920) 60 Can. S.C.R. 456, at pp. 497, 510, 511; *Toronto Electric Commissioners* v. *Snider,* [1925] A.C. 396, at pp. 410-411.

(2) [1922] 1 A.C. 191.

(3) [1924] A.C. 328.

(4) [1916] 1 A.C. 588.

(5) [1925] A.C. 396.

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The words of head 27 read in their widest sense would enable Parliament to take notice of conduct in any field of human activity, by prohibiting acts of a given description and declaring such acts to be criminal and punishable as such. But it is obvious that the constitutional autonomy of the provinces would disappear, if it were open to the Dominion to employ its powers under head 27 for the purpose of controlling by such means the conduct of persons charged with responsibility for the working of provincial institutions. It is quite clear also that the same result would follow, if it were competent to Parliament, by the use of those powers, to prescribe and indirectly to enforce rules of conduct, to which the provincial legislatures had not given their sanction, in spheres exclusively allotted to provincial control. This has been fully elaborated in the series of cases just mentioned.

Second, the language of head 27 must be read in light of head 15 of section 92. Provincial legislative enactments in relation to matters falling within the various heads of s. 92 may, by force of head 15, prescribe sanctions of fine and imprisonment for regulations in respect of such matters; and such regulations may be of such a character that, but for the language of head 27 of s. 91, the offences thus created would be described without hesitation as criminal offences —regulations, for example, for the preservation of public health, order and decency. *Hodge* v. *The Queen* (1). The exclusive jurisdiction of the Dominion in relation to "Criminal Law" under s. 91 is not incompatible with the possession by the provinces of this jurisdiction; although there is the highest authority for applying to proceedings for enforcing the penal clauses of such enactments the description "criminal"; and notwithstanding that it appears to have been assumed, in *Nadan* v. *The King* (2), that such proceedings come within the exclusive jurisdiction of the Dominion Parliament under head 27, s. 91, "procedure in criminal matters."

It is, of course, essential to the exercise of this jurisdiction by the provinces that the substantive provisions shall, within the sense of s. 92, have "relation to" such "local" or "private" matters, as fall within the scope of the subjects designated by the heads of that section.

(1) (1883) 9 App. Cas. 117. (2) [1926] A.C. 482.

The existence of this undoubted jurisdiction of the provinces necessarily affects the operation of the powers conferred upon the Dominion under head 27, s. 91. Evidently the Act does not contemplate the use of these powers for the purpose merely of creating sanctions for rules of law in relation to such matters in their provincial aspects. Matters, however, which in one aspect and for one purpose fall within the jurisdiction of a province over the subjects designated by one or more of the heads of s. 92, may in another aspect and for another purpose, be proper subjects of legislation under s. 91, and in particular under head 27.

This may be illustrated by reference to the subject matters of s. 92 (13), "Property and Civil Rights." You cannot create a new criminal offence without directly affecting civil rights. The characteristic rules of the Criminal Law, rules designed for the protection of the State and its institutions, for the security of property and the person and public order, rules for the suppression of practices which the Criminal Law notices as deserving chastisement by the State, and so on, all are rules restricting the liberty of action of the subjects of the State, and in that sense affecting civil rights; but such acts and neglects are not, as a rule, viewed by the Criminal Law in their juristic aspect, but in their actual effects, physical or moral, as harmful to some interest which it is the duty of the State to protect. They are concerned primarily not with rights, with their creation, the conditions of their exercise, or their extinction; but with some evil or some menace, moral or physical, which the law aims to prevent or suppress through the control of human conduct.

Fraud, for example, may be of such a character as to constitute an actionable wrong or a criminal offence. The law in relation to civil rights, while necessarily concerned with defining the elements of the wrong entailing the civil responsibility of the wrong-doer, is primarily concerned with the victim's right of reparation, while the Criminal Law deals with the fraud as such, as something deserving of punishment at the hands of the State. So in the case of contracts. An agreement involving bribery of a public official may be a criminal offence because the law marks such acts of corruption as criminal and punishes them. The law in relation to civil rights, the law of contracts, takes

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note of the elements of the transaction which give it character as bribery, but solely for the purpose of denying to the parties the legal right of enforcing it.

These considerations do not provide, of course, any precise formula for discriminating between Criminal Law and legislation in relation to property and civil rights. But the indicia suggested by them would probably be sufficient in most cases for deciding to which of these two categories a given enactment belongs. Indeed, as to the first fourteen heads of s. 92, there would probably be little difficulty in determining whether or not legislation dealing with matters falling in their provincial aspects within the subjects designated by those heads is truly legislation from the provincial point of view, or legislation dealing with such matters in some aspect within the jurisdiction of the Dominion under s. 91, head 27.

On the other hand, matters falling within head 16 come under the jurisdiction of a province because they are matters "merely local" or "merely private" within the province, in the sense of s. 92. Prohibitions may be enacted under the authority of that head under sanction of fine and imprisonment, with the object of abating or preventing a local evil in the interests of public order or decency, which, as we have seen, may be perfectly valid, and plausible arguments may be adduced in support of the view, that all such enactments are valid, provided they do not trench upon topics already dealt with by the Criminal Law of the Dominion, expressly or tacitly, and do not intervene in subject matters which by their "very nature belong to the domain of criminal jurisprudence." The exclusive jurisdiction of the Dominion in relation to Criminal Law is not, as I have said, incompatible with the creation by provincial enactment of offences which it has been held properly fall within the description "criminal." But if such matters present aspects which are appropriate subjects for criminal legislation, it does not follow that they may not be the subject of valid legislation under the powers conferred by s. 91 (27).

The matter of section 498 is not property and civil rights. It strikes at agreements, no doubt, but not at those agreements as juridical acts, as having effects in point of law, in creating rights between the parties. The legislation aims

at suppressing certain practices calculated, in the view of Parliament, to limit competition and produce the evil of high prices. Agreements of defined classes are dealt with from that point of view and from that point of view only. Nor can the matter of s. 498 be described as matter "merely local or private" within the several provinces. The combinations struck at, rarely, in their origin or in their operation, take account of provincial boundaries. There is in this respect little, if any, resemblance between s. 498 and the enactments which were the subjects of decision in the *Dominion Liquor License Acts Reference* (1), in the *Board of Commerce* case (2), or in *Snider's* case (3). In the enactments in debate in those cases, the penal provisions were merely incidental. There was an attempt, in each case, in the substantive provisions of the impeached enactment, to regulate matters which were unquestionably "merely local" or "merely private" in each of the provinces in a manner which could, it was held, not be justified, as an exercise of the powers conferred by the residuary clause or the second head of s. 91.

It was argued that the Dominion's jurisdiction only enables Parliament to legislate in relation to offences which were criminal offences at the time of confederation, or to offences which in "their very nature" belong to the domain "of the Criminal Law." It is difficult to understand upon what justification the Dominion Parliament can be denied the power under s. 91 to declare any act to be a crime which, in its opinion, is such a violation of generally accepted standards of conduct as to deserve chastisement as a crime. The views of the community as to what deserves punishment change from generation to generation. Practices calculated to imperil health and safety, or to prejudice the moral standards of the community may become, in the course of a few years, so widely prevalent as to create a general demand for the abatement and prevention of them by State action in the sphere of the Criminal Law. Other acts, once within the scope of the Criminal Law, may, in the course of time, come to be regarded as outside the proper domain of State interference. It is difficult to understand on what principle the court is to review the deci-

(1) See footnote, p. 411 *ante*. (2) [1922] 1 A.C. 191.
(3) [1925] A.C. 396.

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sions of Parliament in seeking to adapt the Criminal Law to successive phases of public opinion in such matters. I am assuming, of course, that Parliament in such decisions is not attempting to deal with matters committed to the provinces in their provincial aspects. Moreover, practices tending to limit competition, to foster monopolies in the popular sense, to enhance prices (the practices of forestalling, regrating and engrossing), were for centuries treated as crimes and were regarded by the law as crimes *mala in se;* the matter of section 498 is a kindred topic.

I do not intend, by what I have said, to imply that Dominion legislation on the subject of the criminal law is necessarily *ultra vires* because it deals with a matter which is local in one or more of the provinces.

As to the *Combines Investigation Act,* that is an Act which, as its name imports, provides for the investigation of matters touching the existence of a combine or the pending formation of a combine; and further provides that where, as the result of investigation, it appears that such a combine exists, the Governor in Council may, in appropriate cases, cause the reduction or abolition of any customs duty imposed on any article affected by it; and where it appears that there has been abuse of his privileges by the holder of any patent under the *Patent Act,* in the manner set out by the Act, the Minister of Justice may exhibit an information in the Exchequer Court of Canada praying the revocation of the patent, and authority is given to the court to give judgment accordingly. The Act also provides that anybody knowingly assisting in the formation of a combine shall be guilty of an indictable offence, and punishable on conviction at the instance of the Solicitor-General of Canada or an Attorney General of the province. Throughout the Act the word "combines" denotes:

> combines which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers or others, and which
>
> (*a*) are mergers, trusts or monopolies, so called; or
>
> (*b*) result from the purchase, lease, or other acquisition by any person of any control over or interest in the whole or part of the business of any other person; or
>
> (*c*) result from any actual or tacit contract, agreement, arrangement, or combination which has or is designed to have the effect of
>
> (i) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing, or

(ii) preventing, limiting or lessening manufacture or production, or

(iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation, or

(iv) enhancing the price, rental or cost of article, rental, storage or transportation, or

(v) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, purchase, barter, sale, storage, transportation, insurance or supply, or

(vi) otherwise restraining or injuring trade or commerce.

That part of the Act which makes it a criminal offence to assist in the formation of a combine, has in principle been already discussed.

As to the other provisions, they may be looked upon from two points of view. First, one may consider them from the point of view of the responsibility imposed upon Parliament in respect of trade and commerce, especially the responsibility in relation to trade with foreign countries and customs and excise duties. It is hardly necessary to observe that trade combinations and their effect upon competition and the results of competition have a special importance and significance in view of the settled policy of this country in the matter of protective duties. To the general belief that such duties, when imposed upon the scale on which they are maintained in this country, tend in their effects to facilitate the operation of plans for reducing competition and maintaining prices, it may be surmised that legislation such as s. 498 in the *Criminal Code* and the Statute we are now considering, are very largely due. It appears to me that legislative authority over trade and commerce with foreign countries, and particularly over such aspects of those subjects as are related to the economic conditions and tendencies arising from the law in force on those subjects, must embrace the authority to legislate for such investigations as those authorized by this Act. It is quite true, combinations in relation to transport and to insurance would not appear, *ex facie,* to be directly connected with the imposition of customs duties. But the Dominion has a special jurisdiction in relation to insurance, jurisdiction touching, that is to say, the rights of foreign countries and foreigners generally to engage in the business of insurance in Canada; and considering that the design of the reigning trade policy is to encourage domestic trade, and

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that its effectiveness for that end may depend upon the character of the facilities for, and the rates of, domestic transport, the authority to conduct such investigations ought, in a fair view of the matter, to enable Parliament to include the subject of transport within the scope of them.

The other point of view is that of the responsibility of the Dominion with regard to the Criminal Law. The authority in relation to the Criminal Law and Criminal Procedure given by s. 91 (27) would appear to confer upon the Dominion, not as an incidental power merely, but as an essential part of it, the power to provide for investigation into crime, actual and potential.

An attempt was made on the argument to bring this statute under the decision of the Privy Council in relation to the *Combines and Fair Prices Act* (1). There is no doubt that parts of the present statute are taken from the earlier Act, but the provisions of the earlier Act which gave character to that Act have disappeared.

The former statute in its substantive enactments on the subject of combines conferred upon the Board of Commerce, a Board created by Dominion legislation, composed of persons named by the Dominion Government, the authority and the duty to inquire into the existence of combines and plans for the formation of combines, and to suppress, by order of the Board, the combines themselves, and practices associated with combines, in so far as the Board might think it right and in the public interest to do so. The present Act gives no such power of regulation.

Both questions should be answered in the negative.

The judgment of Mignault, Newcombe and Lamont JJ. was delivered by

NEWCOMBE J.—Two questions have been propounded by the Governor General in Council for hearing and consideration under the usual practice. They are:—

"1. Is the Combines Investigation Act, R.S.C. 1927, Chapter 26, *ultra vires* the Parliament of Canada, either in whole or in part, and, if so, in what particular or particulars, or to what extent?

(1) [1922] 1 A.C. 191.

"2. Is Section 498 of the Criminal Code *ultra vires* the Parliament of Canada, and, if so, in what particular or particulars, or to what extent?"

Counsel were heard on behalf of the Attorney General of Canada and also for several of the provinces, and counsel were also heard on behalf of the Amalgamated Builders' Council and Amalgamated Clothing Industries' Council, and for the Proprietary Articles Trade Association; these bodies having been authorized by the Court to be heard as classes of persons interested within the meaning of subs. 4 of s. 55 of the *Supreme Court Act.*

I would answer both these questions in the negative, because I am satisfied that the legislation strictly appertains to powers which the Parliament of Canada has, by s. 91 of the *British North America Act,* 1867,

* * * to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say,—

* * * * *

2. The Regulation of Trade and Commerce.

* * * * *

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

* * * * *

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

In the consideration of these provisions it may be useful here to mention the provincial enumerations upon which the advocates of affirmative answers rely. They are to be found in s. 92, by which it is enacted that

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,—

* * * * *

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

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15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

16. Generally all matters of a merely local or private nature in the Province.

It is not, in my opinion, open to question that the powers of Parliament with relation to the criminal law extend, not only to common law and statutory offences, as derived from the Laws of England, or locally enacted, under the constitution of the various provinces and territories of the Dominion, and existing therein at the time of the Union or admission of these provinces or territories into the Union, but comprehend also the power to create new statutory offences. It is, I think, certain that there is legislative authority in the Dominion, when the need arises, to declare criminal, and to prescribe the punishments for, acts or omissions which were lawful and innocent by the common law or by Imperial legislation which, subject to the provisions of the *Colonial Laws Validity Act,* 28-29 Vic., c. 63, is continued in force by s. 129 of the *British North America Act,* 1867, in the four original provinces, or as extended and applied to the provinces and territories subsequently admitted; and this conclusion must follow from the interpretation enunciated by their Lordships of the Judicial Committee in the case of *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (1), where it was held that the Ontario *Act to Prevent the Profanation of the Lord's Day,* R.S.O., 1897, c. 246, was, as a whole, *ultra vires* of the provincial legislature. That case was heard by a very powerful court, which included the Lord Chancellor (Halsbury), Lord Macnaghten, Lord Shand, Lord Davey, Lord Robertson and Lord Lindley. The Lord Chancellor, in pronouncing the judgment, expressed himself as follows:—

> The question turns upon a very simple consideration. The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and indeed to admit, of no plainer exposition than the language itself affords. Sect. 91, subs. 27, of the *British North America Act,* 1867, reserves for the exclusive legislative authority of the Parliament of Canada "the criminal law, except the constitution of Courts of criminal jurisdiction." It is, therefore, the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which

(1) [1903] A.C. 524.

their Lordships have listened, to doubt that an infraction of the Act, which in its original form, without the amendment afterwards introduced, was in operation at the time of confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, "the constitution of Courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception (which obviously does not include what has been contended for in this case) the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.

The extent of the Dominion power is thus so clearly and unmistakably stated that one seeks for a reason for the submission of the questions in hand, and it appears to have arisen out of some of the observations of their Lordships of the Judicial Committee in more recent decisions; but, in my view, the doubt so suggested vanishes when these decisions are properly understood.

The Dominion *Insurance Act* of 1910, which was considered in *Attorney General of Canada* v. *Attorney General of Alberta* (1), embodied a very elaborate set of provisions of considerable variety, designed to regulate the business or trade of insurance, based upon a legislative prohibition, which is to be found in s. 4, the leading section, of that Act, against the acceptance of any insurance risk or policy without a general license from the Minister who was charged with the administration of the Act. The principal question was as to whether s. 4 was *ultra vires* of the Parliament, and it was held in the affirmative, upon the ground that the subject matter was within exclusive provincial powers. Section 70 was an ancillary provision, imposing penalties for contravention of the Act, and, of course, it fell with the principal enactment, which it was designed to enforce. It was not, indeed, attempted to uphold this latter provision as an independent exercise of the Dominion power with relation to criminal law. This decision led to some amendments of the Dominion *Insurance Act* involving modifications of the former provisions.

Subsequently, in 1921, a question arose as to the validity of the *Board of Commerce Act*, 1919, and the *Combines and Fair Prices Act*, 1919, whereby, as narrated in the headnote (2), the Parliament of Canada had purported to prohibit the formation and operation of such trade combinations for production and distribution in the provinces as the Board of Commerce might consider to be detrimental

(1) [1916] 1 A.C. 588. (2) [1922] 1 A.C. 191.

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to the public interest. It was, moreover, provided that the Board might restrict the accumulation of food, clothing and fuel beyond the amount reasonably required, in the case of a private person, for his household, and, in the case of a trader, for his business, and require the surplus to be offered for sale at fair prices; and that the Board could attach criminal consequences for breaches of the Act. The case is reported in [1922] 1 A.C., 191. It was argued that the legislation could be sustained, among other grounds, as criminal law, but it was held otherwise. Their Lordships referred to the *Insurance* Case of 1916 (1) as an illustration of the impotency of the Dominion power for the regulation of trade and commerce, taken by itself, to authorize interference with particular trades in which Canadians would, apart from any right of interference otherwise conferred, be free to engage in the provinces. The result was said to be the outcome of a series of well-known decisions of earlier dates. Then follow these observations:—

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

One must, of course, endeavour to extract the meaning of this paragraph, and perhaps some confusion is apt to be caused by the antithesis, and the illustration chosen for the explanation of the first limb, but I am persuaded that there can be no intention here to restrict the legislative power of Parliament in the creation of offences under s. 91 (27) so as to exclude an act or omission which is not *malum in se*. The occasion did not call for that, and the passage should be read *secundum subjectam materiam*. It is not necessarily inconsistent, and I do not think it was meant to be incompatible, with the notion, that one must have regard to the subject matter, the aspect, the purpose and inten-

(1) [1916] 1 A.C. 588.

tion, instead of the form of the legislation, in ascertaining whether, in producing the enactment, Parliament was engaged in the exercise of its exclusive and comprehensive powers with respect to the criminal law, or was attempting, in excess of its authority, under colour of the criminal law, to entrench upon property and civil rights, or private and local matters, in the provinces; and when, in the case of the *Combines and Fair Prices Act*, 1919, as in the case of the *Insurance Act*, 1910, their Lordships found that Parliament was really occupied in a project of regulating property and civil rights, and outside of its constitutional sphere, there was no footing upon which the exercise of Dominion powers, with relation to the criminal law, could effectively be introduced—no valid enactment to which criminal sanction could be applied. The principle is illustrated by a remark of Lord Dunedin in *Grand Trunk Railway Company of Canada* v. *Attorney General of Canada* (1), which may be applied *mutatis mutandis;* his Lordship said:

> Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation.

In the *Insurance* case (2), Lord Haldane had already recognized the principle as well established, but none the less to be applied only with great caution,

> that subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction.

And I am convinced that he never intended to suggest that Parliament might not competently find a public wrong lurking or tolerated under the head of civil rights in a province which it is necessary or expedient, according to its will and discretion, or, using Sir Matthew Hale's expression, "by the prudence of law-givers," to suppress, in the exercise of its authority over the criminal law.

Then came the *Reciprocal Insurers'* case (3), which contributes a very instructive addition to the interpretation of the British North America Acts. This case suggests no limitation of the legislative authority of the Dominion with regard to the criminal law, although it recognizes that a Dominion enactment, which, in language and form, and *a*

(1) [1907] A.C. 65, at p. 68. (2) [1916] 1 A.C. 588, at p. 596.
(3) [1924] A.C. 328.

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sociis, is criminal, may, having regard to its history, real subject matter, true aspect and purpose, by which it must also be judged, be found, in reality, intended to regulate property and civil rights in a province, or matters of a merely local or private nature, such as have been committed to the exclusive authority of the provinces, and so not to fall within the Dominion enumeration; and it is especially made clear that the quality of such an enactment is not concluded by its introduction into the *Criminal Code*. This decision, in its application to the present question, affirms, with respect to the Dominion insurance legislation of 1917, what was decided in the year immediately preceding, namely, that a provision like s. 70 of the Act of 1910, and which differed from it in no material respect as to the essential purpose which it was intended to serve, remained ancillary and inoperative, notwithstanding the alterations of form to which it had been subjected and its incorporation as an independent section in the *Criminal Code;* and Mr. Justice Duff, who pronounced the judgment of the Board, having reviewed the preceding decisions, observed, at page 337, that:

> It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the "true nature and character" of the enactment: *Citizens' Insurance Co.* v. *Parsons* (1); its "pith and substance": *Union Colliery Co.* v. *Bryden* (2); and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be "scrutinized in its entirety": *Great West Saddlery Co.* v. *The King* (3). Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing.

And further, at page 342:

> In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

(1) (1881) 7 App. Cas. 96. (2) [1899] A.C. 580.
(3) [1921] 2 A.C. 91, at p. 117.

His Lordship thought it proper to add, however, that what had been said

> does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces.

A case involving the like consideration was *Toronto Electric Commissioners* v. *Snider* (1), where the question arose as to the authority of the Dominion to enact the *Industrial Disputes Investigation Act,* 1907, which provided, in effect, speaking by the head-note, that upon disputes occurring between employers and employees in any of a large number of important industries in Canada, the Dominion Minister for Labour might appoint a Board of Investigation and Conciliation to make investigations, with power to summon witnesses and inspect documents and premises, and, if no settlement could be brought about, to recommend fair terms; and, pending the reference, a lockout or strike was prohibited, subject to penalties. It was held that this legislation conflicted with provincial powers as to property and civil rights in the provinces or other enumerations of s. 92; and Lord Haldane, who pronounced the judgment, referred to the judgment in the *Reciprocal Insurers'* case (2), as summing up the effect of the series of previous decisions relating to the point; and he reiterated the antithetical passage quoted above. His Lordship was of the opinion that, on authority as well as on principle, the Board was precluded from accepting the Act as justified in the exercise of Dominion power under s. 91 with relation to criminal law. He reviewed the provision of the Act in question, and concluded with the following important observations:

> It is obvious that these provisions dealt with civil rights, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalties for breach of the restrictions did not render the statute the less an interference with civil rights in its pith and substance. The Act is not one which aims at making striking generally a new crime.

It would seem manifestly to be implied from the last sentence, that different considerations would have presented themselves if the real purpose of the statute had been found to be the construction of a new offence.

(1) [1925] A.C. 396. (2) [1924] A.C. 328.

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It must not be overlooked that, by the 15th enumeration of s. 92, there is included among the classes of subjects as to which the provincial legislatures may exclusively make laws:—

> The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section.

And local enactments, deriving their force from the exercise of the powers conferred by this enumeration, have been described as provincial criminal law. In *Russell* v. *The Queen* (1), Sir Montague Smith, delivering the judgment, referred to an argument submitted by Mr. Benjamin, that, if the Act related to Criminal law, it was provincial criminal law under the 15th enumeration of s. 92; and his Lordship said that no doubt

> this argument would be well founded if the principal matter of the Act could be brought within any of these classes of subjects.

More recently, in the case of *Rex* v. *Nat Bell Liquors Limited* (2), their Lordships had to consider the effect of a conviction under a local liquor Act of Alberta. By s. 36 of the *Supreme Court Act,* as enacted by c. 32 of 1920, the appellate jurisdiction of the Court had been limited by an exception excluding

> criminal causes and in proceedings for or upon a writ of habeas corpus, certiorari or prohibition arising out of a criminal charge,

and the question was considered as to whether a prosecution under a typical temperance Act was or was not a criminal charge. Lord Sumner, who delivered the judgment, at pages 167 and 168, disposed of this issue as follows:—

> The issue is really this. Ought the word "criminal" in the section in question to be limited to the sense in which "criminal" legislation is exclusively reserved to the Dominion Legislature by the *British North America Act,* s. 91, or does it include that power of enforcing other legislation by the imposition of penalties, including imprisonment, which it has been held that s. 92 authorizes Provincial Legislatures to exercise? It may also be asked (though this question is not precisely identical) under which category does this conviction fall of the two referred to by Bowen L.J., in *Osborne* v. *Milman* (3), when he contrasts the cases "where an act is prohibited, in the sense that it is rendered criminal," and "where the statute merely affixes certain consequences, more or less unpleasant, to the doing of the act."
>
> Their Lordships are of opinion that the word "criminal" in the section and in the context in question is used in contradistinction to "civil,"

(1) (1882) 7 App. Cas. 829, at p. 840.

(2) [1922] 2 A.C. 128, at p. 167.

(3) (1887) 18 Q.B.D. 471, at p. 475.

and "connotes a proceeding which is not civil in its character." Certiorari and prohibition are matters of procedure, and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion Legislature, under s. 91, head 27.

It is not, for present purposes, necessary to ascertain precisely what is meant by the concluding sentence, but it may be observed that the criminal law, under s. 91 (27), includes expressly "the procedure in criminal matters," and that, viewing s. 92 (15) as authorizing the constitution of crimes by the provincial legislatures, there is no express provision empowering those legislatures to enact procedure for the enforcement of the punishments so imposed.

Later, in *Nadan* v. *The King* (1), the Board had to consider the effect of s. 1025 (now s. 1024 (4)) of the *Criminal Code,* by which it was provided that:

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

There was a conviction in question for an offence against the provincial *Government Liquor Control Act of Alberta,* and it was argued that the foregoing section did not apply to a penalty imposed by a provincial statute in which it was not incorporated. Their Lordships were of the view, however, that this contention was negatived in principle by the judgment of the Board in *Rex* v. *Nat Bell Liquors Ltd.* (2). They held that:

> Sect. 1025 is expressed to apply to an appeal in a criminal case from "any judgment or order of any Court in Canada," and this expression is wide enough to cover a conviction in any Canadian Court for breach of a statute, whether passed by the Legislature of the Dominion or by the Legislature of the Province.

It must therefore, of course, if I realize the effect of these decisions, be considered that provincial enactments, falling within the 15th enumeration of s. 92, belong to that branch of the law which is criminal. But this does not necessarily diminish or affect the amplitude of Dominion powers under s. 91 (27). What the provinces may do under the authority of s. 92 (15) is to impose punishment, by fine, penalty or imprisonment, for enforcing any law of the province made in relation to a matter coming within any of the pro-

(1) [1926] A.C., 482, at p. 489. (2) [1922] 2 A.C. 128, at p. 167.

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vincial enumerations, and is therefore confined to matters described generally as of a merely local or private nature in the province. But the concluding paragraph of s. 91 must be considered, and it was thus explained by Lord Watson, in the *Liquor Prohibition* case (1):

> It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces." It was observed by this Board in *Citizens' Insurance Co. of Canada* v. *Parsons* (2), that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language of the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens' Insurance Co. of Canada* v. *Parsons* (3) and in *Cushing* v. *Dupuy* (4); and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada* (5), and in *Attorney General of Ontario* v. *Attorney General for the Dominion* (6).

Consequently, if it be, as I apprehend, that the criminal law, in its widest sense, is reserved for the Parliament of Canada, a branch of that criminal law cannot well be *exclusively* within the authority of a province, and, while the provinces may undoubtedly, within their local and private range of legislative power, and in that aspect, impose punishments for enforcing their local laws which are in other respects *intra vires*—punishments that are, in the sense of the decisions, laws of a criminal nature—they can-

(1) [1896] A.C. 348, at pp. 359-60.
(2) (1881) 7 App. Cas. 96, at p. 108.
(3) (1881) 7 App. Cas. 96, at pp. 108, 109.
(4) (1880) 5 App. Cas. 409 at p. 415.
(5) [1894] A.C. 31, at p. 46.
(6) [1894] A.C. 189, at p. 200.

not thereby occupy, so as to obstruct, a field of legislation, like that of the criminal law, which has been committed exclusively to the Dominion.

Each question answered in the negative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitors for the Proprietary Articles Trade Association: *McRuer, Evan Gray, Mason & Cameron.*

Solicitor for the Attorney-General of Quebec: *Charles Lanctot.*

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

Solicitor for the Amalgamated Builders Council and Amalgamated Clothing Industries Council: *W. F. O'Connor.*

CLATWORTHY & SON LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

DALE DISPLAY FIXTURES LIMITED (DEFENDANT) ..... } RESPONDENT.

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*Feb. 28.
*April 30.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Industrial design—Invalidity of registered design—Want of originality—Anticipation in article of analogous character—Trade-Mark and Design Act, R.S.C. 1906, c. 71—Attack on validity of registered design in action against alleged infringer.

An industrial design, to be entitled to registration under the *Trade-Mark and Design Act* (The Act in question was R.S.C. 1906, c. 71), must be original. The originality required involves the exercise of intellectual activity so as to suggest for the first time the application of a particular pattern, shape or ornament to some special subject matter to which it had not been applied before. *(Dover, Ltd.* v. *Nürnberger Celluloidwaren Fabrik Gebrüder Wolff* [1919] 2 Ch., 25, at p. 29). To constitute an original design there must be some substantial difference between it and what had theretofore existed as applied to articles of an analogous character.

Appellant's registered design, which related to a rack for display of garments in a retail store, *held* not to have fulfilled above requirements (and therefore not to have been proper subject matter for registra-

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PRESENT: Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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tion) but to have been anticipated in a previous design for a bedside table, whose function was held analogous to that of a garment rack. (*In re Clarke's Design*, [1896] 2 Ch., 38, at p. 44; *In re Read & Greswell's Design*, 42 Ch. D., 260, at p. 262, referred to. *Walker, Hunter & Co.* v. *Falkirk Iron Co.*, 4 R.P.C., 390, distinguished on the facts.) An attack on the validity of registration of a design is not limited to proceedings under s. 42 of said Act (R.S.C. 1906, c. 71), but may be made by an alleged infringer when sued by the registered owner. (*In re Clarke's Design, supra*, at p. 42).

Judgment of Maclean J., [1928] Ex. C.R. 159, affirmed in the result.

APPEAL by the plaintiff from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing its action for relief for alleged infringement by defendant of plaintiff's registered design of a display stand. Maclean J. held that there was no novelty or subject matter in the plaintiff's registered design, and that the same was invalid.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

R. S. Smart K.C. for the appellant.

H. G. Fox and *B. McPherson* for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal from the judgment of the President of the Exchequer Court (1) in favour of the defendant in an action for damages for the infringement of an Industrial Design which the plaintiff had, on November 26, 1926, registered under the provisions of the *Trade-Mark and Design Act* (R.S.C. 1906, c. 71). The ground upon which the learned President based his judgment was that the plaintiff's design was not novel and was not proper subject-matter for registration.

The design in question relates to a rack or stand for the display of garments in a retail store. In its structure this rack is extremely simple. It consists of a straight horizontal bar so supported at its extremities that garments can be hung on it on ordinary coat or garment hangers. Each of the side supports consists of a vertical bar the lower end of which is fitted into a base or footing which rests upon the floor, and these footings are connected by another

(1) [1928] Ex. C.R. 159.

horizontal bar which holds the rack firm. The footing at each side where it connects with the bar is ornamented so that, in conjunction with an ornamented boss which encircles the upright at the lower end and rests on the footing, the effect produced is pleasing to the eye. The junction of each upright with the top horizontal bar is also ornamented. It is upon the shape of the base or footing and the character of the ornamentation that the appellant relies to justify the conclusion that the combination is artistic, new and original.

No definition of a "design" is given in the Act. The word must, therefore, be taken in its ordinary signification which Lindley, L.J., in *In re Clarke's Design* (1), stated means: "Something marked out—a plan or representation of something." A "design" is, therefore, a pattern or representation which the eye can see and which can be applied to a manufactured article. To be entitled to registration the "design" must be original. The Act does not expressly call for novelty, but s. 27 (3) provides that the Minister's certificate of registration shall, in the absence of proof to the contrary, be sufficient evidence of the originality of the design. Just what is contemplated by "originality" the Act does not make clear. Under the English Act a design, to be registrable, must be "new or original." As that Act uses both words it has, in a number of cases, been sought to draw a distinction in meaning between them, and it has been held that "every design which is original is new, but every design which is new is not necessarily original." *In re Rollason's Design* (2).

In *Dover, Limited* v. *Nürnberger Celluloidwaren Fabrik Gebrüder Wolff* (3), Buckley, L.J., defines "original" as applied to designs, as follows:—

> The word "original" contemplates that the person has originated something, that by the exercise of intellectual activity he has started an idea which had not occurred to any one before, that a particular pattern or shape or ornament may be rendered applicable to the particular article to which he suggests that it shall be applied. If that state of things be satisfied, then the design will be original although the actual picture or shape or whatever it is which is being considered is old in the sense that it has existed with reference to another article before.

(1) [1896] 2 Ch. 38, at p. 43. (2) (1897) 14 R.P.C. 909.
(3) [1910] 2 Ch. 25, at p. 29.

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And further on he says:—

> There must be the exercise of intellectual activity so as to originate, that is to say suggest for the first time, something which had not occurred to any one before as to applying by some manual, mechanical, or chemical means some pattern, shape, or ornament to some special subject-matter to which it had not been applied before.

The above quotations, in my opinion, set out what is called for by our Act. Does the appellant's design comply therewith?

In so far as the rack feature of the appellant's design is concerned (that is the horizontal bar upon which the garments are to be hung supported by upright side bars and connected at the bottom by another bar) the appellant admits that, before his registration, it was well known in the art, and no claim is made in respect thereof. The base or footing upon which stress is laid is briefly described as being composed of oppositely-disposed curved arms of which the outer ends and the upper side of the inner ends terminate in a spiral scroll. This configuration is commonly known as the double ogee curve. The top of the base between the scrolls is flat and supports the upright which at the bottom is, as I have already pointed out, encircled by an ornamented boss. On the outer side of the base there is a heart-shaped panel carrying ornamentation. Each upright is crowned with a fluted, conical-shaped cap, while on its outer side, opposite to the point where it forms a junction with the top horizontal bar, there is an ornamented panel. Such being the appellant's design, we have to determine if it could properly be said to possess originality. The registration thereof was for the rack as a whole and not simply for its configuration and ornamentation.

In the judgment appealed from, the learned President held that it had been anticipated by a rack (Exhibit B) which the respondent, in the latter part of 1925 or the earlier part of 1926, had obtained in the United States where it was manufactured. This rack had the same general characteristics as the one for which the appellant obtained registration. It had the same general outline, and the same underslung feature of the base. It had oppositely-disposed curved arms which, it was argued, constituted the double ogee curve. This rack the learned President held to be essentially the same as the appellant's registered design. It was, however, without ornamentation. To my eye there is a difference between the

ogee curve of the arms of the appellant's base and the arms of the base of the rack obtained in the United States by the respondent. In the latter, instead of having the curve commencing at the inner end of the arm and ending at the extreme outer end, I find the arm extending half its length at the inner end in a perfectly straight line, then making an abrupt curve and ending in a flat knob which does not have the same artistic appearance as the double ogee curve. It must be remembered, however, that to constitute an original design there must be some substantial difference between the new design and what had theretofore existed. A slight change of outline or configuration, or an unsubstantial variation is not sufficient to enable the author to obtain registration. If it were, the benefits which the Act was intended to secure would be to a great extent lost and industry would be hampered, if not indeed paralyzed. Whether these differences between Exhibit B and the appellant's registered design are so unsubstantial as to prevent the appellant's design being proper subject-matter for registration I find it unnecessary to determine, for even if we were to hold that the appellant's registered design was not anticipated by Exhibit B, it was, in my opinion, anticipated by Exhibit F, which shews a cut of a bedside table which had been on the market for years prior to the appellant's registration, and which was composed of two underslung base footings the arms of which presented the same double ogee curve as the appellant's design. These footings were joined together by a bar and from the centre of one of them there extended a vertical upright bar which supported a horizontal bar to the upper side of which was fastened a small table. If anyone had taken the uprights joined together by the top horizontal bar of Exhibit B and had set them in the base footings of Exhibit F, he would have had precisely the design registered by appellant, less the ornamentation. The question then is: Could the appellant company take the framework of Exhibit B and set it on the base footings of Exhibit F, place ornamentation thereon, and properly call it an original design? In my opinion it could not. What is there original about it? Not the underslung base; not the configuration of the ogee curves; not the outline of the rack itself; nothing but the ornamentation, and the ornamentation is not what was registered. For the appellant it was contended that it was quite open to it to take old

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designs and combine them into a new form and obtain registration thereof as a new design. I agree, provided that from the combination there is produced an original design which is substantially different from any of the old designs, or any known combination thereof.

It was further contended that, even if the arms of the footings in Exhibit F possessed the same double ogee curve as the appellant's rack, it had been applied only to bedside tables and not to garment racks, and that, even if it had been registered for bedside tables, the appellant was entitled to have it registered for a different class of article, and, as authority therefor, the case of *Walker, Hunter & Co.* v. *Falkirk Iron Co.* (1), was cited. In that case it was held that a design for a kitchen range fire door with moulding on the top which, by being attached to the door, shut out all cold air and assisted the draft, and fulfilled a function in no way analogous to anything found in its former use, was a properly registered design, although similar mouldings had been used on sideboards. Whether or not a design is original is a question of fact and, unless the matter dealt with in one case is identical with that dealt with in another, a decision on the facts in the one case is of little assistance in the other. In *In re Clarke's Design* (2), Lindley, L.J., said:—

> But it has been decided that if a design is really old in its application to some manufactured article its application to a new substance will not necessarily entitle it to protection, although such substance may not fall within the class to which the first article belongs.

and in *In re Read & Greswell's Design* (3), Chitty J. said:—

> To be capable of being registered a design must be "new or original" in fact, and not, as is suggested, "new or original" as to some particular class of goods. It cannot be said to be new and original if it is already being applied to articles of an analogous character.

In my opinion, the function of a bedside table is analogous to that of a garment rack. The purpose of each is to have the top bar support a weight. Whether that weight is placed directly upon the upper side of the bar by the weight itself or is placed there by means of a hook to which the weight is attached cannot, in my opinion, be material. Apart, therefore, from the ornamentation, the appellant's design was not original at the time of its registration. There was in it no new idea, nor any new way of

(1) (1887) 4 R.P.C. 390. (2) [1896] 2 Ch. 38, at p. 44.
(3) (1889) 42 Ch. D. 260, at p. 262.

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applying old designs to manufactured articles of a class which was not analogous. The appellant's design was, therefore, not proper subject-matter for registration.

In appellant's factum a further question is raised, namely, that as the appellant's design is registered the validity of the registration can only be attacked by proceedings, taken under s. 42, to expunge the entry in the register. In my opinion, this objection is answered by Lindley, L.J., in *In re Clarke's Design* (1), where he said:—

> The only protection afforded to the public against an abuse of the Act and the acquisition of mischievous monopolies for designs which are neither new nor original, but which have escaped the vigilance of the comptroller and been improperly registered, is the protection of a Court when its aid is invoked by the registered owner of the design against an alleged infringer, or by a person aggrieved who applies * * * to expunge a registered design from the register.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Caudwell & Symmes.*
Solicitors for the respondent: *McPherson & Co.*

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*March 8, 11
*April 30.

IN THE MATTER OF THE INCOME WAR TAX ACT

AND

IN THE MATTER OF THE APPEAL OF THE FRASER VALLEY MILK PRODUCERS' ASSOCIATION

THE FRASER VALLEY MILK PRODUCERS' ASSOCIATION (PLAINTIFF) ..... } APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Income War Tax Act, 1917, c. 28 (Dom.)—Liability for income tax by company incorporated under Agricultural Associations Act, R.S.B.C. 1911, c. 6—Purpose and operations of company—Manner and basis of distribution of moneys to shareholders—Co-operative Associations Act, B.C., 1920, c. 19.

It was *held*, affirming judgment of Audette J., [1928] Ex. C.R. 215, that the appellant, incorporated under the *Agricultural Associations Act*, R.S.B.C. 1911, c. 6, and through which was marketed the milk and

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1896] 2 Ch. 38, at p. 42.

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cream produced by its shareholders, was liable to pay income tax under the Dominion *Income War Tax Act, 1917*, upon the balance (less certain allowances) shown by its financial report for the year 1923 in respect of that year's operations and distributed among its shareholders as dividends or interest on paid-up capital.

APPEAL from the judgment of the Exchequer Court of Canada (Audette J.) (1) holding that the appellant, The Fraser Valley Milk Producers' Association, is liable, under the *Income War Tax Act, 1917*, to pay income tax, and dismissing its appeal from the decision of the Minister of National Revenue affirming an assessment of the appellant in respect of alleged income of the appellant for the year 1923.

The appellant was incorporated on June 18, 1913, under the *Agricultural Associations Act*, R.S.B.C. 1911, c. 6, its purpose being to sell through the Association the milk and cream produced by its shareholders. The contract between each producer and the Association, which is set out in full, and the other material facts, and the grounds taken by the appellant against the assessment, sufficiently appear in the judgment now reported. The appeal was dismissed with costs.

Lewis Duncan for the appellant.

C. Fraser Elliott K.C. and *W. S. Fisher* for the respondent.

The judgment of the court was delivered by

DUFF J.—The appellant company is incorporated under the *Agricultural Associations Act* of the Province of British Columbia. The Asociation has share capital. Persons may be admitted to membership, who are resident of the Fraser Valley, west of Yale, producers of milk and subscribers for at least ten shares, and who execute the Association's agreement respecting the sale of milk and cream through the Association. No shareholder may hold less than ten or more than three hundred shares. A shareholder may withdraw from the Association, with the consent of the directors, if he ceases to produce in the territory, and, on the surrender of his certificate, is entitled to a refund of the amount paid up on his shares.

(1) [1928] Ex. C.R. 215.

Shares are to be paid for in cash, and the directors are entitled to make calls in respect of unpaid balances on shares. The dividends received by shareholders are proportioned to the amounts paid on their shares.

The contract executed by producers is in the following words:—

Whereas the Producer has requested the Association to accept for distribution and sale on his behalf, all the milk and/or cream produced by the Producer during the life of this agreement, which the Association has agreed to do.

Now therefore this Agreement witnesseth: That in consideration of the outlays and expenses incurred and to be incurred by the Association in providing means for handling, manufacturing and marketing the milk and dairy products of the Producer as mentioned herein, the said parties have agreed to, and do hereby agree as follows:—

1. The Producer agrees to forward to the Association, or as it may direct, all milk and/or cream produced by the Producer other than that retained by him for his own personal or family use, for a continuous period from the date hereof until he shall retire absolutely from the dairy business, in the lower mainland of British Columbia, subject to cancellation by a twelve months' notice which may be given by either party to the other to terminate this agreement while the Producer is still carrying on dairying in the aforementioned district, the contract to terminate at the expiration of said notice: *Provided always* that the Producer will endeavour to follow the instructions of the Association as to the proportionate quantities of milk to be produced during the several months of the year, in order that the natural surplus in the spring may be reduced as much as possible.

2. The Producer agrees to deliver the said milk and/or cream to such plant or other place as the Association may from time to time require and that he will be responsible for the condition of the said milk and/or cream until the same is accepted at such plant or other place by the Association, or by such person or persons as may be appointed by the Association in that behalf.

3. The Association agrees with the Producer to receive from him all the said milk and/or cream produced by him and to sell the same, as may be deemed by the management of the Association to be most advantageous to all members thereof and to pool the proceeds of all sales on behalf of all Producers delivering to the Association and to distribute the same to such Producers on the basis of the butter fat content f.o.b. Vancouver (reducing the price of such butter fat content f.o.b. Vancouver where the amounts paid for delivery have been less than the cost of delivery at Vancouver, by an equitable difference (according to market prices obtained for sour cream, sweet cream, and whole milk *Provided always* that from and out of the moneys realized from the sale of milk and/or cream during the term of this agreement the Association may deduct and retain from month to month such amounts for the purposes of the Association as its Directors may from time to time decide, which amounts shall not exceed in all 10 per cent. of the amount realized from the sale of the said milk and/or cream, and said amounts so deducted and retained by the Association together with similar amounts deducted and retained by the Association from all other

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Producers delivering to the Association shall be a fund in the hands of the Association to be expended as follows:—

(*a*) To provide for all losses, costs, charges and expenses incurred by the Association in carrying on its business together with a reasonable allowance for depreciation of all plants and equipment.

(*b*) To establish a reserve fund as may be required by the provisions of the "Co-operative Associations Act" as in force here from time to time.

(*c*) For the purpose of paying a cash dividend on the paid-up shares in the capital stock of the Association at such rate as may be fixed by the said Association in annual general meeting, such dividend not to exceed eight per centum per annum.

(*d*) The directors may retain from such fund, after the foregoing subsections have been complied with, such amounts as the directors may deem advisable for the purpose of purchasing any land, buildings, machinery or equipment, or in making any other investment or investments which they may deem for the benefit of the Association, *Provided always* that such expenditure in any year shall not exceed 2½ per cent. of the total amount realized from all sales of milk and/or cream during such year; unless the expenditure of a larger amount be authorized by a special general meeting of the Association called for that purpose, in which case the Producer hereby agrees to be bound by the decision of such meeting whether he be present or not. Upon the completion of any such purchase or investment the Association shall issue paid-up shares to the extent of the capital sum expended and shall issue to each Producer and each Producer agrees to accept his proportion of said shares being that proportion which the value of the butter fat calculated f.o.b. Vancouver, shipped by him during such year bears to the total amount expended by the Association under this subsection.

(*e*) Any balance remaining over, shall be disposed of in such manner as shall be decided by the members of the Association in Annual General Meeting, and the Producer hereby agrees to be bound by the decision of such meeting, whether he be present or not.

4. The tests for butter fat content shall be made by persons holding Government certificates of qualification and shall be subject to the provisions of the Creameries and Dairies Regulation Act.

5. The Association agrees to make payment semi-monthly for all milk and/or cream received, subject to the provisions herein contained, about the middle and end of each and every month during the life of this agreement, or at such periods as may be fixed by the Association in annual general meeting.

6. While doing its best to provide sufficient empty cans to every member for use in shipping milk and/or cream, the Association is not to be held responsible for the failure of any transportation company or milk hauler to leave the requisite number of empty cans for this purpose.

7. The Producer hereby *covenants* with the Association that should the said Producer fail to carry out the terms of this agreement by making default in the supply or delivery of the milk and/or cream within con-

tracted for, he will pay to the Association the sum of twenty cents (20 cents) for each pound of butter fat not delivered by reason of the said milk and/or cream being not delivered, and such amount shall be held to be liquidated damages for such non-delivery and not as a penalty.

The financial report of the company, for the year 1923, showed that there was, from the operations of the company for that year, a balance of $39,953.34, which admittedly has been distributed among the shareholders. In respect of the sum of $32,000 odd, which is arrived at by deducting certain allowances from this balance, it has been held by Audette J. (1) that the appellants are assessable to income tax as taxable income received during the year 1923. From this judgment the appellants now appeal.

The judgment of Audette J. is assailed on two grounds: First, that this sum was not received by the appellants in the year 1923; and, secondly, if so received, it is not assessable to income tax.

To deal first with the second of these contentions. Both the statute, under which the appellants are organized, and the appellants' own rules contemplate the distribution of profits to the shareholders of the Association as such. Section 13 of the *Co-operative Associations Act,* Chapter 19, B.C. Statutes of 1920, is in these words:—

13. (1) The profits from the business of an association shall be apportioned as follows:—

(*a*) By setting aside such sum as its rules may provide, not being less than ten per cent. of the net profits, as a reserve fund, until such fund is equal to at least thirty per cent. of the share capital paid up at the date of the apportionment.

(*b*) By payment of such dividend as its rules may provide, not exceeding eight per cent per annum, on the share capital paid up at the date of the apportionment.

(*c*) By distributing, in accordance with the rules of the association, among its patrons, whether members or not and whether vendors to or purchasers from the association, the remaining profits, or such portion thereof as the association may provide.

The statute treats the Association as a profit-making concern, and as a profit-making concern it is contemplated by the contract. The contract provides for the deduction for moneys, realized from the sale of milk and cream, and the retention by the Association, from month to month, of such amounts not exceeding ten per cent. of the sums so realized, as the directors may from time to time decide, for the purposes of the Association. These moneys de-

(1) [1928] Ex. C.R. 215.

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ducted and retained by the Association "for the purposes of the Association" are to be expended:—

(1) In providing for all losses, costs, charges and expenses of the business of the Association, including an allowance for depreciation of plant and equipment,

(2) in establishing a reserve fund in compliance with the statute,

(3) in payment of a "cash dividend" to the shareholders of the Association, at such rate as shall be "fixed by the said Association, not exceeding eight per cent. per annum,"

(4) as to any surplus, after providing for these requirements, in paying a sum, not to exceed 2½ per cent. of the total moneys realized, in the purchase of lands, buildings, machinery or equipment, or "in making any other investment," deemed to be "for the benefit of the Association"; and in disposing of any balance of the surplus in such manner as the Association may determine in annual general meeting.

Moneys distributed among the shareholders by way of dividend, pursuant to the terms of this contract, are moneys paid out of profits—profits assessable to income tax. The contention of the appellants, however, is that the scheme as a whole is a co-operative scheme; and that the Association is incorporated for the purpose of providing convenient machinery for putting this scheme into effect. The appellants are, it is said, a mere agency, and, the profits, so called, distributed among the shareholders, constitute, in part, the returns received by the appellants in that character, which, in the form of dividends, or interest on paid-up capital, are handed over to the producers.

It seems impossible to accept this view. It is quite clear that the moneys distributed, as dividends, or among shareholders as interest on paid-up capital, are not divided among the producers, unless by accident, in the same proportion as the share of moneys realized from sales, which is paid directly to producers from month to month, under the terms of the contract. The share of each producer in the moneys so distributed is determined by the butter fat

content of his product; while his share of moneys distributed, by way of dividend or interest, is determined by the amount he has paid on his shares. Moreover, while it is intended, no doubt, that the number of shares held shall bear a definite relation to the number of cans of milk supplied by the shareholder to the Association, that relation is not necessarily maintained, as the following evidence shows:—

Q. Supposing we had a shipper who shipped one can of milk but he only held five shares, and we have another who ships one can of milk but he has three hundred shares; you say the money all goes to the shipper and they are synonymous?

A. Yes.

Q. Do they get the same amount of money?

A. No.

Q. Where is the difference?

A. The man with bigger shipments would get more.

Q. The shipments are both the same?

A. The man who has more capital in the company would get more interest.

On the whole it seems impossible to treat the distribution of moneys under clause 3 (*c*) of the contract as a mere accounting by the appellants, as agents, to their principals. Admittedly, by the contract, the moneys realized from the sale of milk and cream, were to be distributed "about the middle and the end of each month," or at such periods as might be fixed by the Association, subject to the monthly deduction above mentioned, which is not to exceed ten per cent. of the total amount realized from sales. Moneys retained, which remained in the hands of the Association at the end of the year 1923, could only be retained in virtue of the proviso to the third paragraph of the agreement, which authorized the retention of moneys "for the purposes of the Association." The destination of the moneys, so retained, is explicitly fixed by the terms of the agreement itself. Only in payment of a cash dividend is the distribution of any part of such moneys among the shareholders authorized, and this only after the expenses, incurred by the Association "in carrying on its business," have been provided for.

As to the first contention. The terms of the contract seem to conclude the point against the appellants. The appellants' argument is that the balance of $39,000 odd, which was distributed after the annual meeting of February, 1924, consisted of the undistributed proceeds of sales

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FRASER VALLEY MILK PRODUCERS' ASSN. v. MINISTER OF NATIONAL REVENUE.

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in the year 1923. These moneys, as part of such proceeds, could only be retained rightfully under the terms of the proviso, paragraph 3; and, therefore, we are entitled, and indeed bound, to presume that they were, from month to month, deducted and retained by the Association, pursuant to those terms, that is to say, "for the purposes of the Association," and, moreover, that the distribution among the shareholders was made in conformity with the obligations of the appellants under the contract. The proper inference, therefore, is that these moneys were received by the appellants, for their own purposes, in the year 1923.

The appeal is to be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Lewis Duncan.*
Solicitor for the respondent: *C. Fraser Elliott.*

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*Feb. 28.
*March 1.
*April 30.

IN THE MATTER OF THE PETITION OF THE PROCTOR & GAMBLE COMPANY,

AND IN THE MATTER OF A SPECIFIC TRADE-MARK.

PUGSLEY, DINGMAN & COMPANY, LIMITED (OBJECTING PARTY) ..... } APPELLANT;

AND

THE PROCTOR & GAMBLE COMPANY (PETITIONER) ..... } RESPONDENT.

PUGSLEY, DINGMAN & COMPANY, LIMITED (DEFENDANT) ..... } APPELLANT;

AND

THE PROCTOR & GAMBLE COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Suit to vary registration of specific trade-mark by restricting its use—Class merchandise of a "particular description" (Trade-Mark and Design Act, R.S.C., 1927, c. 201, s. 4)—Distinction in the trade—Nature and uses of, and course of trading in, the goods—Refusal of registration of proposed trade-mark—Alleged resemblance to existing trade-mark—Possibility of deception—Onus in attacking decision of departmental tribunal—Use on goods of name of predecessors in title.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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Appellant had a registered specific trade-mark "Cameo Soap" to be used in connection with the sale of soap, and for many years had manufactured and sold a yellow bar soap under that name. There is a distinction broadly observed in the soap trade between "laundry soap" and "toilet soap," depending largely upon shape, dimensions, and convenience or indication for use; but some soaps classified as "laundry soaps" are extensively used for toilet purposes, and laundry soaps and toilet soaps are largely sold by the same dealers. Appellant's said soap, although listed in its catalogues and price lists, and known in the trade, as a "laundry soap," was extensively used also for toilet purposes. In February, 1927, appellant decided to produce and sell a white soap in cake form suitable for toilet purposes, and to use in connection therewith said trade-mark. This soap was first announced in its catalogue in January, 1928. Respondent had, in 1926, applied for, and in January, 1927, obtained, in the United States, registration of the word "Camay" as a specific trade-mark for "toilet soap"; and in May, 1927, applied in Canada to register "Camay" as a specific trade-mark to be used in connection with the sale of a "toilet and bath soap," which application was refused because of appellant's registered trade-mark. In an application and an action by respondent in the Exchequer Court, orders were made for registration of its trade-mark and for restricting appellant's trade-mark to laundry soap.

Held (1): Appellant's trade-mark should not be so restricted. Considering the nature of the goods, the uses to which they were put, and the course of the trade in them, it could not be said that "laundry soap" and "toilet and bath soap" are each a "particular description" of goods, within the meaning of the *Trade-Mark and Design Act*. The use by other traders of the same trade-mark in respect of any soap would be likely to give rise to deception or confusion, against which the law was intended to give protection. *Edwards* v. *Dennis*, 30 Ch. D. 454, and *John Batt & Co.* v. *Dunnett*, [1899] A.C. 428, distinguished.

(2): The refusal by the departmental tribunal to register the word "Camay" as a specific trade-mark should not be disturbed, it not being demonstrably wrong. One challenging its decision must establish affirmatively that if the proposed word is registered deception will not result. On this question it is the ultimate purchasers who are to be considered. That the word "Camay," when vocalized, has a strong similarity to the French word "camée," was, in view of conditions in this country, a fact to be considered.

(3): Appellant should not be held to have lost its rights by using on its yellow bar soap the name of its predecessors in title, whose assets it had purchased.

Judgment of Maclean J., [1928] Ex. C.R. 207, reversed.

APPEAL by Pugsley, Dingman & Company, Limited (objecting party in the one proceeding, and defendant in the other proceeding) from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the respondent, The Proctor & Gamble Company

(1) [1928] Ex. C.R. 207.

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(petitioner in the one proceeding, and plaintiff in the other proceeding), was entitled to have registered in the Department of Secretary of State of the Dominion of Canada in the register of Trade-Marks the specific trade-mark consisting of the word " Camay " to be used in connection with the manufacture and sale of toilet and bath soaps; and that the registered trade-mark of the said appellant, consisting of the words " Cameo Soap," should be restricted to laundry soap only, and the register of Trade-Marks be rectified accordingly.

The one proceeding was an application by the respondent to the Exchequer Court of Canada for an order for the registration of the word " Camay " as a specific trade-mark, applicable to a toilet and bath soap, the respondent's application for registration of the same having been refused by the Commissioner of Patents; and the other proceeding was an action by the respondent for an order expunging the entry of the registration by the appellant of the specific trade-mark " Cameo Soap," or, in the alternative, varying the said entry by restricting it to laundry soap.

The material facts of the case are sufficiently stated in the judgment now reported. As to the last point mentioned in the judgment, the reference is to the use by the appellant on its yellow bar soap of the name of its predecessors in title, a company whose assets it had purchased and which had ceased to carry on business.

The appeals were allowed, and the orders of the trial judge set aside, with costs to the appellant throughout.

R. C. H. Cassels K.C. for the appellant.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—These are two appeals from two orders of the President of the Exchequer Court, one made in a proceeding by way of appeal from the Commissioner of Patents who rejected an application of the respondents for the registration of the word " Camay " as a trade-mark for toilet and bath soap, directing the registration of the trade-mark, the other made in an action by the respondents claiming rectification of the registry of the appellants' trade-mark

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"Cameo Soap" by limiting that mark to laundry soap, granting the relief claimed. In 1900, the words "Cameo Soap" were registered in the name of the Imperial Soap Co. Ltd. as a specific trade-mark to be applied to the sale of soap. In 1902, the appellants purchased all the assets of the Imperial Soap Co. Ltd. (who thereupon ceased to carry on business), including said trade-mark, a formal assignment of which was executed in 1902 and registered in the Department of Agriculture in 1906. In December, 1925, the registration of the trade-mark having expired under the law, an application was made by the appellants to register a specific trade-mark to be used in connection with the sale of soap, consisting of the words "Cameo Soap," and this trade-mark was registered on the 11th of January, 1926. From the date of the acquisition of the trade-mark from its immediate predecessors in title, the appellants have, down to the commencement of these proceedings, manufactured and sold a yellow bar soap under the name "Cameo Soap." In February, 1927, the appellants decided to produce and sell a white soap in the form of a cake suitable for toilet purposes, and to use in connection with the sale thereof, their trade-mark "Cameo Soap." This toilet soap first appeared in their catalogue in January, 1928. In August, 1926, more than twenty-five years after the registration of the mark "Cameo Soap," the respondents applied in the United States for the registration of the word "Camay" as a specific trade-mark for "toilet soap," and registration was granted in January, 1927. In May, 1927, the respondents applied to the Commissioner of Patents in Ottawa to register the same word "Camay" as a specific trade-mark to be used in connection with the sale of "toilet and bath soap." This application was refused because of the presence on the register of the appellants' trade-mark. In November, 1926, the respondents commenced to advertise widely their soap "Camay" in the United States, but did not advertise in Canada. Down to the trial in June, 1928, the respondents had not used their trade-mark "Camay" in connection with the sale of soap in Canada.

It will be convenient first to consider the order of the learned trial judge rectifying the registration of the appellants' trade-mark. And at the outset it should be observed

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that there is by the concurrence of all parties, a distinction broadly observed in the soap trade between laundry soap and toilet soap. The distinction is largely evidenced in price lists and catalogues, and it seems to be quite clear that the term "laundry soap" is applied generally to soaps sold in bars or cakes of such shape and dimensions that they cannot be used conveniently in washing the person, while the words "toilet soap" are used to designate soaps which are sold in cakes of suitable size, often perfumed and commonly presented in attractive form with some indication of the purpose for which they are recommended by the seller. On the other hand, the use of the term laundry soap does not indicate that the soap to which it is applied is not used for personal purposes. In truth, there is uncontradicted evidence that a number of well known brands of the commoner soaps, which are sold in bars or cakes not immediately adapted for toilet purposes are extensively used for washing the body and for all other household purposes. One soap, known as "Sunlight Soap," is mentioned in the evidence which the principal witness for the respondent seemed to consider was sold in such a form as to bring it within the classification of laundry soap, which undoubtedly is very widely bought in this country for every purpose for which a soap can be used; and it is not disputed that the yellow bar soap to which the appellants have applied their trade-mark "Cameo Soap" for more than twenty-five years, has always been bought and used extensively for the purpose of washing the body as well as for laundry purposes. It may be observed also that Castile soap, which is used almost exclusively for toilet purposes, and which the appellants list sometimes as toilet soap, sometimes as Castile soap simply, seems to be sometimes sold in large bars and in that form advertised as toilet soap.

The learned trial judge has held that, for the purposes of trade-mark registration, toilet soap and laundry soap belong to descriptions of goods "absolutely different"; and on this ground has held, applying the principle I am about to mention, that the registration of the appellants' trade-mark should be rectified in the manner mentioned (1).

By s. 4 (*c*) of the *Trade-Mark and Design Act*, "specific trade-mark" means a trade-mark used in connection with

(1) [1928] Ex. C.R. 207.

the sale of a "class merchandise of a particular description." I shall assume for the purposes of the appeal, though I shall express no opinion whatever on the point, that the registered owner of a "specific trade-mark" is not entitled to prevent the registration of the identical trade-mark or a closely resembling one by another trader, where that trader does not seek registration in respect of the same description of goods, or of goods of such a like description that the subsequent registration might lead to deception or confusion.

The respondents invoke the authority of the court under s. 45 (formerly s. 42) of the Act. Under that section the court has power to expunge or vary any entry "made without sufficient cause" in the register, and this jurisdiction has been held to empower the court to expunge the registration of a trade-mark where registration ought not to have been granted, or to rectify the terms of such registration when it is of a character to which the applicant was not entitled.

The contention of the respondents, which prevailed with the learned trial judge, is that the appellants' predecessors in title were not entitled to register their trade-mark in respect of soap generally, but only in respect of "laundry" soap. This contention is based upon a principle laid down by the Court of Appeal in *Edwards* v. *Dennis* (1), and afterwards by the House of Lords in *John Batt & Co.* v. *Dunnett* (2), in which it was held that under the English Act then in force, where a trade-mark is registered by a trader, in respect of one of the numbered classes of goods defined by that Act, and that class includes things of a variety of descriptions, and it appears that at the time of the registration the trader was dealing in only one of those descriptions of goods, and had no intention of dealing in any other, the registration of his trade-mark ought to be restricted by excluding the descriptions of goods in respect of which he was not carrying on business. Later, this principle was extended to the case in which the trader, although dealing in the particular description of goods in question, had, at the time of the registration of the trade-mark, never applied his mark to such description of goods, and had no intention of so applying it.

(1) (1885) 30 Ch. D. 454. (2) [1899] A.C. 428.

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I assume in the discussion which follows, although I wish to leave the question entirely open if it should arise for decision, that a title to a trade-mark may, under the Canadian Act, be acquired by registration under the Act, although prior to registration the trader has never made use of the trade-mark. This must, however, be subject to the qualification that a specific trade-mark cannot be acquired in respect of a "particular description of goods" within the meaning of s. 4 of the Act, where the applicant has not made use of the mark in respect of that "description of goods" and has at the time of his application no present definite intention of doing so. It is obvious enough that the application of this qualification may raise questions of some nicety as to what use of the trade-mark or intended use of one constitutes for the purpose of the rule a use in connection with a given "particular description of goods."

The onus is, of course, on the respondents, but the facts are not really in dispute. It is not denied that neither the appellants nor the appellants' predecessors in title, prior to the application for registration in 1900 or to the application in 1926, made use of the trade-mark "Cameo Soap" in connection with any kind of soap other than the yellow bar soap mentioned, or that at the time of either of these applications, the applicant had no present definite intention of using it in connection with any other kind of soap. This yellow bar soap was, and is, as I have said, listed by the appellants in their catalogues and price-lists as a "laundry soap," and is known in the trade as such.

The respondents' contention is that laundry soap is a "particular description of goods" within the meaning of the Act, that toilet and bath soap is another description of goods within the meaning of the Act, and that registration in respect of soap generally cannot be acquired by an applicant, who has used and only intends to use his trade-mark in respect of a soap which is known in the trade as laundry soap or toilet soap. The appellants, on the other hand, contend that the use of their trade-mark in connection with a kind of soap, which, though known in the trade as laundry soap, is used for all the purposes of a soap and is purchased for all such purposes, is manufactured and sold to supply a market largely including such purchasers to the

knowledge of everyone who deals in it, gives them a title to that trade-mark which cannot be adequately protected when the registration is limited to laundry soap; and that the effect of the decision of the learned President of the Exchequer Court, as to the owner of trade-marks used in connection with soaps to which the appellants' yellow bar soap belongs (soap sold in bars, a form which brings it under the trade denomination of laundry soap, but used by purchasers for all purposes), is to deprive him of the protection which the law is intended to give him.

Obviously, it is said, a soap which, though sold in a form bringing it under the description of "laundry soap" is used for toilet and bath purposes very extensively, as, for example, the evidence shows the soap known as "Sunlight Soap," is, has a market for such purposes. It is a laundry soap according to the trade classification referred to (and that because the operation of cutting the large bars into smaller pieces suitable for toilet purposes is left to the customer), but for every other purpose it is a toilet and bath soap as well as a laundry soap. In such a case, it is argued, if you limit the registration of the trade-mark to laundry soap (soap sold in large pieces), you deprive the owner of the trade-mark of the statutory protection under s. 19, where the infringement consists in the use of the trade-mark in respect of soap prepared and sold in a form suited only for use as a toilet soap; and may materially limit the protection he would otherwise enjoy under the Common Law (s. 20). It would, it is said, be difficult to reconcile such a result with the fundamental considerations upon which trade-mark law rests. The rules of law in that respect are intended to protect the interest of the public in not being misled as to the source of the goods which it purchases, as well as the interest of the owner of the trade-mark in the market he has acquired among people for whom the trade-mark stands as a symbol of goods dealt in by him, his interest in his reputation as a producer or dealer connected with his trade-mark, and his interest in the distinctiveness of the trade-mark itself. These interests the Act also is designed to protect; and it is contended that the decision appealed from has the effect of impairing that protection.

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I think the respondents have failed to establish the proposition upon which their contention rests. Soaps which, according to the trade classification, fall within the designation "laundry soap" are used, purchased and sold in fact, for every purpose for which soap can be used; and such soaps are sold by the same dealers as those who sell soap used for toilet purposes exclusively. The evidence is that 85% of toilet soaps are sold by grocers. They are bought by the same persons, used in the same households, and the trade distinction does not appear to be based upon any difference in composition. It would, I think, be greatly straining the application of such cases as *Edwards* v. *Dennis* (1) to give effect to the respondents' contention.

The only object of limiting the registration of a trade-mark by excluding descriptions of goods to which it has never been applied, is to clear the field for the purpose of enabling other traders to make use of the same trade-mark or a similar trade-mark, in respect of such last mentioned descriptions of goods, or to obtain registration of some such trade-mark in respect of such goods. I find it difficult to suppose on what grounds, in view of what I have already said, the Commissioner could satisfy himself, on such an application, that the registration of the trade-mark "Cameo" in respect to toilet and bath soaps, would not create risk of confusion and deception, even when the appellants' trade-mark is limited to laundry soap. In view of the fact that the appellants, even under the restriction, would be entitled to use their trade-mark in respect of any soap falling within the trade description, that is to say, any soap sold in forms and sizes inconvenient for personal use, although largely in fact bought for and applied to such purposes, I cannot suppose that such registration would be permitted. Nor can I understand on what ground the appellants can fairly be deprived of protection against the reasonable possibility of deception and confusion arising from the use by other traders of their trade-mark in respect of any soap whether known in the trade as laundry or as toilet soap.

The question of what degree of similarity between given descriptions of goods is calculated to give rise to deception or confusion has arisen in a great variety of cases; in these

(1) (1885) 30 Ch. D. 454.

cases the tribunals have applied themselves to considerations as to the course of the trade in the goods in relation to sellers and purchasers, to the nature of the goods and to the uses to which they are put. *In re the Australian Wine Importers' Trade-Mark* (1); the *Motricine* case *(In re the Application of the Compagnie Industrielle des Petroles to Register a Trade-Mark)* (2); the *Egall* case *(In re Application by Egg Products Ltd. for a Trade-Mark)* (3); *In re Application of Gutta-Percha & Rubber Mfg. Co. of Toronto Ltd.* (4); *In re McDowell's application* (5); *In re Shreeve's Trade-Mark* (6). To these various considerations I have already adverted.

The persons to be primarily considered in determining any such question, are the ultimate purchasers. *In re Warschauer's Application* (7), and *Bowden Wire Ltd.* v. *Bowden Brake Co. Ltd* (8).

For these reasons, I think that the appeal from the order rectifying the appellants' registration should succeed.

As to the other appeal, the question is a question of fact, and the view of the Departmental Tribunal is one which ought not to be interfered with unless it is demonstrably wrong. It is incumbent upon the party challenging the decision of that Tribunal to establish affirmatively, that if the proposed mark is registered, deception will not result from it. In considering this question, it is the ultimate purchaser who is to be considered, and such purchasers may largely consist of ill-informed people. The question is a practical question. I am satisfied that the appellants are on sound ground in calling attention to the fact that the proposed word, when vocalized, has a strong similarity to the French word "camée," and that in this country there are many thousands of people who, almost every day of their lives, employ both English and French in the ordinary business of life. I am not at all prepared to say that it would be wrong to conclude that if a soap came to be well known among such people as "Cameo Soap," it would be described indifferently as "Cameo" and "Camée." The

(1) (1889) 6 R.P.C. 311, at p. 316.
(2) (1907) 24 R.P.C. 585, at p. 591.
(3) (1922) 39 R.P.C. 155, at p. 163.
(4) (1909) 26 R.P.C. 428.
(5) (1927) 44 R.P.C. 335, at p. 342.
(6) (1913) 31 R.P.C. 24.
(7) (1925) 43 R.P.C. 46, at p. 54.
(8) (1914) 31 R.P.C. 385, at p. 396.

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wrapper produced before us, which may or may not have been before the Commissioner, suggests that the word "Camay" is not in the minds of those who adopted it wholly unconnected with the idea of "Cameo." I am unable to follow the contention that in the circumstances the French word is not to be considered.

This appeal ought also to be allowed.

Reference should also be made to a point, rather faintly suggested, that the appellants have lost their rights by the use of the name of the Imperial Soap Co. The appellants, having purchased the assets, which, *prima facie,* include the goodwill, of their predecessors, were entitled to make use of their predecessors' name, unless there was something in the circumstances of the transfer to them depriving them of that right. *Churton* v. *Douglas* (1); *Levy* v. *Walker* (2). Such a point, if it was to be taken, should have been raised explicitly in the pleadings.

Both appeals should be allowed with costs here and in the Exchequer Court.

Appeals allowed with costs.

Solicitors for the appellant: *Blake, Lash, Anglin & Cassels.*
Solicitors for the respondent: *Smart & Biggar.*

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*Nov. 5, 6.

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*Feb. 5.

TRUSTEES OF ST. LUKE'S PRESBYTERIAN CONGREGATION OF SALT SPRINGS AND OTHERS (DEFENDANTS) } APPELLANTS;

AND

ALEXANDER CAMERON AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Religious societies—United Church of Canada—Congregational meetings—Authority to call—Session—Whether meeting regularly called—Validity of proceedings—The United Church of Canada Act, (D) 14-15 Geo. V, c. 100; (N.S.) (1924) c. 122.

The St. Luke's Presbyterian Congregation of Salt Springs in the County of Pictou, was a congregation in connection with the Presbyterian Church in Canada. Under the provisions of "The United Church of

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

(1) (1859) Johnson's Chy. Rep. 174.

(2) (1879) 10 Ch. D. 436.

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Canada Act" (Can.) it voted on December 22, 1924, not to concur in union. The minister, Rev. S. C. Walls, who was in the minority, resigned. On May 5, 1925, the Presbytery of Pictou (the appellant congregation being within its bounds), appointed one Rev. Robert Johnston of New Glasgow, N.S., interim (*pro tempore*) moderator of its session, and until after July 27, 1925, no minister was inducted to the charge. In that month, requisitions were signed by a large number of the members of the congregation asking the elders to convene a congregational meeting for the purpose of taking a second vote under the provisions of "The United Church of Canada Act" (N.S.). Some of the elders called a meeting for the 27th of July. One hundred of those who attended voted to become part of the United Church; none opposing. Members opposed to union then brought this action for a declaration *inter alia* that the meeting and proceedings so taken were null and void; that the congregation is a Presbyterian congregation and not a congregation of or in connection with the United Church of Canada.

Held, Duff J. dissenting, that, under the circumstances of this case and in view of the enactments of the federal and provincial Acts respecting the United Church of Canada, the vote given at the meeting of the 27th of July, 1925, was ineffective to carry either the congregation or its property into the Union.

Per Newcombe, Rinfret and Smith JJ.—The power of non-concurrence which the appellant congregation duly exercised under the Dominion Act, having been invoked with affirmative consequences, was exhausted and could not be reviewed by the congregation. Moreover, a meeting of non-concurrence is held under the authority of "The United Church of Canada Act," and should be held before the union comes into force. It is, for the purposes of this case, a meeting of a congregation of the Presbyterian Church in Canada, and, in the absence of any express statutory provision, the regulations of that church applicable to holding a congregational meeting in like circumstances were apt to regulate the meeting for which the statute provides. Rule 19 of the Rules and Forms of Procedure of the Presbyterian Church in Canada requires that meetings of the congregation shall be called by the authority of the Session, which may act of its own motion or on requisition in writing of the Deacons' Court or Board of Managers, or of a number of persons in full communion, or by mandate of a superior court, and rule 50 reiterates that it is the duty of the Session "to call congregational meetings." These rules were not followed as to the meeting of 27th July, and there was no antecedent meeting of the Session, but, moreover, by s. 10 (*d*), the United Church of Canada Act specially provides that a meeting of the congregation for the purposes of expressing non-concurrence may be called by authority of the Session of its own motion, and shall be called by the Session on requisition to it in writing of twenty-five members entitled to vote, in congregations, such as this, having over 100, and not more than 500 members. There was no compliance with these provisions, and in consequence the meeting of 27th July was not regularly called or held, and consequently, if for no other reason, it failed of its purpose.

Per Anglin C.J.C. and Smith J.—The meeting of the 27th of July, 1925, was professedly called under the last sentence of clause (*a*) of s. 8 of the Nova Scotia Act. There is no corresponding provision in the Dominion Act. The resolution for concurrence passed at that meet-

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ing could not bring about the entry of the congregation into the incorporated body known as "The United Church of Canada," since that body is a Dominion corporation. While the property of the congregation might possibly be affected, the congregation did not thereby become part of The United Church of Canada. Under the constating Act of that body corporate (s. 10) the congregation of Saltsprings had definitely, and apparently irrevocably, voted itself out of the Union on the 22nd of December, 1924. But assuming that, by virtue of the Nova Scotia Act of 1925, the vote for non-concurrence taken in December, 1924, should be deemed for all purposes of the Nova Scotia Act of 1924 to be a vote taken under and in conformity with the earlier provisions of s. 8 (*a*) of the latter Act, nevertheless the resolution voted on the 27th of July, 1925, being ineffective to bring the Saltsprings Congregation into the Union, *its only avowed purpose*, it could not operate indirectly to affect the property held by the defendant trustees for such congregation. If it did, that property would thereafter be held by the trustees for a body legally non-existent, i.e., The Presbyterian Congregation of Saltsprings in connection or communion with the United Church of Canada. That the legislature contemplated or intended any such anomalous result is inconceivable. Moreover, the only decision at which the last sentence of clause (*a*) of s. 8 purports to authorize the meeting, for which it provides, to arrive is "to enter the Union and become part of the United Church." The application of the Act "to the congregation and all the property thereof" is manifestly dependent on such "decision" being effectively made. Inefficacious to cause the congregation to become part of the United Church, the resolution for concurrence could not bring about the application of the Nova Scotia Act either to the congregation or to its property.

Judgment of the Supreme Court of Nova Scotia en banc, (59 N.S. Rep. 272) aff., Duff J. dissenting.

APPEAL from the decision of the Supreme Court of Nova Scotia, en banc, (1), reversing the judgment of Harris C.J., and maintaining the respondent's action claiming a declaration that a meeting of the Congregation of Saltsprings, held on or about July 27, 1925, to consider entering the United Church of Canada, was null and void and of no effect.

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

H. McInnes K.C. and *G. W. Mason K.C* for the appellants.

H. P. MacKeen for the respondents.

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinion of my brother Newcombe. While I concur in his disposition of this appeal, its dismissal can, in my opinion, be rested on a short and simple ground, not taken at bar, but so obvious from a consideration of the

(1) (1927) 59 N.S. Rep. 272.

statutes that to direct re-argument upon it would seem unnecessary.

The Dominion statute, 1924, (14-15 Geo. V, c. 100), alone provides for the incorporation of the United Church of Canada, a Dominion-wide body. The provincial statute of Nova Scotia (c. 122 of the year 1924) of course makes no provision for incorporation and deals chiefly with matters affecting property.

The Dominion Act, by section 10, provides for a meeting of "any congregation in connection or communion with any of the negotiating churches" being held "at any time within six months *before* the coming into force of the Act," at which a majority of the persons present and entitled to vote may decide "not to enter the said Union of the said Churches." While s. 2 of the Dominion Act, which was assented to on the 19th of July, 1924, provides that the Act as a whole is not to come into force until the 10th of June, 1925, it also expressly provides that s. 10 thereof shall come into force on the 10th of December, 1924.

Section 29 of the Nova Scotia Act reads as follows:

> 29. This Act shall come into force on the day upon which the United Church shall be incorporated by Act of the Parliament of Canada, provided that the said date in respect of the whole of this Act or any section or sections thereof may be altered to such date or dates as shall be fixed by proclamation of the Lieutenant-Governor in Council to be made upon the request of the sub-committee on Law and Legislation of the joint committee on Church Union to be evidenced by the hands of its chairman and secretary.

No proclamation bringing into force the whole or any section or sections of this Act was referred to in argument, nor have I been able to find any such proclamation in the *Royal Gazette* of Nova Scotia. It would seem, therefore, that the Nova Scotia Act came into force only on the 10th of June, 1925.

The Congregation of St. Luke's Presbyterian Church at Saltsprings held a meeting, now admittedly regularly called, on the 22nd of December, 1924, at which a majority of those present and qualified to vote decided "not to enter the said Union of the said churches." Obviously, this meeting was held under s. 10 of the Dominion Act, as s. 8 of the provincial Act did not come into force until the 10th of June, 1925.

Clause (*a*) of section 8 of the Nova Scotia Act reads as follows:

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8. (*a*) Provided always, that if any congregation in connection or communion with any of the negotiating churches shall, at a meeting of the congregation regularly called and held within six months *after* the coming into force of this section, decide by a majority of votes of the persons present at such meeting and entitled to vote thereat, not to concur in the said union of the said churches, then and in such case the property, real and personal, belonging to or held in trust for or to the use of such non-concurring congregation shall be held by the existing trustees, or other trustees elected by the congregation for the sole benefit of said congregation. Should such congregation decide in the manner aforesaid at any later time to enter the union and become part of the United Church, then this Act shall apply to the congregation and all the property thereof from the date of such decision.

In 1925 the Legislature of Nova Scotia, by c. 167, amended its Act of 1924 and enacted this declaratory section:

1. Any vote on the question of entering the said union taken in a congregation prior to the coming into force in pursuance of and in accordance with the provisions of the Act of incorporation, shall be deemed to be the vote of such congregation for the purposes of this Act.

The manifest purpose of this provision was to make "any vote on the question of entering the said union" taken under the authority of s. 10 of the Dominion Act of 1924 of the same efficacy for the purposes of the Nova Scotia Act, as if such vote had been taken under and in conformity with the earlier provisions of s. 8 (*a*) above quoted.

Subsequently, on the 27th of July, 1925, another meeting was held, the regularity of which the respondents challenge, but at which a majority of those present decided to enter the Union and become part of the United Church. This meeting was professedly called under the last sentence of clause (*a*) of s. 8 of the Nova Scotia Act. There is no corresponding provision in the Dominion Act. Obviously, if effective for any purpose, the resolution for concurrence passed at that meeting could not bring about the entry of the congregation into the incorporated body known as "The United Church of Canada," since that body is a Dominion corporation. It would follow, if there were no other objection to the validity of the transactions of the meeting, that, while the property of the congregation might possibly be affected in some way by such resolution, the congregation itself did not thereby become part of The United Church of Canada. Under the constating Act of that body corporate (s. 10) the congregation of Saltsprings had definitely, and under the provisions of the Dominion Act apparently irrevocably, voted itself out of the Union on the 22nd of December, 1924.

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But for the amending Act of 1925, there would have been a deeper objection to the efficacy of what was done at the meeting of the 27th of July, 1925. The last sentence of clause (*a*) of s. 8 of the Nova Scotia Act deals with "such congregation," i.e., a congregation which had already held a meeting under the earlier provision of clause (*a*) of s. 8, and thereat voted non-concurrence. But no such meeting was ever held because s. 8 only came into force on the 10th of June, 1925, and the only meeting at which non-concurrence was voted had been held on the 22nd of December, 1924, exclusively under the authority of the Dominion Act. To the congregation of St. Luke's Presbyterian Church at Saltsprings, the last sentence of clause (*a*) of s. 8, therefore, could not apply, unless by virtue of the legislation of 1925. Consequently the meeting of the 27th of July, 1925, could not have been validly held under that provision. Nor can any meeting under the earlier part of clause (*a*) of s. 8 be now held, since that clause prescribes that such a meeting must be held within six months after the coming into force of the statute, i.e., before the 10th of December, 1925.

But, assuming that, by virtue of the Nova Scotia Act of 1925, the vote for non-concurrence taken in December, 1924, should be deemed for all purposes of the Nova Scotia Act of 1924 to be a vote taken under and in conformity with the earlier provisions of s. 8 (*a*) of the latter Act, nevertheless the resolution voted on the 27th of July, 1925, being ineffective to bring the Saltsprings Congregation into the Union, and to make it a constituent part of the Dominion Corporation, "The United Church of Canada," *its only avowed purpose,* it cannot operate indirectly to affect the property held by the defendant trustees for such congregation. If it had any such operation that property would thereafter be held by the trustees for a body legally non-existent, i.e., The Presbyterian Congregation of Saltsprings in connection or communion with the United Church of Canada. That the legislature contemplated or intended any such anomalous result is inconceivable. Moreover, the only decision at which the last sentence of clause (*a*) of s. 8 purports to authorize the meeting, for which it provides, to arrive is "to enter the Union and become part of the United Church." The application of the Act "to the congregation and all the property thereof" is manifestly dependent on such "decision" being effectively made.

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Wholly inefficacious to cause the congregation "to enter the Union and become part of the United Church," the resolution for concurrence, which the meeting purported to pass, cannot bring about the application of the Nova Scotia Act either to the congregation or to its property.

On this ground, therefore, I would affirm the judgment of the Supreme Court of Nova Scotia en banc in favour of the respondents with the variation in its terms indicated by my brother Newcombe.

DUFF J. (dissenting).—There was no disagreement—and apparently no doubt—in the court below, upon the capacity of a majority of St. Luke's congregation to take the necessary proceedings to make the congregation a part of the United Church; and to bring the congregation property under the trusts of the model trust deed adopted by the Basis of Union and the Act of Incorporation. Neither was there any doubt as to the power of the United Church to receive St. Luke's, at the critical date (27th July, 1925), as one of its constituent congregations.

As these subjects were not discussed or even touched upon in the argument before us, I should not have adverted to them but for the views in respect of them which form the principal ground of the judgment of the majority of the court.

For that reason only, I review briefly the statutory enactments bearing upon these points, before proceeding to the discussion of what I conceive to be the substantial question in controversy. The United Church Act (The Act of Incorporation) (c. 11, 14-15 Geo. V), after reciting that the Presbyterian, Methodist and Congregational Churches had agreed to unite and form one body or denomination of Christians under the name of the "United Church of Canada," declared that the union of these churches should be effective on the day on which the statute should come into force (10th June, 1925). The "Churches" so united included all congregations in communion or in connection with them, except such as should declare their non-concurrence within six months before "the coming into force of this Act" or within any time limited by the local legislature having jurisdiction over the property of the congregation.

On this appeal we are immediately concerned with the effect of this statute (the Act of Incorporation) upon the status and the rights of the non-concurring congregations. Some of its provisions touching upon this subject could only become completely operative under the sanction of provincial legislation, and the Nova Scotia Act of 1924, c. 122, which came into effect on the same date as the Dominion Act (10th of June, 1925) gives in express terms "with respect to property and civil rights" in Nova Scotia, the force of law to these provisions (s. 27).

The effect of the Act of Incorporation in point of law—and this of course is the only aspect of the legislation with which we are concerned—is not obscure. Such a congregation was, so far as legislative enactment could bring it about, the moment the statute came into operation, segregated from the organized ecclesiastical body or connection to which it belonged, that body having now become absorbed in the United Church; and its congregational property freed from all denominational interest and control and the congregation itself from denominational jurisdiction.

The Act of Incorporation contains no explicit provision purporting to enable a non-concurring congregation to reverse its decision and to enter the United Church after the consummation of the Union. But power to receive congregations is given unmistakably to the United Church by s. 18 (*j*)

(To do all such lawful Acts or things as may be requisite to carry out the terms, provisions and objects of the Basis of Union and this Act);

and that power is explicitly recognized by s. 8 of the Act and by article 8 of the Basis of Union.

I am unable to discern any ground for a contention that after the Union, the United Church was destitute of power to receive the St. Luke's Congregation as a congregation of that body. The Act of Incorporation does not deal with the subject from the point of view of the non-concurring congregation. In virtue of the Act of Incorporation and the supplementary provincial legislation, such a congregation having, by voting non-concurrence, severed its former denominational connections, its civil rights and property became, as subjects of legislation, merely provincial matters, within the exclusive jurisdiction of the provincial legislature; and accordingly it is to the law of the province of Nova Scotia that we must return to ascertain the scope of

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the congregation's rights and the conditions controlling their exercise.

The governing enactment is sec. 8 (*a*) of the Nova Scotia Act of 1924, (C. 122), as amended and interpreted by sec. 1 of the Act of 1925 (C. 167). These enactments are in these words:

8. (*a*) Provided always, that if any congregation in connection or communion with any of the negotiating churches shall, at a meeting of the congregation regularly called and held within six months after the coming into force of this section, decide by a majority of votes of the persons present at such meeting and entitled to vote thereat, not to concur in the said union of the said churches, then and in such case the property, real and personal, belonging to or held in trust for or to the use of such non-concurring congregation shall be held by the existing trustees, or other trustees elected by the congregation, for the sole benefit of said congregation. Should such congregation decide in the manner aforesaid at any later time to enter the union and become part of the United Church, then this Act shall apply to the congregation and all the property thereof from the date of such decision.

Sec. 1. Chapter 122 of the Acts of 1924 is amended by the addition of the following subsection to Section 8:

(*d*) 1. Any vote on the question of entering the said union taken in a congregation prior to the coming into force in pursuance of and in accordance with the provisions of the Act of incorporation, shall be deemed to be the vote of such congregation for the purposes of this Act.

The Nova Scotia courts as I have observed have had no doubt about the effectiveness of this legislation to empower St. Luke's Congregation by appropriate proceedings to enter the United Church. "The purposes of this Act" mainly contemplated by the clause introduced into s. 8 of the Act of 1924 by the amendment of 1925, are manifestly the "purposes" of the first clause of the same section—clause (*a*)—which specifically declares the consequences of a vote of non-concurrence. A vote of non-concurrence therefore pursuant to and in accordance with the provisions of the Act of Incorporation is, in virtue of this amendment, a vote within the meaning of sec. 8 (*a*). It is, in short, in the words of the statute of 1925, a vote of non-concurrence for "the purposes of" clause (*a*), and for all the purposes of that clause—for the purposes of that part of the clause which enables a non-concurring congregation to enter the United Church, as well as of that part of it which declares the effects of non-concurrence.

St. Luke's Congregation is therefore a congregation within the operation of the second sentence of s. 8 (*a*):

should such congregation decide in manner aforesaid at any later time to enter the Union and become part of the United Church, then this Act shall

apply to the congregation and all the property thereof from the date of such decision.

Section 8 (*a*) and the statute of 1925 were not intended to take effect *in vacuo*. They must be read with the Act of Incorporation, which empowers the United Church to receive congregations after the Union. The capacities of the United Church, in so far as they affect the exercise of rights in relation to property or other civil rights within the province, are recognized by the provincial statute (s. 27). The enactments of that statute (as is evidenced by sec. 27) are intended to operate in harmony with the Act of Incorporation; and must be read in light of this legislation as a whole. Section (*a*), by necessary implication, empowers a non-concurring congregation to which it applies, to take, as a congregation, the steps prescribed, in order to "enter the Union and become part of the United Church"; and again, by necessary implication, to take these steps in co-operation with the United Church, acting under the powers derived from the Act of Incorporation and in pursuance of its provisions. It is, perhaps, not out of place to observe that, the main purpose of the enactment being clear, it ought not to be reduced to a nullity, in consequence of infelicities of draughtsmanship. *Salmon* v. *Duncombe* (1).

As to the property of the congregation, the Nova Scotia Statute is to apply to it. It matters little, it seems to me, whether that property comes under s. 4 or s. 6. If under s. 6, that section sanctions (as do s. 8. of the Act of Incorporation and article 8 of the Basis of Union) the use by a congregation of the United Church of congregational property in which, as property, the United Church has no interest and over which it has no control. The congregation, as a congregation of the United Church, has control over the congregational property (affected by s. 6) for congregational purposes; and after proper proceedings under s. 8 (*a*), the congregation is pursuing its legitimate congregational objects in exercising its ecclesiastical and religious functions as a congregation of the United Church. The trustees hold the property for the benefit of the congregation, that is to say, to enable the congregation to make use of it for such legitimate congregational purposes. In either view, the plaintiffs must fail if the proper steps have been taken under s. 8 (*a*).

(1) (1886) 11 App. Cas. 627.

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Turning now to the question of procedure. The enactment of the Act of Incorporation and the decision of the congregation to become a non-concurring congregation, necessarily affected the congregational procedure. The Book of Rules envisages a congregation under the Presbyterian polity; under a denominational system of church government in the Presbyterian form and in full vigour.

By section 8 (*a*), the property of a non-concurring congregation "shall be held * * * for the sole benefit of the congregation." This necessarily implies capacity in the congregation to act as a congregation; and the last sentence of the clause, authorizing such a congregation "to enter the Union" if "such congregation decide, in the manner aforesaid" to do so, implies the existence of capacity on the part of the congregation to reach a decision, "in the manner aforesaid," that is to say, in the words of the earlier part of the clause, "at a meeting of the congregation regularly called and held" to "decide by a majority."

A non-concurring congregation, so long as it remains unconnected with a denominational system acknowledging the Presbyterian form of government, is outside the sphere of Presbyteries and other superior church courts; and on the separation taking effect, all rules involving the exercise of authority by such superior courts were necessarily *ipso facto* suspended or modified in their practical operation. The retention of all such rules in their entirety may be put out of question, because that would have the effect, the obvious effect, in contingencies likely to occur in the ordinary course, contingencies which must have been foreseen, of paralysing the congregation as an ecclesiastical body. The participation of the Presbytery, for example, in the selection and induction of a minister became impossible; and the appointment of a minister, therefore, also impossible, unless plenary authority in relation to such matters vested in the congregation in consequence of the severance. So also, if the minister died or resigned or became incapable of acting, a session could not be properly constituted, according to the strict prescriptions of the Book of Rules; because according to the rules the appointment of an interim moderator rests exclusively with the Presbytery. There could, under the rules, be no properly constituted session and therefore, if the view advanced by the re-

spondents be accepted, no properly constituted meeting of the congregation—no such meeting "regularly called and held."

It cannot be supposed that the legislature intended that the enactments of clause (*a*) should become nugatory in circumstances and conjunctures so probable that they must be taken to be contemplated; in such easily foreseeable contingencies, for example, as the resignation of the minister after a vote of non-concurrence. The Act of Incorporation for the Trustees of St. Luke's (C. 217 of Nova Scotia statutes of 1906) provides for an annual meeting of the congregation on a specified date, and prescribes the notice to be given. It enacts also that no property of the congregation shall be disposed of, and no action or suit brought by the trustees without the authority of the congregation, given at a regular meeting, called for the purpose of granting such authority. There is nothing in this Act requiring meetings of the congregation to be called by the session or requiring notice of the annual meeting, which the statute itself enjoins, to be given under the authority of the session.

But, assuming the proceedings directed and authorized by the St. Luke's Act to be governed by the rules in the Book of Rules, the Nova Scotia legislature, in enacting s. 8 (*a*) and in giving its sanction to the Dominion enactments in the Act of Incorporation, can hardly have intended to deprive a congregation situated as St. Luke's was, of the power of functioning as a congregation in relation to its property or in holding an annual meeting. A decision of such a congregation "in the manner aforesaid" which, by the second limb of s. 8 (*a*) is the condition upon the performance of which such a congregation enters the Union, does not require for its validity a meeting "regularly called and held" within the strict prescriptions of the Book of Rules—a condition impossible of performance in such cases as those alluded to. What is required is a meeting fairly called in a manner conforming to the customary procedure in such a degree as is reasonably practicable, and, having regard to the disruption, fairly demanded in the circumstances of the particular case.

I now turn to a brief consideration of the circumstances in which the impeached decision of the congregation was

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arrived at. First of all, it is well to correct an impression which one might gather from the judgments in the full court, that there was in fact no meeting of the elders who signed the notice calling the meeting of the congregation. There is evidence that the session, that is to say, the elders who were members of the session, in the absence, of course, of Mr. Johnston, decided to call a meeting of the congregation for the purpose of having a second vote. This evidence is uncontradicted and there was no cross-examination upon it. For the purposes of this appeal, it must be taken that the elders professed to meet, without Mr. Johnston, as a session, and that, as such, they decided upon calling the congregational meeting. In the circumstances, it would appear that the elders did everything that could reasonably be required of them. Mr. Johnston had, at a meeting of the Presbytery of Pictou on the 5th of May, been appointed interim moderator. On the 10th of June, the legislation constituting the United Church took effect and the vote of non-concurrence by St. Luke's Congregation in December became operative. Mr. Johnston, himself a non-concurrent, together with the Pictou Presbytery constituted by the non-concurring Presbyterian congregations, of which he was a member, assumed that St. Luke's came under the jurisdiction of this Presbytery—a not unnatural supposition perhaps in view of the vote in the December preceding. In fact, St. Luke's had not adhered, and never did adhere to the church formed by the continuing Presbyterians, and the Presbytery never acquired any jurisdiction over that congregation. At a meeting of the session on the 10th of July, at which Mr. Johnston was present, there was a good deal of acrimonious discussion, and Mr. Johnston reported to the Presbytery that the elders had resigned; the Presbytery accordingly, acting no doubt under the belief that it possessed the authority to do so, appointed assessors, who with Mr. Johnston were to act as the Session (R. 59). In this action, the respondents took the position that these proceedings by the Presbytery were effective, that the elders had resigned as Mr. Johnston had reported, and that the assessors so appointed had been regularly constituted assessors, under the constitution by which the congregation was governed.

The learned trial judge, the Chief Justice of Nova Scotia, held that, although Mr. Johnston had acted under a belief that the elders had resigned, there never was any intention on their part to do so, and that they had not in fact done so. The learned trial judge evidently accepted the evidence of the elders, and was convinced that there was a quarrel and a misunderstanding as to what had occurred. The learned judge also finds that Mr. Johnston was notoriously opposed to Union and opposed to the holding of a meeting for the purpose of taking a second vote.

I cannot in these circumstances doubt that the elders, who unanimously desired a meeting of the congregation for that purpose, were entitled to proceed as they did. They and they alone represented the congregation as members of the Session. There was no minister. The presence of an interim moderator could not, for the reasons I have given, be essential to the proper constitution of a meeting of the Session.

It is argued that the present case differs from those suggested because there was an interim moderator who had been duly appointed; and it is contended that it was necessary to observe the rules in so far as it was possible to do so, in the circumstances. There are, I think, weighty reasons for doubting that Mr. Johnston's authority as interim moderator survived the separation of the congregation from the church which, by force of legislative enactment, had become incorporated in the United Church of Canada. Up to that time, he was interim moderator and possessed of such authority as pertained to that office under the constitution of the Presbyterian Church of Canada. But it was not an authority attaching to him personally in the sense that he was entitled to wield it according to his uncontrolled discretion. He was the appointee of the Presbytery; he was subject to the direction of the Presbytery as to calling meetings of the Session and in respect of other things; against him complaints could be addressed to the Presbytery, which had full powers to deal with such matters as well as a general superintendency over the Session. The records of the Session were subject to review by the Presbytery, to which an appeal lay from the Session. The Presbytery in its turn was subject to the jurisdiction of superior courts, the general assembly and the Synod. It would be superfluous

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to pursue these matters into their details. What is now contended is that Mr. Johnston, having been appointed interim moderator of this Session under a polity which conferred upon him certain very important powers touching matters pertaining to the spiritual and temporal affairs of the congregation, but subject, in the exercise of them, to the control and discipline of the superior courts of the church, still retained those powers in their full vigour, but free from any such discipline and control. I am disposed to think that the authority of the interim moderator lapsed when the disruption occurred which deprived the congregation of the protection provided in the Presbyterian polity against ill-judged or arbitrary acts by a moderator in whose appointment the congregation itself had no voice. That is the view upon which I am disposed to think this branch of the appeal ought to be decided; but, beyond that, I am wholly unable to assent to the proposition that an interim moderator in Mr. Johnston's position, assuming the attitude he assumed, asserting an authority derived from a Presbytery which had no jurisdiction over the congregation, could insist upon being recognized as the official solely entitled to initiate the proceedings necessary to call the congregation together for the transaction of business of vital moment to the congregation itself.

If the elders were strictly bound by the letter of the rules, they were in the circumstances powerless. By those rules it is the moderator who convenes the Session. It is true that he is bound to do so when enjoined by a superior court or when requested to do so by one-third of the elders. There was no longer a superior court possessed of jurisdiction. It is improbable that he would have recognized any of the elders (who, he believed, had resigned), if they had requested him to call a meeting. It is equally improbable that he would have called a meeting for such a purpose of his own motion. And if he had called one, there can be little doubt that he would have recognized only the assessors appointed by the Presbytery as entitled to take part with himself in the business of the Session. Under the rules, in their integrity, the elders would have had their remedy by way of complaint or appeal. In the circumstances, if the view advanced by the respondents be accepted, the elders of the congregation were subjected to the arbitrary dictates of the interim moderator.

The appeal should be allowed with costs.

NEWCOMBE J. (concurred in by Rinfret J.).—This action relates to a division which has unfortunately taken place in the congregation known to the law as "St. Luke's Presbyterian Congregation of Saltsprings in connection with Presbyterian Church in Canada," as to the position which that congregation occupies with regard to the recent legislative union of the churches. It is maintained by the plaintiffs, on the one hand, that the congregation is non-concurrent, while it is contended by the defendants, on the other hand, that the congregation belongs to the union.

The plaintiffs, whose contention has been upheld by the majority of the Supreme Court *en banc,* were, at the time of the union (10th June, 1925), members of the congregation in full communion, and the Rev. Robert Johnston, who was the *pro tempore* or *interim* Moderator of the Session. It is claimed, on behalf of the plaintiffs, that Mr. Cameron and Mr. Halliday were also assessors to the Session, and a question was suggested in the court below as to the validity of their appointment, but that is a question which, in my view, it will not be necessary to consider. The defendants are the trustees of the congregation under the statute of Nova Scotia, c. 217 of 1906, entitled *An Act to Incorporate the Trustees of St. Luke's Presbyterian Congregation of Saltsprings in connection with the Presbyterian Church in Canada;* also two reverend gentlemen, Mr. Frame and Mr. Matheson, who were in some wise thought to be concerned in the controversy, and against whom the action was dismissed.

The question depends upon the meaning of the legislation, to which I shall now refer, in its application to the material facts.

The Act incorporating the United Church of Canada, c. 100 of the Dominion, received assent on 19th July, 1924, and may be cited as *The United Church of Canada Act;* it recites that the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches of Canada, believing the promotion of Christian unity to be in accordance with the Divine Will, recognize the obligation to seek and promote union with other churches adhering to the same fundamental principles of the Christian faith, and, having the right to unite with one another without loss of

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their identity, upon terms which they find to be consistent with such principles, have adopted a basis of union, which is set forth in schedule A to the Act, and have agreed to unite and form one body or denomination of Christians under the name of "The United Church of Canada"; and it is declared that the Act shall come into force on 10th June, 1925,

except the provisions required to permit the vote provided for in section ten being taken, which section shall come into force on the tenth day of December, 1924.

Some definitions follow, including these:

(*c*) "Congregation" means any local church, charge, circuit, congregation, preaching station, or other local unit for purposes of worship in connection or in communion with any of the negotiating churches or of The United Church of Canada.

(*e*) "The Presbyterian Church in Canada" shall include * * * the Presbyterian congregations separately incorporated under any statute of the Dominion of Canada or of any province thereof, and all congregations heretofore and now connected or in communion with The Presbyterian Church in Canada, whether the same shall have been organized under the provisions of any statute or deed of trust or as union or as joint stock churches or otherwise howsoever.

* * * * *

(*k*) "Non-concurring congregations" shall mean those congregations which decide, as hereinafter provided, not to enter the union hereinafter mentioned.

By section 4, the union of the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches becomes effective when the Act comes into force, namely, on 10th June, 1925,

and the said churches, also united, are hereby constituted a body corporate and politic, under the name of "The United Church of Canada."

The several corporations, described as the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches, are merged in the United Church, and the congregations of these churches which are known as the "negotiating churches," are admitted to, and declared to be congregations of, the United Church; but it is provided, notwithstanding anything in the Act contained, that members of any non-concurring congregation

shall be deemed not to have become, by virtue of the said union or of this Act, members of the United Church;

and provisions follow to the effect that any minister or member of the negotiating churches may, within six months from the coming into force of the Act, notify in writing to the prescribed authority his intention not to become a minister or member, as the case may be, of the United Church,

and that, in such event, he shall be deemed not to have become, by virtue of the union or of the Act, such minister or member.

Sections 5 to 9 inclusive relate to church or congregational property, and need not, for the present, be considered. Section 10 is the important section. It provides in part that if any congregation in connection or communion with any of the negotiating churches, shall,

at a meeting of the congregation regularly called and held at any time within six months before the coming into force of this Act (10th June, 1925) or within the time limited by any statute respecting the United Church of Canada passed by the legislature of the province in which the property of the congregation is situate, before such coming into force, decide by a majority of votes of the persons present at such meeting and entitled to vote thereat not to enter the said union of the said churches, then, and in such case, the property, real and personal, belonging to such non-concurring congregation shall remain unaffected by this Act, except that any church formed by non-concurring congregations of the respective negotiating churches into which such congregation enters shall stand in the place of the respective negotiating churches in respect of any trusts relating to such property, and except that, in respect of any such congregation which does not enter any church so formed, such property shall be held by the existing trustees or other trustees elected by the congregation free from any trust or reversion in favour of the respective negotiating churches and free from any control thereof or connection therewith..

It is further enacted by s. 10 that the persons entitled to vote shall be only those who are in full membership and whose names are on the roll of the church "at the time of the passing of the Act" (19th July, 1924); but it is nevertheless provided that

In any province where by an Act of the Legislature respecting the United Church of Canada passed prior to the passing of this Act, a different qualification for voting has been prescribed, the qualification for voting under this section shall be as provided in such Act.

Then it is provided by paragraph (*c*) that

The non-concurring congregations in connection, or in communion with, any or all of the negotiating churches may use, to designate the said congregations, any names other than the names of the negotiating churches, as set forth in the preamble of this Act, and nothing in this Act contained shall prevent such congregations from constituting themselves a Presbyterian Church, a Methodist Church, or a Congregational Church, as the case may be, under the respective names so used.

It will have been observed by the foregoing that the meeting of the congregation at which the power of non-concurrence may be exercised is, by the express direction of the statute, to be regularly called and held. Paragraph (*d*) of s. 10 proceeds to define more closely the method by which the meeting may be called. It may be called by the author-

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ity of the Session of its own motion, and shall be called by the Session on requisition to that body in writing of a number of members entitled to vote, depending upon the total membership of the congregation; and it is further provided that such meeting shall be called by public notice read before the congregation at each diet of worship on two successive Lord's Days on which public service is held, and that such notice shall specify the object of the meeting.

These directions follow very nearly, although with variations, the method described by the *Rules and Forms of Procedure of the Presbyterian Church in Canada,* to be found in rule 19 thereof. That rule is as follows:

> 19. Meetings of the congregation are called by the authority of the Session of its own motion or on requisition in writing of the Deacons' Court or Board of Managers, or of a number of persons in full communion, or by mandate of a superior court. Meetings are called by public notice, read before the congregation on the Lord's Day; such notice specifies the object of the meeting and is given on at least one Sabbath before the time of meeting, unless otherwise and specially provided for. Congregational meetings are opened and closed with prayer.

Before passing on to consider the provincial legislation, attention should, perhaps, be directed to s. 22 of the Dominion Act, by which it is provided that all synods and presbyteries of the Presbyterian Church in Canada, and all other courts or governing bodies of any of the negotiating churches shall,

> save as to the non-concurring congregations, continue to have, exercise and enjoy all or any of their respective powers, rights, authorities and privileges, in the same manner and to the same extent as if this Act had not been passed, until such time or times as the United Church, by its general council, shall declare that the said powers, rights, authorities and privileges, or any of them, shall cease and determine.

There is no evidence of any such declaration, and I refer to this section because the appellants endeavour to justify an inference from it that, once a congregation becomes non-concurring, it ceases to be subject to any of the church courts or governing bodies. The section, however, did not come into effect until 10th June, 1925, when the non-concurrence became operative, and then it did not, in my view, operate to displace the regulations for the holding of meetings contemplated by the previous clauses to which I have referred, and which, I think, must have their application, notwithstanding any inference which may be admissible under s. 22.

The promoters of the union, in order to obtain adequate legislative sanction, and for the avoidance of doubts, sought legislation, not only by the Dominion, but also by the provinces, and, in Nova Scotia, the local provisions are to be found in ch. 122 of 1924, entitled *An Act Respecting the Union of Certain Churches Therein Named,* enacted on 9th May, as amended by c. 167, enacted on 7th May of the next following year. We were told that the common intent was, in one way or another, to have each legislative provision sanctioned by both the Parliament and the provincial legislature, and no question of legislative power was in terms raised or suggested at the hearing, although the point is specifically made in the statement of claim that the proceedings upon which the defendants rely are " null and void and of no effect." So far as the intention of Parliament and of the legislature appear to be the same, it is, perhaps, unnecessary to define their respective limits of authority, but, as I shall presently shew, the Assembly has, in some material particulars, purported to enact provisions which form no part of the incorporating Act. The local statute is however largely in conformity with and anticipates the enactments of the *United Church of Canada Act.* It is provided by s. 29, the concluding section, that

> This Act shall come into force on the date upon which the United Church shall be incorporated by Act of Parliament of Canada, provided that the said date, in respect of the whole of this Act or any section or sections thereof, may be altered to such date or dates as shall be fixed by proclamation of the Lieutenant-Governor in Council, to be made upon the request in writing of the said Committee on Law and Legislation and the joint committee of Church Union to be evidenced by the hand of its chairman and secretary.

Our attention was not directed to any such proclamation, and none appears to have been published in the *Nova Scotia Gazette.* The local provisions affecting non-concurrence are to be found in s. 8 of the Nova Scotia Act, and they correspond, in some measure, with s. 10 of the Dominion Act, but it will be useful, I think, to reproduce s. 8. It reads as follows:

> 8. (*a*) Provided always, that if any congregation in connection or communion with any of the negotiating churches shall, at a meeting of the congregation regularly called and held within six months after the coming into force of this section, decide by a majority of votes of the persons present at such meeting and entitled to vote thereat, not to concur in the said union of the said churches, then and in such case the property, real and personal, belonging to or held in trust for or to the use of such non-concurring congregation shall be held by the existing trustees, or

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other trustees elected by the congregation, for the sole benefit of said congregation. Should such congregation decide in the manner aforesaid at any later time to enter the union and become part of the United Church, then this Act shall apply to the congregation and all the property thereof from the date of such decision.

(*aa*) notwithstanding the provisions of this subsection (*a*) no congregation of the negotiating churches within the province of Nova Scotia excepting such congregation as have prior to the passing of this Act joined with any one or more congregations of any of the other negotiating churches for purposes of worship shall be deemed to have entered the Union or become part of the United Church, nor shall all the property, real or personal, belonging to or held in trust for or to the use of such congregation be affected by the provisions of this Act, if within six months from the day upon which this Act comes into force such congregation at a meeting of the congregation regularly called shall decide by a majority of votes of the persons present at such meeting and entitled to vote thereat not to concur in the said Union of said churches.

(*b*) the persons entitled to vote under the provisions of the first clause of this section shall be those who by the constitution of the congregation, if so provided, or by the practice of the Church with which they are connected, are entitled to vote at a meeting of the congregation.

(*c*) "Congregation" in this section means a local church as mentioned in the Basis of Union.

Paragraph (*b*) of this section should be read in connection with rule 14 of the *Rules and Forms of Procedure of the Presbyterian Church in Canada,* by which it is prescribed that

All members in full communion, male and female, have the right to vote at all congregational meetings, and to them exclusively belongs the right of choosing ministers, elders and deacons. At any meeting of the congregation when matters relating to the temporal affairs of the congregation, and not affecting the order of worship, the discipline of the Church, or the disposal of property, are under consideration, adherents who contribute regularly for the support of the Church and its ordinances may vote.

It will have been perceived that the Nova Scotia Act came into force as a whole on 10th June, 1925, and there is no such exception, as there is in s. 2 of the Dominion Act, with respect to the

provisions required to permit the vote provided for in section ten being taken,

and that, by the provincial requirement, the time for a meeting of the congregation to authorize non-concurrence in the union is within six months after the coming into force of s. 8; and, moreover, there is introduced into s. 8 the concluding sentence of paragraph (*a*), which provides that

Should such congregation decide in the manner aforesaid at any later time to enter the Union and become part of the United Church, then this Act shall apply to the congregation and all the property thereof from the date of such decision.

There is no corresponding enactment in the Dominion Act, nor does that Act contain any express provision whereby a non-concurring congregation may enter the union; and, moreover, according to the meaning of s. 8 (*a*), the intention seems to be that this concluding sentence applies only to a congregation which, at a meeting within six months after 10th June, 1925, has decided, by a majority of votes, not to concur in the union. What happened may now be stated in the order of the events.

On 22nd December, 1924, the congregation of Saltsprings, then under the ministry of the Rev. S. C. Walls, voted not to concur in the union. There is, notwithstanding a suggestion to the contrary by the learned Chief Justice who tried the cause, no dispute as to the regularity and effect of this meeting. The vote was for non-concurrence, and the congregation admittedly then became non-concurrent. The minister, who was in the minority, resigned. The congregation was within the bounds of the Presbytery of Pictou, and that body, following the prescribed practice in like cases, at a meeting on 5th May, 1925, appointed a *pro tempore* Moderator of the Session. The Rev. Robert Johnston was selected, and, by the minute, his appointment was to take effect from 10th May. His powers and duties as Moderator are regulated by Rules 53, 54, 58 and 59 of the *Forms and Rules of Procedure,* as follows:

53. The duty of the moderator is to preside; to preserve order; to take the vote; to announce the decisions of the court and to pronounce censures. The moderator may introduce any competent business, and may express his views upon any matter under consideration. He has only a casting vote.

54. In the absence of the moderator, or when, for prudential reasons, he deems it better not to preside, another minister of the Church, having authority from him, may act as moderator *pro tempore*. When the minister has been removed by death or otherwise, or is under suspension, a moderator *pro tempore* is appointed by the Presbytery.

58. The moderator has power to convene the Session when he sees fit; and he is bound to do so when enjoined by a superior court or requested by one-third of the elders. Meetings are called on the authority of the moderator, either by notice from the pulpit or by personal notice to the members.

59. The moderator and two other members constitute a quorum. When from any cause, the number of elders is not sufficient to form a quorum, application is made to the Presbytery for assessors to act with the other members until new elders have been elected.

At the December meeting, there had been a substantial minority of the congregation voting against non-concur-

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rence, and subsequently a question of reconsideration arose. There were, nominally, nine elders. On 10th July, Mr. Johnston met the Session, when he ascertained that three of the five elders who attended were unwilling to continue in office. There was talk about resignations, and the minister apparently understood that the way was open for the election or re-election of seven elders. Notice was to be given on the two next following Sabbaths, 12th and 19th July, and the ballots were to be taken on the third Sabbath, 26th July. Whether or not this was done does not appear by the evidence, but I infer that the election did not take place. Some of the elders caused to be read at the church on 19th and 26th July the following notice:

> Notice is hereby given that a meeting of the congregation shall be held at the Church on the 27th day of July, 1925, at 2 o'clock p.m. for the purpose of considering and voting upon a resolution that St. Luke's Presbyterian Church, Saltsprings, concur in the Union of the Churches provided for by Chapter 122 of the Acts of Nova Scotia for 1924, and that the said St. Luke's Presbyterian Church at Saltsprings shall become part of The United Church of Canada. The meeting and the voting thereat shall take place under the provisions of said section 8 of said Chapter 122 of the Acts of Nova Scotia, 1924.
>
> Dated at Saltsprings, N.S., this 18th day of July, 1925.

This notice was preceded by a requisition, signed by some of the members of the congregation, which reads as follows:

> The undersigned members in full communion of St. Luke's Presbyterian Congregation at Saltsprings hereby request the elders to call a meeting of the congregation to be held at the earliest time possible under the constitution of the Church for the purpose of considering and voting whether or not the said cogregation shall concur in the union of St. Luke's Church with The United Church of Canada, and become part of the said The United Church of Canada.
>
> The said meeting is to be called under Section 8 of Chapter 122, of the statutes of Nova Scotia, for the year 1924.
>
> Dated at Saltsprings, N.S., this 15th day of July, 1925.

The pulpit was supplied, on 19th July, by Mr. Harrison, a student for the ministry, who had for some time been conducting services for the congregation under authority of the Presbytery; and, on the 26th, Mr. Johnston preached, but each of them declined to read the notice.

Pursuant to the notice thus advertised, a meeting was held at the time and place thereby appointed, when, according to the notes of the meeting, Mr. W. H. McKay, one of the elders, was appointed Chairman of the meeting, and Mr. C. H. McKay, Secretary. The notice was read,

and the following resolution, moved and seconded by two of the elders, was put to the meeting and carried by a standing vote:

Resolved, that St. Luke's Presbyterian Church, Saltsprings, concur in the Union of Churches, provided for by Chapter 122 of the Acts of Nova Scotia for 1924, and that St. Luke's Presbyterian Church, Saltsprings, shall become part of the United Church of Canada.

The votes having been counted by scrutineers, who were then appointed, the Chairman declared 100 for, and none opposing, and he then proceeded to declare.

That St. Luke's Presbyterian Church, Saltsprings, is now a part of the United Church of Canada.

Then a letter was prepared by the Rev. Mr. Farquhar, "the minister in New Glasgow," who had been invited to attend the meeting, and signed by Mr. A. C. MacDonald, the clerk of the Session. The letter is addressed to Mr. Harrison, the student who had been supplying the congregation at Saltsprings, and reads as follows:

ST. LUKE'S CHURCH, SALTSPRINGS

July 27, 1925.

Mr. E. HARRISON,
Saltsprings.

Dear Sir,—You will recall that some time ago a resolution was passed and communicated to you that we held ourselves responsible for your services for two Sundays only, your services to terminate on June 10. You have since continued to give services in the congregation of St. Luke's while it remained an independent congregation and neither at the request of nor with the acquiescence of the elders of the congregation, in whose hands all arrangements for pulpit supply, for the time being, lay.

To avoid difficulty we have till now taken no action. To-day the congregation of St. Luke's has decided to enter the United Church of Canada.

This is to inform you that from to-day any further attempt on your part to supply St. Luke's will be in opposition to the wishes of the elders and the congregation and contravene the authority of the Presbytery of Pictou of the United Church of Canada, under whose jurisdiction this congregation now lies.

We write you thus because we are persuaded that you are not aware of the gravity of the situation, and the very serious matter of contravening constituted authority.

We would also inform you that the Presbytery of Pictou of the United Church of Canada is asked to send supply to the pulpit of St. Luke's on Sunday next.

Yours very truly,
(Sgd.) ALEX. C. MCDONALD,
Session Clerk.

The writ was issued on 1st September, 1925.

The trial was had before the learned Chief Justice. He had some doubts as to the validity of the meeting of De-

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cember 24, 1924, when the congregation voted non-concurrence. He concluded that the elders had not resigned. He thought that if the *pro tempore* moderator had not been properly appointed, he would not be a constituent of the Session, and that the signing of the notice for the congregational meeting of 27th July "would seem to do away with the necessity of any meeting" of the Session; but, upon the assumption that Mr. Johnston had been properly appointed, he expressed the following view:

> The situation was, as everybody knew, that the Reverend Robert Johnston would oppose in every way the taking of a second vote on the question of Union by this congregation. His attitude throughout shews this. If a meeting of the Session had been asked for there is no reason to suppose that he would have called it; and if he had called it he would have had no vote at the Session meeting, because all the elders were unanimously for the holding of a meeting, and the minister only had a casting vote in case of an equal division. Under the circumstances the holding of a meeting of the Session would have been a mere formality and the question is whether the notice given by all the elders was not under the circumstances a good notice for the purpose. I think it was.

He held that the notice of the congregational meeting complied with the rules; that s. 7 of ch. 217 has reference only to the Annual Meeting of the congregation, and does not apply to the meeting of 27th July, and he held that, although it had been argued that there was no provision for a second vote upon the question of union, and that once the congregation had voted against union, no further vote was permissible, the latter part of s. 8 (*a*) of the provincial Act specifically states that after the congregation has decided not to concur, it may, at a later date, decide to enter the union. Accordingly, he dismissed the action.

The plaintiffs appealed, and the judges en banc were Rogers, Mellish, Graham and Carroll JJ. The majority (Rogers, Graham and Carroll JJ.) were of the view that the congregational meeting of 27th July, 1925, was ineffective because no meeting of the Session was held authorizing the calling of the congregational meeting, and that, in the absence of such authorization, a valid meeting could not be held, seeing that, by the requirements of s. 8 (*a*) of the provincial Act, non-concurrence of a congregation could not be authorized, unless "at a meeting of the congregation regularly called and held." The learned judges referred to the *Rules and Forms of Procedure,* adopted by the General Assembly, as setting forth the law and practice of the

Church, and they considered that the regularity of the procedure was to be judged by these rules, and that, if the elders believed that the congregation had changed its view, and desired to enter the union, their proper course would have been to request another meeting of the Session, under Rule 38, for the purpose of passing a resolution for the calling of another meeting. Mellish J., on the other hand, was of the opinion that it was the paramount intention and purpose of Parliament and the Legislature "to obliterate each of the negotiating churches as such, and their ministry and membership," and he says that after the union, the Session of the Saltsprings congregation had no right to function, that it no longer remained a court of a negotiating church, and that the elders and congregation were no longer under any obligation to respect or conform to the previously existing rules with respect to meetings. Mellish J., seems therefore to have been of the opinion, if I do not misjudge his reasoning, that the July meeting was regularly called and held within the meaning of s. 8 (*a*) of the provincial Act.

Beyond this, he held that the trustees of the Saltsprings congregation are not entitled to hold the congregational property in trust for the benefit of the congregation as part of the United Church, unless the congregation consent thereto; that the individual members of the congregation have the right to select their own church, but not to alter the proprietary rights of each other, unless so authorized by statute, and that

> the consent contemplated is not the consent of the congregation as a part of the United Church, but in this case I think the *quondam* congregation of the Presbyterian Church in Canada known as St. Luke's. And their property can, I think, be dealt with under the Act incorporating the trustees to reasonably meet any situation, whether the congregation enters the union in a body or not.

This point, it is said, was not raised before the learned Chief Justice at the trial, and it is rejected by Rogers and Graham JJ., who are in agreement throughout, although Carroll J., concurs with Mellish J.

> as to the conditions or terms under which this particular property is held.

In the result, upon the latter point, the Court en banc is equally divided, but in the view which I take of the case, it is not necessary for me to consider it.

One must desiderate, in these judgments, an explanation or statement of the reasons which led the judges in

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Nova Scotia to permit the provincial Act to operate in a manner to affect the constitution of the United Church as incorporated and established by Act of Parliament. It is remarkable that no attention was paid to that subject, but it is none the less obvious that, by the *United Church of Canada Act*, every congregation of the Presbyterian Church in Canada was a negotiating church, and, subject to the provisions or exceptions of s. 10 of that Act, became embodied in the union, on 10th June, 1925, when the union of the Presbyterian Church in Canada, the Methodist Church and the Congregational Churches, became operative, and the churches, as so united, were constituted a body corporate and politic under the name of The United Church of Canada. The legislative description is that the several corporations embraced within the definitions of s. 3 are merged in the United Church, and the congregations are admitted, and declared to be, congregations of the United Church; and, moreover, the congregations which, in the manner and within the time prescribed, decided not to enter the union, were excepted from the union as non-concurrent. These remain, as to their property, unaffected by the Act of Union, except in respect of trusts and reversions, as to which there are special provisions, intended no doubt, for the protection of the non-concurring congregations, and to produce equity.

Now the time for non-concurrence was within six months before 10th June, 1925, " or within the time limited by any statute respecting the United Church of Canada passed by the legislature of the province in which the property of the congregation is situate, before such coming into force," and the meeting of non-concurrence was held on 22nd December, 1924, before the provincial Act, or any of its provisions, came into force, and not otherwise than under the Church Union Act of Canada. This proceeding seems definitely to have placed Saltsprings in the category of a non-concurring congregation. Certainly the Nova Scotia Act, including s. 8, was passed before the Dominion Act, if that be a relevant circumstance, but neither s. 8, nor any other provision of the local Act, was meant to come into force until 10th June, 1925, nor had it anything to do with bringing about the condition of non-concurrence in which Saltsprings has stood since the meeting of 22nd December,

1924, by the effect of the Dominion Act; and, the power of non-concurrence which the congregation duly exercised under that Act, having been invoked with affirmative consequences, is, in my opinion, exhausted, and cannot be reviewed by the congregation. Under the authority of the Dominion Act there is no sanction for re-trial of the vote upon a future occasion; and by the amending Act of Nova Scotia, ch. 167 of 1925, it is enacted in terms that

1. Any vote on the question of entering the said union taken in a congregation prior to the coming into force in pursuance of and in accordance with the provisions of the Act of incorporation, shall be deemed to be the vote of such congregation for the purposes of this Act.

2. Notwithstanding any informality in the taking of any vote or defect in the proceedings relating thereto, and notwithstanding that persons not entitled to vote have voted or that persons entitled to vote have been deprived of the vote, all votes taken or purporting to have been taken in pursuance of the Act of incorporation shall be valid and binding upon the congregations respectively in which such votes have been taken unless on or before the 10th day of June, 1925, a proceeding is taken in the Supreme Court of Nova Scotia for the purpose of having such vote set aside or declared of no effect.

The concluding sentence of s. 8 (*a*) of the provincial Act does not help; first, because the premises or conditions in which it is intended to operate never did, in fact, exist; and secondly, because that clause, relying, as it does, solely upon provincial authority, is incompetent to the legislature of the province, according to principles which are very plainly established by such cases as *Dobie* v. *The Temporalities Board* (1); *Colonial Building and Investment Association* v. *Attorney General of Quebec* (2), and the more recent authorities.

Moreover, the formula of the vote, by which a congregation of the negotiating churches may escape union, as prescribed by the Dominion Act and by s. 8 (*a*) of the Nova Scotia Act, differs from that which has been adopted in this case under the authority said to be derived from s. 8 (*a*). What is required, in order to disqualify and exclude a congregation from the operation of the Act of Union, is a majority of qualified votes "not to enter such union of the said churches," and in fact the vote of 22nd December, 1924, is the only vote which complies with that requirement. No effect is given by Parliament to a resolution, expressing concurrence in the union of the churches,

(1) (1881) 7 App. Cas. 136. (2) (1883) 9 App. Cas. 157.

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or that a congregation "shall become part of the United Church of Canada," nor is any authority given for the holding of a meeting for such a purpose.

As to the invalidity of the meeting of 27th July, I agree with the reasons of the majority of the Supreme Court *en banc*. A meeting of non-concurrence is held under the authority of the *United Church of Canada Act*, and should, as I interpret the statute, be held before the union comes into force. It is, for the purposes of this case, a meeting of a congregation of the Presbyterian Church in Canada, and I should have thought that, in the absence of any express statutory provision, the regulations of that church applicable to holding a congregational meeting in like circumstances were apt to regulate the meeting for which the statute provides.

Now I have already shewn that Rule 19 requires that meetings of the congregation shall be called by the authority of the Session, which may act of its own motion or on requisition in writing of the Deacons' Court or Board of Managers, or of a number of persons in full communion, or by mandate of a superior court, and rule 50 reiterates that it is the duty of the Session "to call congregational meetings." These rules were not followed as to the meeting of 27th July, and there was no antecedent meeting of the Session, but, moreover, by s. 10 (*d*), the statute itself specially provides that a meeting of the congregation for the purposes of expressing non-concurrence may be called by authority of the Session of its own motion, and shall be called by the Session on requisition to it in writing of twenty-five members entitled to vote, in congregations, such as this, having over 100, and not more than 500 members. There was no compliance with these provisions, and in consequence it seems to me to be very plain that the meeting of 27th July was not regularly called or held, and that consequently, if for no other reason, it failed of its purpose. I do not think the Court is entitled to infer that, although the regulations were disregarded, the meeting, such as it was, would have been held, or would have reached the identical result, if the prescribed preliminaries had been observed, and it is, I should think, very unlikely that Parliament or the legislature intended to leave congregations who were in doubt about their future affiliation, without adequate directions for the determination of that vital question.

The suggestion that the defect in the meeting of 27th July is, at most, an irregularity, which does not affect the reality of the thing accomplished, ought therefore to be rejected. The prescribed regulations must, I should think, rather be regarded as essential requirements of procedure in the polity or administration of the Church. And besides, there is a two-fold answer: In the first place, the statute in this particular case, which involves the whole status of the congregation, expressly insists that the meeting shall be regularly called and held, and therefore it would seem that irregularity is not to be tolerated; and, secondly even assuming regularity in the calling of the meeting, its object and business, in so far as it could effectively serve any purpose, was, in substance, the reversal of a statutory election or option, which having been already competently exercised, could not be revoked by the congregation: *quod semel placuit in electionibus amplius displicere non potest.* The case is not within the principle enunciated in the cases of which the well known judgment of Mellish L.J., in *McDougall* v. *Gardiner* (1), is a leading example.

For these reasons, I would dismiss the appeal, but I think the judgment of the Supreme Court of Nova Scotia *en banc* should be varied by striking out the fourth paragraph, which begins with a statement of opinion

> that the congregation, at a meeting regularly called and held, may, pursuant to the latter part of s. 8 (*a*), of ch. 122 of the Acts of the Province of Nova Scotia, 1924, enter the union and become part of the United Church,

because I am not satisfied that this congregation may, pursuant to that authority, exercise such a power, and certainly cannot do so in the present circumstances with the consequence of uniting or merging the congregation with the united body.

The costs of the appeal should follow the event.

SMITH J.—I agree with the Chief Justice and my brother Newcombe that the provincial Act could not introduce into the Dominion Corporation a congregation that the latter Act, in pursuance of the vote of non-concurrence under it, expressly excluded. This ground, however, was not taken, either in the court below or here, and my brother Newcombe has therefore deemed it advisable to discuss the

(1) 1 Ch. D., 25.

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merits of the appeal upon the grounds presented to the Court.

If this be advisable, I would concur in his conclusions, as I agree with him that the meeting of 27th July, 1925, was not strictly regular. It seems to me that the rules of procedure of the Presbyterian Church in Canada continued to apply to this congregation after the union, so far as applicable, and that the officers of the congregation continued in office. I think there was a method by which a meeting of the Session could have been had, in accordance with these rules, notwithstanding any efforts by the temporary moderator to prevent it.

The object of the meeting was to enable the members of the congregation who wished to go into the union to carry with them into the union the property of the congregation. If that could be done at all, under authority of the provincial statute, it could only be done by the vote of a meeting regularly called. It is argued that what was done by the individual members of the Session in calling a meeting is precisely what would have been done had a meeting of the Session been regularly called, and that therefore there is no substantial difference, and that the contention that the meeting was not regular is a mere technicality, without substantial merit. There is, of course, weight in this argument, and it was pressed with great force. The answer to it would be that if the statute authorizes the transfer of the property of the congregation from the congregation to another body, upon a vote taken at a meeting regularly called, this condition must be strictly fulfilled, and here it was not fulfilled, because the meeting was not regular. The point is, of course, a debatable one, as is indicated by the difference that has arisen in judicial opinion concerning it in this case. I have, however, intimated that in my opinion, for the reasons set out by the Chief Justice and also by my brother Newcombe, the vote of 27th July, 1925, even if the meeting had been regular, was ineffective to carry either the congregation or its property into the union.

I concur in disposing of the appeal as proposed by my brother Newcombe.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondents: *C. B. Smith.*

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THE WESTERN RACING ASSOCIATION LIMITED (DEFENDANT)..... } APPELLANT;

*Mar. 13, 14.
*March 20.

AND

WILLIAM R. WOOLLATT (DEFENDANT). RESPONDENT.

AND

BRADLEY WILSON..... PLAINTIFF.

THE WESTERN RACING ASSOCIATION LIMITED (DEFENDANT)..... } APPELLANT;

AND

WILLIAM R. WOOLLATT (PLAINTIFF).. RESPONDENT.

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

Company—Claim against company for indebtedness—Accounts—Reference —Attack on Referee's report—Claims for salary and bonus as manager —Compound interest—Appeal from judgment of Appellate Division, Ont., 62 Ont. L.R. 620, dismissed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing the present appellant's appeal from the judgment of Middleton, J. A., confirming (with a variation) the report of His Honour Judge Coughlin, special referee, upon a reference (directed in an action brought by the plaintiff Wilson, in which the respondent and appellant were defendants) to determine the amount for which a certain default judgment in favour of the respondent against the appellant should have been entered "in accordance with the accounts, books and vouchers of the said defendant corporation and from other evidence available".

After hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment (written reasons being delivered by Smith J., with whom the other members of the Court concurred) dismissing the appeal with costs.

Appeal dismissed with costs.

R. S. Robertson K.C. for the appellant.

S. L. Springsteen for the respondent.

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*PRESENT:—Duff, Mignault, Rinfret, Lamont and Smith JJ.

(1) (1928) 62 Ont. L.R. 620.

1929

*May 30.
*June 13.

CLIFFORD SIFTON (PLAINTIFF).....APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT).....} RESPONDENT.

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

Assessment and taxation—Municipal income tax—Assessment made in one year adopted as assessment for following year—Removal of person from municipality—Assessment Act, R.S.O. 1914, c. 195, s. 57, s. 11 (2) (as enacted by 12-13 Geo. V, c. 78), s. 95 (3) (as enacted by 7 Geo. V, c. 45, s. 9)—Consolidated Municipal Act, 1922, c. 72, ss. 249 (1), 297 (1).

Plaintiff removed from the city of Toronto to the township of York on December 14, 1923. He paid an income tax to the City of Toronto in 1923 and to the Township of York in 1924. An assessment roll for the City of Toronto was prepared and settled in 1923, pursuant to by-law under s. 57 of the *Assessment Act*, R.S.O. 1914, c. 195, and plaintiff, then resident in Toronto, was entered on this roll for income. This assessment of 1923 was, pursuant to subs. 5 of said s. 57, adopted by the city council of 1924, by by-law passed February 28, 1924, and the City levied on plaintiff an income tax in 1924, which he paid under protest. He now sought repayment.

Held (reversing judgment of the Appellate Division, Ont., 63 Ont. L.R. 397, which, by equal division, sustained the judgment of Widdifield, Co. C. J., dismissing the action), that plaintiff should succeed. The income assessed in 1924 was the income for 1924 (*City of Ottawa* v. *Egan* [1923] S.C.R. 304) notwithstanding 12-13 Geo. V, c. 78, s. 11, changing subs. 2 of s. 11 of said *Assesment Act*. That subsection, as so changed, merely made the amount of the previous year's income conclusive as to the amount of income to be assessed in the current year, instead of (as formerly) a mere basis for estimating the amount for the current year. The income to be assessed was still the income for the current year. Therefore, under its by-law of February 28, 1924, the city council was assessing and levying on plaintiff's income of 1924; and in doing so was attempting to exercise jurisdiction outside the municipality, contrary to s. 249 of the *Consolidated Municipal Act, 1922*, was going beyond the jurisdiction given it by s. 297 of said Act to "levy on the whole rateable property within the municipality," and was attempting to assess plaintiff in respect of income in a municipality in which he did not reside, contrary to s. 12 of said *Assessment Act*. Subs. 3 of s. 95 of said *Assessment Act*, as enacted by 7 Geo. V, c. 45, s. 9, did not give power to the City to collect from plaintiff a tax on his income of 1924; that subsection only applies to rates properly assessable, and not to rates levied on an income not assessable at all. The fact that the assessment roll of 1923 was finally revised and settled without an appeal by plaintiff, then resident in Toronto, did not make the matter *res judicata* (*Hagersville* v. *Hambleton*, 61 Ont. L.R. 327, distinguished).

*PRESENT:—Anglin C. J. C. and Newcombe, Rinfret, Lamont and Smith JJ.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing (on equal division of the court) his appeal from the judgment of Widdifield, Co. C. J., dismissing his action for return of money paid, under protest, to the defendant, the City of Toronto, for income tax.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

The appellant in person (with him *John C. M. Macbeth*) for the appellant.

G. R. Geary K.C. and *F. A. A. Campbell* for the respondent.

The judgment of the court was delivered by

SMITH J.—The appellant for some time had been a resident of the City of Toronto, but, on the 14th December, 1923, he removed to the Township of York, where he has since continuously resided. He paid an income tax to the City of Toronto in 1923, and to the Township of York in 1924. The City of Toronto assessed and levied on him an income tax in 1924 of $176.46, which he paid under protest on the 9th day of March, 1925, and which he seeks to recover with interest in this action.

The trial judge dismissed the action, and this judgment was sustained by the First Appellate Division (1), the Court of four being equally divided.

Section 249 of the *Consolidated Municipal Act, 1922* (now s. 258) is as follows:

> 249 (1) Except where otherwise provided, the jurisdiction of every council shall be confined to the municipality which it represents and its powers shall be exercised by by-law.

Section 297 (1), now s. 306 (1), provides that,

> Subject to subsection 13 of section 397 (not material here), the council of every municipality shall in each year assess and levy on the whole rateable property within the municipality a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year.

Section 300 (now s. 309) provides that,

> The rates imposed for any year shall be deemed to have been imposed and to be due on and from the 1st day of January of each year unless otherwise expressly provided by the by-law by which they are imposed.

(1) (1929) 63 Ont. L.R. 397.

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Smith J.

Sections 11 and 12 of R.S.O. 1914, c. 195, provide as follows:

11. (1) Subject to the exemptions provided for in sections 5 and 10 (not material here)—

(*a*) Every person not liable to business assessment under section 10 shall be assessed in respect of income;

((*b*) and (*c*) not material here.)

(2) Where such income is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past.

12. (1) Subject to subsection 6 of section 40 (not material here), every person assessable in respect of income under section 11 shall be so assessable in the municipality in which he resides either at his place of residence or at his office or place of business.

Section 50 of the *Assessment Act*, R.S.O. 1914, c. 195, provides that, subject to ss. 56 to 60, the Assessor shall begin to make his roll in each year not later than the 15th day of February, and complete it not later than the 30th day of April.

Section 57 provides that the council of a city may, by by-law, provide for making the assessment at any time prior to the 30th September, and may fix prior and separate dates for the return of the roll of each ward, and shall provide for holding a Court of Revision.

Subsections 3 and 4 provide that the County Judge may sit throughout the year to hear appeals as therein provided.

Subsection 5 provides that,

The assessment so made and completed may be adopted by the council of the following year as the assessment on which the rate of taxation for such following year shall be fixed and levied, and the taxes for such following year shall in such case be fixed and levied upon the said assessment.

7 Geo. V, c. 45, s. 9, amended s. 95 of the *Assessment Act* by adding subs. (3) as follows:

(3) Subject to the provisions of section 118 (now 121) every person assessed in respect of business or income upon any assessment roll which has been revised by the Court of Revision or County Judge shall be liable for any rates which may be levied upon such assessment roll notwithstanding the death or the removal from the municipality of the person assessed or that the assessment roll had not been adopted by the council of the municipality until the following year.

An assessment roll for the City of Toronto was prepared and settled in 1923, pursuant to by-law under s. 57, and the appellant was entered on this roll for income quite properly, as he was a resident of Toronto in that year and in receipt of the income mentioned in the roll. He

made no appeal, and had no ground for appeal. This assessment of 1923 was, pursuant to subs. (5) of s. 57 quoted above, adopted by the council of the following year by by-law No. 9942, passed 28th February, 1924, and by this same by-law the council exercised the power given it by s. 297 of the *Municipal Act*, and nowhere else, to "assess and levy on the whole rateable property within the municipality the sum required for the current year."

The effect of subs. (2) of s. 11 of the *Assessment Act* as quoted above was considered in *City of Ottawa* v. *Egan* (1). The City of Ottawa assessed and levied in 1921 an income tax on Sir Henry K. Egan in respect of moneys received from an industrial company in 1920. It was established that no similar amount was received from the company in 1921. The Appellate Division of the Supreme Court of Ontario held that this amount must be deducted from the income assessment, and this was affirmed by the unanimous judgment of this Court.

The decision was that the income to be taxed was the income for the current year, and that the income of the preceding year was only a basis from which to estimate the former. Duff J. says, at p. 309:

> The principle of income assessment and taxation clearly expressed in the legislation which comes under consideration on this appeal is that it is the income for the current year which is assessable.

We must accept this as still the law, unless it has been changed by subsequent legislation.

Subsection (2) of section 11, quoted above, was repealed by 12-13 Geo. V., c. 78, s. 11, and the following substituted:

> (2) The income to be assessed shall be the amount of the income received during the year ending on the 31st of December then last past.

This provision has remained unchanged, and is now subs. (2) of s. 10 of the Act. No other statutory change material here seems to have been made.

Has, then, this change in subs. (2) entirely altered the principle of income assessment expressed in the legislation prior to this change as laid down in *City of Ottawa* v. *Egan* (1), and has it had the effect of enacting that, in case of a city proceeding under s. 57 (5), the income to be assessed shall be not the income for the current year, but the income for the previous year? I am of opinion that

(1) [1923] S.C.R. 304. Judgment below: (1922) 52 Ont. L.R. 183.

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the substituted subsection (2) has no such effect. It merely makes the amount of the previous year's income conclusive as to the amount of income to be assessed in the current year, instead of a mere basis for estimating the amount for the current year. The income to be assessed is still the income for the current year, to be fixed at the amount of the previous year's income, and not subject to be changed to the actual amount of the current year's income, as previously.

It follows, therefore, that the decision in *City of Ottawa* v. *Egan* (1) applies in this case, and that the assessment in question was on appellant's income of 1924, during which year he was a resident of another municipality, and was properly assessed there for that income. The city council, therefore, in assessing and levying by its by-law of 28th February, 1924, on appellant's income of 1924, was attempting to exercise jurisdiction outside the municipality that it represented, contrary to s. 249 of the *Municipal Act;* was going beyond the jurisdiction given it by s. 297 to "levy on the whole rateable property within the municipality"; was attempting to assess the appellant in respect of income in a municipality in which he did not reside, contrary to s. 12 of the *Assessment Act;* and was thus attempting to subject the appellant to taxation twice on his income of 1924.

It is contended, however, that, notwithstanding these sections, the added subs. (3) of the statute of 1917, quoted above, gives the city council power to collect from the appellant a tax on his income of 1924.

I agree with the view expressed by Hodgins, J. A., in the Appellate Division that this subsection only applies to rates properly assessable, and cannot apply to rates levied on an income not assessable at all, as in this case.

It is further argued that, because the assessment roll of 1923 was finally revised and settled without an appeal by the appellant, then resident in Toronto, the matter is *res judicata,* and the case of *Hagersville* v. *Hambleton* (2), is relied on. There the defendant was assessed for income and appealed to the Court of Revision on the ground that he was not a resident; his appeal was dismissed and he

(1) [1923] S.C.R. 304. Judgment below: (1922) 52 Ont. L.R. 183.
(2) (1927) 61 Ont. L.R. 327.

made no further appeal. In an action by the corporation for these taxes, defendant pleaded that there was no right to tax, because he was not a resident, and the decision was that, as the Court of Revision, being a court of competent jurisdiction, had decided that point, that decision was final.

I am quite unable to see that this decision has any application to the present case. We have in question here the assessment of appellant's income of 1924. The assessment roll of 1923 had to do with the income of 1923, and the Court of Revision for that year had no jurisdiction to deal with the income of 1924. Appellant was properly placed on the 1923 roll for the income appearing there. He could not appeal successfully against being placed there for that income, and he clearly could not have appealed then against being assessed for the same amount for income in 1924, by by-law of that year. The assessment and levy on his income for 1924 were first made by by-law of 28th February, 1924, and there was no tribunal to which he could appeal against that improper assessment and levy except the ordinary courts to which he has resorted.

The only passage in the judgments in *Hagersville* v. *Hambleton* (1) that seems to me to have any application to this case is the quotation by Riddell J. from *Board* v. *Board* (2), as follows:

> If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice.

The appeal is allowed with costs, and there will be judgment for the appellant (plaintiff) for the amount claimed with interest and costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *MacBeth & MacBeth.*

Solicitor for the respondent: *C. M. Colquhoun.*

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(1) (1927) 61 Ont. L.R. 327. (2) [1919] A.C. 956, at p. 962.

1929
*May 31.

THE CORPORATION OF THE TOWN OF FORD CITY..... APPELLANT;

AND

THE FORD MOTOR COMPANY OF CANADA, LIMITED..... RESPONDENT.

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

Assessment and taxation—Assessability of gantry crane—Assessment Act, Ont., R.S.O. 1927, c. 238, ss. 1 (h), 4 (19)—"Real Property"—Exemption of "machinery used for manufacturing"—Exception from exemption, of "machinery used for the production or supply of motive power."

The judgment of the Appellate Division, Ont., 63 Ont. L.R. 410, holding that the gantry crane on the respondent's premises was not assessable or liable to taxation under the Ontario *Assessment Act*, R.S.O. 1927, c. 238, was affirmed, it being held that the subject of assessment clearly fell within subs. 19 of s. 4 of said Act, and was not taken out by the exception; the movable part of the crane, if it should not be regarded as a chattel and not within s. 1 (*h*), was "machinery used for manufacturing," and not "machinery used for the production or supply of motive power."

APPEAL by the Corporation of the Town of Ford City from the judgment of the Appellate Division of the Supreme Court of Ontario (1) whereby the judgment of the Ontario Railway and Municipal Board, upholding the judgment of the senior Judge of the County Court of the County of Essex affirming the assessability or liability for taxation under the Ontario *Assessment Act*, R. S. O., 1927, c. 238, of the gantry crane on the respondent's premises, was set aside and it was declared that the gantry crane was not assessable or liable to taxation under the said Act.

Bernard Furlong for the appellant.

H. L. Barnes for the respondent.

On the conclusion of the argument for the appellant, and without calling on counsel for the respondent, the judgment of the Court was orally delivered by

*PRESENT:—Anglin C. J. C. and Duff, Newcombe, Lamont and Smith JJ.

(1) (1929) 63 Ont. L.R. 410.

1929

TOWN OF FORD CITY v. FORD MOTOR CO. OF CANADA, LTD.

ANGLIN C.J.C.—We are all of the opinion that the appellant cannot succeed. The subject of assessment clearly falls within subs. 19 of s. 4 of the *Assessment Act* (R.S.O., 1927, c. 238); and is not taken out by the exception. The movable part of the crane, if it should not be regarded as a chattel and not within s. 1 (h), was, in our view, clearly "machinery used for manufacturing"; and, equally clearly, it was not "machinery used * * * for the production or supply of motive power". It has, therefore, rightfully been held non-assessable.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Furlong, Furlong, Awrey and St. Aubin.*

Solicitors for the respondent: *Bartlet, Bartlet, Barnes, Aylesworth and McGladdery.*

THE NEWPORT INDUSTRIAL DEVELOPMENT COMPANY (PLAINTIFF) } APPELLANT;

AND

SUSIE P. HEUGHAN (DEFENDANT) ..... RESPONDENT.

1929

*March 5
*April 30.

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

Contract—Landlord and tenant—Action for rent under alleged lease—Whether relationship of landlord and tenant constituted, or any contract made between the parties—Mere negotiation—Offer by signing draft lease as lessee not accepted within reasonable time.

Plaintiff sued defendant for arrears of rent under an alleged lease.

Held, affirming in the result the judgment of the Appellate Division, Ont., 62 Ont. L.R. 364, that defendant was not liable. The relationship of landlord and tenant had not been constituted between the parties. On the evidence of what took place, they never got beyond the stage of mere negotiation. While a draft lease was signed by defendant (the findings below to this effect being sustained) and the signed copy received by plaintiff, this, under the circumstances, evidenced nothing more than an offer to become lessee upon the terms set forth, and plaintiff could not rely upon that offer beyond a reasonable time; and plaintiff did not itself sign or deliver the lease, or agree to do so except upon a condition never fulfilled, until after such lapse

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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of time and material change of circumstances as rendered it too late for plaintiff to be entitled to make the lease effective and engage defendant's liability by executing and forwarding a copy. Defendant had never entered or exercised any possession; and it was a certain company (contemplated to be the actual occupier of the property, and originally proposed as lessee) and not the defendant, who was at all times recognized by plaintiff as having the use and occupation of the property.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which, reversing the judgment of Kelly J., held that the plaintiff's action, which was for arrears of rent claimed to be payable by the defendant under an alleged lease, should be dismissed. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

I. F. Hellmuth, K.C. and *F. C. Betts* for the appellant.

D. L. McCarthy, K.C. and *S. A. Hayden* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff sues for arrears of rent alleged to be payable by the defendant under a lease dated 20th April, 1926. There are two volumes of testimony and documents; but the material facts for the disposition of this appeal are comprised in the following narrative:

The plaintiff company was incorporated in 1923, under the laws of the State of Rhode Island, for the purpose of promoting industrial development and the employment of labour at the City of Newport, Rhode Island, in co-operation with the Chamber of Commerce. In January, 1926, it acquired, for the price of $85,000, which it borrowed from the local banks, a property situate at Newport, which, having been used as a chewing gum factory, had recently been abandoned by the previous tenants. The plaintiff was evidently desirous that the city should not be left without a chewing gum factory, and the employment which its activities would afford, and, in seeking a new tenant who would carry on the industry, came into touch with the Everybody's Chewing Gum Corporation, then operating a factory in Newark, N.J. There were negotiations for a

(1) (1928) 62 Ont. L.R. 364.

lease, in which the latter company was represented by Henry E. Short and his son, Percy H. Short, its President and Treasurer, respectively; of whom Percy H. Short appears to have been the principal director of the business.

Proposals were submited and favourably entertained, and the plaintiff, by letter of 6th January, 1926, agreed, upon the terms and conditions therein stipulated, to lease the vacant property, with an option of purchase, to the Everybody's Chewing Gum Corporation, for a period of twenty years, to begin 10th February, 1926, at the rent of $10,000 per annum for the first ten years, payable monthly in advance; and, during the second ten years, at a rent, payable in like manner, to be agreed upon, or, if the parties could not agree, to be fixed by arbitration. By the fifth clause, it was stipulated that

> The lessee shall furnish to the lessor a guarantee in writing with surety or sureties satisfactory to the lessor, whereby the said surety or sureties guarantees or guarantee the payment of all rents provided for in said lease for said full term of twenty years, including that to be fixed by arbitration.

Options of purchase were provided for, and also the various details. This offer proved acceptable, and by a note, written at the foot of the letter,

> Everybody's Chewing Gum Corporation hereby accepts the provisions of the above contract, subject to the conditions therein stated.

The letter was signed, for the plaintiff company, by Charles Tisdall, President, and Thos. B. Congdon, Treasurer; and the acceptance, for the Everybody's Chewing Gum Corporation, by Henry E. Short, President, and Percy H. Short, Treasurer; and the document, as so executed, was returned to the plaintiff by letter of 9th January, signed "Everybody's Chewing Gum Corporation, H. E. Short, President," and addressed to Walter Clemens Campbell, the Secretary of the Newport Chamber of Commerce. There is no question about Mr. Campbell's authority to receive this communication on behalf of the plaintiff company; he is treated throughout the case as having competent authority for the business which he transacted. There is an entry in the plaintiff's minute book of 14th January, that an agreement had been reached in accordance with the terms submitted by the Board of Directors at its meeting on 6th January, and it was resolved that, upon the acquisition of the title and performance of the other conditions as stipulated,

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the President and Treasurer be authorized to sign and execute for the Newport Industrial Development Company a lease to the Everybody's Chewing Gum Corp. in accordance with said agreement of January 6th, 1926.

In this posture of affairs it would appear that the Everybody's Company, with the plaintiff's consent, entered into possession of the premises; and it remained in possession uninterruptedly until February or March, 1927, when it became bankrupt.

In a letter of 20th January, signed "Apple Gum Corporation, P. H. Short, Secretary," and addressed to Mr. Campbell, referring to security for payment of the rent, which was to be given by the United States Fidelity and Guaranty Company, it is said, "Enclosed find cheque on Canada." It is not perfectly clear, but apparently the business transacted at Newark, N.J., had been carried on under the name of the Apple Gum Corporation, and on that account some confusion is apt occasionally to be introduced into the correspondence, which relates entirely to the Everybody's Company. The cheque referred to was not, in fact, enclosed, and Mr. Campbell wrote to Mr. Short on 21st January,

You also indicate that a cheque was enclosed, but through some oversight it was not enclosed with your communication of the 20th.

On the following day Mr. Short wrote to Mr. Campbell,

I hasten to forward cheque which I intended to enclose in my previous letter.

The explanation is found in a letter written on the same day by Percy H. Short to his Aunt Susie, the defendant, and Uncle William Heughan, her husband, jointly, who reside and carry on a dry goods business at London, Ontario. In this letter Mr. Short says,

* * * I have figured out that I don't want Newport Industrial Co. to get any money from Everybody's, so have asked them to return Everybody's cheque of $833.34, and I'm sending them cheque of same amount as though it is from you. I enclose you exact copy of cheque I sent them, so on Monday when I get cheque back from them, will send you cheque of $833.34, and will you please deposit in your account, and give Mr. Goodall your cheque for $833.34 to pay the cheque I have drawn.

To make it clear.

I gave cheque as per copy to Newport, $833.34.

I will send you our cheque for $833.34.

You deposit our cheque $833.34 in your bank.

You give Mr. Goodall, Imperial Bank cheque of $833.34 to pay cheque I gave Newport.

Each month I will send you $833.34 to mail. * * *

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Mr. Goodall was the Manager of the Imperial Bank at London. Mr. and Mrs. Heughan were carrying on business there as partners under the name of "Heughan & Co." In consequence of this communication of 22nd January, Mrs. Heughan sent her cheque, or that of Heughan & Co., for $833.34, to the plaintiff company, that being the amount of one month's rent, plus one cent; and, in fact, as resolved by Mr. Short, in accordance with his letter, throughout the period during which rent was paid on behalf of the Everybody's Corporation, namely, until January, 1927 inclusive, the rent was paid in the manner indicated; that is to say, a cheque of the Everybody's Company was deposited at London to the defendant's credit, and the defendant sent Heughan & Co's cheque to the plaintiff. Meantime there had been no communications whatever between the appellant company and the defendant, and the cheques, when acknowledged by the plaintiff, were acknowledged, not to the defendant, but to Percy H. Short, or to the Everybody's Company. For example, on 26th January, Mr. Campbell wrote to Mr. Short, at 342 Madison Avenue, New York, where he or the Everybody's Company had an office:

> I am returning herewith the cheque from the Everybody's Gum Co. forwarded to me some time ago.
>
> I also wish to acknowledge receipt of cheque for $833.34 on the Imperial Bank of Canada.

There is an extract from the plaintiff's income book shewing credits for the cheques of Heughan & Co. so received, as follows:

1926:
February 3, Everybody's, etc., $830.22.
March 12, Everybody's, etc., $833.34.
April 14, Everybody's, etc., $833.34.
May 17, Susie Heughan for "Chewing Gum Co.", $833.34.
June 10, Heughan & Co., "for Gum Co.", $833.34.
July 13, Heughan & Co., "for Gum Co.", $833.34.
August 12, Heughan & Co., "for Gum Co.", $833.34.
September 22, Everybody's Chewing Gum Co., $833.34.
October 13, Everybody's Chewing Gum, $833.34.
November 19, Everybody's Chewing Gum, $833.34.
December 20, Everybody's Chewing Gum, $833.34.
1927:
January 21, Everybody's Chewing Gum, $833.34.

A formal lease for execution was prepared under the instructions of the plaintiff company, bearing date the day of March, 1926, in which the plaintiff is described

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as the lessor, and Everybody's Chewing Gum Corporation as the lessee. It contains a covenant on the part of the lessee to pay rent at the rate of $833.33 monthly in advance for the term of ten years, beginning 10th February, 1926; and, for the remainder of the term, at an agreed rate, or as fixed by arbitration.

It had been orally proposed, on the part of the Gum Company, that Percy H. Short's aunt, the defendant, should guarantee payment of the rent for the entire period of the lease, and the plaintiff had made some enquiries as to her means, and, in consequence, was apparently satisfied to accept her as a guarantor, provided a guaranty company became an additional surety. Accordingly, there was endorsed on the form of lease, which the plaintiff sent to the Gum Company, a formal guaranty, to be executed under seal by the defendant, whereby she was to guarantee "the payment when due of rent for the entire period of 20 years." The Gum Company referred the draft lease to its solicitors, and they suggested some alterations, which were accepted, and, on 9th March, Messrs. Sheffield & Harvey, the plaintiff's solicitors, wrote to Messrs. Thomas & Freedman, who represented the Gum Company, enclosing a re-draft and saying:

> We are, therefore, enclosing the lease redrafted, and would ask you to kindly have this executed in duplicate, returning both copies to us for signature, and accompanying same with a vote of your corporation authorizing the President and Treasurer to execute the lease.
>
> We understand that under an arrangement with the company Miss Heughan is going to guarantee the payment of this rent and that the United States Fidelity and Guaranty Company will deliver, simultaneously with it, a bond in the sum of $10,000, guaranteeing the performance by the company.

But, on 24th March, Percy H. Short wrote Mr. Campbell:

> I expect to be with Thomas & Freedman to-morrow and go over the leases with Mr. Freedman which your attorney sent. I wish you would please write me if it will be satisfactory to your people to have the lease made out to Susie P. Heughan, and guaranteed by Everybody's Chewing Gum Corp. It will mean a good deal to me to have the lease made out in this way, and I trust therefore, that you will write me that this is satisfactory.

And, by letter of 27th March, Mr. Campbell replied:

> The Industrial Development Co. would be agreeable to your changing the lease to Susie Heughan, lessee, and guaranteed by Everybody's Gum Corporation, provided the security as outlined in the form of lease forwarded to you is obtained.
>
> We cannot, of course, say that it will be entirely satisfactory to our banks, but we will be glad to submit the lease to them and urge their acceptance when you have returned same properly executed.

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On 30th March, the Gum Corporation acknowledged this letter, saying:

We appreciate your information regarding the lease, and we naturally expect to furnish the security as outlined.

The plaintiff then caused to be prepared and delivered to Mr. Short a corresponding draft lease, in duplicate, wherein the defendant is described as lessee, and the Gum Company is substituted for the defendant as guarantor of the rent, and, on 22nd April, Mr. Short wrote Mr. Campbell:

Enclosed lease signed by my Aunt. I note they did not sign duplicate, but after your folks execute the duplicate and mail it to us, I can have our copy signed up, and you keep the original.

On 8th May, Mr. Campbell wrote Mr. Short:

I am getting in a real "jam" on account of not having the bond to accompany the lease. Is there not some way to rush it through promptly so that I may have it first of next week, Tuesday at the latest.

Mr. Short's reply is dated 10th May, and he says:

Just received your favour of the 8th inst., and I sincerely regret that the bond has not reached you, and I'm getting right into this matter, and will not be contented until same is in your hands.

* * * *

Will go right after the bond as I must get you out of the "jam."

On 25th May, Thomas B. Congdon, the plaintiff company's Treasurer, wrote Mr. Short:

At the request of Mr. Campbell we enclose herewith a copy of the lease from the Newport Industrial Development Company to Susie Heughan for your use with the surety company whose bond you propose to furnish us in accordance with the agreement with the directors of the Newport Industrial Development Company. Upon receipt of the Surety Company bond and its approval by our attorney we will send to you the issue duly executed.

It is agreed that the antepenultimate word of this extract should read "lease," instead of "issue."

On 27th May, Mr. Short wrote Mr. Campbell:

Received copy of lease yesterday, and had a meeting with the representative of the bonding company.

We can secure Ten Thousand Dollar bond, but the charge for same for one year is ($500) Five Hundred Dollars.

This price or charge seems to me to be exorbitant, and even though we were willing to go to this expense, I don't think your folks in Newport would expect us to go to such a tremendous expense.

* * * *

In the event your people insist on bond, I will immediately commence negotiations to purchase the plant, as it is within our power to do so, although with the extensive sales program we are inaugurating, the purchase plan would deter our production. In our opinion, your people are desirous that we attain a large production as quickly as possible, so as to make openings for a large number of employees, and this is the direction in which we are working.

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Mr. Campbell again wrote Mr. Short on 11th June:

We have canvassed the situation here with the banks quite carefully, and it seems to be considered as a part of the agreement to furnish the bond with the lease, and that the agreement should be kept.

It will be to the advantage of all concerned to keep this agreement and prevent any adverse criticism in case future banking accommodations are required.

This is the crux of the situation, as I see it, and while the price is high for the bond, yet it will be worth it in good will and confidence that will be established.

On 1st July, Mr. Campbell wrote the Mercantile Credit Company, of 321 Broadway, New York City:

The Everybody's Chewing Gum Corporation, 342 Madison Ave., New York, have leased a plant in this city, formerly occupied by the William Wrigley Co., for which they are paying $10,000 a year rental from February 10, 1926. The rent has been paid promptly in advance of the date due each month.

And he gave some further particulars with regard to the constitution and standing of the Gum Company.

The plaintiff's solicitors, Messrs. Sheffield & Harvey, on 30th October, wrote to Hockstein & Zimmerman, 104 West 42nd St., New York City, enclosing form of guaranty bond "for the rent of Everybody's Chewing Gum Corporation property to the Newport Industrial Development Company," and enclosing a form of bond, whereby Everybody's Chewing Gum Corporation bound itself for payment of the rent. On 11th November, the Lancashire Agency Ltd. wrote Messrs. Sheffield & Harvey: "Re indemnifying lease Everybody's Chewing Gum Corporation," making some suggestions and enquiries, to which the solicitors answered, on 12th November, as follows:

Your letter of November 11th about the lease of the Newport Industrial Development Company to Everybody's Chewing Gum Corporation is duly received. Unfortunately after this lease was originally drawn they changed the name of lessee and failed to let us know about this, so that we did not have in our files a correct copy; as yet no lease has been executed.

We enclose herewith a copy of the document as completed thus far. We understand that the Lessor has not signed this because one of the conditions of signing was that the lease should give satisfactory guarantee from an insurance company.

There was a meeting of the plaintiff company on 23rd November, the minutes of which are produced. They relate to a conference with Percy H. Short as to guaranty of the lease, wherein he related "the difficulties which they (the Gum Company) had encountered in trying to secure a bond to cover the lease for a period of years," and evidence a final decision that

* * * the best they (the Gum Company) could do would be to give a bond for $10,000 covering the lease for one year, the same to be renewed for each year to follow, and the bonding company would require the name of Susie Heughan to be released from the lease and placed on the bond as surety.

The Vice-President advised Mr. Short that this would not be a satisfactory arrangement and that the banks would require more surety to cover the lease.

Mr. Short then advised that the Everybody's Chewing Gum Corporation would proceed to purchase the building at the optional price mentioned in the lease; namely, $85,000, and that it would probably require about sixty days to consummate the purchase.

On 27th November, Mr. Campbell wrote Mr. Short:

Answering your request for information covering the buildings on Third Street now occupied by your company under lease from the Newport Industrial Development Company, we submit the following:

and he mentions the various units and submits valuations of the land and buildings.

On 1st December, Mr. Congdon, the plaintiff's Treasurer, wrote Mr. Short:

Please be advised that we have received checks in payment for rent of the factory of the Newport Industrial Development Company, on Third Street, which is leased to Everybody's Chewing Gum Corporation, each check covering rental for one month in advance, as follows:

and he proceeds with a statement of the monthly payments of rent received by the plaintiff, beginning 3rd February and ending 19th November, ten months in all.

On 8th December, Messrs. Sheffield & Harvey received a communication from the Lancashire Agency Ltd., reminding them that the documents relating to the surety bond for Everybody's Chewing Gum Corporation had not come to hand, and the solicitors replied that "The matter is being temporarily held up, pending a decision on the part of the lessees to purchase."

There was another meeting of the plaintiff company on 29th December, in which the financial condition of the Gum Company was considered; and on 5th January, 1927, Messrs. Sheffield & Harvey suggested to the Lancashire Agency that the latter should communicate directly with the Chewing Gum Company. Then there was a meeting of the plaintiff company on 1st March, of which the minutes read as follows:

The report of the committee having under consideration the financial condition of the Everybody's Chewing Gum Corporation was given by the Vice-President. He outlined the method followed in advancing loans to the Everybody's Chewing Gum Corporation on the receipt of open accounts with bills of lading attached. The total loans amounting to

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$13,000 have been extended to the Corporation and arrangements made with local banks as to plans for additional credit of $30,000.

The report was received.

The President reported the lease on the Third Street Building as having been signed by the president and treasurer.

It was moved by Titus, seconded by Friend, that the copy of the lease on the Third Street Building be forwarded to Mrs. Susie Heughan. Motion carried.

It may be inferred from the evidence that about this time the defendant received a copy of the lease by registered letter, and that she sent the document to Edwin J. Tetlow, of Providence, R.I., a lawyer. Her reason for this is stated in her testimony as follows:

Well, I had received a letter from Percy some time before telling me that anything I received from Newport I should send to Tetlow, and not bother with it at all, because he thought these things might and would worry me.

She says the copy which she received was not signed at all, and that

It was the first and only thing I had ever seen in the way of a lease.

There is a letter, without date, postmarked at Newport 9th March, 1927, signed "Percy H. Short for Susie P. Heughan," addressed to and received by the plaintiff company, stating:

This is to notify you that through failure on your part to deliver to me within a reasonable time after our negotiations an executed lease of the premises described as the Gum Company on the easterly side of Third Street in said City of Newport, bounded westerly on Third Street, southerly on land of A. B. Cascambas, easterly on land of the New York, New Haven & Hartford Railroad and northerly on land of Kate Hunter Dunn, I will not now accept delivery of the lease of said premises which you drafted and dated the day of April, 1926, and proposed to execute and deliver to me for the term of 20 years from February 10, 1926, or any other lease of said premises.

To this the plaintiff company replied by James T. Kaull, Secretary, on 10th March, as follows:

The Newport Industrial Development Company received yesterday by registered mail a letter undated, signed by Percy H. Short, purporting to act for you, in which it is stated that because of our failure to deliver "to me" an executed lease of the Gum Company property, that the signer of the letter will not now accept any lease.

We beg to inform you that the Newport Industrial Development Company holds a lease of said premises, duly executed by you; that a copy of this lease was delivered, with your consent, to Percy H. Short, then acting for you; that you have, since the execution of said lease by you, entered into possession thereunder, paid rent provided for under the terms of said lease, and that the lessor will hold you liable and responsible for the performance of the covenants to be performed by you under said lease, including the payment of rent, for the full period of 20 years, as therein provided.

It appears from a subsequent letter of 5th November, 1927, from the plaintiff's solicitors in this cause to the defendant's solicitors, that the plaintiff company had released the premises to a Delaware corporation for a period of five years from 1st November, 1927, at an annual rent of $7,000.

The action was brought by a specially endorsed writ of 12th May, 1927, claiming $3,333.33 for the stipulated payments of February, March, April and May, 1927, then overdue, and the defendant, in her affidavit of merits, alleges, among other defences:

That there is not now and never has been any privity of contract between me and the plaintiffs in respect of the said lands or otherwise howsoever.

The action was tried without pleadings, and Kelly J., the learned trial judge, found that the defendant had signed the lease, and that she was clearly under an obligation to pay, either as lessee or as guarantor; and he held, moreover, that nothing had happened to relieve her from her obligation to pay.

The appeal was heard by five learned judges of the Appellate Division, who, for various reasons, which were stated, agreed that the action failed (1), and Middleton J. A., one of these learned judges, expressed the view which, upon the foregoing evidence, appears to be perfectly sound, that

The negotiations between the parties never got beyond the stage of mere negotiation. There never was any actually completed transaction.

The defendant never entered or exercised any possession, and it was the Gum Company, and not the defendant, who was at all times recognized by the plaintiff as having the use and occupation of the property. There is no proof that either the Gum Company or Percy H. Short was the defendant's agent. That suggestion is denied by the defendant, and Short was not called. The defendant testifies that she did not sign the draft lease, but the signature looks like hers, and that issue has been found against her, both at the trial and upon the appeal, and these concurrent findings must stand. It required something more, however, to constitute the relationship of landlord and tenant between the parties.

The plaintiff company, although it received a copy of the lease, signed by the defendant, as early as April, 1926,

(1) (1928) 62 Ont. L.R. 364.

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did not itself sign or deliver the lease, or agree to do so, except conditionally, upon receiving the stipulated security of a guaranty company, which never was furnished, and it was not until the plaintiff company's meeting of 1st March, 1927, that it was resolved to execute and deliver the lease. Up to this time the plaintiff had not communicated at all with the defendant. Meantime the Gum Company had been continuously in possession, under the agreement of 6th January, 1926, and had not only utterly failed in the performance of the condition upon which the plaintiff would accept the defendant as its lessee, but also had made default in payment of the February rent, and had become insolvent; and it was by that time too late for plaintiff company, as said in its minutes of 1st March, 1927, "having under consideration the financial condition of Everybody's Chewing Gum Corporation," to make the lease effective and engage the defendant's liability by signing and forwarding to her a copy. The defendant's signature, which is found to be written upon the copy that the plaintiff received from Percy H. Short, evidenced nothing more than an offer at that time to become lessee upon the terms set forth, and the plaintiff could not rely upon that offer beyond a reasonable time, or, after nearly a year had passed, and when the conditions, under which the defendant was content to accept the responsibility of lessee, had disappeared, or materially changed, by reason of the collapse of the gum business at Newport.

There are other serious difficulties in the plaintiff's way, which were considered in the Appellate Division, and urged on behalf of the respondent at the hearing in this Court; but, holding the view which I have expressed, it is not necessary now to consider whether these can be overcome.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Cronyn & Betts.*

Solicitors for the respondent: *McCarthy & McCarthy.*

J. JACK (PLAINTIFF).....APPELLANT; 1929

AND *May 27. *May 31.

J. G. CRANSTON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE APPELATE DIVISION OF THE SUPREME COURT OF ONTARIO

Appeal—Jurisdiction—"Amount or value of the matter in controversy in the appeal"—Supreme Court Act, R.S.C. 1927, c. 35, s. 41, cl. (f).

For the purposes of appeal to the Supreme Court of Canada, "the amount or value of the matter in controversy in the appeal" depends, not on what is claimed in the action, but on what may be contested in the proposed appeal (*Dreifus* v. *Royds*, 64 Can. S.C.R. 346). Where a plaintiff seeks to appeal against the dismissal of his action by a provincial appellate court, after he had recovered at the trial a pecuniary judgment for an amount (with allowable interest) less than $1,000, but from which he had not cross-appealed, the Supreme Court of Canada has no jurisdiction to grant special leave to appeal under clause (*f*) of the proviso to s. 41 of the *Supreme Court Act*, as the utmost relief which he can possibly obtain on the appeal is the restoration of the trial judgment, in which, by not appealing against it, he has acquiesced. (*Monette* v. *Lefebvre*, 16 Can. S.C.R. 387, and other cases, referred to.)

MOTION by the plaintiff, under the proviso to s. 41 of the *Supreme Court Act* (R. S. C. 1927, c. 35) for special leave to appeal to this Court from the judgment of the Appellate Division of the Supreme Court of Ontario (1), special leave to appeal having been refused by the Appellate Division.

The motion was refused with costs.

J. Jack (applicant in person) for the motion.

A. W. Rogers contra.

The judgment of the court was delivered by

ANGLIN C. J. C.—The plaintiff moves, under the proviso to section 41 of the *Supreme Court Act* (R.S.C., 1927, c. 35), for special leave to appeal to this Court, having been refused such leave by the Appellate Divisional Court, which had dismissed the action. The only clause of the proviso which can possibly apply to this case is that which enables this Court to grant special leave, refused below,

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

(1) (1928) 35 Ont. W.N. 159.

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(*f*) In cases * * * in which the amount or value of the matter in controversy in the appeal will exceed the sum of one thousand dollars.

The plaintiff's claim was for $2,000 damages and, at the trial, he recovered judgment for $250. On appeal by the defendant, that judgment was set aside by the Appellate Divisional Court and the action dismissed. The plaintiff did not cross-appeal to that court from the judgment at the trial.

Whatever doubt may have existed in the past as to the basis upon which the value of the matter in controversy should be determined for the purposes of appeal to this Court, since the amendment of 1920, enacting the proviso above referred to, it is beyond question that "the amount or value of the matter in controversy in the appeal" depends not on what is claimed in the action, but on what may be contested in the proposed appeal. *Dreifus* v. *Royds* (1). In the case of a plaintiff seeking to appeal against the dismissal of his action by a provincial appellate court, after he had recovered at the trial a pecuniary judgment for an amount (with allowable interest) less than $1,000, but from which he had not cross appealed, the utmost relief which he can possibly obtain in this Court is the restoration of the trial judgment, in which, by not appealing against it, he has acquiesced.

It follows that the amount or value of the matter in controversy in this appeal is, at the outside, the sum of $250, with the possible addition of some interest; in any event, an amount much less than $1,000.

Moreover, under the proviso of s. 41 referred to, the application for special leave to appeal must be made to this Court within the sixty days from the entry or pronouncement of the judgment to be appealed from fixed by s. 64, or within thirty days thereafter. This time has long since expired. But, assuming in favour of the applicant that he has made a case for the exercise of the discretion conferred on the Court by 15-16 Geo. V., c. 27, s. 3 (R.S.C., 1927, c. 35, s. 41) to extend this period, the fact that the amount or value of the matter in controversy in the appeal is clearly less than $1,000 is fatal to our jurisdiction to grant the present motion. The motion will, accordingly, be refused with costs. A decision directly in

(1) (1922) 64 Can. S.C.R. 346.

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point is the case of *Monette* v. *Lefebvre* (1), which has been since approved in *Laberge* v. *Equitable Life Ass. Soc.* (2); *Beauchemin* v. *Armstrong* (3); and *Beauvais* v. *Genge* (4).

Motion refused with costs.

Solicitors for the appellant: *Ewart, Scott, Kelley & Kelley.*

Solicitor for the respondent: *Trevor H. Grout.*

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*May 1, 2.
*May 27.

CAPE BRETON COLD STORAGE COMPANY, LIMITED (DEFENDANT)..... APPELLANT;

AND

G. A. R. ROWLINGS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, EN BANC

Solicitor—Company—Director of company acting as its solicitor—Claim for payment for legal services—Whether a "trustee" within s. 56 of the Trustee Act, R.S.N.S., 1923, c. 212.

Plaintiff, who was a director and vice-president of defendant company, acted as its solicitor (although not formally appointed as such) in a great number of matters, and was consulted, and his advice sought, by his co-directors and the officers of the company. His co-directors were aware of his so acting, and he was paid substantial amounts on account of the legal services rendered from time to time. He sued on an account for legal services rendered.

Held, reversing judgment of the Supreme Court of Nova Scotia *en banc* ([1929] 2 D.L.R. 519), that he could not recover; his position as director of the company incapacitated him from engaging as its solicitor, on principles of law laid down in *Aberdeen Ry. Co.* v. *Blaikie, Bros.*, 1 MacQueen, 461, at p. 471; *North-West Transportation Co.* v. *Beatty*, 12 App. Cas., 589, at p. 593; *Broughton* v. *Broughton*, 5 De G. M. & G., 160, at p. 164. He was not a "trustee" within the meaning of the enabling s. 56 of the Nova Scotia *Trustee Act*, R.S.N.S., 1923, c. 212. *In re Lands Allotment Co.*, [1894] 1 ch. 616, distinguished.

APPEAL by the defendant, a company incorporated in 1922 under the provisions of *The Nova Scotia Companies Act* (1921, c. 19; now R.S. N. S., 1923, c. 174), from the

(1) (1889) 16 Can. S.C.R. 387.
(2) (1894) 24 Can. S.C.R. 59, at p. 61.
(3) (1904) 34 Can S.C.R. 285.
(4) (1916) 53 Can. S.C.R. 353, at p. 369.

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

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judgment of the Supreme Court of Nova Scotia *en banc* (1) dismissing its appeal from the judgment of Carroll J. (1) confirming and varying (by increasing the amount allowed) the decision or report of His Honour Walter Crowe, Co. C. J. (1), as special referee appointed under order of Jenks J., in an action by the plaintiff claiming payment for legal services rendered by him to the defendant.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed, with costs in this court and in the court below, and the action dismissed with costs.

C. B. Smith K.C. and *R. S. McLellan K.C.* for the appellant.

T. R. Robertson K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—I have examined this case with some anxiety, hoping to find that the law has made provision whereby the plaintiff may be compensated for his services, but I have reluctantly come to the conclusion that his case breaks down irretrievably upon the main point.

The material facts are stated in a compact and orderly fashion by the learned County Court Judge, who was the Referee in the case. I quote the following passage from his report:

> The salient facts, as I find them, and as to which I think there is no serious dispute, briefly are that the defendant company was incorporated in 1922 under the Nova Scotia Companies Act, chap. 174 R.S. The plaintiff, who is a Barrister and Solicitor of this Court of many years' standing, and a King's Counsel, took the necesasry steps to incorporate the Company, of which he was one of the promoters and provisional directors, and he was paid for that service. At a later stage in the Company's history the plaintiff became a Director and its Vice-president, and I find that during the period covered by the accounts referred to he was a Director and Vice-president of defendant company. I find that no formal appointment of plaintiff as the Solicitor of the Company was made, certainly no express resolution to that effect was ever passed by the Board of Directors, or if it was no evidence was offered about it. I find, however, and of this there can be no doubt, that plaintiff did act as the Company's Solicitor in a great number of matters, that he was freely consulted and his advice sought by his co-directors and the officers of the company, and of his so acting his fellow directors were well aware.

(1) [1929] 2 D.L.R. 519.

Indeed he was paid substantial amounts on account of the legal services he had rendered or was rendering to the company from time to time.

The Referee found for the plaintiff upon items of the accounts filed, amounting to $1,876.48, and Carroll J., upon motion before him to adopt or vary the report, increased the amount found by the addition of some further items; confirmed the report in other respects, and directed judgment to be entered for $2,730.48 (corrected by the judgment of the Supreme Court *en banc* to $2,630). There was an appeal and a cross-appeal to the Supreme Court of Nova Scotia, sitting *en banc,* and both appeal and cross-appeal were dismissed (subject to the variation aforesaid); Jenks J. dissenting. He would have allowed the appeal.

The appellant company relies upon the principle enunciated by Lord Cranworth, L.C., in *Aberdeen Railway Co.* v. *Blakie Brothers* (1) that

> a corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

This doctrine is affirmed by the Judicial Committee of the Privy Council in *North-West Transportation Company* v. *Beatty* (2), where Sir Richard Baggallay, pronouncing the judgment, says:

> Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different from, the general or particular interests of the company.
>
> On the other hand, a director of a company is precluded from dealing, on behalf of the company, with himself, and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director.

The rule is, indeed, so well established and familiar as to require no citation of authority. It is applied in the case

(1) (1853) 1 MacQueen, 461, at p. 471.

(2) (1887) 12 App. Cas., 589, at p. 593.

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of a solicitor-trustee in relation to his profit-costs, as in *Broughton* v. *Broughton* (1). So far there seems to be no dispute.

But the respondent objects that the appellant is not entitled to raise that contention; that it is not set up in his pleadings. I think, however, that the pertinent facts are sufficiently stated by paragraphs 3 and 4 of the defence, wherein the existing relation between the parties is in fact alleged; moreover, no effect was given to the objection by the court *en banc*, where, presumably, the adequacy of the pleadings was considered in the light of the local practice, if the question were raised in that court; and therefore I think we must proceed upon the view that if, according to the law, the claim cannot be enforced, there is sufficient in the defence to enable the court to decide in conformity.

The respondent's principal answer, and that to which the majority of the court *en banc* gave effect, rests upon s. 56 of the Nova Scotia *Trustee Act*. R.S. N.S., 1923, c. 212, whereby it is enacted that:

> 56. Where there are more executors, administrators, trustees or guardians than one, any one of such executors, administrators, trustees or guardians who is also a solicitor may with the consent of his co-executors, co-administrators, co-trustees or co-guardians, charge for professional services rendered by him in relation to the estate in the same manner as if he were not such executor, administrator, trustee, or guardian: Provided, however, that no such charge shall be made for any service which an executor, administrator, trustee or guardian ought to render without the intervention of a solicitor.

This was the chief topic discussed at the hearing, and my view, which I have reached upon very careful consideration, is that the legislature has not, by this provision, manifested an intention to include the directors of a company, as such, within the class of trustees to which the enactment is meant to apply. The collocation of the words, "executors, administrators, trustees or guardians", as descriptive of the persons for whose benefit the dispensation is made, coupled with the limitation of the professional services, which are the subject-matter of the clause, to those rendered "in relation to the estate", make it to my mind extremely unlikely that a solicitor, if not a trustee otherwise than because he is a director of a company, is within the purview of the section. The reading of the text is not only inapt to draw attention to the

(1) (1855) 5 De G. M. & G., 160, at p. 164.

ordinary case of a director, but it seems, upon my interpretation, more likely to stifle any suggestion that a mere director is intended to share in the benefit of the provision. And, however the case may stand as to a director, who has in hand money or property of the company, and who is thus, in a qualified sense, a trustee, whether within the application of s. 56 or not, the respondent here is no more than an agent who is endeavouring, without any enabling clause, to justify the transaction in question, and to recover reward for his services by reason of instructions emanating from himself and his co-directors. This is not a case of dual capacity, such as that to which James, L. J., referred in *Smith* v. *Anderson* (1), when he observes that

> the same individual may fill the office of director and also be a trustee having property, but that is a rare, exceptional, and casual circumstance.

On the other hand, the respondent's disqualification arises only by reason of his quality as agent of the company; as is said by Lord Selborne, L.C., in *Great Eastern Railway Co.* v. *Turner* (2)

> The directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company.

The majority of the court below appears to have reached a different view upon the authority of *In re Lands Allotment Company* (3). In that case, the company was being wound up, and it was said that the directors had engaged in a transaction which was *ultra vires* of the company. What they had done, in effect, was this: One Hobbs was indebted to the company to the extent of £35,000, and a company called the Building Securities Company was formed to purchase his business and to take over his assets and liabilities. It thus became the duty of the Building Securities Company, as between it and Hobbs, to pay off that sum of £35,000, and it did so by purporting to sell its shares to that amount to the Lands Allotment Company which sent the Securities Company its cheque for the sum, upon the understanding that the cheque should be immediately returned. Hobbs' debt was thus repaid in a manner which is described as a farce. In point of fact, it was a

(1) (1879) 15 Ch. D., 247, at pp. 275-276.

(2) (1872) 8 Ch. App., 149, at p. 152.

(3) [1894] 1 Ch., 616.

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mere paper transaction; the cheque was handed back on the following day, and, as stated by Lindley, L. J.,

> the real substance of that transaction, when you see through the cloak which is thrown around it, is that the Lands Allotment Company took £35,000 worth of shares in the Building Securities Company in satisfaction of Hobbs' debt. That was what was really done.

Lindley, L. J., considered the case upon the assumption that the transaction was *ultra vires,* and therefore that the directors were liable to make good the money; and the question was whether they were protected by the *Statute of Limitations* relating to trustees, c. 59, s. 8, of 1888; it was held in the affirmative, and upon the view, if I correctly interpret the meaning, that the directors had committed a breach of trust; that directors, although not, properly speaking, trustees, have always been considered as trustees of money which comes to their hands, or is actually under their control, and liable to make good that which they have misapplied, upon the same footing as if they were trustees; that s. 8 of the *Trustee Act,* 1888, applies to trustees, and includes

> a trustee whose trust arises by construction or implication of law as well as an express trustee;

and that directors are considered as express trustees of money which they have control of, or, if not, that they are certainly trustees by construction or implication of law, within the definition of the Act. Kay, L. J., makes the matter very clear at pages 638 and 639, where he says:

> Then comes the question, what was the position of the directors who made an improper and *ultra vires* investment of that kind? Now, case after case has decided that directors of trading companies are not for all purposes trustees or in the position of trustees, or *quasi* trustees, or to be treated as trustees in every sense; but if they deal with the funds of a company, although those funds are not absolutely vested in them, but funds which are under their control, and deal with those funds in a manner which is beyond their powers, then as to that dealing they are treated as having committed a breach of trust.
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> * * *
>
> It is said, by way of argument, "Why did not the definition clause expressly include directors?" But it would have been quite wrong to have included directors, because directors are not always trustees. As directors they are not trustees at all. They are only trustees *quâ* the particular property which is put into their hands or under their control, and which they have applied in a manner which is beyond the powers of the company. I conceive that *quâ* such fund they are constructive trustees, or trustees by implication of law, and they come exactly within the words of this definition in the Act, and therefore the 8th section of the Act, which applies to all persons who come within this definition of trustees, does apply to exonerate these directors from that misapplication of funds for which otherwise, I assume, they would have been liable.

The case of the *Lands Allotment Company* (1), upon this point, may therefore be taken as a mere example or illustration of the principle affirmed by Jessel, M.R., when he said in *In re Wincham Shipbuilding, Boiler, and Salt Co.; Poole, Jackson and Whyte's case* (2):

> It has always been held that the directors are trustees for the shareholders, that is, for the company. They are the managing partners of the company, and if they abuse their powers, which they hold in trust for the company, to the damage of the company, for their own benefit, they are liable to make good the breach of trust to their *cestuis que trust* like any other trustees.

The directors had misused their powers. They were charged with the resulting liability, and, the proceeding not being within the statutory exception, they were naturally held entitled to the protection of the statute.

Upon this review of the *Lands Allotment* case (1), I do not think it affords the respondent any assistance. His case is entirely different. He is seeking to recover from the appellant company, for services rendered under a contract, which, by the general principles of the law, is incapable of being enforced, and the company resists the demand, relying upon the director's incapacity. The respondent has no money or property of the company in his hands; he is not subject to any action for breach of trust; rather, it seems, he is endeavouring to persuade the court to sanction a breach of trust.

For these reasons I do not think that the respondent can be regarded as a trustee for the purposes of s. 56 of the Nova Scotia *Trustee Act*.

It follows that the appeal must be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitor for the appellant: *R. S. McLellan.*

Solicitor for the respondent: *M. A. Patterson.*

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(1) [1894] 1 Ch. 616.

(2) (1878) 9 Ch. D., 322, at p. 328.

1929
*Feb. 6, 7.
*April 30.

MICHAEL WILKINSON BRIGHOUSE (DEFENDANT) ..... } APPELLANT;

AND

FREDERICK C. MORTON, ADMINISTRATOR OF THE TRUST AND ONE OF THE EXECUTORS AND TRUSTEES OF THE ESTATE OF SAM BRIGHOUSE, DECEASED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Trusts and trustees—Accounting—Accounting to deceased's estate as to receipts and expenditures in connection with deceased's affairs—Disputed items—Whether payments properly chargeable to estate—Findings on the evidence—Corroboration—Mingling of funds of trustee and cestui que trust—Presumption as to funds of unidentified origin—Mingling authorized by cestui que trust.

By the judgment of this Court, [1927] S.C.R. 118, defendant was held accountable for all moneys of the late S. B. received by him since February 6, 1907 (except as to gifts completed within S. B.'s lifetime) and was held entitled to all just and proper allowances for expenditures made, and for costs, charges and expenses incurred by him in or in relation to or in connection with S. B.'s affairs. On the accounting, disputes arose as to certain items, which, by the judgment now reported, were decided by this Court as follows:

(1) As to certain payments by defendant to discharge a liability of S. B. for money borrowed from a bank for which a demand note was given, it being contended that the money was used for a business given by S. B. to defendant, and that, as between defendant and S. B., the note was a liability of defendant rather than of S. B.; *held* that there was no evidence that the money was received by defendant after February 6, 1907, or at any time, and therefore it was not money for which defendant was accountable by the said former judgment of this Court, upon which the accounting must proceed; and, moreover, the payments were expenditures or charges incurred by defendant "in or in relation to or in connection with the affairs" of S. B.; and the items should be allowed to defendant.

(2) As to sums charged by defendant as paid to his brother W., deceased, for W.'s wages for work on S. B.'s farm, as to which it was contended that there was no proof or presumption that the services of W. (who was S. B.'s nephew and lived with him on his farm) were to be paid for, and that the payments were not really for wages but on account of the sale price of land which defendant and W. had sold and in which each had a half interest, and that there was no corroboration of defendant's evidence that he appropriated the payments to wages or that W. was entitled to wages; *held*, that the sums should be allowed to defendant; on the evidence, and with due regard to the rule requiring

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

corroboration in such cases (*Evidence Act*, B.C., s. 11) there was ample proof of the payments and of their imputation on account of wages, and there was no evidence to the contrary beyond an inference sought to be drawn from certain circumstances, but which was negatived by the evidence; as to W. having an enforceable claim against S. B. on a presumed or implied agreement, the circumstances possibly justified the inference of a legal demand, but, in any event, the payments to W. constituted expenditures by defendant in relation to S. B.'s affairs, there was no reason to doubt that they were made honestly and within the scope of defendant's authority as proved, and therefore they should not be disallowed on the ground that possibly W. could not have established his claim for wages by strict proof of a contract for payment; the situation, under the circumstances, was one as to which defendant was entitled to exercise his judgment in the administration of his authority with relation to S. B.'s affairs. (Lamont J. dissented as to this allowance, holding that, on a consideration of all the evidence, there was no corroboration of defendant's statement that S. B. told him to pay wages to W. or that the sums were paid as wages.)

(3) As to certain sums deposited by defendant in his bank account, the origin of which sums he was, after the long time elapsed, unable to identify, and as to which it was contended that, since defendant admittedly deposited moneys of S. B., along with his own, in his individual account, he was responsible for an unlawful mingling of funds, and moneys not shown to have belonged to defendant must be taken to have belonged to S. B.; *held*, that the reason underlying the principle invoked by such contention did not apply in this case, where it was found that S. B. himself had authorized and encouraged defendant to dispense with a separate account and to keep the entries in the manner in which the account appeared; it would be inequitable, and also inconsistent with the judgment which regulated the accounting, that defendant should be held accountable for deposits not admitted or identified as belonging to the estate; as to the contention that defendant could not plead the authority derived from S. B. because S. B. became insane, *held*, that, on the evidence in this regard, no revocation or suspension of authority at the material time was established.

Judgment of the Court of Appeal of British Columbia, 40 B.C. Rep. 278, reversed on the above questions.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1) which decided in favour of the plaintiff upon the items of account in question in the present appeal. The disputes arose in connection with the accounting by the defendant pursuant to the judgment of the Supreme Court of Canada reported in [1927] S.C.R. 118. The material facts of the case appear in that judgment together with the judgment now reported. The appeal was allowed with costs, Lamont J. dissenting in part.

(1) (1928) 40 B.C. Rep. 278.

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Ghent Davis for the appellant.

W. D. Gillespie for the respondent.

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

NEWCOMBE J.—The writ was issued 13th June, 1924, and the action, which was for an account, has been productive of considerable litigation. The defendant, now appellant, disputed his liability to account, and succeeded at the trial, and, upon an equal division of judicial opinion, in the Court of Appeal in British Columbia (1). But a different view prevailed in this Court (2), and the defendant was ultimately held accountable, subject to the provisions of the judgment. The case is reported, *sub nomine Morton* v. *Brighouse,* in [1927] S.C.R., 118. The material clauses of the judgment, for present purposes, are these:

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the respondent, Brighouse, is accountable for all moneys of the late Sam Brighouse, received by him since the 6th day of February, 1907, excepting money in respect of which the intended gift mentioned in the pleading was completed within the lifetime of the said Sam Brighouse.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the respondent is entitled to all just and proper allowances for expenditures made by him, and for all costs, charges and expenses incurred by him in or in relation to or in connection with the affairs of the said Sam Brighouse.

Three classes of items, and interest, are in dispute.

First. These are payments amounting to $7,287.76, which were made by the defendant to the Bank of Montreal to discharge a liability of Sam Brighouse. The latter had borrowed $13,000 from the bank in June, 1906, for which he gave his demand note endorsed by his nephew, the defendant, and by the Royal Ice and Dairy Company, a concern which at that time belonged to Sam Brighouse, or in which he was interested, and he constructed upon the defendant's land the buildings and plant which were used for the purposes of that company. Subsequently Sam Brighouse gave the business to the defendant. It is satisfactorily proved, and is in fact not disputed, that the defendant made the payments, amounting to $7,287.76, on account of this loan. Sam Brighouse himself had made

(1) 36 B.C. Rep. 231; [1925] 3 W.W.R. 412.

(2) [1927] S.C.R. 118.

the preceding payments in reduction of his liability, and the amount in question was required to discharge the balance. It is in proof, however, that the defendant owned the ice business in 1909, although he did not own it in 1906 and 1907, and it is suggested, but not proved, that the money borrowed by Sam Brighouse in 1906 was used for that business, and that, as between the defendant and Sam Brighouse, the note was a liability of the defendant rather than of Sam Brighouse. There were differences of opinion in the provincial courts. The Deputy Registrar disallowed these charges, and the learned judge, before whom they came upon review, D. A. McDonald J., allowed them. In the Court of Appeal the majority upheld the Deputy Registrar. But it is certain that the proceeds of the loan were credited to Sam Brighouse's bank account, and were withdrawn by him in June, 1906; and, whether he used the money to construct the ice building or not, or whatever he used it for, there is no evidence that it was money received by the defendant after 6th February, 1907, or at any time, and therefore it is not money for which the defendant is accountable by the judgment of this Court, upon which the accounting must proceed; and, moreover, it cannot be successfully disputed that the payments were expenditures or charges incurred by the defendant "in or in relation to or in connection with the affairs of the said Sam Brighouse." Consequently these items aggregating $7,287.76 should be allowed.

Second. There are payments amounting to $4,000, which the defendant charges as paid to his brother William A. Wilkinson, deceased, for the latter's wages for work done on the farm of Sam Brighouse, during the period from 1896 to 1913. The payments were made, and that is not disputed; but it is said that, although the services were rendered, there is no proof or presumption that they were to be paid for; that the payments were in reality not for wages, but on account of the sale price for Gulf lots, which the defendant and his brother had sold, and in which each of them had a half interest, and that there was no corroboration of the defendant's evidence that he appropriated the payments for wages or that his brother was entitled to wages. The items comprising this amount were disallowed by the Deputy Registrar for lack of corroboration, and they

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were allowed by D. A. McDonald J. upon the finding that "the evidence is sufficiently corroborated that these moneys were paid to W. A. Wilkinson on instructions from the deceased Sam Brighouse, and they were moneys properly payable to W. A. Wilkinson." The Court of Appeal, in turn, disallowed these items; the Chief Justice, "because there was no agreement by the deceased or by the defendant to pay wages to W. A. Wilkinson," and because "this was not a transaction with which Sam Brighouse had anything to do"; Martin J.A., considered that the Deputy Registrar was right. Galliher J.A., says that the defendant's evidence in connection with the payment of these items "is far from convincing or sufficient in my opinion. I would therefore restore the Registrar's finding." M. A. MacDonald J.A., did not consider that there was sufficient corroboration of defendant's testimony to show "that the brother was actually hired with the consent of the deceased to work in the farm."

Here again, I am disposed to think that the learned judges did not pay proper regard to the judgment of this Court of 4th January, 1927, by which the accounts are directed to be taken. The first payment made by the defendant to his brother, amounting to $2,000, was paid on 15th December, 1909, and on that day the defendant received the sum of $4,000 on account of the sale of the Gulf lots. The defendant testifies:

> December 15, 1909, I paid to my brother W. A. Wilkinson, $2,000. This $2,000 I paid on account of wages. He had been on the farm for close —since '96, that is for thirteen years at that time. He was on the farm until 1919, until Brighouse's death. Practically, he had received nothing, only a few dollars here and there. Sam Brighouse asked me many times —told me many a time to pay him as soon as I could give him something. I paid him this $2,000 on account.

The second payment of $2,000 was actually made in four payments of $500 each by Mr. Sauerberg, who was the book-keeper of the Royal Ice Company during the years from 1908 on, when the defendant owned the business, and he testifies to the making of these payments on defendant's account. The defendant, at that time had been paid only $6,000, net, from the sale of the Gulf lots, and so, if the whole sum of $4,000 which is claimed, was paid by the defendant to his brother on account of the Gulf lots, it was more by $1,000 than the brother's share of the receipts. The whole proceeds of the sale were ultimately received by

the defendant, and the total amount, with interest, was $52,462. This, with $30,000 more of the defendant's own money, was invested by the defendant in the Royal Mansions.

The defendant testifies that his brother was pressing him for money on account of wages and that he gave it to him, referring to the first payment of $2,000. He says: "Now in making the deal in putting up the Royal Mansions I split even with him. I paid him that on account of his wages, or I would have taken that much out of him." And it is shown by the consent judgment in the will case, by which the Royal Mansions were declared to belong to the testator's (Sam Brighouse's) residuary estate, that this property passed to the estate, subject to a mortgage to the defendant for $25,000, and to a mortgage for a like amount to William A. Wilkinson, the defendant's brother; thus accounting for the proceeds of the Gulf lots in full by equal division between the brothers, except, perhaps, as to a balance of $2,462 in which the estate of William A. Wilkinson may still retain a one-half interest; but that matter has not been brought into question, nor has it been explained. It is, however, sufficiently plain that, if the $4,000, represented by the payments now in controversy, be regarded as part of the proceeds to William A. Wilkinson of the Gulf lots, he has been, to that extent, paid twice, an event which is very unlikely to happen by the payer's consent. The settlement thus furnishes strong corroboration of the defendant's denial that the payments of $4,000, which his brother received, were appropriated to the reduction of the defendant's liability for proceeds of the Gulf lots, and it is not suggested that there is an alternative motive for these payments, except wages. There is independent proof of the services, at least during the period from 1907 to 1913, which comprises the last six years of Sam Brighouse's life. The first payment of $2,000 was made by defendant's cheque, which is in evidence, and which was paid and charged to the defendant in his bank account. The other four payments of $500 were made by Sauerberg, and charged against the defendant in the books of the Royal Ice Company.

There is thus, with due regard to the rule requiring corroboration in cases of this character, ample proof of the

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payments in question, and of their imputation on account of wages, and there is no evidence to the contrary beyond the inference which is sought to be drawn from the fact that there was a liability of the defendant to his brother in respect of proceeds of the Gulf lots as to which the defendant might, if so disposed, have appropriated a payment of $2,000; an inference which, I think, is negatived by the evidence.

There remains the contention that William A. Wilkinson, being nephew of Sam Brighouse, and living on his farm, had no enforceable claim against his uncle for wages by reason of a presumed or implied agreement. I am not sure that the circumstances do not justify the inference of a legal demand, but, in any event, the payments constituted expenditures by the defendant in relation to the affairs of Sam Brighouse, and there is no reason to doubt that the defendant made the payments honestly, within the scope of his authority as proved; and, if so, it does not appear to me that the court would be justified to disallow the claim on the ground that perhaps the nephew could not have established his claim for wages against his uncle by strict proof of a contract for the payment of wages. The situation was one as to which, in my view of the circumstances, the defendant was entitled to exercise his judgment in the administration of his authority with relation to his uncle's affairs.

Third. There are two other items, $992.80 and $668.30, aggregating $1,661.10, described as "surcharge," which were disallowed, both by the Deputy Registrar and by all the judges. These two sums were deposited in the defendant's account in the Bank of Montreal on 23rd August and 26th September, 1910; the account does not specify the origin of either deposit, and the defendant, after the long time elapsed, is unable to identify them, except as deposits which he made; but there is, on the other hand, no proof that they belonged to Sam Brighouse. The plaintiff accordingly invokes the principle that, since the defendant admittedly has deposited the moneys of Sam Brighouse, along with his own, in his individual account, he is responsible for an unlawful mingling of the funds, and the moneys must, he says, belong to the *cestui que trust,* which are not shewn to belong to the trustee. This principle, in its usual

application, the defendant does not dispute, but he answers the plaintiff's contention by the fact that, according to the proof, the account was kept in a manner authorized by Sam Brighouse, and that therefore neither he nor those claiming under him could, in the circumstances, equitably insist upon the surcharge, and the defendant cites par. 399 from Halsbury's Laws of England, Vol. 28, and *Fletcher* v. *Collis* (1). I think the answer is well founded; it would be not only inequitable, but also inconsistent with the judgment which regulates the accounting, that the defendant should be held accountable for deposits which are not admitted or identified as belonging to the estate.

In *Lupton* v. *White* (2), Lord Eldon ruled that the distinction lies upon the person who occasions the confusion of property, and he explained that although the principle did not produce strict justice, it was the only justice that could be done; and that no more could be done was the fault of the accounting party. It is well enough to hold that where a trustee has confused the fund, the whole is to be treated as belonging to the trust, except so much as the trustee can distinguish as his own, but the reason underlying the principle manifestly does not apply in the present case, where it is found that Sam Brighouse himself had authorized and encouraged the defendant to dispense with a separate account, and to keep the entries in the manner in which the account appears.

The plaintiff suggests, however, that the defendant cannot plead the authority which he derived from Sam Brighouse, because Sam Brighouse became insane; thereby, I suppose, intending to intimate that the defendant's authority was revoked. The contention is thus stated in the appellant's factum:

> The said Samuel Brighouse developed mental trouble after being at the hospital in December, 1908, which eventually led to insanity, so that he was not in a normal condition to acquiesce or concur in the acts of the appellant in mixing the trust funds of Samuel Brighouse with his own.

Now the following facts are narrated in the judgment of this Court upon the former appeal:

> In 1908, Brighouse had a serious operation, after which, according to the evidence of the respondent, his mental powers suffered a decline, and, as a result of which, he eventually became demented. In 1911, Brighouse executed a codicil to the will of 1906, making unimportant alterations in the particular legacies, but leaving the respondent still the beneficiary of

(1) [1905] 2 Ch. 24. (2) (1808) 15 Vesey Jr., 432.

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his residuary estate. In 1912, Brighouse left Vancouver for England, and in the same year he executed a new will, the effect of which will be fully stated. In 1913 he died.

The deposits which it is sought to surcharge were, as already shown, made in August and September, 1910. Sam Brighouse went to the hospital in December, 1908. The defendant, in his cross-examination, gave the following testimony:

Q. I think you told me also, on discovery, when your uncle went to the hospital, his trouble was all mental.

A. I couldn't tell you it was all mental, because it was enlargement of the prostate gland, but it led to mental trouble. His doctor told me that would be the effect of it.

He appears to have recovered from the operation, because he subsequently returned to his home, and, in 1911, executed a codicil. In the same year he went to England, and there he made a new will in 1912, of which the plaintiff is one of the executors, and he died in 1913. There is no evidence as to the precise time when his mind sank into the condition of dementia, but I cannot draw the inference that he was not responsible for instructions to which he adhered in 1910, and I am satisfied that the appellant fails to establish any revocation or suspension of authority at the material time, while, on the contrary, the deceased was executing testamentary instruments in 1911 and 1912, the latter of which was admitted to probate and constitutes the respondent's title.

In consequence the defendant succeeds upon all the material items in dispute, and it is not necessary to consider the question of interest.

The appeal should therefore be allowed upon all items, with costs throughout.

LAMONT J.—This is an appeal from the decision of the Court of Appeal of British Columbia (1), in which it was held that the defendant was indebted to the plaintiff as administrator of the trust and one of the trustees of the estate of Sam Brighouse, deceased, in the sum of $7,986.63, with interest thereon from July 31, 1913. The action was for an accounting by the defendant of the moneys and property of the late Sam Brighouse which came into his hands. The defendant's name originally was Michael Wilkinson; Sam Brighouse was his uncle and, in compliance with a

(1) (1928) 40 B.C. Rep. 278.

stipulation contained in his uncle's will, the defendant added the name of Brighouse to his own.

The defendant had been carrying on the business of Sam Brighouse under a power of attorney dated February 6, 1907. By a judgment of this Court (1), the defendant was ordered to account for all the moneys of the late Sam Brighouse received by him after February 6, 1907, except moneys which constituted a completed gift to him by Brighouse during his lifetime. The accounting was had, and, by the judgment appealed against, the plaintiff was held entitled to recover the sum above mentioned. From that judgment the defendant has appealed to this Court in respect of three classes of items.

The first class, aggregating $7,287.76, comprises sums of money paid into the Bank of Montreal from time to time by the defendant, or charged to his account by the bank, to pay off the balance due on a promissory note for $13,000, dated June 13, 1906, made in favour of the bank by Sam Brighouse and in which the defendant and the Royal Ice Company joined, either as makers or endorsers, which, it is not clear. This much, however, is beyond dispute, that the $13,000 was placed to the credit of the account of Sam Brighouse in the bank, and that Brighouse drew out the entire amount before the end of June, 1906. On the note Brighouse himself paid $3,000 on October 23, 1906, and a further sum of $3,000 on February 14, 1907. The balance with interest was paid by the defendant in instalments between April 23, 1907, and September 21, 1910; and it is these several instalments, amounting in all, as I have said, to $7,287.76, that the defendant seeks to charge against Brighouse's estate. In my opinion he is entitled to do so. He has shewn that he paid the above amount into Brighouse's account at the bank to square that account. *Prima facie,* therefore, he paid it for Brighouse, and the onus was on the plaintiff to shew that, notwithstanding this application of the money, the note was in reality a debt that should have been paid by the defendant himself, and not by Brighouse. This, in my opinion, the plaintiff has failed to do. Neither the defendant nor any other witness at the trial could say just what Sam Brighouse did with the $13,000. The defendant suggested that some of it may have been

(1) [1927] S.C.R. 118.

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used to erect buildings on Lots 18 and 20, Block 1 D.L. 185, for the Royal Ice Company, a company which Brighouse at that time controlled and whose business he carried on. In 1908 Brighouse gave the property and business of the company to the defendant.

For the plaintiff it was contended that it should be held that this $13,000 had been used to erect buildings for the Ice Company or to assist in carrying on the company's actual business operations; and that, as Brighouse gave the business to the defendant before the note was fully paid, the defendant was under an obligation to pay the balance thereof as a liability of the business. In my opinion this contention cannot prevail: In the first place there is no evidence whatever that Brighouse used the money for the business operations of the company, and in the second place, if he used it for the erection of buildings on the above mentioned lots, he knew, when he did so, that these lots were the property of the defendant and had been since 1890. In view of that fact and the relationship existing between them, if the money did go into the buildings, the proper inference to be drawn, under all the circumstances, would be that Brighouse intended the buildings to be a gift to the defendant. As to the suggestion that the $13,000 was a loan to the defendant, all that needs to be said is that there is absolutely no evidence to justify such a conclusion, and the defendant has testified that when Brighouse gave him the business of the Royal Ice Company no obligation was imposed on him to pay off the note in question. The defendant was, therefore, entitled, in the accounting, to charge the $7,287.76 against the estate.

The second class consists of a payment of $2,000 made by the defendant to his brother, W. A. Wilkinson, on December 15, 1909, and four payments of $500 each, made in 1911 by the Royal Ice Company to W. A. Wilkinson on the following dates: March 24, April 10, April 28, and May 12. The defendant claims that all these sums were paid as wages due to his brother from Sam Brighouse; while the plaintiff contends they were moneys belonging to W. A. Wilkinson in the hands of the defendant. The circumstances under which the first sum of $2,000 was paid, were as follows: The defendant and his brother jointly owned lands known as the Gulf lots. These lands they sold under

an agreement of sale on November 29, 1909, for $46,400, payable, $500 on the execution of the agreement; $5,500 on December 15, 1909; $8,400 on November 29, 1910, and $8,000 on November 29 in each of the following four years, with interest at 6%. The $500 and the $5,500 were paid, and the defendant endorsed on the agreement, under date of December 14, 1909, the receipt of this $6,000, and also the payment thereout of a commission of $2,000. On December 15 he deposited the balance ($4,000) to his credit in the bank and, on the same day, issued a cheque to his brother for $2,000, the exact amount of his brother's share of the purchase money then in the defendant's hands. As the defendant had, just before issuing the cheque to his brother, deposited in his own account in the bank $2,000 belonging to his brother, it is important to note the reason he gives for issuing the cheque on account of wages rather than as a payment of purchase money. His explanation is that his brother had worked for Sam Brighouse from 1896, a period of thirteen years, and had received therefor "only a few dollars here and there"; that Sam Brighouse had told him many times to pay his brother "as soon as he could give him anything"; that his brother had been pressing him the whole time for payment and that when he got the money from the Gulf lots he was in a position to pay him. His testimony on this point is as follows:—

Q. Now, let us clear up the facts. It was because you had received money from the sale of the Gulf lots on the 15th of December that put you in funds to enable you to pay your brother $2,000?

A. Exactly.

The whole tenor of his evidence was calculated to lead the court to the conclusion that Sam Brighouse recognized an obligation on his part to pay wages to W. A. Wilkinson; that he did not have the money to pay him and that he requested the defendant to pay these wages as soon as he could collect sufficient to do so. Sam Brighouse was a very wealthy man, which is attested by the fact that he left an estate of $700,000. Had he been under an obligation to pay wages to W. A. Wilkinson, it seems highly improbable that he would not have made a payment on account in the ten years from 1896 to 1906 that W. A. Wilkinson lived with him, and prior to the time when the defendant took over the management of Brighouse's business. The fact is that the mother of the defendant and W. A. Wilkinson was a sister

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of Sam Brighouse, and went to live with him at the ranch on Lulu Island in 1896, and she and her boys continued to live there until Brighouse's death. There was absolutely no evidence of any agreement on the part of Brighouse to pay wages to W A. Wilkinson, or any evidence that W. A. Wilkinson had ever asked him for wages. It is not, in my opinion, unworthy of note that although the defendant was receiving considerable sums of money on Brighouse's account from time to time, including $1,515 on November 19, and $2,500 on December 11, 1909, he did not pay anything to his brother until he had on hand money to which his brother was entitled, and then paid him the exact sum due.

Then as to the four $500 payments in 1911, made also, the defendant claims, for wages: These sums were paid by the Royal Ice Company and charged to the defendant's account. The defendant was asked if, on March 24, 1911, when the Royal Ice Company paid the first $500 to his brother, he (defendant) had received the payment of $8,400 due November 29, 1910, under the agreement of sale. His answer was " I don't know I am not sure of that." Then he gave this testimony:

Q. * * * It is true, is it not, that at the time you paid your brother these four items of $500 you had received moneys from the sale of the Gulf lots, out of which your brother would be entitled to more than $2,000.?

A. Not at that time he would not be entitled to it from the Gulf lots.

Q. You received $5,500 on the 15th December, 1909?

A. Yes.

Q. And you received $8,400 in November, 1910?

A. I don't know whether I received the second one at that time, Mr. Craig.

Now if the defendant did not know whether or not he had received the $8,400 payment before directing the Ice Company to make these $500 payments to his brother, he was scarcely in a position to state, as he did, that when the payments were made his brother was not entitled to them out of the moneys from the Gulf lots. The defendant did know, however, that he had received a part, at least, of the $8,400 due November 29, 1910, for, on December 20, 1910, he made a deposit in the bank of $2,674, and the deposit slip shews that $2,424 of this amount came from one Wakely, and $250 from one Esmond. In reference to the deposit slip he was asked:

Q. * * * Take the next item, 45, Mr. Brighouse, marked "Wakely" and the item 46 marked "Esmond"?

A. That is part of the same payment for the sale of the Gulf lots.

So that when the first $500 was paid to his brother by the Ice Company the defendant had on hand over $1,300 of his brother's money, apart altogether from the moneys received in 1909.

Before the Registrar the defendant was asked:

Q. Why should the Royal Ice Company pay him $2,000?

A. It was out of my account at the Royal Ice Company. I was charged with it. I put the money from the Royal Ice Company into a mortgage in his name.

From this answer it appears that these payments, for whatever purpose they were made, came back to the defendant for investment on his brother's account. At a later stage of the examination the defendant testified that he put the money which he and his brother received from the Gulf lots into the Royal Mansions Apartment Block. These apartments were erected by the defendant in 1912, at a cost of over $80,000, on land of which Sam Brighouse was the registered owner, but which the defendant stated Brighouse had verbally given to him. After Brighouse's death, by a judgment of the courts of British Columbia, the Royal Mansions were adjudged to form part of Brighouse's estate and the defendant and his brother were each given a mortgage thereon of $25,000, evidently for the reason that the defendant had established that he had put into the block $50,000 that did not belong to Sam Brighouse, and that such a sum had been received by himself and his brother from the sale of the Gulf lots. It was argued that the fact that the defendant's brother received a mortgage in his own name for $25,000 corroborated the defendant's statement that none of the $4,000 paid to W. A. Wilkinson could have been paid on account of the purchase money of the Gulf lots, otherwise he would have been overpaid. The fact that W. A. Wilkinson obtained a mortgage for $25,000 must be considered in the light of the further fact that he never had a dollar invested in the Gulf lots. Brighouse bought these lots under an agreement of sale and afterwards turned the agreement over to the defendant who obtained title and then made his brother a gift of a half interest. The defendant's conduct towards his brother, in reference to the Gulf lots and also to the Royal Mansions Apartments, would really indicate that he was making pro-

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vision for him. He gave him his entire interest in the lots and, with regard to the Royal Mansions he, in one place, gave the following evidence:

Q. But the Royal Mansions—you considered you owned the Royal Mansions?

A. No, no, he had a half interest in it.

In another place he says:

Now in making the deal in putting up the Royal Mansions, I split even with him.

From these answers I take it that had it been adjudged that the Royal Mansions belonged to the defendant, his brother would have had a half interest therein. When it was adjudged to belong to the estate and the only interest the defendant had therein was the money he could shew he had put into the block, other than the money of Sam Brighouse, it was to his interest to make this sum as large as possible. Under these circumstances the fact that W. A. Wilkinson got a mortgage on the Royal Mansions of $25,000 is not, in my opinion, corroborative of defendant's statement that had the $4,000 not been paid as wages he would have deducted it from his brother's mortgage. His brother's whole interest in the Royal Mansions was a gift from the defendant and the inference to be drawn from the dealings between them is not that which might be drawn from transactions between strangers carried out in accordance with business principles.

Section 11 of the *Evidence Act* of British Columbia reads:

11. In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, 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.

In the evidence before us I am unable to find any corroboration of the defendant's statement that Sam Brighouse told him to pay his brother wages, or that the $4,000 was paid as wages. An agreement to pay will not, as between near relatives living together, be implied from the fact that service is rendered by one to another. In my opinion, therefore, the defendant is not entitled to charge against the estate the items of this class.

The third class comprises two items, one for $992.80 and the other for $668.30, charged against the defendant in the surcharge. These items appear as credits in the defendant's

bank book, and the defendant is now unable to say whether they are trust funds or his own money. He kept the trust funds and his own money in one bank account. The plaintiff relies upon the rule that where a trustee mixes trust funds with his own, whether in his account at the bank or elsewhere, the *cestui que trust* has a claim to have it restored out of the mixed fund in priority to any right of the trustee to the fund, and can claim the whole fund, if the amount which is trust money cannot be ascertained. Generally speaking, therefore, a trustee mixes trust funds with his own at his peril. It is, however, justifiable if done with the consent of the *cestui que trust,* and that is the ground upon which the defendant justifies his action. He says that on more than one occasion Sam Brighouse told him to use his (Brighouse's) money as his own and not to keep any account of it as that was not necessary. If Sam Brighouse made these statements to the defendant the mixing of the defendant's money with the trust money was with the consent and acquiescence of Brighouse, in which case the plaintiff would not be entitled to succeed in respect of these two items, for they have not been proved to be trust funds and it is established law that a *cestui que trust* who actively concurs, or passively acquiesces, in a breach of trust can obtain no relief against the trustees in respect of it if, at the time of this concurrence or acquiescence, he was of full age and *sui juris* and had full knowledge of the circumstances. A person claiming under a *cestui que trust* stands in the same position as the *cestui que trust* himself. (*Fletcher* v. *Collis* (1)).

The important question therefore is: Did Sam Brighouse acquiesce in the defendant's keeping the trust funds in his own bank account? To corroborate his statement that he did, the defendant called a number of witnesses. R. M. Currie testified that in November, 1908, Sam Brighouse had stated to him that "everything he had was Michael's (defendant's) to use and do with as he liked, that he (defendant) had kept the estate together and it was his." W. R. Burdes testified that Brighouse had great confidence in the defendant and spoke of the property as "ours" and said that "Michael had authority to do what he liked." J. H. Cocking, another witness, testified to a

(1) [1905] 2 Chy. 24.

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conversation he had with Sam Brighouse when he took him to the hospital. He says that on that occasion Brighouse told him that everything he had was Michael's and "that Michael could use anything he had as though it were his own."

The evidence of these witnesses, in my opinion, corroborates the testimony of the defendant and justifies its acceptance. As against the defendant, therefore, the rule as to mixing trust moneys with the trustee's own money has no application. The defendant cannot, therefore, be called upon to account for these two sums.

I would allow the appeal as to classes one and three, and dismiss it as to class two. Costs to be paid out of the estate.

Appeal allowed with costs.

Solicitors for the appellant: *E. P. Davis & Co.*

Solicitor for the respondent: *W. D. Gillespie.*

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*April 26.
*May 27.

REVILLON WHOLESALE, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

GAULTS, LIMITED (DEFENDANT) ..... RESPONDENT.

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

Sale of goods—Sale of stock-in-trade of wholesale business—Consideration—Construction of contract—"Cost landed price to the vendor."

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which, reversing the judgment of Ives J., held (Harvey, C. J. A., dissenting) that in the agreement in question, which was an agreement for sale by the plaintiff to the defendant of the plaintiff's wholesale dry goods stock-in-trade, the words "the cost landed price to the vendor", in the provision for the consideration to be paid by defendant to the plaintiff, in their proper interpretation, must be taken to have contemplated that the defendant should

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) [1929] 1 W.W.R. 825.

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have the benefit of "cash discounts" of which the plaintiff had received the advantage in settlement with its vendors.

After hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment (written reasons being delivered by Newcombe J., with whom the other members of the Court concurred) dismissing the appeal with costs.

Appeal dismissed with costs.

H. H. Parlee K.C. for the appellant.

H. R. Milner K.C. for the respondent.

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*May 1.
*June 13.

THE TRUSTS AND GUARANTEE COMPANY LIMITED (PLAINTIFF).. } APPELLANT;

AND

GEORGE HENRY McLEOD.....(DEFENDANT);

AND

WILLIAM BUXTON (DEFENDANT).....RESPONDENT.

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

Limitation of actions—Mortgage—Transfer of land subject to mortgage—Liability of transferee to mortgagee under implied covenant under Land Titles Act, Alta., R.S.A., 1922, c. 133, s. 54—Period of limitation for bringing action—Limitation of Action Act, R.S.A., 1922, c. 90, s. 3; Real Property Limitation Act, 1874 (Imp.), c. 57, s. 8.

M., by mortgage under seal and registered, mortgaged land in the province of Alberta to plaintiff, and subsequently, by transfer, not under seal, made pursuant to the Alberta *Land Titles Act*, and registered, transferred the land to B., who thereby became liable to plaintiff, under the covenant implied by virtue of s. 54 (1) of said Act, to pay the mortgage money. More than six years (the period of limitation applicable to a simple contract debt) but less than 12 years after registration of the transfer or any payment on account or written acknowledgment of liability by B., the plaintiff sued B. in Alberta for payment.

Held (reversing judgment of the Appellate Division, Alta., 23 Alta. L.R. 565) that B.'s liability to plaintiff was not statute barred. The period of limitation in Alberta for bringing action to recover money secured by mortgage made under the Alberta *Land Titles Act* is 12 years. (*Limitation of Action Act*, R.S.A. 1922, c. 90, s. 3; *Real Property*

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

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Limitation Act, 1874 (Imp.), c. 57, s. 8; and other statutes, considered); and that was the period applicable to the implied covenant in question.

Per Duff, Newcombe, Rinfret and Smith JJ.: The covenant implied under s. 54 is, not a simple contract, but a covenant in its ordinary and primary sense, that is, an agreement under seal.

Per Lamont J.: Whether or not the implied covenant is a covenant in the sense of an agreement under seal, in view of the language in which it is couched (in s. 54) the transferee's liability upon it is co-extensive with the mortgagor's liability on the mortgage; and an action thereon may be brought within the same period of limitation as applies to the mortgagor's liability.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) holding that the liability in question of the respondent to the appellant was statute barred. The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above head-note. The matter came before the Supreme Court of Alberta by way of stated case, which was referred by Walsh J. to the Appellate Division. The stated case is set out in full in the judgment of Smith J. The appeal was allowed with costs.

M. M. Porter for the appellant.

A. Macleod Sinclair, K.C. for the respondent.

The judgment of Duff, Necombe, Rinfret and Smith J. J. was delivered by

SMITH J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (1) in a case stated upon consent by the Trial Division.

The stated case is as follows:

"1. By an Instrument of Transfer in writing, made pursuant to the provisions of the Land Titles Act and Amendments thereto, not under seal, executed by the Defendant, George Henry McLeod, dated the 24th day of November, 1917, and registered in the Land Titles Office for the South Alberta Land Registration District on the 23rd day of January, 1918, as No. 522 C.A., the Defendant, William Buxton, the transferee therein named, became the registered owner of the following lands situate in the Province of Alberta, and being composed of the East Half of Section Fourteen (14), in

(1) 23 Alta. L. R. 565; [1928] 3 W.W.R. 205.

Township eleven (11), Range Twenty-two (22), West of the Fourth (4th) Meridian, containing 320 acres more or less, reserving unto the Crown all mines and minerals.

2. At the time of registration of said transfer the said lands were subject to a mortgage in favour of the Plaintiff, duly executed under seal by the Defendant, George Henry McLeod, dated the 3rd day of April, 1917, and duly registered on the 17th day of April, 1917, as No. 2546 B.S.

3. The Defendant, William Buxton, does not deny but admits that by virtue of the registration of said transfer he became liable to the Plaintiff under and by virtue of the provisions of Sections 54 and 55 of the said Land Titles Act.

4. A period of over six years has elapsed since the date of registration of said transfer and since the date of any payment on account or of any written acknowledgment of the said liability by the said Defendant, William Buxton.

Question for the Consideration of the Court:

Was the said liability of the Defendant, William Buxton, statute barred at the time of the commencement of this action, i.e., the 31st day of January, 1928?

The Plaintiff and the Defendant, William Buxton, hereby agree to the submission of the Special case, as above stated, to a Judge of the Supreme Court of Alberta, subject to the usual right of appeal, or of a reference to the Appellate Division, given by the Rules of the Supreme Court, and further agree that if the question of law hereby submitted is answered in the affirmative the action of the Plaintiff shall be dismissed with costs, and in the event that the said question shall be answered in the negative, Judgment shall be given against the Defendant, William Buxton, for the amount of the Plaintiff's claim with interest and costs, including the costs of and incidental to the disposition of this special case.

Costs in either case to be taxed on column 4 of Schedule C of the Tariff of Costs.

DATED at the City of Calgary, in the Province of Alberta, this 13th day of September, 1928."

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Section 54 of the *Land Titles Act* provides as follows:

54. (1) In every instrument transferring land, for which a certificate of title has been granted, subject to Mortgage or encumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the Transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or encumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the Transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.

The word "covenant" in English law, in its ordinary and primary signification, means an agreement or promise under seal. Wharton's Law Lexicon, 11th ed., 240; Stroud's Judicial Dictionary, 168. It may, like many other words, by reason of circumstances or context have a different meaning in particular instances, but I am unable to discover any ground for supposing that in the section quoted above the Legislature intended to use the word otherwise than in its ordinary and primary sense. On the contrary, I should think it remarkable if it was used with the intention that it should be given any other meaning. If the intention was that only a simple contract was to be implied, there was no difficulty about using a word that would make that intention absolutely clear, such as "agreement". The use of the technical word "covenant", in dealing with conveyancing, indicates, in my opinion, that the deliberate intention was to provide for a real covenant; that is, an agreement under seal, the equivalent of what would be used in such a transaction in ordinary conveyancing if there were no such Act.

We are therefore to imply by the express words of s. 54 that the transferee Buxton, by the transfer in question, entered into a covenant, that is, an agreement under seal, with both the transferor and the mortgagee, in the terms set out in the section.

I agree with my brother Lamont, for the reasons stated by him, that the period of limitation in Alberta for bringing an action to recover money secured by mortgage in statutory form is twelve years, and it may follow, as he holds, that the same period applies to an action on the covenant to be implied under s. 54, even if it be regarded as a simple contract. Whether this be so or not, I think

it clear that the period of limitation under the implied covenant is twelve years for the reasons I have stated.

The appeal is allowed with costs here and below.

The question submitted is answered in the negative, and there will be judgment against the (defendant) respondent, as provided in the stated case.

LAMONT J.—This is an appeal from the Appellate Division of the Supreme Court of Alberta (1). The facts are all admitted and are as follows:—

Prior to November 24, 1917, the defendant McLeod was the registered owner of the E. ½ 14 — 11 — 22 — W. 4. That land was subject to a mortgage in favour of the appellant company made by McLeod, on April 3rd, 1917, and duly registered during that month. On November 24th, 1917, McLeod executed a transfer of the land, subject to the mortgage, to the respondent Buxton, which transfer was registered January 18, 1918. That transfer was not under seal. After the registration of the transfer a period of more than six years elapsed without any payment by Buxton on account of the mortgage, or any written acknowledgment of any liability on his part thereunder.

On January 31, 1928, the appellant brought action to compel payment of the mortgage by Buxton by virtue of the implied covenant contained in s. 54 of the *Land Titles Act*. Buxton claimed that the liability imposed on him by that section was merely a simple contract debt and that it was statute barred when the action was brought. There being no dispute as to the facts, a stated case was agreed upon and the following question was submitted to the court:

Was the liability of Buxton statute barred at the time of the commencement of this action, i.e. 31st day of January, 1928?

The Appellate Division, applying its own previous decision in *Societe Belge D'Enterprises Industrielles et Immobilieres* v. *Webster and Mill* (2), answered the question in the affirmative. From that decision this appeal is brought.

(1) 23 Alta. L.R. 565; [1928] 3 W.W.R. 205.
(2) 23 Alta. L. R. 129; [1928] 1 D.L.R. 465; [1927] 3 W.W.R. 817.

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The relevant sections of the *Land Titles Act* are sections 50, 54 and 55.

50. After a certificate of title has been granted for any land, no instrument shall be effectual to pass any estate or interest in such land (except a leasehold interest for three years or for a less period) or render such land liable as security for the payment of money, unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; but upon the registration of any such instrument in the manner hereinbefore prescribed the estate or interest specified therein shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants, conditions and contingencies set forth and specified in such instrument or by this Act declared to be implied in instruments of a like nature.

54. (1) In every instrument transferring land, for which a certificate of title has been granted, subject to mortgage or incumbrance, there shall be implied the following covenant by the transferee both with the transferor and the mortgagee, that is to say: That the transferee will pay the principal money, interest, annuity or rent charge secured by the mortgage or incumbrance, after the rate and at the time specified in the instrument creating the same, and will indemnify and keep harmless the transferor from and against the principal sum or other moneys secured by such instrument and from and against the liability in respect of any of the covenants therein contained or under this Act implied, on the part of the transferor.

55. Every covenant and power declared to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration in the instrument; and in any action for a supposed breach of any such covenant the covenant alleged to be broken may be set forth and it shall be lawful to allege that the party against whom the action is brought did so covenant, precisely in the same manner as if the covenant had been expressed in words in the transfer or other instrument, any law or practice to the contrary notwithstanding; and every such implied covenant shall have the same force and effect and be enforced in the same manner as if it had been set out at length in the transfer or other instrument.

For the appellant it was contended that, as the obligation of the transferee was, in s. 54, stated to be a "covenant", the employment of that word indicated a legislative intention that the liability of the transferee should be the same as though the covenant were under seal.

In the view I take of the case it is not necessary to determine this question, for I find in the obligation which s. 54 expressly imposes, and in the statutory enactments relating to limitation of actions, sufficient to enable me to answer the question submitted to the court.

The obligation imposed upon Buxton by the implied covenant is that he will pay the principal money and interest secured by the mortgage and will indemnify and

keep harmless the transferor from and against his obligations under the mortgage. This means that Buxton must idemnify McLeod and keep him harmless from any payments which McLeod, as mortgagor, may be called upon to make by reason of his covenants in the mortgage.

In view of the language in which the covenant is couched, Buxton's obligation to indemnify McLeod must be held to be co-extensive with McLeod's obligation to pay. The argument advanced in the respondent's factum that even if the mortgage debt be a specialty, Buxton's liability was only a simple contract debt, seems to me so inconsistent with the plain language of the covenant as not to merit serious consideration. When the mortagor's liability in respect of the mortgage is at an end the transferee's liability will cease. The important question, therefore, is: Within what period can an action be brought to enforce a mortgage debt in the Province of Alberta?

Before September 1, 1905, the territory now forming the Province of Alberta was part of the North West Territories. By s. 3 of c. 25 of the Statutes of 1886, the Parliament of Canada enacted that the laws of England relating to civil and criminal matters, as the same existed on the 15th day of July, 1870, shall be in force in the Territories in so far as the same are applicable and in so far as the same have not been, or may not hereafter be, repealed or modified. In the same year Parliament enacted the *Territories Real Property Act,* which introduced into the Territories the Torrens System of registration of land titles, which, with some slight variations, became the *Land Titles Act* of Alberta, after the creation of that province.

Among the laws of England in force on July 15, 1870, were those relating to limitation of actions.

By 21 Jac. I., cap. 16, all actions arising out of simple contracts or torts had to be brought within six years after the cause of action arose.

By 3 and 4 Wm. IV., cap. 42, s. 3 (Imp.) (1833) it was enacted that the time within which actions upon specialties must be brought was twenty years after the cause of action arose.

By 3 and 4 Wm. IV., cap. 27, the time within which an action could be brought to recover any sum of money

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secured by any mortgage, or otherwise charged upon or payable out of land, was fixed at twenty years.

These were the periods of limitation according to English law in force on July 15th, 1870, which were introduced into the Territories.

In 1874, however, another alteration was made. The *Real Property Limitation Act, 1874* (Imp.), cap. 57, s. 8, enacted as follows:—

> No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable * * *.

By an ordinance (No. 28 of 1893) the Legislative Assembly of the North West Territories declared the provisions of the Imperial Act of 1874 to be in force in the Territories. In 1905 the Province of Alberta was carved out of the North West Territories and the laws of the Territories were made applicable thereto, until repealed or altered by the Alberta Legislature. By c. 24 of 1906 the provincial legislature enacted the *Land Titles Act* under which a mortgage, to become a security on land, must be in the form prescribed by the Act and duly registered. Then in 1922 the Legislature enacted the *Limitation of Action Act* (R.S.A. 1922, c. 90), sections 2 and 3 of which are as follows:—

> 2. All actions for recovery of merchants' accounts, bills, notes, and all actions of debt grounded upon any lending or other contract without specialty shall be commenced within six years after the cause of such action arose and not afterwards.
>
> 3. The provisions of *The Real Property Limitation Act*, 1874, being chapter 57 of the Statutes of the Imperial Parliament, passed in the thirty-seventh and thirty-eighth years of Her Majesty's reign, are hereby declared to be in force in the Province and shall be deemed to have been in force in the Province and in the North-West Territories since the passing thereof.

By s. 3, above quoted the legislature, by reference, enacted that no action shall be brought to recover any sum of money, secured by any mortgage or otherwise charged upon or payable out of land, but within twelve years from the time the cause of action arose. The only mortgages in Alberta to which that provision could be applied were

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those provided for in the *Land Titles Act*. By no other means could money be secured by mortgage on Alberta lands. The legislature, therefore, in enacting the section must have contemplated its application, so far as actions on mortgages are concerned, to the statutory mortgage of the *Land Titles Act*. The legislature, having jurisdiction to fix the period within which a mortgage debt shall become statute barred and having fixed it at twelve years, reference to other considerations is rendered unnecessary. As an action on the mortgage in question may be brought against the mortgagor, McLeod, within twelve years from payment or acknowledgment in writing, an action, in my opinion, may be brought on the implied covenant in s. 54 within the same time.

I would allow the appeal with costs; set aside the judgment below, and enter judgment for the plaintiff, with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Brownlee, Porter & Rankine.*

Solicitors for the respondent: *Mann, Dawson & Co.*

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*Feb. 5, 6.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Fire—Escape of fire from defendant's premises to plaintiffs' building—Liability of defendant—Origin of fire—Unauthorized act of third person—Findings of fact.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for British Columbia (1) which, reversing the judgment of D. A. McDonald J., dismissed with costs their action against the defendant for damages for destruction of their building and contents thereof through fire, which, they alleged, originated in defendant's building through defendant's negligence. The material facts of the case are set out in the judgment of the Court of Appeal (2).

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*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) 40 B.C. Rep. 209; [1928] 3 W.W.R. 182.

(2) 40 B. C. Rep. 209; [1928] 3 W.W.R. 182.

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At the conclusion of the argument of counsel for the appellants, and without calling on counsel for the respondent, the Court delivered judgment orally, dismissing the appeal with costs, on the ground that, assuming that the appellants, if they could bring themselves within the doctrine of *Rylands* v. *Fletcher* (1), were entitled to invoke that doctrine with respect to the fire, which started, as the trial judge had found, from the application of the blow torch, it was not disputed, and, of course, could not be disputed, that they must fail if these two propositions of fact were determined against them: (1) that the fire started in the afternoon and originated in some act of Ferguson, and (2) that the act of Ferguson was the unauthorized act of a third person; and the Court had no manner of doubt that Ferguson's acts in the afternoon were the acts of an unauthorized person, and agreed with the majority of the Court of Appeal that the most natural conclusion from all the evidence was that the fire must have occurred as the result of the sawdust being ignited on the occasion of Ferguson's visit to the cellar in the afternoon.

Appeal dismissed with costs.

Chas. F. R. Pincott for the appellants.

R. S. Robertson K.C. and *E. F. Newcombe* for the respondent.

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*Feb. 8.
*May 27.

WINNIPEG ELECTRIC COMPANY (DEFENDANT) ..... } APPELLANT;

AND

FANNY ZEIDEL (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Street Railways—Negligence—Person waiting on platform on street to board approaching street car injured through the car striking the platform—Platform provided and maintained and kept in repair by municipality—Liability of street railway company.

Plaintiff, while standing on a platform or "island" at a city street corner in order to board an approaching street car of the defendant, was thrown off her feet and injured by the car striking the platform. The platform was provided and maintained and kept in repair by the

*PRESENT: Duff, Mignault, Newcombe, Rinfret and Smith JJ.

(1) (1868) L.R. 3 H.L. 330.

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city. Plaintiff claimed damages against the defendant street railway company.

Held, reversing judgment of the Manitoba Court of Appeal, 37 Man. R. 412, that defendant was not liable. It could not be said that defendant owed a duty to plaintiff to see that the platform was maintained "at a safe distance from the rail," or "to take care that it could be used in safety by the persons who went upon it" waiting for and entering defendant's cars. The platform was one of the appurtenances of the public street. It was, as such, under the care of the municipality, and persons using it, as a stopping place while crossing the street, or for waiting for a street car or other public conveyance, were doing so under such guarantees of safety as the municipal control and the duties incident to that control might provide. In no pertinent sense could it be said that such persons used the platform "at the invitation of the defendant." The fact that defendant made the platform one of its stopping places involved no assurance by it that the municipality had discharged its duty in respect of maintenance and repair.

APPEAL by the defendant from the judgment of the Court of Appeal for Manitoba (1) dismissing its appeal from the judgment of Kilgour J. (2) who held that the plaintiff was entitled to recover damages against the defendant for personal injuries sustained by her when the platform or "island" stationed beside the defendant's street car track on the corner of Jarvis Avenue and Main Street in the City of Winnipeg, on which she was standing in order to board an approaching street car of the defendant, was struck by the step (which had not been let down and was in its closed or vertical position) of the said street car, causing the plaintiff to be thrown off her feet and injured. The platform was provided and maintained and kept in repair by the City of Winnipeg.

The appeal was allowed with costs.

W. N. Tilley K.C. for the appellant.

S. Abrahamson for the respondent.

The COURT.—We have come to the conclusion that the appeal should be allowed. The Court of Appeal rightly treated the question of onus of proof as of no importance. The respondent, no doubt, established a *prima facie* case; but the Court of Appeal rightly considered that, on the facts in evidence, the motorman could not be held to be chargeable with negligence and that the car was of normal dimensions.

(1) 37 Man. R. 412; [1928] 2 W.W.R. 601.

(2) 37 Man. R. 412; [1928] 1 W.W.R. 435.

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The grounds upon which that court proceeded appear from the judgments of Dennistoun and Trueman, JJ.A., in these passages. Mr. Justice Dennistoun says:—

> I think there was negligence on the part of the defendant company in permitting the platform to occupy a position on the highway for a considerable time, with only one-half inch of lateral clearance. It should have been realized by the company that a very slight movement of the platform would bring it into collision with a passing car. It is well known to judges of this Court that these platforms are frequently collided with by motor cars. That being so the company should have taken precautions to see that the platform in question was placed by the city, or their own workmen, at a safe distance from the rail.

The same learned judge also agrees with the reasons of Trueman, J.A., who expresses this view:—

> The defendant having knowledge that the platform was in the way and likely to be displaced by motor traffic, it plainly was its duty to take care that it could be used in safety by the persons who went upon it by its invitation.

The substantial controversy on the appeal concerns the question whether the appellant company did owe a duty to the respondent to see that the platform was maintained "at a safe distance from the rail" as Dennistoun, J.A., puts it; or, as Trueman, J.A., puts it, "to take care that it could be used in safety by the persons who went upon it" waiting for and entering the company's cars. Dennistoun, J.A., it will be perceived, states the rule in narrower terms than those employed by Trueman, J.A.; but, with great respect, we are not aware of any basis of legal principle upon which the rule, stated in either form, can stand.

The platform was one of the appurtenances of the public street; it was, as such, under the care of the municipality, and persons making use of it, as a stopping place while crossing the street, or for entering an auto bus or a street car, were doing so under such guarantees of safety as the municipal control and the duties incident to that control might provide. Persons waiting for a street car or other public conveyance made use of it just as in other circumstances they would have used a sidewalk or pavement.

It seems impossible to hold that in any pertinent sense such persons used the platform "at the invitation of the company." The fact that the company, whether under compulsion of municipal by-law or without any such compulsion, made the platform one of its stopping places, involved no assurance by it that the municipality had discharged its duty in respect of maintenance and repair. It might with equal force be affirmed that such an assurance

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is implied in the fact that at street corners and other convenient places, the company sets up marks showing where its cars are brought to a stop in order to receive or discharge passengers.

The appeal involves no question as to the responsibility of the company in respect of the safe carriage of its passengers. That responsibility, no doubt, is in full force when the passenger is actually being received, as such, upon a car. But its responsibility for the safe carriage of its passengers is not susceptible of being enlarged to the indefinite extent required to make it applicable to a person standing on a street, waiting for a car which has not yet come to a stop.

The appeal should be allowed with costs here and in the Court of Appeal, and the action dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Anderson, Guy, Chappell & Turner.*

Solicitors for the respondent: *Abrahamson & Greenberg.*

CITY OF OTTAWA *v.* MURPHY

1929

*March 6.

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

Municipal corporations—Negligence—Action against municipality for injuries sustained by fall upon an icy sidewalk—Dismissal of appeal from judgment of Appellate Division, Ont. (63 Ont. L.R. 247) sustaining judgment at trial for damages against municipality.

APPEAL by the City of Ottawa (defendant) from the judgment of the Appellate Division of the Supreme Court of Ontario (1) dismissing its appeal from the judgment of McEvoy J., in favour of the plaintiff for damages against the City for injuries sustained by a fall upon an icy sidewalk.

On the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondent, judgment was delivered orally, dismissing the appeal with costs.

Appeal dismissed with costs.

F. B. Proctor K.C. for the appellant.

A. O'Connor for the respondent.

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*PRESENT:—Duff, Mignault, Rinfret, Lamont and Smith JJ.

(1) (1928) 63 Ont. L.R. 247

1929
*April 25.
*June 13.

PATRICK HENRY MURPHY (DEFENDANT) ..... } APPELLANT;

AND

HENRY JOSEPH McSORLEY AND PRINCE EDWARD HOTELS LIMITED (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Sale of land—Option of purchase in lease—Terms of purchase—Cash payment and "balance to be arranged"—Attempted exercise of option—Want of complete enforceable agreement.

A contract dated October 30, 1926, for lease of premises for one year from November 1, 1926, gave to the lessee (appellant) an option to purchase the premises "for a period of one year from the date hereof at a price of $45,000 with a cash payment of $15,000 and balance to be arranged." Before the end of the year some discussions took place as to terms of payment of the balance but no further agreement was reached. On October 29, 1927 (a Saturday evening), the lessee, stating his intention to purchase (without reference to terms for the balance), tendered $15,000 (accompanied by a letter) as being the first payment under the option, which was not accepted, the lessor (respondent) requiring terms that the balance be "practically cash" or be placed in escrow in the bank pending delivery of title. On October 31 (Monday) the lessee had decided to pay the whole price in cash, but could not find the lessor who was out of town, and, on his return, notified him on November 3 that $45,000 was on deposit in a certain bank and would be paid out in accordance with the terms required. The offer was refused, and the lessee claimed damages for breach of contract.

Held (affirming judgment of the Court of Appeal of British Columbia, 40 B.C. Rep. 403), Newcombe J. dissenting, that the lessee could not succeed. By the option terms the balance of the price was left to be determined by a further understanding between the parties, which did not take place; the lessor's terms not having been accepted on October 29, there was no enforceable agreement; acceptance on November 3 was too late.

Per Newcombe J., dissenting: The expression "balance to be arranged," having regard to the context, was unilateral, and intended only to evidence an obligation of the purchaser, the word "arranged" having the sense of "provided." To convert the option into a contract of sale it was not necessary for the lessee (purchaser) to do more than he did. It involved him in the obligation to provide $30,000 more, to be paid when the lessor (vendor) made out his title; and the passing of the conveyance and payment of said balance should, in ordinary course, take place simultaneously. The lessee had fortified himself

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

with the money; in other words, he had "arranged" the balance, and it would have been paid but for the lessor's default in rejecting the tender and ignoring the contract.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1) which, reversing the judgment of Morrison J. (2), dismissed his counterclaim for damages for alleged breach of contract in not carrying out the sale of certain hotel premises in accordance with a certain alleged exercised option to purchase contained in a lease. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was dismissed with costs, Newcombe J. dissenting.

J. W. de B. Farris K.C. for the appellant.

Aimé Geoffrion K.C. and *W. F. Hansford* for the respondents.

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

MIGNAULT J.—On the 30th of October, 1926, the parties entered into a contract of lease for one year from the 1st of November, 1926, of an hotel known as the King Edward Hotel in Revelstoke, B.C. The contract gave to the lessee (the appellant) an option to purchase the hotel which reads as follows:—

And the said lessors hereby give to the said lessee the first option to purchase the said lands, premises, furniture and equipment for a period of one year from the date hereof at a price of $45,000 with a cash payment of $15,000 and balance to be arranged.

The present litigation has arisen over an attempt of the appellant to exercise the option granted by this clause, and the whole difficulty is occasioned by the words "balance to be arranged" in the option. It was apparently not intended that more than $15,000 should be paid in cash, and there had to be a further agreement between the parties as to the terms of payment of the balance of the purchase price.

The appellant waited until the year was nearly completed before taking any steps to exercise the option. He had every reason to expect trouble because, on September 17, 1927, the respondent McSorley gave him a written

(1) 40 B.C. Rep. 403; [1928] 3 W.W.R. 589.

(2) (1928) 39 B.C. Rep. 505.

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notice that he had sold to the other respondent, Prince Edward Hotels, Limited, the land and premises, furniture and equipment of the King Edward Hotel at Revelstoke. McSorley had previously asked Murphy to release him on the option, which the latter refused to do. About three months before the end of the year McSorley had asked him what he was going to do, and Murphy replied: "If you tell me what your terms are, I will tell you right now what I can do." McSorley's answer was that the terms would have to be practically cash.

Finally Murphy placed the matter in the hands of a Mr. A. M. Grimmett, a solicitor of Revelstoke. Mr. Grimmett had an interview with McSorley on October 28, 1927, and the latter stated that the terms would be $15,000 cash and the balance placed in escrow pending delivery of title. Mr. Grimmett says:

I told him that Mr. Murphy did not consider those terms satisfactory; however, would pay him $40,000 cash if, in consideration for giving the cash, Mr. McSorley would throw off $5,000. Mr. McSorley said, "No," that he was definite in his terms, and it would have to be $15,000 cash and the balance placed in the bank in escrow pending delivery of title. We had further discussion as to the advisability of such terms, but Mr. McSorley would not deviate, and I told him that I would place the proposition before Mr. Murphy.

On October 29, a Saturday, during the evening, Mr. Grimmett and Murphy met McSorley by appointment. What ensued may be stated in the words of Mr. Grimmett:

On the 29th of October I went, in company with Mr. Murphy, to the King Edward Hotel, an appointment having been made with Mr. McSorley for eight o'clock. I waited in the lobby until approximately 8.10, when Mr. McSorley was free, and the three of us went into the ladies' parlour, and Mr. Murphy took a certified cheque, which he had attached to a letter, and offered it to Mr. McSorley, saying "This is the first payment under the terms of the option." Mr. McSorley said, "I won't accept it." He said, "You know my terms. It has to be practically cash,"—or, "you know my terms, the balance to be placed in escrow in the bank." Mr. McSorley then said: "I want to know what Mr. Murphy intends to do." Mr. Murphy said, "I tender you the $15,000 in accordance with the terms of the option and intend to purchase the hotel." Mr. McSorley refused it, and there was nothing said for a few moments. Then I said, "Well, I guess that is all we can do." And another silence for a few moments; I repeated what I said, then got up, and we left.

The letter to which Mr. Grimmett refers reads as follows:

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Mignault J.

REVELSTOKE, B.C.,
October 29, 1927.

H. J. MCSORLEY and
King Edward Hotel Ltd.,
Revelstoke, B.C.

Dear Sir:

I herewith tender to you the sum of fifteen thousand dollars ($15,000), by certified cheque, being the first payment under the terms of a certain option to purchase, made between Henry Joseph McSorley and the King Edward Hotel Limited of the one part and Patrick Henry Murphy, of the other part, bearing date the 30th day of October, A.D. 1926.

Yours truly,

P. H. MURPHY.

It appears from the above that the parties separated on the evening of October 29, without having agreed upon the terms of payment of the balance of the purchase price. The next day, Sunday the 30th, was the last day of the year mentioned in the option. On Monday, the 31st October, Murphy had decided to pay the whole purchase price in cash. But he could not find McSorley, who had gone to Vancouver. When the latter returned, Mr. Grimmett notified him, on November 3, that

the sum of $45,000 is now on deposit in the Imperial Bank of Canada at Revelstoke, B.C., and will be paid out to you or the King Edward Hotel Limited in accordance with the terms set out by you on the 29th of October.

McSorley refused to accept this offer, and as Murphy had remained in possession of the hotel after the expiration of the year, he took proceedings with Prince Edward Hotels Limited, to have him ejected. To this action Murphy counterclaimed demanding specific performance of the agreement of sale. The issue under the counterclaim is now reduced to a claim of damages for breach of contract, for Murphy was unable to tie up so large a sum as $45,000 during the litigation.

The learned trial judge (Morrison J.) decided the case in favour of Murphy (1). He said:

Any difficulty which the incidents of the transaction present arises from the words—"balance to be arranged," which appear in the lease. To my mind, it cannot be that the price of $45,000 having been fixed, and $15,000 to be paid in cash, it was intended the balance should also be in cash, as demanded by the plaintiff. The character of the transaction and the knowledge which it is reasonable to find that the plaintiff had of the defendant's financial capacity repel such submission. So that the true

(1) (1928) 39 B.C. Rep. 505.

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meaning of that clause as to the arrangement for the balance would, in my opinion, come within the cases cited in the judgment of Martin J., in the *Townley* case (1).

The balance was to be arranged impliedly upon a reasonable and fair basis. The attitude taken by the plaintiff was, in my opinion, not reasonable or fair. I find there was no waste or neglect on the defendant's part. For ought it appears the plaintiff could have performed his part of the contract, but he would not do so.

This judgment was set aside by the Court of Appeal (Macdonald C.J. and Martin & Galliher JJ.), Mr. Justice Galliher dissenting (2). The substantial ground of reversal, as stated by the learned Chief Justice was that

an agreement which leaves one of the essential terms to be determined by the parties mutually at a future time is unenforceable. It was contended that, since an election to purchase was made within the year, respondent was in time when he notified the appellant of his election. There are two answers to that contention, first, the agreement is void *ab initio*, and secondly, if that be not a sufficient answer, there was an attempt to arrange the terms, which failed; *Godson* v. *Burns* (3); *Bocalter* v. *Hazle* (4).

With the learned trial judge, I am of opinion, as I have already stated, that the understanding of the parties, so far as it had progressed at the time of the lease, was not that if Murphy exercised the option, he should pay the whole price in cash. There was to be a down payment of $15,000, and the balance was to be "arranged," that is to say, its mode of payment, no doubt very imprudently, was left to be determined by a further understanding between the parties, for to "arrange" something is to come to an agreement in respect of it, to settle or adjust it. Unfortunately for the appellant, this further understanding or meeting of the minds did not take place. It is no answer to say that McSorley's attitude was not "fair" or "reasonable." As it takes two to make a bargain, the only way this bargain could have been made would have been by acceptance of McSorley's terms at the interview of October 29. It was too late to accept them on November 3. The court cannot make for the parties a bargain which they themselves did not make in proper time. It follows, with all possible deference for the opinions of the learned trial judge and of Mr. Justice Galliher, that the majority of the Court of

(1) *Townley* v. *City of Vancouver* (1924) 34 B.C. Rep. 201, at pp. 211-212.

(2) 40 B.C. Rep. 403; [1928] 3 W.W.R. 589.

(3) (1919) 58 Can. S.C.R. 404.

(4) (1925) 20 Sask. L.R. 96.

Appeal were right when they rejected the appellant's counterclaim for damages.

The appeal should therefore be dismissed with costs.

NEWCOMBE J. (dissenting).—I would have thought that if, within the year to which the option extended, the appellant had exercised his option and tendered to the respondent McSorley the stipulated price, $45,000 in cash, the latter would have been bound; on the contrary, it is the real foundation of the respondents' case that there was no contract, and that, even in the event which I have assumed, McSorley would have been justified to reject the tender and to deny any obligation—an interpretation which denudes the option clause of any effect; but the construction ought to be otherwise if reasonably possible. It is the duty of the Court to find a reasonable intendment when the words are capable of it, and the contract should be construed *ut res magis valeat quam pereat.*

Now there is not a word expressed in the contract to indicate that, as has been said, the mode of payment was left to be determined by a further understanding between the parties. I repeat the clause:

> And the said lessors hereby give to the said lessee the first option to purchase the said lands, premises, furniture and equipment for a period of one year from the date hereof at a price of $45,000 with a cash payment of $15,000 and balance to be arranged.

What is to be arranged? The balance, that is, $30,000. Who was to do this? I should think, undoubtedly, the purchaser. The expression " balance to be arranged," having regard to the context in which it stands, is unilateral, and intended only to evidence an obligation of the purchaser. The word " arrange," while it often may import a meaning which requires two parties for the effecting of the arrangement, does not necessarily have that meaning; and, in the sense in which it is here used, when you look for the subject of the verb, expressed, as it is, in its passive form, and you find it to be $30,000, it becomes obvious that it was for the appellant to do the arranging. I would give effect to the word, as we find it, in the sense of " provided "; that is an authorized or admissible synonym, and is very frequently used as a convenient equivalent, particularly in business transactions. When a man says, " I will arrange the funds," he means, " I will provide the funds "; and, if he says, " The

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NewcombeJ.

funds will be arranged," in relation to a transaction in which it is implicit that the funds are to come from him, it means nothing but that he will provide the funds.

Then, upon the assumption that an effective purchase would have been contracted by the tender of the purchase price on 28th October, it is clear that the contract was not, upon its face, utterly inefficient; and it is necessary to inquire further as to what was the vendor's position in the circumstances as they existed. In order to convert the option into a contract for sale, it was necessary, according to the stipulations, for the appellant to do no more than he did. The purchaser attended upon the vendor on the penultimate day of the year and tendered the requisite payment of $15,000 in cash, stating that he intended to purchase the hotel. This involved the purchaser in the obligation to provide $30,000 more, to be paid, of course, when the vendor made out his title; and the passing of the conveyance and the payment of the aforesaid balance should, in ordinary course, take place simultaneously. The appellant had fortified himself with the money. In other words, he had arranged the balance, and it would have been paid but for McSorley's default in rejecting the tender and ignoring the contract and his obligations thereunder.

Upon this view of the case, I would allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Farris, Farris, Stultz & Sloan.*

Solicitors for the respondents: *Harper & Sargent.*

1929

*March 4, 5.
*April 30.

THE SHIP "GLENROSS" (DEFENDANT)..APPELLANT;

AND

THE CANADA STEAMSHIP LINES LIMITED (PLAINTIFF) ..... } RESPONDENT.

SWAN, HUNTER & WIGHAM RICHARDSON LIMITED (PLAINTIFF).... } APPELLANT;

AND

THE SHIP "GLENLEDI" (DEFENDANT)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, TORONTO ADMIRALTY DISTRICT

Shipping—Collision of ships in fog—Liability—Breach of rules 19 and 22 of the rules adopted by Order in Council of February 4, 1916, for the navigation of the Great Lakes.

The steamships *Glenross,* upward bound, and *Glenledi,* downward bound, collided in a thick fog on Lake Superior, about 7.24 a.m. on June 17, 1926.

Held, that both ships should be held equally liable for the damages caused; the *Glenross,* on the ground that, on hearing the *Glenledi's* fog signals, it did not reduce its speed to bare steerageway in accordance with rule 19 (of the rules adopted by Order in Council of February 4, 1916, for the navigation of the Great Lakes); the *Glenledi,* on the ground that, when the *Glenross* blew its first one-blast signal (indicating, under rule 21, that it was directing its course to starboard), and the second mate and watchman on the *Glenledi* reporting to its captain that they thought they heard such a signal, and the captain being in doubt, it failed to sound immediately the danger signal in accordance with rule 22 (instead of giving, as it did, the usual fog signal); even if it were at a standstill at the time of the collision (which the evidence did not seem to establish), that fact would not be an answer to a charge of breaking rule 22 which required it to give a warning to the other ship; and it was impossible, under all the circumstances, to say that the absence of a warning did not contribute to the collision. The fact that the captain of the *Glenross,* when hearing fog signals from the other ship, changed its course one point to starboard (immediately indicating this by signal), was not, of itself, under the circumstances, a ground of liability against the *Glenross.*

APPEAL by the ship *Glenross* and by its owners from the judgment of Hodgins J., Local Judge in Admiralty of the Toronto Admiralty District of the Exchequer Court of Canada, holding the ship *Glenross* solely responsible for

*PRESENT:—Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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the collision in question between it and the respondent ship *Glenledi,* which occurred on Lake Superior on the morning of June 17, 1926. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed with costs, and the judgment below varied by declaring both ships equally liable for the damages caused by the collision.

W. Fraser Grant and *W. A. Robinson* for the appellants.

Francis King K.C. for the respondents.

The judgment of the court was delivered by

MIGNAULT J.—These two actions, which were consolidated and tried together in the court below, are proceedings *in rem* against the ship *Glenross,* in one case, and against the ship *Glenledi,* in the other, arising out of a collision between the two ships on Lake Superior early in the morning of the 17th of June, 1926. The Local Judge in Admiralty of the Toronto Admiralty District (Mr. Justice Hodgins), found the *Glenross* solely to blame for the collision and dismissed the action brought against the *Glenledi.* The *Glenross* and her owners now appeal in both actions.

The *Glenross* is a steamer of a gross tonnage of 3,219 tons, and measures 343 feet in length. The gross tonnage of the *Glenledi* is 3,571 tons and its length 391 feet, so that it is the larger vessel of the two. It is also the faster ship, its full speed being 12 miles per hour and that of the *Glenross* 8½ miles, or a shade better. At the time of the accident, the *Glenross* was upward bound and the *Glenledi* downward bound, both being on the stretch, more than 100 miles in length, between Passage Island and Whitefish Point, and the place of collision was between 27 and 28 miles from the latter point. Both ships were fully laden.

The weather was heavy with rain, and the wind was from the southeast. Notwithstanding the wide expanse of Lake Superior, neither ship apparently had caught sight of the other, although they were then approaching rapidly, and several hours of daylight had intervened. At about 7 a.m. a thick fog set in, and any possibility of seeing passing ships became out of the question, the only way their presence could be detected being by the fog signals which they

were required to blow at regular intervals. The *Glenledi* was steaming on a course S. 60° E. by compass, while the *Glenross* was steering N. 53° W., also by compass. They were thus on substantially parallel courses, these courses being in close proximity, and the ships were approaching on the starboard side of each other.

When the fog set in, the captains of both ships were called and came on the bridge. Captain Taylor was master of the *Glenledi,* and he went into the wheelhouse, or pilot house, in the forepart of the ship, where he remained with the wheelsman, Mahew, while the second mate, Sykes, and the watchman, Gerster, stood outside on the bridge. Captain Taylor placed himself before an open window. Captain Hudson was master of the *Glenross,* and, with his second mate, Bush, his wheelsman, Bruce, and his watchman, Woods, took his stand in the wheelhouse, the three front windows of which were open, the captain being at the window on the starboard side.

The clocks on the two ships did not agree, and this explains the discrepancy in the testimony as to the precise time at which the material events happened. For this reason, and because the marking down of the hour on the *Glenledi* appears to have been the most accurate, I propose to follow what I may call the respondent's time-table, which places the collision at 7.24 a.m., the time given by the appellant being 7.28 a.m.

Fog signals (three distinct blasts according to the rules) were at intervals sounded and heard by both ships, the conditions, on account of the direction of the wind, being better for hearing signals on the *Glenledi* than on the *Glenross.* To the watchers on the latter ship, the fog signals from the *Glenledi* appeared to come from straight ahead. For this reason, and after three or four fog signals had been exchanged, Captain Hudson of the *Glenross* ported his helm one point (11 degrees), thus bringing the ship's head one point to starboard. He says that he wanted to test the bearing of the other ship, the identity of which he did not know, and after the manoeuvre was effected, the signals were heard one point to port, confirming, the captain states, his impression as to the position and bearing of the oncoming vessel.

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Mignault J.

This change of course of the *Glenross,* whatever may have been its motive, was much insisted upon by the respondent. It is no doubt a circumstance to be considered, but in itself it does not appear to have been necessarily faulty. A circumstance more material, in view of what happened, is that while the wheelsman on the *Glenross* was carrying out the manoeuvre of porting one point, Hudson blew one blast on his whistle, and he states that he heard in reply a one-blast signal, appearing much nearer than the previous fog signals from the other ship, but the witnesses from the *Glenledi* say that this one-blast signal was not given. Hudson also checked his ship to half-speed, about 4½ miles per hour.

Under rule 21 of the rules adopted by Order in Council of February 4, 1916, for the navigation of the Great Lakes, one blast, with an exception not material here, means: "I am directing my course to starboard." And the same rule states that *in all weathers* every steam vessel under way in taking any course authorized or required by the rules shall indicate that course by the following signals (mentioned in paragraph 2 of rule 21) on her whistle, to be accompanied, whenever required, by corresponding alteration of her helm; and every steam vessel receiving a signal from another shall promptly respond with the same signal or sound the danger signal as provided in rule 22.

These signals are known as passing signals, and the testimony on behalf of the *Glenross* is that this one-blast signal was sounded at the time her course was changed one point to starboard. If this signal was received by the *Glenledi,* it called for the action on her part required by the rule just mentioned.

It will be convenient at this point to see what was being done at that time on the *Glenledi.* The master, Captain Taylor, had come on the bridge at 7.13 a.m. For some time he heard fog signals from an approaching vessel which turned out to be the *Glenross.* To those on the *Glenledi,* these signals sounded one and two points to starboard, and they seemed to broaden out more and more on that side. At 7.20 both the second officer, Sykes, and the watchman, Gerster, reported to Captain Taylor that they thought they had heard a one-blast passing signal from the approaching steamer. Taylor himself admits that he heard something

but not distinct. He says he was in doubt. I think it may be taken that Hudson's first one-blast signal was sounded at 7.20 a.m., four minutes before the collision, when both ships were hidden by the fog.

Before discussing what was Taylor's duty in these circumstances, it may be mentioned that he testifies that on receiving this report from Sykes and Gerster, he blew a fog signal of three blasts. He denies giving the one-blast signal which the witnesses from the *Glenross* say they heard in answer to their first passing signal. The learned trial judge suggests that possibly what was heard on the *Glenross* was one of the blasts of the three-blast fog signal. Hudson states that after his first one-blast signal, and the hearing of the answer, he sounded a second one-blast signal which was heard by the *Glenledi*. Taylor then blew an alarm, and while he was doing so the vessels hove in view, witnesses from the *Glenledi* say at a distance of about 1,000 feet, witnesses from the *Glenross* at some 600 or 700 feet from their ship. The collision was then inevitable, and as the *Glenross* was swinging to starboard—Hudson had put his helm hard to port on receiving an answer to his second one-blast signal—Taylor states that he gave her a one-blast signal so that she might continue her swing and not strike the *Glenledi* amidships. The vessels came together almost at their bows, each one sustaining a deep wound from the other. The bulkheads, however, held good and the ships were able to continue their journey in safety.

It is now important to determine what was the speed of the vessels from the time the fog set in until the collision. When each captain came on the bridge, the ships were travelling at full speed. On giving his first one-blast signal, Hudson checked his engines to half-speed, 4½ miles, and reversed them to full speed astern when he heard the second one-blast signal from the *Glenledi*. Taylor, on the other hand, says that when he arrived on the bridge at 7.13 he checked his ship to half speed, 7 miles. At 7.17 he first heard the fog signal of the other vessel, and stopped his engines. Fog signals from the *Glenross* were heard from 7.17 to 7.20, when his second mate and watchman reported that they thought they heard a one-blast signal from the other ship. Taylor then went full speed astern and blew a fog signal. The *Glenross* at that time was not in sight.

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I am satisfied that the alarm which Captain Taylor says he sounded was appreciably later than 7.20, when he received the above mentioned report from his second officer and his watchman, for on this report he states that he sounded the usual fog signal.

This appears to me as clear an account as it is possible to give of the material events which preceded the collision. The testimony on behalf of the *Glenross* is confused and the learned trial judge preferred the story of the officers of the *Glenledi,* which, however, somewhat lacks in definiteness, notably as to the interval of time which intervened between the fog signal which Taylor says he sounded after receiving the report of Sykes and Gerster, and the alarm signal which he subsequently gave. But one salient fact is established beyond any question, to wit, the failure of Captain Taylor, on receiving this report, to sound immediately an alarm, instead of giving the usual fog signal. On this fact it seems possible to base a decision as to the liability of the *Glenledi.*

The first passing signal was undoubtedly given by the *Glenross,* and I have placed it at 7.20 a.m. The second officer and the watchman of the *Glenledi* reported to the captain that they thought they heard it and the latter heard something himself, but not distinct. Taylor admits that he was in doubt and that he had "no idea what his (the *Glenross's*) heading might be."

What then was Taylor's duty under the rules, the signal in question being a passing signal indicating that the other ship was directing her course to starboard, which would bring her across the course of the *Glenledi* and involve danger of collision?

If Taylor was in doubt, as he says, rule 22 imperatively required him to sound immediately the danger signal. This rule is as follows:

> Rule 22. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from signals being given or answered erroneously, or from other causes, the pilot so in doubt shall immediately signify the same by giving the danger signal of five or more short and rapid blasts of the whistle; and if both vessels shall have approached within half a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerageway, and, if necessary, stopped and reversed, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

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The learned trial judge found the *Glenledi* in fault under this rule, but he absolved her owners from all liability on the ground that this fault had not caused or contributed to the collision. He came to this conclusion because he believed the evidence on behalf of the *Glenledi* that at the time of the collision that ship was at a standstill or moving backward.

It does not appear to me absolutely clear that the *Glenledi* was at a standstill or moving backward when the ships came together. Taylor does not say that his ship was travelling backward. I quote from his testimony:

By His Lordship:

Q. You were backing full speed?

A. Yes, sir.

Q. You mean your vessel was travelling backward?

A. No, sir. I mean the engines were going full speed astern.

By Mr. King:

Q. Can you tell us at that time about how much speed you had on your ship? I don't suppose you can put it in miles an hour, but I mean were you going fast or slow or how?

A. We were going fairly slow I would think. I am sure.

His Lordship:

I would like to know what he means, because when he says "fairly slow" I don't understand.

A. (Continued) In the neighbourhood of four miles an hour when he (the *Glenross*) first loomed into view.

Q. You have no way of estimating the speed?

A. No sir.

Q. You are just guessing at it. You have no record of the speed of the ship at all?

A. Not at that speed. No, sir.

The nature of the wound inflicted by the *Glenledi* near the bow of the *Glenross* would further seem to show that the former was still moving forward at the time of the collision.

Moreover, with great respect, I cannot think it an answer to a charge of breaking rule 22, to say that the *Glenledi* had come to a standstill at the time of the collision. What that rule required her to do was to give a warning to the other ship, so that the latter might "be immediately slowed to a speed barely sufficient for steerage way, and, if necessary, stopped and reversed, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other." The navigation of the *Glenledi* may have been faultless, but it is hard to see how that would be an excuse for a breach of rule 22 requiring her to give a warning to the approaching ship. And I find

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it impossible, under all the circumstances, to say that the absence of a warning did not contribute to the collision. What Captain Taylor tells us he did would rather be calculated to mislead the other ship. (See *Blamires* v. *Lancashire and Yorkshire Ry. Co.* (1), and judgment of Blackburn J., at p. 288).

I think therefore that the *Glenledi* cannot be absolved from liability for the collision.

At the same time I would not disturb the finding of liability of the learned trial judge against the *Glenross*. I would, however, base this liability on the ground that the *Glenross* did not reduce her speed to bare steerageway as required by rule 19, which says:

> Rule 19. Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at *moderate speed*. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other. (*The italics are in the official edition of the rules.*)

Like the trial judge, I think the more reliable testimony shows that the *Glenross* would answer her helm at a slower speed than half-speed. Captain Hudson made the assertion that it would not, but his testimony was contradicted. The mere hearing of these fog signals at not more than four points from right ahead made it incumbent on the *Glenross* to reduce her speed to mere steerage way. It is a well known natural fact that the direction of sound cannot be accurately determined in a thick fog; and although Hudson felt confirmed by his change of course that the approaching vessel would pass him on his port side, under all the circumstances he should have strictly followed rule 19. It is extremely important, in the interest of the safety of the public, that no violation of such a rule of caution should be tolerated.

Inasmuch as the change of course of the *Glenross* was immediately signalled to the *Glenledi*, I do not regard it by itself as a sufficient ground of liability. Nor do I think that there was a failure on the part of the *Glenross* to keep a sufficient look-out.

The appeals should be allowed with costs and the formal judgments varied so as to declare the *Glenledi* equally liable for the damages caused by the collision with the *Glenross*.

(1) (1873) L.R. 8 Exchequer, 283.

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The reference ordered by the learned trial judge should be carried out on this basis of equal liability. Both plaintiffs having succeeded and both ships being liable, I would make no order as to costs in the trial court.

Appeal allowed with costs.

Solicitor for the appellants: *Frederick W. Grant.*

Solicitor for the respondents: *Francis King.*

SILVER BROTHERS, LIMITED (DEBTOR)

AND

ALLAN J. HART (TRUSTEE)

AND

THE ATTORNEY-GENERAL FOR CANADA (CREDITOR RESPONDENT).. } APPELLANT;

AND

THE ATTORNEY-GENERAL FOR QUEBEC (CREDITOR PETITIONER).... } RESPONDENT.

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*Nov. 15, 16.

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*Feb. 5.
**May 7.
**Sept. 26.

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

Constitutional law—Statute—Priorities of taxes, rates or assessments imposed by federal and provincial laws—Conflict—Preference—Bankruptcy—The Special War Revenue Act (1915), 5 Geo. V, c. 8, as amended by 12-13 Geo. V, c. 47, s. 17—Bankruptcy Act, 9-10 Geo. V, c. 36, s. 51 (6)—Interpretation Act, R.S.C., 1906, c. 1, s. 16—R.S.Q. (1909), s. 1357 —Art. 1985 C.C.

Section 1357, R.S.Q. (1909), states that "all sums due to the Crown in virtue of this section (the section dealing with taxes on commercial corporations) shall constitute a privileged debt ranking immediately after law costs." The Dominion *Bankruptcy Act*, s. 51 (6), enacts that "nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

**PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

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or charge in respect of such property created by any such laws." In 1922, by an amendment to the *Special War Revenue Act*, 1915, being s. 17 of c. 47 of 12-13 Geo. V (D), the Dominion Parliament declared that "notwithstanding the provisions of *The Bank Act* and *The Bankruptcy Act*, or any other statute or law, the liability to the Crown of any person, firm or corporation, for payment of the excise taxes specified in *The Special War Tax Revenue Act*, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets."

The debtor was owing to the Quebec Government the sum of $527.42 for taxes imposed under ss. 1345 *et seq.* R.S.Q., 1909, on commercial corporations. It was also indebted to the Dominion Government in the sum of $3,707.07 for sale taxes under *The Special War Revenue Act*, 1915, and amendments. After payment of law costs and the expenses of the trustee, there remained only $2,453.51 available for distribution. The trustee, confirmed by the trial judge, Panneton J., gave priority to the Dominion claim. The Court of King's Bench (Guerin J. dissenting) decided that the two claims should rank concurrently under article 1985 C.C.

Held, reversing the judgment of the Court of King's Bench (Q.O.R. 43 K.B. 234), Duff and Rinfret JJ. dissenting, that the Dominion claim is entitled to preference over the claim of the province.

Held, also, that s. 16 of the *Interpretation Act* (R.S.C., 1906, c. 1), which enacts that "no provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated herein that His Majesty shall be bound thereby," does not operate to preserve the right asserted by the province to rank concurrently with the Dominion. Duff and Rinfret JJ. *contra.*

Held, also, that the language of s. 17 of c. 47 of 12-13 Geo. V (D)—"notwithstanding the provisions of * * * the *Bankruptcy Act* or of any other statute or law"—excludes from operation here s. 51 (6) of the *Bankruptcy Act* as well as s. 1357, R.S.Q., 1909.—*The King* v. *Canadian Northern Railway Co.* ([1923] A.C. 714) applied. Duff and Rinfret JJ. *contra.*

Held, further, that s. 17 of c. 47 of 12-13 Geo. V, (D) is *intra vires* of the Dominion Parliament.

Per Anglin C.J.C.—In so far as there may be conflict between priority created by the Dominion statute and that which the Quebec statute purports to give, each being within the legislative jurisdiction conferred by the B.N.A. Act on the legislature which enacted it, it is well established that the former must prevail; and this must be so whether the provision for priority—substantially the same in each Act—is attributable to the exercise of a jurisdiction which should be regarded as an integral part of that conferred by an enumerated head, or as ancillary thereto.

Per Duff and Rinfret JJ. (dissenting).—The decisions of the Privy Council, which give preference to Dominion claim in case of conflict between Dominion and provincial legislation, have no application in this case, as these statutes do not cover the same field.

Per Duff and Rinfret JJ. (dissenting).—The reference in s. 17 of c. 47 of 12-13 Geo. V to the *Bank Act* (which would appear to contemplate the liens constituted by section 88 of that enactment) seems to reveal the intention that the "charge" brought into being by section 17, in order to secure the payment of the "excise taxes" there named, should, when it takes effect, have priority over liens of like character with those arising under the *Bank Act;* including of course (if the primacy established affects other Crown debts) liens of a similar character created for the purpose of securing the payment of provincial taxes, or other pecuniary obligations owing to the provincial Crown, numerous examples of which are evidenced in the statutory law of the provinces. Section 17, so construed, would have the effect, the direct effect, of entitling the Dominion to deal with a subject of provincial taxation or other private property in which the province holds a *jus in re* as such security, in such manner as to obliterate that *jus in re,* if necessary to give priority to the Dominion charge. "Property," in section 125 of the *British North America Act,* should be construed in its widest sense, and, in its widest sense, it would embrace such a *jus in re.* As other Crown debts are not mentioned, section 17 ought, especially in view of the *Interpretation Act,* to be construed as excluding such debts from its purview.

Per Duff and Rinfret JJ. (dissenting).—If the Dominion Parliament, in enacting the above section 17, has intended to constitute "a first charge" having priority even over a "privileged debt" of the province of Quebec (R.S.Q., 1909, s. 1357), such legislation would be *ultra vires.*

Per Newcombe J.—Section 17, for the purposes of this case, is bankruptcy legislation under item 21 of the Dominion powers (B.N.A. Act, s. 91); and in enacting that section, it was the intention of Parliament, in the distribution of assets in a bankruptcy, to accord priority to the excise taxes specified in *The Special War Revenue Act,* 1915, and its amendments.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, sitting in bankruptcy, Panneton J., and maintaining the claim contained in the petition of the Attorney-General for Quebec.

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

T. B. Heney and *F. P. Varcoe* for the appellant.

C. Lanctot K.C. and *A. Geoffrion K.C.* for the respondent.

ANGLIN C.J.C.—I have had the advantage of perusing the carefully prepared opinion of my brother Mignault, who states the question for determination and the relevant facts; and in his conclusion I agree.

(1) (1927) Q.O.R. 43 K.B. 234.

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Anglin C.J.C.

In so far as there may be conflict between priority created by the Dominion statute (12-13 Geo. V, c. 47, s. 17) and that which the Quebec statute (R.S.Q., 1909, Arts. 1345 *et seq.*) purports to give, each being within the legislative jurisdiction conferred by the B.N.A. Act on the legislature which enacted it, it is well established that the former must prevail. This must be so whether the provision for priority—substantially the same in each Act—is attributable to the exercise of a jurisdiction which should be regarded as an integral part of that conferred by an enumerated head, or as ancillary thereto. *Royal Bank of Canada* v. *Larue* (1); *Attorney General of Ontario* v. *Attorney General for Canada* (2); *City of Toronto* v. *Canadian Pacific Railway Co.* (3); *Grand Trunk Railway Co.* v. *Attorney General for Canada* (4); *City of Montreal* v. *Montreal Street Railway Co.* (5).

Whether such conflict exists depends upon the construction of the Dominion statute. Has Parliament expressed the intention that

> all other claims of whatsoever kind heretofore or hereafter arising,

over which

> the excise taxes specified in the *Special War Revenue Act, 1915*, and amendments thereto.

are given priority, shall include claims for taxes imposed by a Provincial statute which purports to give to them a like priority?

Prima facie the phrase "all other claims of whatsoever kind, etc.," would include such claims. That it was meant to embrace them is, I think, made manifest by the introductory words of the section:

> Notwithstanding the provisions of *The Bank Act* and *The Bankruptcy Act*, or any other statute or law, * * *

The relevant provision of the *Bankruptcy Act*, s. 51 (6), had expressly preserved the priorities of taxes, rates and assessments imposed by provincial law. The intent to supersede that policy is expressed. Moreover, the words, "any other statute or law," *prima facie* include all statutes and laws having force in regard to the administration of the property or estate being dealt with, by whatever authority imposed. If in a provincial statute providing for an exemp-

(1) [1928] A.C. 187.
(2) [1894] A.C. 189, at p. 200.
(3) [1908] A.C. 54, at p. 55.
(4) [1907] A.C. 65, at p. 68.
(5) [1912] A.C. 333, at pp. 343-4.

tion from taxation this *prima facie* meaning of the words "any statute" should prevail so as to include within them not only Acts of the same provincial legislature within that description, but also a similar statute of the Dominion Parliament, as was held in *Rex* v. *Canadian Northern Railway Co.* (1), I can see no good reason for refusing to give the like scope to the words, "any other statute or law," in s. 17 of 12-13 Geo. V, c. 47 (D). In this respect I am unable to distinguish the case at bar in principle from the decision of the Judicial Committee in *Rex* v. *Canadian Northern Railway Co.* (1); and the reason upon which that decision proceeds is distinctly in point.

The right of the Dominion Parliament, under the legislative jurisdiction conferred upon it by heads 3 and/or 21 of s. 91 of the B.N.A. Act, to enact s. 17 appears to me to be so clear as to admit of no question. If so construed as to avoid any conflict with over-riding Dominion legislation, the provincial statute is, no doubt, within the authority given by head 2 of s. 92. The provincial tax in question is not covered by Art. 1994 (10) C.C. It depends entirely on post-Confederation legislation (6 Edw. 7, c. 10; Arts. 1345 *et seq.*, R.S.Q., 1909). To invoke Art. 1985 C.C. is, with respect, to beg the question. The effect of Arts. 1980-1 C.C. is not to create in favour either of the Dominion or of the province, as a creditor, a specific lien or charge on the debtor's property or any part thereof. There is nothing in the Quebec legislation which vests in the Crown in the right of the province, as a result of the imposition of the tax for which it provides, anything in the nature of "property" within the purview of s. 125 of the B.N.A. Act.

Nothing advanced upon the re-argument of this appeal before the full court has affected my views upon the questions in issue expressed in the foregoing opinion, which was written after the earlier argument had before a Court consisting of five judges.

DUFF J. (dissenting).—Subsection 6 of section 51 of the *Bankruptcy Act* preserves (see particularly the French version) the rights created by article 1357 of the statutory law of Quebec. Neither that article nor section 17 of the

(1) [1923] A.C. 714, at pp. 716-8.

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Duff J.

Amendment to the *War Revenue Act* passed in 1915, does in my opinion give any priority over any lien charge or privilege vested in the Crown and preserved by section 51.

The reference to the *Bank Act* (which would appear to contemplate the liens constituted by section 88 of that enactment) seems to reveal the intention that the "charge" brought into being by section 17, in order to secure the payment of the "excise taxes" there named, should, when it takes effect, have priority over liens of like character with those arising under the *Bank Act;* including of course (if the primacy established affects other Crown debts) liens of a similar character created for the purpose of securing the payment of provincial taxes, or other pecuniary obligations owing to the provincial Crown, numerous examples of which are evidenced in the statutory law of the provinces. Section 17, so construed, would have the effect, the direct effect, of entitling the Dominion to deal with a subject of provincial taxation or other private property in which the province holds a *jus in re* as such security, in such manner as to obliterate that *jus in re,* if necessary to give priority to the Dominion charge. "Property," in my opinion, in section 125 of the *British North America Act,* should be construed in its widest sense, and, in its widest sense, it would embrace such a *jus in re,* which, in virtue of the prohibition in that section, would be immune from sale or appropriation under a taxing statute.

That, I think, must be the natural construction and effect of section 17, if it is read as applying to other debts of the Crown. Such debts are not mentioned in section 17 and the result of what I have just said, having regard to the provisions of the *Interpretation Act,* is that other pecuniary claims of the Crown are not prejudiced by the priority declared by that section. Likewise, the priority established by section 1357 neither by the express terms of that section nor by necessary inference affects such claims.

Both claims seem therefore to be of equal rank and should be satisfied rateably.

I have had the opportunity of reading the judgment of my brother Rinfret and with his reasons I entirely concur.

The appeal should be dismissed with costs.

MIGNAULT J.—This litigation arose in connection with the distribution of the proceeds realized by the trustee out of the assets of Silver Brothers, Limited, insolvents. After payment of law costs and of the expenses of the trustee, there remained $2,453.51 available for distribution. The Government of Canada had filed a claim for $3,707.07 for sale taxes due by the insolvent under the *Special War Revenue Act*, 1915 (chapter 8 of the statutes of 1915), and amendments, and the Government of the province of Quebec claimed $527.42, taxes due by the insolvents for the years 1921, 1922 and 1923 under a provincial statute imposing a tax on commercial corporations (Articles 1345 and following, R.S.Q., 1909). Both these claims are given priority after law costs by the statutes governing them. The issue here, as it has developed, is whether the Dominion is entitled to preference over the province, or whether the two claims should rank *pari passu*. In his dividend sheet the trustee gave priority to the Dominion, and in that he was sustained by the learned trial judge (Panneton J.). The Court of King's Bench, on the contrary, held (Guerin J., dissenting) that both claims should rank concurrently. The Dominion now appeals.

It may be observed that each legislature was within its jurisdiction when it imposed the tax, and, under reserve of the question whether the Dominion enactment should prevail here, I can see no reason to doubt that, as an incident of its taxing power, each legislature could give to its claim priority over the claims of ordinary creditors, subject, however, to this qualification that Parliament can undoubtedly, in a bankruptcy law, determine the priority of claims against the estate of a bankrupt, and no provincial legislature can interfere with this priority (*Royal Bank of Canada* v. *Larue* (1)).

There is, however, a saving clause in section 51 of *The Bankruptcy Act* which deals with the priority of claims. This clause, subsection 6 of section 51, reads as follows:

(6) Nothing in this section shall interfere with the collection of any taxes, rates or assessments now or at any time hereafter payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

(1) [1928] A.C. 187.

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Section 86 of the Act should also be noted:

86. Save as provided in this Act, the provisions of this Act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown.

As the matter stood under the *Bankruptcy Act*, therefore, no lien created by federal or provincial legislation to secure the payment of taxes was affected.

The priority claimed by the provincial authorities was first enacted in 1906 by 6 Edward VII (Que.), c. 10. Under the Quebec civil code (which antedates Confederation, and consequently is the enactment of a legislature with plenary legislative power), the only privileged claim of the Crown was against persons accountable for its moneys (comptables), this privilege being on movables only (Art. 1994, parag. 10). There does not appear to be, under the common law of Quebec as expressed in the civil code, or the code of civil procedure, which have been held to be binding on the Crown, any prerogative or other right of the Crown to priority, except as provided by Art. 1994 C.C. See *Exchange Bank of Canada* v. *The Queen* (1).

The priority asserted by the Dominion was enacted in 1922 by an amendment to the *Special War Revenue Act*, 1915. This amendment—which is section 17 of chapter 47 of 12-13 George V (Can.), (this section was repealed in 1925 by 15-16 Geo. V, c. 26, s. 9)—reads as follows:

17. Notwithstanding the provisions of *The Bank Act* and *The Bankruptcy Act*, or any other statute or law, the liability to the Crown of any person, firm or corporation, for payment of the excise taxes specified in *The Special War Tax Revenue Act*, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets.

Article 1357 R.S.Q., 1909, gives the provincial tax priority after law costs. It says:

All sums due to the Crown in virtue of this section (the section dealing with taxes on commercial corporations) shall constitute a privileged debt ranking immediately after law costs.

The appellant contends that full effect must be given to section 17, notwithstanding any priority created by provincial legislation such as Article 1357, R.S.Q., 1909. This

(1) (1886) 11 A.C. 157.

section states that the Dominion tax "shall constitute a first charge on the assets," and shall rank for payment "in priority to all other claims of whatsoever kind heretofore or hereafter arising," save only the judicial costs, fees and lawful expenses of the assignee or other public officer charged with the administration or distribution of the assets. This tax, the appellant argues, would not be "a first charge," if the claim for the provincial tax were entitled to rank concurrently with it upon the assets of the insolvent.

The contention chiefly relied on by the respondent is founded on section 16 of *The Interpretation Act* (R.S.C., 1906, c. 1), which states that

no provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated herein that His Majesty shall be bound thereby.

And the respondent argues that, under this rule of construction, section 17 of the amendment to the *Special War Revenue Act, 1915,* notwithstanding the generality of its language, must be read as if it had stated that the right of the Crown in right of the province to the priority granted by article 1357 R.S.Q., 1909, is not to be affected thereby.

It may be observed that section 16 of *The Interpretation Act* is merely a re-statement of the fundamental rule of statutory construction of the common law that the Crown is not bound by a statute unless it be specially named therein, or unless there is a necessary implication to be drawn from the provisions of the statute or the nature of the enactment that the Crown was intended to be bound thereby (Beal, Cardinal Rules of Legal Interpretation, 3rd ed., p. 332).

It would seem likely that "the rights of His Majesty, his heirs or successors", intended to be preserved by section 16, are rights derived from the prerogative, and not rights created by statute. Rights of the latter category could hardly continue to exist for the future when the statute creating them is repealed, or excluded by a subsequent enactment, and the consent of the Crown as a component part of the Legislature would seem to be all that is required. In the case of the prerogative, the Crown's expressed consent is necessary, but even then "if the whole

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ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules" (per Lord Dunedin in *Attorney General* v. *De Keyser's Royal Hotel* (1)).

Here, moreover, we have an enactment the whole purpose of which is to grant to the Crown in right of the Dominion priority for the excise taxes specified by *The Special War Revenue Act,* 1915, and amendments, which priority exists "notwithstanding the provisions . . . . of any other statute or law". These terms are wide enough to exclude any statute federal or provincial (*The King* v. *Canadian Northern Railway Co.* (2), the converse case), and of course such an enactment as Article 1357, R.S.Q. 1909. The appellant's contention based on section 16 of *The Interpretation Act,* a federal statute, which moreover would come within the scope of the words "notwithstanding the provisions of any other statute or law," would defeat the very purpose of section 17. It is obvious that the Dominion tax could not be "a first charge" after judicial costs and the fees and expenses of the assignee, if the provincial tax were to rank immediately after law costs. Even if the rights of the Crown referred to in *The Interpretation Act* could be considered as comprising statutory rights, the exclusion of the statute creating these rights would render them ineffective against the Crown in right of the Dominion.

The respondent also relies on subsection 6 of section 51 of *The Bankruptcy Act,* which, with respect to the collection of taxes, rates or assessments, recognizes the priority or lien conferred by provincial legislation. But full effect must be given to section 17, notwithstanding *The Bankruptcy Act,* so that, if Parliament did not transcend its jurisdiction, there appears little doubt that any priority granted by Article 1357, R.S.Q., 1909, and preserved by *The Bankruptcy Act,* is excluded.

The trial judge sustained the trustee's dividend sheet on the ground that there being a conflict here between Dominion and provincial legislation in a field open to both, the Dominion statute must prevail. In support of this view, the appellant has referred us to four pronouncements of

(1) [1920] A.C. 508, at p. 528. (2) [1923] A.C. 714.

the Judicial Committee: *Tennant* v. *Union Bank of Canada* (1); *Attorney General of Ontario* v. *Attorney General of Canada* (2); *Grand Trunk Railway Co.* v. *Attorney General of Canada* (3); *Compagnie Hydraulique de St. François* v. *Continental Heat and Light Co.* (4).

The principle deducible from these cases can be stated in the words of Sir Arthur Wilson, in the last mentioned case, at page 198:

> Where a given field of legislation is within the competence both of the Parliament of Canada and of the provincial Legislature, and both have legislated, the enactment of the Dominion Parliament must prevail over that of the province if the two are in conflict.

Assuming that both Parliament and the Quebec Legislature were within their jurisdiction when they granted priority to these taxes after law costs, there would clearly appear to be conflict between the two statutes. It is *nihil ad rem* to say that these enactments do not by themselves necessarily clash, but that the conflict is brought about by the accidental circumstance that the assets are insufficient to pay both claims, because it is in view of this very circumstance that Parliament has ordered that the claim for the Dominion tax "shall constitute a first charge on the assets". The judgment appealed from denies this right to the Dominion, since it allows the province to share with the former this first place in the distribution of the assets after payment of costs. Such a case of conflict between enactments of the Dominion and the province should not be met by giving both enactments concurrent effect. I do not think that article 1985 of the Civil Code applies to such a case. Any argument based on that article begs the question, for the point to be decided is whether the two claims are of "equal rank".

The appeal should be allowed with costs here and in the Court of King's Bench and the judgment of the learned trial judge restored.

NEWCOMBE J.—In this case, the provincial Crown has no prerogative preference, the debtor not being a *comptable*. *Exchange Bank* v. *The Queen* (5).

(1) [1894] A.C. 31.
(2) [1894] A.C. 189.
(3) [1907] A.C. 65.
(4) [1909] A.C. 194.
(5) (1886) 11 A.C. 157.

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ATTY.-GEN. FOR CANADA v. ATTY.-GEN. FOR QUEBEC.

SILVER'S CASE.

Newcombe J.

The Quebec tax was imposed under s. XVIII, R.S.Q., 1909; the preference upon which the Attorney General of Quebec relies is created by these words (art. 1357 of that section):—

> All sums due to the Crown in virtue of this section (XVIII) shall constitute a privileged debt, ranking immediately after law costs.

The alleged provincial privilege therefore depends upon an exercise of legislative power which Quebec claims to possess under s. 92 of the *British North America Act*, 1867. The provision is *ultra vires* of Quebec, if the power do not exist; or, if it do exist, the provincial enactment may be over-ridden by the Parliament of Canada in the use of any apt ancillary power which the Dominion has under the enumerated heads of s. 91 of that Act.

Assuming that the province had the power of enactment, an over-riding power is to be found in the following items of s. 91:—

(1) "The public debt and property";

(3) "The raising of money by any mode or system of taxation";

(21) "Bankruptcy and insolvency";

one or another, but not logically within each of them. *Cushing* v. *Dupuy* (1); *Attorney General of Ontario* v. *Attorney General of Canada* (2).

The exercise of the Dominion power is evidenced by s. 17 of c. 47 of the Dominion Acts of 1922, which reads:—

> Notwithstanding the provisions of *The Bank Act* and *The Bankruptcy Act*, or any other statute or law, the liability to the Crown of any person, firm or corporation, for payment of the excise taxes specified in *The Special War Revenue Act*, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets.

As to the interpretation of this section, I see no reason to doubt that it was the intention of Parliament, in the distribution of assets in bankruptcy, to accord priority to the excise taxes specified in *The Special War Revenue Act*, 1915, and its amendments.

(1) (1880) 5 A.C. 409, at pp. 415, 416.

(2) [1894] A.C. 189, at pp. 200, 201.

The competing claims are stated in the admissions, as follows:—

1. Messrs. Silver Brothers, the debtor above named was declared bankrupt by an order rendered by this honourable court on or about 31st December, 1923.

2. The Government of the Dominion of Canada duly fyled with the trustee, a claim to the amount of $3,707.07, for sales tax imposed in virtue of the *Special War Revenue Act*, 1915, and amendments, said tax having become due subsequent to the 28th of June, 1922, the date on which the Act 12 and 13 George V, Statutes of Canada, 1922, Chapter 47, amending the *Special War Revenue Act*, came into force.

3. The Government of the Province of Quebec also duly fyled with the trustee a claim to the amount of $527.42, for taxes due by the debtor for the years 1921, 1922 and 1923, under the provisions of Articles 1345 and following, of the Revised Statues of Quebec, imposing a tax on commercial corporations.

And, for the purposes of this case, s. 17 is, in my judgment, bankruptcy legislation under item (21) of the Dominion powers. The provision is, therefore, competent to the Dominion Parliament.

I do not think there is anything in the Dominion *Interpretation Act* which is intended to conflict with these conclusions; and, in any case, s. 17 must have its operation as expressed, "notwithstanding any other statute or law".

RINFRET J. (dissenting).—Je suis d'avis qu'il ne s'agit pas ici d'un cas où les deux Parlements ont légiféré sur le même sujet ("same field") et, dès lors, qu'on ne doit pas appliquer à cette cause les arrêts du Conseil Privé qui, dans les cas de conflit, ont accordé la prépondérance à la législation fédérale.

Il ne me paraît pas y avoir d'analogie entre la question qui nous est soumise et, par exemple, la subordination du pouvoir provincial en matière de propriété et de droits civils au pouvoir fédéral en matière de faillite, qui a fait l'objet de la décision *re Royal Bank of Canada* v. *Larue*. (1).

L'effet de cette décision et des autres semblables est d'oblitérer la législation provinciale et de laisser subsister exclusivement la législation fédérale sur le point en conflit.

Ainsi, pour poursuivre l'exemple tiré de la cause de *Royal Bank of Canada* v. *Larue* (1), l'hypothèque judiciaire créée en vertu de la loi provinciale y fut déclarée inexistante parce que la loi de faillite fédérale le décrétait. Le résultat fut que la loi provinciale en l'espèce fut complètement mise de côté.

(1) [1928] A.C. 187.

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Il ne saurait en être ainsi en matière de taxation. Il ne me paraît pas admissible que le Parlement fédéral puisse de cette façon contrôler ou limiter—et, au besoin, rendre inefficace—le pouvoir de taxer qui appartient aux provinces. Cette distinction nécessaire a été signalée précisément par le Conseil Privé dans la cause de *Citizens Insurance Company of Canada* v. *Parsons* (1), où Sir Montague Smith dit (p. 108):

> Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the legislature could not have intended that the powers exclusively assigned to the provincial legislature should be absorbed in those given to the Dominion Parliament. Take as one instance the subject "marriage and divorce," contained in the enumeration of subjects in sect. 91; it is evident that solemnization of marriage would come within this general description; yet "solemnization of marriage in the province" is enumerated among the classes of subjects in sect. 92, and no one can doubt, notwithstanding the general language of sect. 91, that this subject is still within the exclusive authority of the legislatures of the provinces. So "the raising of money by any mode of taxation" is enumerated among the classes of subjects in sect. 91; but, though the description is sufficiently large and general to include "direct taxation within the province, in order to the raising of a revenue for provincial purposes," assigned to the provincial legislatures by sect. 92, it obviously could not have been intended that, in this instance also, the general power should override the particular one. With regard to certain classes of subjects, therefore, generally described in sect. 91, legislative power may reside as to some matters falling within the general description of these subjects in the legislatures of the provinces. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them.

Je répète, avec le Conseil privé, parlant du pouvoir fédéral, "Le prélèvement de deniers par tous modes ou systèmes de taxation" (*Acte de l'Amérique Britannique du Nord*, art. 91, parag. 3) et le comparant avec le pouvoir provincial, "La taxation directe dans les limites de la province, dans le but de prélever un revenu pour les objets provinciaux" (Acte cité, art. 92, parag. 2),—

(1) (1881) 7 A.C. 96, at p. 108.

It obviously could not have been intended that, in this instance * * * the general power should override the particular one

—Ces deux paragraphes (91-3 et 92-2) confèrent des pouvoirs absolus et indépendants, dont l'un ne peut empiéter sur l'autre, tant en vertu de leur nature même que par application de l'article 125 de *l'Acte de l'Amérique Britannique du Nord* (comme le fait remarquer mon collègue, Mr. le Juge Duff, dont j'adopte le raisonnement).

Si, par conséquent, la législation fédérale qu'on invoque (*" An Act to amend The Special War Revenue Act,"* 1915, 12-13 Geo. V, c. 47, s. 17) a eu pour but de créer " a first charge " ayant priorité même sur la dette privilégiée de la province de Québec (S.R.Q. 1909, art. 1357), je conclurais que, en cela, cette législation est *ultra vires.*

Mais l'intention de donner à la taxe fédérale préséance sur la taxe provinciale ne résulte pas nécessairement du texte de l'article 17 de *Special War Revenue Act,* 1915. L'intention " d'y atteindre Sa Majesté " n'y est pas " formellement exprimée " (*Loi d'interprétation*—S.R.C. 1906—c. 1, c. 16). Il est à présumer que le législateur fédéral a voulu que sa loi sur *The Special War Revenue* fût comprise conformément à cette prescription de sa propre loi d'interprétation.

Il en résulterait que l'art. 17 du *Special War Revenue Act,* 1915 ne porte pas " atteinte aux droits de Sa Majesté " représentée par la province de Québec, tels qu'ils sont exprimés dans l'art. 1357 des Statuts Revisés de Québec, 1909, et que chaque législation doit recevoir son plein effet.

Par suite de l'insuffisance des deniers dans la faillite de Silver Bros., il survient une impossibilité de payer intégralement les deux réclamations. La division proportionnelle s'impose donc par la force même des choses. Ce n'est pas, si l'on veut, l'art. 1985 du Code Civil qui s'applique, mais c'est le principe général de droit énoncé dans cet article qui entre en jeu.

Je rejetterais le pourvoi en appel avec dépens.

LAMONT J. concurs with the Chief Justice.

SMITH J. concurs with the Chief Justice.

Appeal allowed with costs.

Solicitors for the appellant: *Cook & Magee.*

Solicitor for the respondent: *Charles Lanctot.*

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*Nov. 19.
1929
*May 27.

THE DOMINION GRESHAM GUARANTEE & CASUALTY LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

THE BANK OF MONTREAL (DEFENDANT) ..... } RESPONDENT.

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

Bank and banking—Guarantee—Company—Insurance—Defalcations by employee of insured—Drafts, payable to himself, obtained by employee from the bank in exchange for cheques signed by insured—Liability of the bank—Ostensible authority—"Holding out"—Negligence.

The appellant company sued the respondent bank for the recovery of the sum of $7,565.61 ($5,000 being the amount of a guarantee policy and $2,565.61 for legal costs), which the appellant was condemned to pay to the insured, Willis, Faber & Co., in respect of the defalcations of one Rogers, chief accountant of the latter company. The frauds committed by Rogers began in September, 1919, and were not discovered until the 10th of January, 1922, and during that period Rogers procured from the respondent bank drafts on New York, payable to his own order, in exchange for cheques payable to the bank drawn by himself and another of the properly authorized signing officers of Willis, Faber & Company. The amounts of these drafts, plus exchange, were charged by the bank against the latter's account. The appellant company contended that the respondent was not entitled to do so, the appellant exercising in this action the rights of the insured, to which it was subrogated by the latter. In 1912, a resolution of the directors of the insured company, a copy of which was in possession of the respondent bank, directed that any two of four officers therein designated, Rogers being one of them, were "authorized to make, draw, sign, accept or endorse, bills of exchange, promissory notes, cheques, orders for payment or other commercial paper on behalf of the company." The respondent bank submitted that what Rogers did was within his ostensible authority; and it also argued that the insured was negligent in not sooner discovering Rogers' frauds and through this negligence the officers of the bank were misled. The judgments of the trial judge and the Court of King's Bench were in favour of the respondent bank.

Held, Rinfret J. dissenting, that, upon the evidence, the respondent bank was not entitled to charge against the insured company's account the drafts obtained from it by Rogers. The respondent's contentions cannot be upheld in view of the evidence as to the actual course of business followed in the bank and of the terms of the resolution of 1912; and the doctrine of "holding out" has no application in this case: the bank in acting on Rogers' directions was not acting under any belief in the existence of Rogers' assumed general authority and

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

was not misled by any such belief or by any act of negligence of the insured company.

Per Rinfret J. (dissenting).—There is a well established rule that the question "whether or not the evidence establishes that a person acts without negligence is a question of fact." ([1920] A.C. 683, at p. 688); and, in this case, both the trial judge and the appellate court unanimously found that the bank acted without negligence. The bank followed towards the insured company the procedure the latter had established for many years, and no positive acts of negligence were proven. Moreover, the cheques charged against the insured company's account were in accordance with the resolution of 1912 and properly charged against that account; the foreign drafts were not charged to the insured, but they were really sold and delivered to Rogers for the insured in consideration of the respective cheques, and the respondent bank cannot be held responsible for the subsequent misappropriation of those drafts by Rogers.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, at Montreal, Duclos J., and dismissing the appellant's action.

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

J. A. Mann K.C. for the appellant.

A. R. Holden K.C. for the respondent.

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

DUFF J.—This litigation arises out of a series of frauds committed by one Rogers, the chief accountant of Willis Faber & Company, who were customers of the respondent bank. The title of the appellants to sue rests upon the fact that, in execution of the obligations under an insurance policy by which they insured Willis Faber & Company against losses arising from embezzlements and defalcations by certain employees, of whom Rogers was one, they paid in respect of the defalcations of Rogers the sum of $5,000, and an additional sum for legal costs, making up the total of the amount sued for. The questions in controversy relate strictly to the liability of the respondent bank in principle, the correctness of the claim as advanced, in point of amount, on the assumption that such liability exists, not being challenged.

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The frauds began in September, 1919, and were not discovered until the 10th of January, 1922, and during that period Rogers procured from the bank drafts on New York, payable to his own order, in exchange for cheques payable to the bank drawn by himself and another of the properly authorized signing officers of Willis Faber & Company. The amounts of these drafts, plus exchange, were charged by the bank against Willis Faber & Company's account, and the issue in the litigation is to whether they were entitled to do so. The trial judge and the Court of King's Bench decided this issue in favour of the respondent bank.

The practice of Willis Faber & Company, in respect of foreign drafts, was as follows: Rogers, who was the chief accountant, would prepare a cheque and present it for signature to the signing officers, of whom he was one, with a statement of the account to be paid. It seems to have been understood that Rogers was to be a signatory only when Mr. Dettmers, the treasurer, or Mr. Mercer, the secretary, was absent from the office; but apparently the cheques for foreign drafts usually bore the signature of Rogers. Rogers would ascertain the rate of exchange from the bank by telephone, and the cheque would be drawn, payable to the Bank of Montreal, for the amount of the account plus the exchange. The cheque itself contained no direction as to the application of the proceeds. The requisition for the draft was not drawn up in the office, or signed by the officer who signed the cheque with Rogers. Rogers, at the bank, would prepare the requisition, giving the amount of the draft, and the name of the payee, and sign it in the name of Willis Faber & Company. In the cases with which we are concerned, the signature was that of the firm only; there was nothing except the handwriting to identify the person affixing it. Whether or not this was the practice in other cases, is not stated. The draft would be drawn up in the foreign exchange department of the bank, and would be delivered by the foreign exchange teller to Rogers, who would deliver to the teller the cheque of Willis Faber & Company, which he had got certified by the ledger keeper. The teller, would, as she explains in her evidence, see that the cheque was certified, but would not concern herself about the payee of the draft, and would recognize Rogers, without knowing his name or the nature

of his authority, as a person who usually received drafts for Willis Faber & Company. If the amount of the cheque was slightly in excess of the draft, as it was occasionally, she would pay the change to Rogers. If there was a deficit, it would be paid to her by him in currency.

First of all, it is important to note the actual authority of Rogers. A resolution of the directors of Willis Faber and Company of Canada Limited of 1912, designates the persons authorized to execute documents on behalf of the company in these terms:—

> Resolved that any two of the following persons, namely, Mr. Raymond Willis, president, Mr. O. W. Dettmers, director, Mr. E. N. Mercer, director, and K. V. Rogers, accountant, be and they are hereby authorized to make, draw, sign, accept or endorse, bills of exchange, promissory notes, cheques, orders for payment or other commercial paper on behalf of the company, and that Mr. Raymond Willis, president, and Mr. O. W. Dettmers, director, and Mr. E. N. Mercer, director, and either of them singly be and they are hereby authorized to make all contracts and engagements other than the foregoing for and on behalf of the company and that this resolution replace the resolution of directors dealing with the same matter and passed on the 5th January, 1911, which former resolution shall hereafter be of no effect.

A copy of this resolution was in the possession of the bank, and from its terms, the bank knew that Rogers was invested with no general authority to execute documents of any description in the name of the company, except as one of two signatories. In accordance with the practice above mentioned, he had authority, to take a cheque signed by Dettmers or Mercer and himself to the bank, and obtain a draft on New York payable to the creditor for the payment of whose account the cheque had been drawn, if such authority could be derived from the consent of the signatories of the cheque. I shall assume that the practice of permitting Rogers to act as the intermediary to communicate the name of the payee to the bank, and to receive the draft from the bank, was ratified by the directors. But ratification cannot be extended beyond the authority which in fact was committed to Rogers—and this authority was limited to procuring a draft payable to the person to whom Willis Faber & Company were indebted, according to the statement produced by Rogers upon which the cheque was based. He had in fact, no general authority to direct the application of the proceeds of such a cheque.

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Actual authority, therefore, Rogers had none, to direct the bank to charge any of the moneys in dispute against their customer's account, nor had he actual general authority to do any class of acts within which such a direction would fall.

The bank's case rests upon its contention that what Rogers did was within his ostensible authority, in other words, that he was held out by the customer as having a general authority to instruct the bank concerning the application of the proceeds of such cheques in the purchase of foreign drafts, and that the bank acted in the belief that such general authority was vested in him.

There appear to be two conclusive answers to this contention. One arises out of the actual course of business in the bank, and the other out of the resolution of 1912 which had been communicated to the bank.

Let it first be observed that, as a direction to the bank for the application of moneys standing to the credit of the customer, the cheque itself was incomplete. It was a cheque payable to the bank, and such a cheque, though debited to the customer's account, was still, in the hands of the bank, held for the customer until it was applied pursuant to a direction by the customer to an authorized purpose. In the case of each of the cheques with which we are concerned, that direction consists, as the bank alleges, of a requisition for a draft on New York, payable to K. V. Rogers, which requisition was presented and signed in the name of the customer by Rogers. In other words, the direction consists of a request by Rogers to hand to himself a draft on New York, payable to his own order. The contention is, that is to say, that by entrusting Rogers from time to time with a cheque payable to the bank, in order to obtain a draft on New York, payable to a particular payee, the customer held Rogers out as having authority to apply, or to direct the application of, the proceeds of such a cheque in purchasing, and procuring delivery into his own hands of a draft payable to his own order.

On the face of it, this does not seem very convincing; but it is not necessary to analyse the argument critically, because it is impossible to reconcile it with the fact that the bank had before it the resolution of 1912. By that

resolution, cheques, orders for payment and "commercial paper" of a similar character, were to be signed on behalf of the appellants by two of four named persons, of whom Rogers, it is true, was one. It is impossible to suppose that any banker of ordinary judgment, with this resolution before him, could have inferred from Rogers' authorized acts that he had power to direct, by his sole signature, that funds standing to the credit of their customer should be paid to himself, or that those funds should be applied in the purchase, from the bank, of bank drafts payable to his order, and that these drafts should be delivered into his own hands. To adapt the language of Lord Cave in *Australian Bank* v. *Perel* (1), speaking for the Privy Council, to act upon such an inference must have the effect of "neutralizing and defeating" the resolution, which, I repeat, for cheques, orders for payment and similar documents required at least two signatures. The requisition was treated by the bank as the equivalent of a cheque or an order for payment.

The bank, of course, seeks to bring its case within the principle of article 1730 of the Civil Code,

> the mandator is liable to third parties, who in good faith contract with a person not his mandatory, under the belief that he is so, when the mandator has given reasonable cause for such belief.

This principle does not in substance differ from that of the rules of the common law under the heads of "ostensible" authority, "apparent" authority and "holding out," and the decisions under those rules may usefully be referred to, as illustrating the application of the principle. In *Russo-Chinese Bank* v. *Li Yau Sam* (2), Lord Atkinson in delivering the judgment of the Privy Council says:

> the several authorities cited by Mr. Scrutton, from *Grant* v. *Norway* (3), down to *Ruben* v. *Great Fingall Consolidated* (4), establish, in their Lordships' opinion, the proposition that, in order that the principle of "holding out" should in any given case of agency apply, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts which the agent is held out as having a general authority on behalf of his principal to do; and, of course, the party prejudiced must have believed in the existence of that general authority and been thereby misled.

It is argued, accordingly, that Rogers being the chief accountant of Willis Faber & Company, and their trusted employee, it might properly be assumed that his employ-

(1) [1926] A.C., 737, at p. 742.
(2) [1910] A.C., 174, at p. 184.
(3) (1851) 10 C.B. 665.
(4) [1906] A.C. 439.

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ers were taking drafts payable to his order for remittances to New York, for some convenience of their own. Evidence was offered to show that this would not be an unusual course, if the person transmitting the funds wished to avoid disclosing to the bank the name of the transmittee. This evidence ought no doubt to have been received, but the appeal does not turn upon it. It may be assumed that such a practice is not unknown and that the bank was aware of it. Rogers, although chief accountant, and although having authority to act as co-signatory in the execution of documents requiring two signatures, had no authority under the resolution to execute any document on behalf of the company without the concurrence of one of the other three persons named for that purpose. With regard to certain documents, this authority was committed to each of the other three; it was not committed to Rogers. The customer no doubt, by ratifying the practice by which Rogers was authorized to communicate the name of the payee to whom moneys were to be transmitted, had departed from the strict course laid down in the resolution of 1912; but there is a vast difference between the departure authorized, which permitted only the communication of the name of the payee, for the payment of whose account the cheque was drawn, and the receipt of the draft payable to such payee, and the departure postulated by the argument I am now considering—a general authority, which would involve an authority in Rogers to place the funds of his employers (to the amount of the cheque), under his sole control; an authority, the existence of which would be quite incompatible with the object of the resolution, as well as with its terms, that were carefully framed to prevent such control over the funds of the company by any one of its signing officers.

It is contended also on behalf of the bank, that the customer was negligent in not sooner discovering Rogers' frauds, and that through this negligence the officers of the bank were misled, and a course of business was established according to which Rogers' directions were followed. I postpone the consideration of this contention for the present.

In truth, the doctrine of "holding out" has no application here; the bank in acting on Rogers' directions was

not acting under any belief in the existence of Rogers' general authority and was not misled by any such belief. The officials of the foreign exchange department did not concern themselves about either the identity or the authority of the person who attached the customer's name to the requisition. This is, on the evidence, indisputable. The teller who handed the drafts to Rogers recognized him as the person who usually received the customer's drafts, but beyond the fact of his possession of the cheque, she did not direct her attention to the matter of his authority. The possession of the cheque was, as she and Mr. Pratt, who was the principal witness for the bank, both stated, regarded as a sufficient credential. From the bank's point of view—it is quite plain—the business hinged upon that.

The evidence does not permit us to proceed on the hypothesis that in acting on the latest of Rogers' directions, the bank officials were influenced by any consideration in addition to those which influenced them at the inception of his frauds. Neither the terms of the resolution, nor Rogers' position, nor the course of business, was adverted to.

What I have just said seems to be also a complete answer to the contention that the bank was misled by the negligence of the appellants.

The appeal should be allowed and judgment entered for the appellants for the sum of seven thousand five hundred and sixty-five dollars and sixty-one cents ($7,565.61), with costs of the appeal and in the courts below.

RINFRET J. (dissenting).—The appellant, the Dominion Gresham Guarantee and Casualty Company, is seeking to exercise against the respondent, the Bank of Montreal, certain alleged rights of Willis Faber Company of Canada Limited, in which it was subrogated by the latter. For all purposes the case must be treated as one between the Willis Company (which I will call the company) and the Bank of Montreal (which I will call the bank). The rights asserted in this litigation are supposed to have arisen out of a series of frauds perpetrated by K. V. Rogers, the chief accountant of the company, in procuring from the bank drafts payable to his own order in exchange for cheques of the company payable to the bank's order.

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In the course of its ordinary business, and since a long number of years, the company had occasion very frequently to purchase from the bank drafts on New York or London. In all cases the practice followed was the same. I will quote from the evidence of Dettmers, one of the directors of the company, and put forward by it as being the official who could give the best information concerning the inside management of its affairs:—

Our usual custom was to telephone the bank and give them particulars of the draft or drafts required.

Q. Not you, or Mr. Mercer (another director)?

A. No.

Q. That would be done by Mr. Rogers?

A. By Rogers.

The next move was the preparation of a cheque to pay the draft or drafts. A resolution adopted by the company was to the effect that

any two of the following persons, namely, Mr. Raymond Willis, president, Mr. O. W. Dettmers, director, Mr. E. N. Mercer, director, and K. V. Rogers, accountant, be and they are hereby authorized to make, draw, sign, accept or endorse bills of exchange, promissory notes, cheques, orders for payment or other commercial paper on behalf of the company.

The cheque for the drafts would therefore be prepared in this way, as explained by Mercer:

Rogers would come into my private office with a cheque in favour of the Bank of Montreal, and in most cases (I could not swear it was on every occasion) there was a document attached to the cheque. He would invite me to place my signature on the cheque, saying he wished to remit to New York.

* * * * *

Q. In respect to Rogers obtaining those cheques, what was the usual custom in regard to presenting some document with them? What was the usual custom when Rogers came in with a cheque and wanted it signed, as regards handing in some document with the cheque?

Mr. Holden, K.C., of counsel for defendant objects to the question as irrelevant and illegal.

The objection is reserved by the court.

A. There was a statement attached to the cheque.

Q. I understood you to say you could not swear that happened in every case?

A. Quite so.

Q. Can you say from memory just now the number of cases in which it happened?

A. To the best of my recollection it generally happened.

Q. What was the nature of that document you would have before you?

A. It would be just a statement showing a certain sum due. That we owe a certain firm, say Johnston and Higgins, New York, a certain sum of money.

Rogers would then go to the bank and, as to what took place at the bank, we have the testimony of Miss C. Aus-

tin, who occupied the position of exchange teller throughout the period material to the case:

By the court:

Q. If I understand the procedure correctly, it was this: a requisition note for the draft would be handed in to your draft department?

A. Yes.

Q. The draft would be prepared there?

A. Yes.

Q. And the prepared draft, with the requisition note, would be sent to your wicket?

Q. Yes.

Q. And you would surrender it to the party who came for it, on receiving a cheque covering the amount?

A. Yes.

And later on Miss Austin added:

Q. To what extent did you examine the cheques? Did you examine them to see that they were payable to the bank?

A. Yes. I noticed they were payable to the Bank of Montreal, and that they were certified.

We have thus the outline of the whole procedure in the very words of the witnesses. Such was the course pursued between the bank and the company, so far as the evidence goes, from January 17, 1910, to April 18, 1922, presumably before Rogers became chief accountant and obviously for three months after his frauds were discovered and he had left the employ of the company.

It is admitted that the procedure was the same for drafts issued to creditors of the company in the ordinary course of business and those issued to Rogers' order. It is further admitted by the company that the cheques themselves in all cases were complete and regular on their face.

The contention of the company is that by issuing drafts to Rogers' own order, the bank committed "illegal, wrongful and grossly negligent acts" and the company has suffered loss which it "is entitled to have and recover * * * by way of damages."

The well established rule is that whether or not the evidence establishes that a person acts without negligence is a question of fact. (Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank*) (1).

In the present case, both the trial judge and the Court of King's Bench unanimously found that the bank acted without negligence. The bank followed towards the company the procedure it had established since a number of years as regards hundreds of foreign drafts issued daily at the re-

(1) [1920] A.C. 683, at p. 688.

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quest of all its customers. It is certain that no positive acts of negligence were proven. In fact, on this point, the company was content practically to rest its case on the proposition that the drafts in question being made to the order of Rogers was at least notice that he was appropriating to his own use the company's money and should have put the bank upon inquiry. That this would not necessarily follow would appear to be the effect of the judgment of the Privy Council in *Corporation Agencies Limited* v. *Home Bank of Canada* (1). There are many instances where it may be found convenient for a company to adopt such a course. One of those instances is in evidence in the present case: Rogers was paid his salary by a cheque to his own order. It is conceivable that, in the ordinary course of business and consistently with the custom of trade and banking in Montreal and in the province of Quebec, it was not an unusual occurrence for a company to ask for foreign drafts to be issued to the order of its own officials. At all events, it does not lie in the mouth of the appellant to contend otherwise when, by its own unwarranted objections at the trial, it prevented the bank from establishing such a practice in evidence.

I would therefore conclude that, on that ground, the appellant's case must fail.

But the bank is alleged to be at fault yet for another reason. The bank had a copy of the resolution of the company (already referred to) appointing certain persons therein named as its signing officers and requiring the signatures of at least two of them on its

bills of exchange, promissory notes, cheques, orders for payment or other commercial paper.

On the strength of that resolution, it is argued that the bank should not have issued foreign drafts to Rogers' order except upon requisition notes signed by two of the persons mentioned.

Very respectfully, I do not think the resolution has any application to this case.

The company had its bank account with the respondent, and, through the resolution, the bank was given the company's instructions as to how moneys should be paid out of such bank account. It is admitted that the cheques pre-

(1) [1927] A.C. 318.

sented, certified to and charged against that account were in all respects in accordance with the resolution and properly chargeable against the account.

The foreign drafts themselves were not charged to the company. They did not represent funds belonging to the company. They were orders for payment by the bank out of its own funds. The bank, under its charter powers, dealt in those drafts as a merchant with his goods. The bank sold the drafts to the company. The company purchased the drafts which were issued and delivered to it in consideration of the respective cheques. The cheques were given in payment. In my opinion, the resolution had nothing to do with that kind of transaction. The respondent, so far as it was concerned, stood in the same position as if the cheques had been drawn upon some other bank. This view is expressed in the following passage of Mr. Justice Bernier's judgment in the Court of King's Bench:

La compagnie donnait l'ordre à Rogers d'acheter des traites de la banque; elle lui remettait l'argent nécessaire, sous forme de chèques dûment signés; Rogers allait chercher la marchandise et la payait.

Dans mon opinion, la formule de réquisition remplie par Rogers n'a aucune importance.

La marchandise était livrée à Rogers, comme elle aurait pu l'être pour toute autre marchandise dans un commerce différent; Rogers agissait, en tout cela, comme un commis chargé d'aller chercher cette marchandise; la banque savait chaque fois, par les téléphones qu'elle recevait de la compagnie, que Rogers allait chercher cette marchandise.

The bank should not be held responsible for the misappropriation by Rogers of the drafts sold to the company more than, in the case suggested by Mr. Justice Bernier, the merchant would be if Rogers, after having obtained delivery of the goods, had run away with them.

Moreover, that the company never looked upon the resolution as governing its requisitions for foreign drafts is established by its course of dealing. So far from relying, for its protection against what happened, upon the assurance that, by force of the resolution, the requisition notes ought to have been signed by two of the persons named, the company, as shown by the evidence, did not even know that requisition notes were part of the procedure to obtain the drafts. Mr. Dettmers testified to that. He said:

As far as I am aware, we never made out any of those requisitions. Our method was simply to telephone to the bank and inquire regarding the rate of exchange, and then advise them whatever drafts were required.

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This is complete evidence that the company never expected the bank to regard the requisition notes as coming within the scope of the resolution or the resolution as having any bearing upon the request for foreign drafts. The requisition notes were no part of the method adopted by the company. So far as it was concerned, they might as well have been dispensed with. In fact, they were nothing more than an incident in the routine work of the bank. But the company made it understood that the cheques, properly signed, were intended to be debited to its account for the purchase of remittances, that they left it to Rogers to arrange for and obtain the remittances and, in the words of Mr. G. C. Pratt, the accountant for the bank, " the mere fact that he brought the cheques would be a credential."

I have for those reasons, come to the conclusion that the action was properly dismissed and that the judgment of the courts below ought to be confirmed. This makes it unnecessary to examine whether, under different circumstances, the company would nevertheless have been precluded from recovering both on account of its own negligence as well as on account of the experience " of the previous years which had passed unchallenged "—two points in respect of which much could be said on behalf of the bank.

Appeal allowed with costs.

Solicitors for the appellant: *Mann & Mackinnon.*

Solicitors for the respondent: *Meredith, Holden, Heward & Holden.*

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*Feb. 22.
*April 30.

JOSEPH CARDINAL (PLAINTIFF).....APPELLANT;

AND

JOSEPH PILON (DEFENDANT).....RESPONDENT.

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

Servitude—Obligation of mitoyenneté—Exercise of party rights—Contribution towards party wall—Plea of non-mitoyenneté—Acquisition by way of prescription—Inscription-in-law—Arts. 510, 512, 532 C.C.

In an action by the appellant to have the respondent condemned to reconstruct, at his own expense, a wall alleged to be situated on the boundary line between their respective properties.

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith.

Held that, upon the evidence, the appellant can only charge the respondent and his predecessors with a neighbourly tolerance of his own very slight acts of trespass; and this, in itself, is not sufficient to entitle the Court to impute to them a recognition of the rights of *mitoyenneté* set up by the appellant.

Morgan v. *Avenue Realty Company* ((1912) 46 Can. S.C.R. 589) distinguished.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Weir J. (1), and dismissing the appellant's action.

The appellant sought by his action to have the respondent condemned to reconstruct, at his own expense, a wall situated on the boundary line between their respective properties, alleging that it was a party wall and was leaning towards the respondent's property owing to the fact that the latter's house was not properly underpropped. The respondent, in his plea, besides alleging that the wall was his own wall and not a party wall, denied the allegations of the statement of claim. The appellant, in his answer, alleged that he had been using that wall to support his house for a period extending over thirty years and that he had acquired a party right by way of prescription; and the respondent filed an inscription in law against this last allegation.

The facts, as found by the appellate court, are as follows: the wall is one of the four walls of the respondent's house; this house, built before that of the appellant, is faced with stone and its three other sides are solid brick; the three outside walls of the appellant's house are of lumber covered with brick, while on the side next to respondent's property, the wall is merely a stud-work covered with laths and mortar, the two houses being therefore connected, not by one wall only, but by a wall and a stud-work. If the wall had been straight, the appellant's house would not have been exposed to wind and weather; but, owing to the opening resulting from the leaning of the wall, the appellant's house was damaged by exposure from wind and rain.

The appellate court held that the leaning of the wall was apparently caused, upon the evidence, not by a fault of the respondent, but by the unsettled condition of the soil;

(1) (1927) Q.O.R. 66 S.C. 29.

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that, under these circumstances, the reconstruction of the wall, if necessary and on the assumption that it was a party wall, could be ordered only at the expense of both parties (Art. 512 C.C.); and, without deciding whether the wall was a party wall or not, the appellate court maintained the judgment of the trial judge dismissing the appellant's action, on the ground that it could not order the reconstruction of the wall at the joint expense of both owners as such judgment would be *ultra petita.*

P. St. Germain K.C. and *G. Guérin* for the appellant.

L. Farribault K.C. and *J. A. Robillard K.C.* for the respondent.

THE COURT.—We are all of the opinion that this appeal should be dismissed. It seems plain that but for the decision of this Court in *Morgan* v. *Avenue Realty Co.* (1), we should never have heard of it.

The facts which then confronted the Court differed radically from those before us. There the view of the majority of the Court was that, having regard to the circumstances in which the respondents had taken possession of part of the appellant's wall, and to the manner in which they had used it, they were precluded from denying that they had done so with "*la volonté d'en acquérir la mitoyenneté.*"

The present appellant, upon the evidence, can only charge the respondent and his predecessors with a neighbourly tolerance of his own very slight acts of trespass. This, in itself, is not sufficient to entitle us to impute to them a recognition of the rights of *mitoyenneté* now set up. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guérin, Renaud & Cousineau.*

Solicitors for the respondent: *Robillard, Julien, Allard & Julien.*

(1) (1912) 46 Can. S.C.R. 589.

HENRI GADBOIS AND OTHERS (MIS-EN-CAUSE) ..... } APPELLANTS;

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*Feb. 26, 27.
*May 27.

AND

ARMAND BOILEAU AND ANOTHER .... (DEFENDANTS);

AND

STIMSON-REEB BUILDERS SUPPLY COMPANY (PLAINTIFF) ..... } RESPONDENT.

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

Privilege—Lien—Claim—Supplies of materials—When constituted—Houses built on different lots of land at the same time and by the same builder—Registration of single or separate privileges—Arts. 376, 2013, 2013e, 2167, 2168 C.C.—Bankruptcy Act, s. 24.

The appellants, Gadbois and Collé, were owners of nine lots bearing subdivision numbers 185 to 193, inclusive, of lot No. 37, in the parish of Montreal. They entered into a contract in writing with the builders, now defendants, Boileau and Cordeau, for the construction of nine duplex houses (one detached and the other eight semi-detached) on the above mentioned lots. The plan prepared by the architect shewed that each house should be wholly situate on one of the subdivision lots. The builders made arrangements with the respondent company for the purchase of materials to be used in the construction of these houses and obtained materials from it to the amount of $18,288.53. Before the builders had completed their contract, the appellants became bankrupt and trustees in bankruptcy were appointed; as a result, the builders were also compelled to make an assignment and a trustee was appointed. Before the completion of the last house, the respondent, to preserve the privilege given by law to a supplier of materials, registered against the above mentioned lands its account for all the materials supplied to the builders for the construction of the nine houses, showing a balance of $12,193.30 still unpaid; and within three months thereafter the respondent brought action against the builders personally and their trustee in bankruptcy and impleaded the appellants (mis-en-cause) as owners of the property burdened with the privilege and also their trustees in bankruptcy.

Held, reversing the judgment appealed from, that the respondent was not entitled to claim any privilege as supplier of materials. His notice of registration had not been given in conformity with the enactments of the civil code, if one considers the provisions which give to the supplier of materials a privilege on the immovable of the proprietor on whose lot or lots a building is erected (art. 2013e C.C.) in conjunction with the provisions of the law relating to the registration of titles to land according to the cadastral numbers of the lots into which it is subdivided (art. 2167-8 C.C.).

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Lamont JJ.

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Munn & Shea Limited v. *Hogue Limitée* ([1928] S.C.R. 398) discussed and distinguished.

The principle laid down in that case that a supplier of materials may register, under certain circumstances, a single privilege for the full amount of his claim against several lots as a whole, must be limited, in its application to the present case, to each pair of semi-detached houses, i.e., the respondent here, provided he registered a proper memorial, was entitled to a privilege on each pair of semi-detached houses for the unpaid price of its materials entering into the construction of each pair respectively; but it was not entitled to a single privilege on all the lots and houses for the balance of its claim for materials supplied which entered into the different buildings erected on the nine lots.

Held, also, that the respondent was not obliged to obtain leave of the bankruptcy court (s. 24 of the *Bankruptcy Act*) before taking its action against the appellants (owners of the lots), as the present proceedings so far as they relate to the enforcement of the privilege against the appellants' immovable are not proceedings "against the property or person of the debtor," the defendants being in this case the "debtors." The fact that judgment has been irregularly rendered against the "debtors" defendants without leave of the court does not constitute a defence by the appellants to the enforcement of the privilege.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Panneton J., and maintaining the respondent's action.

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

T. Brosseau K.C. for the appellant.

E. Lafleur K.C. and *J. F. Chisholm* for the respondent.

The judgment of the court was delivered by

LAMONT J.—In January, 1927, the appellants, Henri Gadbois and H. L. Collé, were carrying on business together in Montreal under the firm name of Duplex Construction Company, and were owners of subdivisions 185 to 193, inclusive, of lot 37, according to the official plan and book of reference of the municipality of the parish of Montreal. On January 7, 1927, they entered into a contract in writing with Armand Boileau and J. B. Cordeau (hereinafter called the "builders"), for the construction of nine duplex houses (one detached and the other eight semi-detached) on the above mentioned land. Article 1 of the contract reads as follows:—

Article 1. L'entrepreneur fournira tous les matériaux et exécutera tous les ouvrages indiqués sur les dessins ou mentionnés dans les devis préparés par Cajetan Dufort (ci-après nommé l'architecte) pour la construction et finition de neuf duplex, lesquels dessins et devis sont identifiés par la signature des parties ci-contre et font partie de ce contrat.

The plan shewed that each house should be wholly situate on one of the subdivision lots and was to cost $16,000, except the detached house for which an additional sum was to be paid. The builders made arrangements with the respondent for the purchase of materials to be used in the construction of these houses, and, on February 9, 1927, the respondent notified the appellants, in accordance with Art. 2013 (*e*) of the Civil Code, as enacted by 7 Geo. V (1916), c. 52, and, in its amended form, as enacted by 14 Geo. V (1924), c. 73, that it had contracted with the builders to furnish materials " to the extent of $10,000 " for the construction of buildings on the lands above mentioned owned by them. This notice was received and accepted by the appellants. The builders proceeded to erect the houses and, after February 9, obtained materials from the respondent therefor to the amount of $18,258.53. Before the builders had completed their contract the appellants became bankrupt and J. E. Beaudin and N. Grobstein were appointed their trustees in bankruptcy. As a result of the bankruptcy of the appellants the builders were compelled to make an assignment in bankruptcy, and one Turcotte was appointed their trustee. As the houses were not finished when both the appellants and the builders became bankrupt, Beaudin and Grobstein, in their capacity as trustees, obtained from the respondent a further supply of materials, amounting to $887.55, to complete the buildings. On November 28, 1927, the respondent, to preserve the privilege given by the statute to a supplier of materials, registered against the above mentioned lands its account for material supplied to the builders, with the amounts paid thereon, which shewed a balance of $11,305.75 still unpaid. It also registered its account for $887.55 for material supplied to the trustees in bankruptcy. These registrations were made before the completion of the last house, and, within three months thereafter, the respondent brought action against the builders personally, and their trustee in bankruptcy, for $12,193.30, and impleaded the appellants (mis-en-cause) as owners of the property

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burdened with the privilege and also their trustees in bankruptcy. Neither the builders nor their trustee appeared to the action, but the appellants, as well as their trustees, contested the respondent's claim. The trial judge gave judgment in favour of the respondent, holding that it was entitled to a privilege as claimed, to the extent of $7,000. This judgment was affirmed by the Court of King's Bench, although two judges thereof were of opinion that the amount for which the respondent was entitled to a privilege was only $2,709.44. From the judgment of the Court of King's Bench the mis-en-cause appeal to this court.

Before dealing with the main grounds of appeal I will refer to certain objections to the procedure taken on behalf of the appellants. The first objection was, that, as both the appellants and the builders were in bankruptcy, the leave of the court should have been obtained before commencing proceedings and that in the absence of such leave all the proceedings were null and void. Section 24 of the *Bankruptcy Act* (formerly Art. 8 (B)) in part reads as follows:—

> 24. On the making of a receiving order or authorized assignment, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor or shall commence or continue any action, execution or other proceedings for the recovery of a debt provable in bankruptcy unless with the leave of the court and on such terms as the court may impose.

I am unable to find anything in this section to support the appellants' objection. Under the section it is only when proceedings are brought against the person or property of the debtor for a debt provable in bankruptcy, that the leave of the court must first be obtained. The present proceedings so far as they relate to the enforcement of the privilege against the appellants' immovable are not proceedings against the property or person of the debtor. In this case it is the builders who occupy the position of debtor. It is true that in these proceedings personal judgment was given against the builders. This, in my opinion, should not have been given without the leave of the court, but that is not a matter in which the appellants have any interest, nor does it constitute a defence to the enforcement of the privilege. Making the debtor a party simply for the purpose of enforcing the privilege against the appellants' immovable does not, in my opinion, contravene s. 24 above cited.

Another objection taken was that the memorial as registered was illegal because it was not a statement of the respondent's account of materials supplied for the houses in question, but a copy of its current account with the builders, which commenced at a period prior to February 9, 1927, and included materials not furnished for the construction of the buildings upon the appellants' land.

The code requires the memorial registered to specify "the nature and price of the materials supplied" to the builder, and such materials are all that should be set out in the memorial. If, however, materials are included in the account which should not have been included and for the price of which a court would not decree a privilege, how can that invalidate the memorial or its registration? At the hearing the secretary of the respondent company checked over the accounts and testified as to the materials which were delivered for the construction of the buildings in question, and the payments applicable thereto. This put the court in possession of the facts necessary to enable it to determine the amount for which the respondent should have a privilege provided all the materials furnished by it for the construction of the buildings entered into them. There is, in my opinion, no substance in this objection.

The two substantial grounds of appeal are: (1) That the appellants' contract with the builders was for the construction of nine houses, each house to be on a separate and distinct lot with a separate price fixed for each; that each lot, with the house thereon, constituted a separate immovable and, therefore, the right of the respondent to a privilege for materials supplied was a privilege against each separate immovable and was limited in amount to the price of the materials furnished by the respondent which were incorporated in each house respectively.

(2) That if the respondent was entitled to claim a privilege on all the houses and lots as one immovable, it had failed to establish the quantity of materials supplied by it which had entered into the construction of the houses.

In answer to the first of the above grounds of appeal the respondent cited the case of *Munn & Shea, Ltd.* v. *Hogue Limitée* (1), which was affirmed by this court (2). That case, it was contended, governed the case at bar and con-

(1) (1927) Q.O.R. 44 K.B. 198. (2) [1928] S.C.R. 398.

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clusively established the respondent's right to a single privilege covering the nine lots. In that case one Davis being the owner of twelve lots decided to erect thereon thirteen houses. He applied to Hogue Limitée to supply him with the materials necessary therefor. This that company agreed to do. Nothing was said as to any part of the materials being allocated to any particular house. Materials were furnished to the amount of over $11,000 and incorporated into the thirteen houses, but no account was kept of the amount which entered into the construction of each house. Davis paid Hogue Limitée for all materials supplied by it with the exception of $3,643. For that sum the company registered a privilege against five of the lots with the houses thereon. These five houses had, while in course of construction but before the registration of the claim of privilege, been sold by Davis to Munn & Shea, Ltd. In that case, as in the one now before us, it was argued that it was illegal to register a privilege for the full amount of the claim against all the lots as a whole. This argument was rejected in all courts and Hogue Limitée was held entitled to claim a privilege on the five lots. The ground upon which the decision is based is stated by Lafontaine C.J. in his judgment in the Court of King's Bench, as follows:—

Comme on l'a vu, le défendeur a donné à l'intimée une commande du bois nécessaire à la construction de 13 maisons érigées sur 12 lots sans spécifier aucune des maisons ou aucun lot en particulier et sans faire la division des matériaux pour chacune des maisons ou chacun des lots. Le débiteur n'avait qu'un chantier et l'intimée a livré ses matériaux à l'endroit qui lui a été indiqué. En sorte que le défendeur a donc, lui-même considéré ses 12 lots comme ne faisant qu'un seul immeuble et il serait bien difficile sinon impossible à un fournisseur de matériaux d'indiquer la quantité et l'espèce de matériaux entrés dans la construction de chacune des maisons construites par le défendeur. Comme de sa nature le privilège est indivisible et qu'il garantit la créance toute entière, il s'en suit que le privilège de l'intimée porte sur les 12 lots compris comme un tout et, par conséquent, sur chacun d'eux.

In this court all the judges who heard the appeal were satisfied on the argument that Hogue Limitée was entitled to a single privilege on the lots claimed. This was expressed in the written judgment by the words

there seems to be no ground for disagreeing with the views of the Court of King's Bench.

It was not our intention by that observation to indicate that we accepted every expression which had been used in that case in the broadest sense of which it is capable, but that we accepted the conclusion of the court, and the prin-

ciple of the decision as involved in that conclusion; the reasoning, in other words, as applied to the circumstances of that case. It remains now to apply that decision and to determine whether or not it governs the case at bar.

For the appellants it was contended that it was distinguishable: (*a*) Because in that case it was the owner of the lots who contracted for the materials; whereas in the present case it was the builders who contracted with the respondent, and a representation by the builders that they were to be used in the construction of nine houses for the appellants was not evidence that the appellants were treating the land on which they were to be erected as a single parcel or tract.

(*b*) That in the former case the owner was erecting thirteen houses on twelve lots, which shewed clearly that he was not using each lot as a distinct and separate immovable; whereas in the present case each house was to be erected on a separate lot with a separate price fixed for each.

Art. 2013 (*e*) C.C. gives to the supplier of materials a privilege on the immovable in the construction of which the materials supplied to the proprietor or builder have been used. Under the Code the privilege attaches when the materials are supplied to the builder to the same extent as it does when they are supplied to the proprietor, but when the materials are contracted for by the builder the person supplying them must notify the proprietor that he has contracted with the builder for the delivery of the materials. The respondent in the present case having delivered materials to the builders in accordance with its contract and having given to the proprietor the notice required by the code, was entitled to a privilege against the proprietor's immovable to the same extent as if the proprietor himself has contracted for the materials.

Then as to each house erected on a separate lot constituting a separate immovable:

Art. 2013 C.C. reads as follows:

2013. The workman, supplier of materials, builder and architect have a privilege and a right of preference over all the other creditors on the immovable, but only upon the additional value given to such immovable by the work done or by the materials.

The word "immovable" here means the premises to which additional value is given by the work done or the

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materials used. That is the land and any building erected thereon forming in law a part thereof. (Art. 376 C.C.) When the building is erected, as it is attached to and forms part of the land, the privilege covers both land and building, but is limited in amount to the additional value given to the land by the materials used in the building. How much land shall be considered as constituting one immovable depends upon the quantity allotted to it by the proprietor. This in practice is, speaking generally, largely determined by the character of the building to be erected. The subdividing of a piece of land into lots and the registration of a plan thereof which gives each lot its own distinctive number is some evidence that the owner will thereafter consider—as the law certainly considers (art. 2167-8 C.C.)—each lot as a separate parcel, and the same conclusion might be drawn where a man acquires lots according to a registered plan of subdivision. The fact, however, remains that notwithstanding the subdividing of a piece of land and the registration of a plan thereof, the owner of contiguous lots may, for building purposes, use two or more of them as one parcel or tract, in which case a row of connected houses on these lots may properly be regarded as one structure or, with the lots, one immovable, as was decided in the *Munn & Shea* case (1).

If nothing more appears than that a proprietor has built, or caused to be built, a house or other building upon a piece of land which comprises a single lot according to a registered plan, *prima facie* the boundaries of the lot would be the boundaries of the immovable. Where, however, as in the case before us, the proprietor of a number of contiguous lots erects thereon a number of buildings, the question is: What constitutes the immovable on which a privilege for materials supplied and used will attach? The answer furnished by the *Munn & Shea* case (1) is: "Such lot or lots as the proprietor for building purposes uses as one parcel or tract." In that case, however, the court was not dealing with buildings entirely unconnected with each other and erected wholly upon individual lots. It was there not called upon to determine the character of the evidence which in such a case would be required to establish that the proprietor was, for building purposes, using two or more

(1) [1928] S.C.R. 398.

contiguous lots as one parcel. There the evidence shewed that the proprietor was building thirteen houses on twelve lots. The houses were all physically joined together and anyone could see at a glance that he was really erecting only one structure. If an intending purchaser of one of the houses had looked at the house it would have been apparent to him that it was physically connected with the house on either side, and he would thus have been put upon his guard to make inquiries as to the privileges against which he must protect himself in case he purchased.

In the present case we have no such evidence. Here we have proprietors who cause to be erected on their nine lots a central house situated wholly on one lot and entirely separate from the adjoining houses. Then we have two pairs of semi-detached houses, each pair wholly erected on two lots and entirely separate from the next pair which also occupies two lots. Under these circumstances can it reasonably be said that the proprietors were using their nine lots as one parcel or tract for building purposes, simply because they made a contract for the erection of nine houses thereon according to a plan which shews that each house is to occupy only one lot? In other words was the making of one contract for all the buildings they intended to erect on the lots sufficient to establish the user by them of the nine lots as one parcel, or must there be on the lots themselves some evidence that they are being used as a single tract for one structure, to justify the application of the principle laid down in the *Munn & Shea* case? (1).

In determining this question regard must be had to the provisions of the law relating to the registration of titles to land according to the cadastral numbers of the lots into which it is subdivided, as well as to the provisions which give to the supplier of materials a privilege on the immovable of the proprietor on whose lot or lots a building is erected. The registration provisions are designed to maintain security of title. The provisions relating to a right of privilege are designed to give a supplier of materials security on the immovable of the proprietor although they do not define just what in each case shall constitute the immovable on which security is given. The privilege provisions of the code and in particular those which provide

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for a privilege without registration until the expiration of thirty days after the completion of the building, constitute an invasion of the strict principle of the registration provisions. The precise extent of that invasion may, in particular cases, be a nice question. We may, however, I think, start with this, that the legislature did not intend the privilege provisions of the code to invade the principle of the registration provisions beyond what was necessary to give effect to the privilege that was being granted, which privilege was intended to be a real protection and to be capable of being successfully worked out in practice. From the fact that the privilege is effectively constituted without registration at the date when the obligation of the proprietor or contractor arises (1), and continues to be effective without registration until thirty days after the completion of the building (provided the materials supplied have been used therein) I think the inference may reasonably be drawn that the legislature did not apprehend that, in the absence of anything on the register, anyone during that period would be misled into believing that no privilege attached. The reason for not requiring notice to be given by means of the register to intending purchasers, or others desiring to acquire an interest in the immovable, must, in my opinion, have been that notice by registration was considered unnecessary in view of the notice furnished by a building under construction or newly completed on the land sought to be dealt with. Anyone proposing to deal with such land would know, or would be presumed to know that privileges might attach thereto. Giving full effect, therefore, to the privilege which the code gives to a supplier of materials, I am of opinion that the evidence necessary to justify the conclusion that a proprietor is using a number of contiguous lots as one parcel for building purposes must be so open and visible that anyone viewing the premises would see thereon sufficient to indicate to an ordinary man the likelihood or probability that the lots were being used as a single parcel. The *prima facie* inference that each separate building with the lot or lots on which it stands is an immovable in itself, must be displaced by something sufficient to put an ordinary man, be he a supplier of materials or an intending purchaser, on inquiry

(1) [1928] S.C.R. 398.

to ascertain if, for building purposes, the lots were being used as a single parcel to which would attach a single privilege for the price of materials used in any building erected thereon.

In the present case I fail to find on the premises anything which, in my opinion, would be sufficient to bring home to the mind of a supplier of materials, or an intending purchaser, the likelihood or probability that the appellants for building purposes were using the nine lots as one parcel. Only the semi-detached houses are physically connected and have the appearance of being one structure. Anyone looking at the centre house would conclude that it with the lot on which it stood constituted a separate immovable. He would also conclude that each pair of semi-detached houses with the ground belonging to them, according to the registered plan, was likewise an immovable within the meaning of art. 2013 C.C. In my opinion, therefore, the application of the principle laid down in the *Munn & Shea* case (1) must be limited in the case at bar, to each pair of semi-detached houses. That is to say, the respondent here, provided he registered a proper memorial, was entitled to a privilege on the detached house for the unpaid price of the material supplied by it which entered into the construction of that house. It was also entitled to a privilege on each pair of semi-detached houses for the unpaid price of its materials entering into the construction of each pair respectively. But it was not entitled to a single privilege on all the lots and houses for the balance of its claim for materials supplied which entered into the different buildings erected on the nine lots.

The respondent not being entitled to a single privilege on the nine lots, is its registered memorial sufficient to support a privilege on any one of the immovables against which it might elect to proceed? It may be that it is, but we are not called upon in this case to decide that question. Before a privilege can be decreed against any one of the appellants' immovables the respondent must establish the price of its materials which went into that immovable. That has not been done with respect to any one of the immovables.

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For the respondent it was argued that if the appellants' contention prevailed it would cast upon a supplier of materials the task of keeping a specific tally of the quantity of its various materials used in the construction of each separate building and that, under modern conditions, this task was an impossible one. That may indeed be so, but it must be borne in mind that the right to a privilege for material supplied and used in the construction of a building is purely a statutory right and extends only as far as the legislature has seen fit to grant it. Whether a more extensive right should be granted is a matter for the consideration of the legislature but not for the courts.

I would allow the appeal with costs and disallow the respondent's claim.

Appeal allowed with costs.

Solicitors for the appellants: *Brosseau & Brosseau.*

Solicitors for the respondent: *Lafleur, MacDougall, Macfarlane & Barclay.*

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*Feb. 19.
*Mar. 20.

MONTREAL TRAMWAYS COMPANY *v.* BRILLANT

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

Trial by jury—Motion to withdraw the case before verdict—Sufficiency of the evidence adduced—Proper order as to a new trial. Arts. 469, 495, 1248 C.C.P.

APPEAL by the defendant appellant from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Duclos J., and ordering a new trial.

The plaintiff (respondent), the widow of one Charles Quirion, claimed compensation for the death of her husband, caused, as she alleged, by the defendant (appellant) company's negligence. He was struck by one of the company's tram cars while attempting to cross its tracks in Montreal, and thereby received injuries from which he died soon after. At the trial, which took place before

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith JJ.

(1) (1928) Q.O.R. 45 K.B. 521.

Duclos J. and a special jury, the plaintiff presented her case, and the defendant then moved that the case be withdrawn from the jury and that the action be dismissed, upon the ground that the plaintiff had introduced no evidence upon which the jury could find a verdict. The Court granted this motion. The plaintiff appealed to the Court of King's Bench, which was unanimous in the view that there was evidence to go to the jury. But the order for a new trial, as framed by the appellate court, directed

que la cause soit remise devant le tribunal de première instance dans l'état où elle se trouvait, au moment où la susdite motion a été faite, et pour qu'il soit procédé suivant la loi.

A. Vallée K.C. for the appellant.

J. P. Lanctot for the respondent.

The Supreme Court of Canada upheld the view of the judges of the appellate court that the trial judge erred in withdrawing the case from the jury and in dismissing the action, and that there was evidence which he should have submitted for the jury's consideration; and the appeal was dismissed with costs. But the court added that " a question arose at the argument as to the form of the order " for a new trial as made by the appellate court, and " attention was directed to the difficulty of continuing the proceedings before the tribunal of first instance in the state in which (they were) when the defendant company launched its motion. In order to comply (with such order), it would seem necessary to resume the proceedings before the judge, and with the special jury, who functioned on the former occasion, and it would be inconvenient, or perhaps impossible, to satisfy these requirements, the judgment at the trial having been given more than a year ago." This Court therefore varied the judgment appealed from " by substituting for the clause (above) quoted a direction to the effect that a new trial shall be had between the parties."

Appeal dismissed with costs.

Solicitors for the appellant: *Perron, Vallée & Perron.*

Solicitors for the respondent: *Lanctot & Hamelin.*

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*June 13

DAME GEORGIANA E. DUGAS (PLAINTIFF) ..... APPELLANT;

AND

OSCAR AMIOT AND OTHERS (MIS-EN-CAUSE) ..... RESPONDENTS.

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

Will—Probate—Validity—Onus probandi—Res judicata—Object and effect of probate—Requête civile—Arts. 857 and 858 C.C.—Art. 1177 C.C.P.

In an action in contestation of a holograph will which had been probated, the burden of proof still lies upon the beneficiary to establish the genuineness of the writing or of the signature of the testator, the probate not having the effect of shifting to the party repudiating the will the burden of proving that the writing or the signature were forged.

The judgment ordering the probate of a holograph will does not constitute *res judicata*. The main object of the probate is to give publicity to holograph wills and to those made in the form derived from the laws of England; and the practical effect of the probate is to enable "parties interested" to "obtain certified copies of the will * * * which are authentic." Then the will takes effect "until it is set aside upon contestation" (Art. 857 C.C.).

Semble that, in the absence of Art. 858 C.C., a *requête civile* would have been a proper remedy to attack the validity of the probate now in question (Art. 1177 C.C.P., par. 6); but Art. 858 C.C. entitled the respondents to do it by way of defence to an action taken by the appellant to enforce the probate.

Judgment of the Court of King's Bench (Q.O.R. 45 K.B. 85) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) reversing the judgment of the Superior Court, at Montreal, Mercier J., and dismissing the appellant's action.

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

S. Poulin K.C. for the appellant.

A. Duranleau K.C. for the respondents.

The judgment of the court was delivered by

RINFRET J.—L'appelante, Dame Georgiana E. Dugas (Madame Wilbrod Thivierge), poursuit pour la somme de $7,000 l'exécuteur testamentaire de feue Dame Marie-

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Rinfret and Lamont JJ.

(1) (1928) Q.O.R. 45 K.B. 85.

Louise Amiot en vertu d'un codicille olographe en date du 11 septembre 1922, qui a été vérifié le 4 mai 1926 et qui se lit comme suit:

Montréal, 11 septembre 1922.

En ce onzième jour de septembre mil neuf cent vingt-deux, moi Marie-Louise Amiot en présence de ma sœur Evélina, je lègue à notre fille adoptive Georgiana (Dame Wilbrod Thivierge) la somme de $7,000 sept mille dollars qu'elle touchera après la mort de ma dite sœur Evélina.

Signé: MARIE-LOUISE AMIOT
EVELINA AMIOT

L'exécuteur testamentaire s'en est rapporté à justice; mais les légataires, en vertu d'un testament antérieur daté du 11 février 1896, ont contesté le codicille en niant qu'il fut écrit et signé par la testatrice.

La Cour Supérieure a maintenu l'action; et la Cour du Banc du Roi l'a rejetée, mais seulement à une majorité de trois juges contre deux. Les questions en litige ont donc donné lieu jusqu'ici à une division égale d'opinion, et l'on voit par là qu'elles ne sont pas sans présenter des difficultés très sérieuses. Ces difficultés proviennent en premier lieu d'une divergence de vues sur les faits, mais également d'une divergence de vues sur le droit.

Après l'examen le plus attentif et le plus minutieux, nous sommes arrivés à la conclusion que le résultat de la cause dépendait de la solution de la question de droit.

A l'âge de neuf ans, l'appelante a été adoptée par Marie-Louise Amiot, qui était célibataire. Elle demeura avec elle jusqu'à l'âge de vingt-trois ans. Elle se maria, passa encore deux ans chez la testatrice, puis alla demeurer à Iberville. Cette ville est à une courte distance de Montréal où résidait la testatrice.

L'appelante resta sept ans sans aller voir sa bienfaitrice. Elle nous dit cependant que cette dernière lui envoyait

des mandats presque tous les quinze jours * * * des mandats de trois piastres tous les quinze jours * * * . Elle a continué à me protéger.

Le 11 septembre 1922 l'appelante vint à Montréal. Les raisons de ce voyage ne sont nullement données dans la preuve. Mademoiselle Amiot était alors malade. Le fait est qu'elle est morte trois mois après. L'appelante ne nous dit pas qu'elle aurait été appelée par Mademoiselle Amiot, ou qu'elle fut induite à faire le voyage à Montréal parce

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que Mademoiselle Amiot était malade, ou même qu'elle savait alors que Mademoiselle Amiot était malade. Elle dit simplement ceci:

En septembre 1922; c'est la servante qui m'a ouvert la porte; je suis entrée le 11 septembre 1922 pour voir les demoiselles (Mlle Amiot vivait avec sa sœur Evélina, également célibataire) parce qu'elles avaient exprimé le désir qu'elles voulaient me voir souvent; elles m'aimaient et je les aimais. C'est là qu'elle m'a donné le codicille.

Cette unique explication du voyage est plutôt curieuse, puisque, de son propre aveu, l'appelante n'était pas allée "voir les demoiselles" depuis sept ans. C'est en cette circonstance que le codicille aurait été écrit et que Mademoiselle Amiot l'aurait remis à l'appelante. Mais il vaut mieux laisser parler cette dernière elle-même dans son langage plutôt décousu:

Q. Racontez donc à la cour ce qui s'est passé?

R. Elle était malade. C'est sa sœur Mademoiselle Evélina, a aidé à se soulever dans le lit, et Mademoiselle Lyman. Elles sont mortes toutes les deux, aujourd'hui.

Q. Mademoiselle Evélina et Mademoiselle Lyman sont mortes, aujourd'hui?

R. Oui, monsieur, à trois semaines d'intervalle.

Q. Qu'est-ce qu'elle vous a dit, Marie-Louise?

R. Elle m'a donné le codicille et elle m'a dit de ne pas en parler à personne pour ne pas qu'Evélina ait du trouble, parce que ça allait mal dans la famille. D'abord, c'était payable après la mort d'Evélina. C'est pour cela qu'elle m'a dit de ne pas en parler, parce que c'était certain qu'elle aurait eu beaucoup de trouble. Marie-Louise m'aimait beaucoup.

* * *

Elle a écrit devant moi.

Q. Qu'est-ce qu'elle vous a dit avant d'écrire?

R. Elle m'a dit qu'elle m'avait promis de me donner quelque chose: "Je tiens ma promesse."

Q. Comment s'y est-elle prise pour écrire?

R. C'est mademoiselle Lyman qui a apporté les effets qu'il fallait: une petite planchette; elle a mis une feuille de tablette et Marie-Louise a écrit. Elle était malade; elle s'est reposée un peu; elle était bien malade.

Q. Vous parlez du codicille?

R. Oui, monsieur.

Q. Il a été écrit devant vous?

R. Devant moi, par mademoiselle Marie-Louise Amiot.

Q. A-t-il été écrit à l'encre?

R. A l'encre, devant moi.

Q. Après l'avoir écrit elle l'a signé?

R. Elle l'a signé.

Q. Et elle vous l'a remis?

R. Elle me l'a remis. C'est là qu'elle m'a dit: "J'ai promis de ne pas t'oublier, je ne t'oublie pas."

* * *

Q. Vous avez trouvé Marie-Louise bien malade?

R. Oui, monsieur, elle était malade trois mois avant sa mort.

Q. Elle était malade au lit?

R. Oui, monsieur, au lit; elle était malade, elle m'a bien parlé cependant; elle avait beaucoup de peine, je vous assure.

Q. Et vous dites qu'elle avait de la difficulté à écrire?

R. Non, monsieur, elle n'avait pas de difficulté à écrire; elle était bien faible, elle s'est reprise.

Q. Vous avez constaté qu'elle était faible?

R. Pas faible.

Q. Elle s'est reprise plusieurs fois?

R. Elle s'est reprise pour se reposer; quand on est malade, on se repose pour faire quelque chose.

Q. Combien de fois s'est-elle reprise?

R. Deux ou trois fois. Je l'ai dit une fois, c'est assez.

* * *

Q. A qui le document a-t-il été donné, en premier lieu?

R. Marie-Louise l'a remis à Evélina; elle l'a plié devant moi et me l'a remis.

* * *

Q. D'après votre déclaration, je comprends que mademoiselle Lyman se serait mise d'un côté du lit et Evélina de l'autre pour soulever Marie-Louise et lui permettre de s'asseoir dans son lit pour écrire le document?

R. Il y en avait seulement qu'une le temps qu'elle a écrit; l'autre lui donnait ce qu'il fallait pour écrire. Elles l'ont soulevée toutes les deux, après cela il n'y en avait seulement qu'une qui la soutenait le temps qu'elle a écrit et l'autre lui donnait ce qu'il fallait en main.

* * *

J'ai dit que Marie-Louise avait écrit le document, qu'elle l'avait signé et l'avait donné à Evélina; Evélina me l'a donné de suite. Je n'ai pas vu écrire Evélina, Marie-Louise signait souvent Evélina.

* * *

J'ai vu Marie-Louise signer le document; Evélina ne l'a pas signé, elle me l'a remis de suite.

Q. Qu'est-ce que cela veut dire "de suite"?

R. Evélina, ça lui aurait pris bien trop de temps pour signer.

* * *

Q. Le document est parti des mains de Marie-Louise et est allé dans celles d'Evélina?

R. Oui, monsieur.

Q. Et Evélina vous l'a remis sans signer ce qu'il avait dessus?

R. Non, monsieur.

Q. Alors, ce n'est pas elle qui a écrit?

R. C'est Marie-Louise qui a écrit; elle a signé probablement le nom d'Evélina, parce qu'Evélina était bien lente à écrire, elle était bien énervée.

Q. Vous êtes prête à jurer qu'Evélina, dont le nom apparaît sur le document, n'a pas elle-même signé son nom, là?

R. C'est mademoiselle Marie-Louise qui a signé tout le document.

Q. Et vous le jurez positivement?

R. Oui, monsieur.

Nous croyons que les extraits qui précèdent contiennent tout ce qu'elle a dit au cours de son témoignage sur la façon

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dont les choses se seraient passées lorsque le codicille fut écrit. Ainsi nous en avons le récit de sa propre bouche. Cela est extrêmement important, puisqu'elle est restée le seul témoin survivant qui ait pu raconter les faits à l'enquête, Mademoiselle Evélina Amiot, la sœur de la testatrice, et Mademoiselle Lyman, sa servante, étant mortes non seulement avant le procès, mais même avant que le codicille ait été présenté à la cour pour fins de vérification.

Le soir du 11 septembre 1922, l'appelante revint à Iberville, et voici comment son mari, M. Wilbrod Thivierge, nous raconte son retour:

Q. Vous rappelez-vous son retour de Montréal, il y a quelques années, alors qu'elle aurait eu en sa possession un document; vous rappelez-vous cette circonstance?

R. Nous étions, moi et Lucien St-Arnaud à la maison.

* * *

Nous étions allés à la gare, au-devant de Madame Thivierge, ma femme. Je lui ai demandé si elle avait fait un bon voyage. Elle m'a dit: "Oui, j'ai fait un bon voyage." * * * Alors elle m'a montré le papier, je l'ai lu et l'ai montré à M. St-Arnaud.

Q. Qu'est-ce qu'elle vous a montré?

R. Le document.

Q. Voulez-vous examiner le document produit en cette cause, étant un des feuillets de la pièce P-I, supposé être l'original d'un codicille, et dire si c'est ce document qu'elle vous a montré?

R. C'est bien celui-là.

Q. Vous l'avez lu, dans le temps?

R. Je l'ai lu.

Q. Vous rappelez-vous l'année?

R. Le onze septembre mil neuf cent vingt-deux.

Q. Qu'est-ce qui a été fait de ce document?

R. Nous l'avons serré dans un coffre de sûreté.

Q. Et jusqu'à quelle époque?

R. Jusqu'à la mort d'Evélina Amiot.

Q. Qu'est-ce que vous en avez fait ensuite?

R. Je l'ai donné au notaire Guillet, d'Iberville.

Nous avons omis de reproduire les objections faites par l'avocat des intimés et qui ont entrecoupé sa déposition.

Lucien St-Arnaud a affirmé se rappeler la circonstance du retour de Madame Thivierge et qu'elle avait à ce moment-là "son codicille" en sa possession. Il avait alors dix-huit ans et son témoignage a été rendu cinq ans après. Il convient de reproduire cette partie de son contre-interrogatoire:

Q. Etes-vous parent avec monsieur et madame Thivierge?

R. Non, monsieur.

Q. Vous êtes intime?

R. Oui, monsieur.

Q. Vous n'avez pas examiné le document ce soir-là?
R. Non, monsieur; je ne l'ai pas examiné; je l'ai vu seulement.
Q. Vous n'en avez pas pris de photographie?
R. Non, monsieur.
Q. Vous n'avez pas pris la forme, les grandeurs?
R. Non, monsieur.
Q. On vous l'a passé sous le nez, purement et simplement?
R. Oui, monsieur.
Q. Vous n'avez rien vu dessus?
R. Oui, monsieur.
Q. Vous n'avez rien vu dessus?
R. Non, monsieur; seulement, je l'ai vu.
Q. Vous le reconnaissez?
R. Oui, monsieur.
Q. Comment pouvez-vous jurer que vous reconnaissez ce document? C'est un papier carré?
R. Oui, monsieur, je l'ai vu; c'est celui-là.
Q. Vous êtes en état de jurer aujourd'hui, sans avoir pris ce que vous avez vu ce soir-là?
R. Oui, monsieur.
Q. L'avez-vous regardé.
R. Je l'ai regardé.
Q. Avez-vous regardé du côté de l'écriture ou bien sur le dos?
R. Du côté de l'écriture.
Q. Etait-il exactement comme aujourd'hui?
R. Je ne peux pas vous dire, bien juste, je ne l'ai rien que vu en passant, pour moi il est à peu près pareil.

Marie-Louise Amiot décéda le 12 décembre 1922. Comme nous l'avons vu, elle avait fait son testament devant notaire le 11 février 1896, en vertu duquel sa sœur, Evélina, était instituée légataire universelle en usufruit sa vie durant et les intimés étaient constitués légataires en nue-propriété. Evélina Amiot fit au percepteur du revenu une déclaration des biens laissés dans la succession de sa sœur. Cette déclaration est faite devant notaire. On y trouve que sa sœur est décédée

ayant laissé pour dernier testament non modifié ni révoqué celui qu'elle a fait devant Maître Perrault, notaire, le onzième jour du mois de février en l'année mil huit cent quatre-vingt-seize (1896).

Evélina Amiot mourut au mois de mars 1926.

Mademoiselle Lyman mourut le 2 mai 1926.

Le codicille fut vérifié le 4 mai 1926, par l'intermédiaire de Maître G. Guillet, notaire.

L'enquête ne dévoile pas si le codicille fut remis à Maître Guillet pour lui permettre de préparer les procédures de vérification avant la mort de Mademoiselle Lyman. On voit, sur les procédures, que ce notaire demeure à Iberville. La vérification a eu lieu à Montréal. Vu la courte distance entre Iberville et Montréal, on ne peut conclure nécessaire-

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ment de ce seul fait que le notaire a eu les documents avant le 2 mai.

La requête pour vérification et les affidavits qui l'accompagnaient sont datés du 4 mai. Toutefois, il a fallu le temps de les préparer. On constate maintenant que Mademoiselle Lyman était morte deux jours avant; mais la preuve ne démontre pas que lorsque l'appelante alla porter le codicille au notaire Guillet elle savait que Mademoiselle Lyman était morte.

Comme on l'a vu, l'appelante explique pourquoi elle n'aurait pas songé plus tôt à faire vérifier le codicille. Ce serait parce qu'il ne lui conférait aucun droit tant qu'Evélina Amiot vivait. On peut raisonnablement déduire de son témoignage qu'elle ignorait que la loi exigeait une vérification. Comme elle le dit elle-même: "Le notaire s'est arrangé avec cela." Son explication vaut plutôt pour indiquer comment il se fait qu'elle n'en ait pas parlé au notaire avant la mort d'Evélina. On n'a pas cherché à élucider ce point davantage au cours du contre-interrogatoire.

Pour obtenir la vérification du codicille, l'appelante et son mari ont assermenté l'affidavit suivant:

Province de Québec.
District d'Iberville.

Nous soussignés, Wilbrod Thivierge et Dame Georgianna Emélie Dugas, étant dûment assermentés, déclarons ce qui suit:

1° Nous avons connu Demoiselles Marie-Louise Amiot et Evélina Amiot, depuis au delà de quinze ans; et nous avons eu l'occasion, en maintes circonstances, de les voir écrire, et de lire leur écriture;

2° Après avoir pris connaissance du codicille olographe de ladite Marie-Louise Amiot, daté le 11 septembre 1922, annexé aux présentes, nous sommes en position de déclarer, et nous déclarons tous deux que ce codicille du onze septembre mil neuf cent vingt-deux, a été entièrement écrit et signé de la main de ladite Marie-Louise Amiot, à l'exception de la signature "Evélina Amiot" qui a été écrite de la main de Demoiselle Evélina Amiot, sœur de ladite Marie-Louise Amiot.

Et nous avons signé à Iberville, ce quatre de mai mil neuf cent vingt-six.

GEORGIANNA DUGAS
WILBROD THIVIERGE.

Assermenté devant moi, à Iberville, ce quatre mai mil neuf cent vingt-six.

G. GUILLET, notaire,
C.C.S.D. d'Iberville.

Cet affidavit est faux sur un point capital. Il a été prouvé indiscutablement à l'enquête que la signature

" Evélina Amiot " n'avait pas été écrite de la main de cette dernière. L'appelante, du reste, l'a reconnu expressément.

M. Wilbrod Thivierge, l'époux de l'appelante, n'a pas jugé à propos d'expliquer, lors de son témoignage, pourquoi, afin d'obtenir la vérification du codicille, il avait juré que la signature " Evélina Amiot " avait été écrite de sa propre main. Voici comment l'appelante a expliqué la chose, en autant qu'elle était concernée:

Q. Et vous avez déclaré cela sous votre signature et sous serment, le quatre (mai) mil neuf cent vingt-six (1926) avec votre mari M. Wilbrod Thivierge?

R. Je n'ai pas déclaré qu'Evélina avait signé, jamais.

Q. Est-ce votre signature qu'il y a au bas de l'affidavit accompagnant votre requête?

R. Oui, monsieur; j'ai pu signer sans lire ce qu'il y avait dessus; je n'ai lu aucun papier, cela je peux le dire; je n'ai pas lu le papier, mais j'ai signé.

Q. C'est la seule explication que vous avez à donner?

R. Je peux dire que c'est Marie-Louise qui a fait le codicille.

Q. Vous prétendez avoir donné un affidavit pour la vérification de ce fameux codicille sans avoir pris connaissance de l'affidavit; c'est cela que vous jurez?

R. J'ai déjà répondu à la même chose.

Q. Je vous demande si vous avez assermenté l'affidavit accompagnant votre requête pour vérification sans lire ou vous faire lire l'affidavit par le notaire qui l'a pris?

R Je ne l'ai pas lu.

Q. Jurez-vous que le notaire ne vous a pas lu ce document-là?

R. J'avais un jeune bébé qui était malade à ce moment; je ne l'ai pas lu.

Q. Aviez-vous votre bébé dans les bras au moment où vous avez signé?

R. Je l'ai donné à mon mari pour signer. J'aurais dit la même chose que je dis aujourd'hui; je suis certaine de moi.

Q. Surtout depuis qu'Evélina et mademoiselle Lyman sont décédées. Vous jurez que vous ne savez pas ce que vous avez signé lorsque vous avez signé l'affidavit en question?

R. Je jure que Marie-Louise a fait son codicille.

Q. Vous jurez que vous ne savez pas ce que vous avez signé lorsque vous avez signé l'affidavit en question?

R. Je ne l'ai pas lu, moi.

Q. Vous ne savez pas ce que vous avez signé?

R. * * *

Q. C'est votre signature, cela?

R. Oui, monsieur.

Q. Est-ce que le notaire vous a lu l'affidavit?

R. Il me l'a lu, probablement; il me l'a peut-être lu vite; je ne l'ai peut-être pas tout compris, parce que j'étais occupée avec mon enfant dans les bras, je n'étais pas assez intéressée.

Nous avons tâché de relater tous les faits que le dossier nous fait connaître, en notant à mesure, sur le moment même, les réflexions que chacun de ces faits nous inspirait.

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Il faut ajouter qu'il y a eu, devant le juge de première instance, une preuve très importante par comparaison des écritures. Les experts entendus étaient tous des hommes d'expérience. Leurs travaux témoignent d'une grande compétence et d'une conscience minutieuse. Ils n'ont rien négligé pour faciliter la tâche des tribunaux. Malheureusement ils n'ont pas été d'accord et ils ont laissé la Cour Supérieure et la Cour du Banc du Roi dans l'indécision.

Les circonstances sont plutôt défavorables à l'appelante. Au cours de l'examen de la preuve, nous avons déjà procédé à l'analyse des faits saillants. Il en est qui militent en faveur de la demanderesse: il en est d'autres qui s'opposent à sa version avec également de force. Il pouvait être "logique, juste et raisonnable", comme le dit le juge de première instance, que Marie-Louise Amiot fît cette disposition en faveur de sa fille adoptive. Cette raison n'existait pas lors du testament, puisque l'adoption n'a eu lieu que deux ans plus tard.

D'autre part, il est certain que Mademoiselle Amiot était une personne très particulière et très méticuleuse. Il paraît étrange qu'à l'occasion d'une simple visite inattendue de l'appelante, qu'elle n'avait pas vue depuis plusieurs années, elle ait songé à brûle-pourpoint à faire un testament en sa faveur dans les circonstances difficiles où elle se trouvait ce jour-là. Sa mentalité et son caractère, tels qu'ils sont révélés par le dossier, portent à croire qu'elle aurait fait venir un notaire pour un acte qui, pour elle, avait une importance considérable. Ce que nous connaissons de Mademoiselle Amiot, à travers ses écrits et les témoignages rendus, donne à toute l'affaire une allure d'improbabilité.

Même en accordant au témoignage du mari et à celui de St-Arnaud tout le crédit possible, ils prouveraient seulement que le document existait le soir du 11 septembre 1923. Ils n'ajoutent rien de plus. Ils n'établissent pas l'authenticité du document. Ils n'écartent pas la possibilité que ce document ait été fabriqué avant de leur avoir été montré.

Puis, tant d'autres présomptions s'accumulent contre l'appelante: le codicille ne réfère en aucune façon au testament; il dispose d'une somme de $7,000, qui est apparemment supérieure à la valeur totale des biens que Marie-Louise Amiot a laissés; il semblerait que la testatrice n'eût

pas rédigé le document tel qu'il est, comme, par exemple, l'emploi du mot " dollars ", alors qu'il est avéré qu'elle se servait toujours du mot " piastres ". La mention de la présence d'Evélina dénoterait que Marie-Louise s'en servait comme témoin. Pourquoi alors ne l'avoir pas fait signer? Pourquoi même n'avoir pas demandé à Mlle Lyman, qui était là, de signer comme témoin? Tous ces petits détails, qui ne sont pas insignifiants,—car, dans une cause de cette nature, ce sont surtout les petits détails qui comptent,—prennent une importance considérable quand on songe à la personne que l'enquête et les écrits émanant d'elle nous ont dépeinte.

Il y a ensuite que le document n'est pas resté dans les papiers de la testatrice. C'est l'appelante qui l'avait en sa possession. Elle a attendu près de quatre ans avant de voir à sa vérification, ou, si l'on veut, avant d'en parler à son notaire et de le lui remettre pour qu'il fît les procédures requises par la loi. A part cela, il arrive qu'elle ne prend sa décision que lorsque Evélina Amiot et Mlle Lyman sont mortes. L'on se trouve en présence de cette coïncidence que les deux témoins qui pourraient la contredire ne sont plus là. Enfin, Evélina Amiot, qui, d'après la version de l'appelante, ne saurait ignorer l'existence du codicille, fait par devant notaire une déclaration au percepteur des droits de succession et y déclare que le testament authentique de sa sœur en date du 11 février 1896 est son " dernier testament " et qu'elle l'a " non modifié ni révoqué ". Il est difficile de penser que si Evélina Amiot, comme on l'a suggéré, avait connu l'existence du codicille elle ne l'eût pas mentionné dans cette déclaration solennelle.

On l'admettra, l'ensemble et le poids des circonstances se réunissent pour jeter le soupçon sur la version de l'appelante. On prétend que son témoignage est resté " intact " et que les conjectures même les plus graves ne devraient pas le faire mettre de côté. Cependant on ne saurait dire ici que la crédibilité de la demanderesse n'était pas en jeu puisque la cause était une attaque contre cette crédibilité. Malheureusement pour elle, la déposition assermentée qu'elle a donnée et qui a été produite pour les fins de la vérification du codicille contient une affirmation très importante qu'elle a reconnue fausse dans son témoignage. Il se peut que l'explication qu'elle en a donnée soit une légère

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atténuation. On peut être indulgent pour l'appelante en pensant qu'elle s'en est rapportée au notaire. Il reste cependant qu'elle aurait signé sans savoir et qu'elle aurait juré sans comprendre.

Il résulte de tout cela, des circonstances et de la preuve, un doute extrêmement sérieux qui a laissé dans l'incertitude la majorité de la Cour du Banc du Roi, et l'on peut dire également la Cour Supérieure. Cette dernière a décidé en faveur de l'appelante parce qu'elle fut d'avis qu'il incombait

au mis-en-cause * * * d'établir * * * de prouver hors de tout doute que le codicille qui fait la base de la présente action était un codicille faux;

et, pour cette raison, elle a tranché le doute en faveur de l'appelante. La Cour du Banc du Roi a été d'avis, au contraire, qu'il incombait " à la demanderesse de prouver la signature du codicille " et elle a donc infirmé le jugement de première instance en déboutant l'appelante des fins de son action.

Une étude attentive du dossier n'a pas amené chez nous une conviction suffisante pour nous permettre de juger différemment des faits et des circonstances. Il nous faut donc décider la question de droit qui se pose et qui est de savoir à qui incombe le fardeau de la preuve. De cette décision dépend la solution de la cause.

La loi est contenue dans le premier paragraphe de l'article 857 et dans l'article 858 du Code civil:

857. Le testament olographe et celui fait suivant la forme dérivée de la loi d'Angleterre sont présentés pour vérification au tribunal ayant juridiction supérieure de première instance dans le district où le défunt avait son domicile, dans celui où il est décédé, ou à l'un des juges de ce tribunal, ou au protonotaire du district. Le tribunal, le juge ou le protonotaire reçoit les déclarations par écrit et sous serment de témoins compétents à rendre témoignage, lesquelles demeurent annexées à l'original du testament, ainsi que le jugement, s'il a été rendu hors de cour, ou une copie certifiée, s'il a été rendu par le tribunal. Il peut ensuite être délivré aux intéressés des copies certifiées du testament, de la preuve et du jugement, lesquelles sont authentiques, et font donner effet au testament, jusqu'à ce qu'il soit infirmé sur contestation.

* * *

858. Il n'est pas nécessaire que l'héritier du défunt soit appelé à la vérification ainsi faite d'un testament, à moins qu'il n'en soit ainsi ordonné dans des cas particuliers.

L'autorité qui procède à cette vérification prend connaissance de tout ce qui concerne le testament.

La vérification ainsi faite d'un testament n'en empêche pas la contestation par ceux qui y ont intérêt.

L'on voit par là que la vérification peut se faire *ex parte*. "Il n'est pas nécessaire que l'héritier du défunt soit appelé." On peut affirmer que, dans la pratique, il est exceptionnellement rare qu'il le soit.

En plus, "la vérification n'empêche pas la contestation par ceux qui y ont intérêt". Et le Conseil privé a décidé que cette partie de l'article conservait son effet même à l'égard de ceux qui s'étaient opposés à la vérification. (*Migneault* v. *Malo* (1); voir aussi *Wynne* v. *Wynne* (2).) Le jugement de vérification n'a donc pas l'effet de la *chose jugée*. Et l'on peut dire que la juridiction exercée en ces matières est plutôt "gracieuse ou non contentieuse" que judiciaire. (Migneault, Droit civil canadien, vol. 4, p. 314.)

Sir Robert Phillimore, rendant le jugement du Conseil privé dans la cause de *Migneault* v. *Malo* (1), signale la différence essentielle entre le "probate" de la loi anglaise et la "vérification" suivant le système de la province de Québec. Il fait remarquer que ce qui est "somewhat loosely termed proving" est, en réalité, un simple "registering". M. le juge Badgley, dans la même cause, avait déjà dit (3):

The *vérification* of the common law and the probate of the statute (le code), similar in their legal result, have effect only upon the factum of the will to be proved, and the incidents of its deposit and enregistration.

Envisagé de ce point de vue, le principal but de la vérification serait de donner la publicité au testament olographe et à celui fait suivant la forme dérivée de la loi d'Angleterre. Un autre but, dont parle le code, serait qu'il

peut ensuite être délivré aux intéressés des copies certifiées du testament, lesquelles sont authentiques.

Mais en soi, d'après le texte du code, le testament vérifié ne change pas de caractère. La vérification n'en fait pas un acte authentique; les copies seules le sont. Le code poursuit:

et font donner effet au testament jusqu'à ce qu'il soit infirmé sur contestation.

Textuellement, cela voudrait dire que les copies authentiques du testament, de la preuve et du jugement "font donner effet au testament". Il faut plutôt comprendre que l'effet du testament vérifié subsiste "jusqu'à ce qu'il soit infirmé". Mais en dehours de la publicité, qui est évi-

(2) [1921] 62 Can. S.C.R. 74 (1) L.R. 4 P.C. 123.
(3) [1869] Q.O.R. 20 S.C. 47, at p. 54.

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dente, et du pouvoir d'en donner des copies qui y est exprimé, le code n'indique aucun effet qui résulterait de la vérification.

L'une des conséquences est-elle que le fardeau de la preuve s'en trouve déplacé? Suffit-il ensuite au bénéficiaire d'un testament vérifié d'invoquer cette vérification pour contraindre " ceux qui y ont intérêt " à faire une preuve négative? Du moment que le testament vérifié est contesté, est-ce au bénéficiaire qu'il incombe de prouver l'écriture et la signature du testament vérifié, comme l'a décidé la majorité de la Cour du Banc du Roi en la présente cause, ou, est-ce celui qui répudie le testament qui doit prouver que cette écriture et cette signature sont fausses, suivant le jugement de la Cour Supérieure?

Il semblerait extraordinaire que la vérification, à laquelle il n'est pas nécessaire d'appeler les intéressés, pût modifier la position et les droits de ces derniers. Avant la vérification, celui qui voudrait opposer un testament olographe à l'héritier du défunt aurait le fardeau de la preuve. Par le seul fait d'une vérification à laquelle l'héritier n'aurait pris aucune part, qui aurait même pu avoir lieu hors de sa connaissance, c'est sur lui maintenant que ce fardeau reposerait, et il serait ainsi privé de ses avantages antérieurs. De prime abord, cela paraît injuste. On incline à croire que le sens des articles 857 et 858 C.C. est plutôt à l'effet que, advenant la contestation, les parties seront placées dans la même position que s'il n'y avait pas eu vérification. Il y a déjà en ce sens dans la jurisprudence de la province de Québec l'opinion clairement exprimée par sir Melbourne Tait, dans *St. George Society* v. *Nichols* (1). Nous n'interprétons pas l'arrêt *re Doucet* v. *MacNider* (2), où d'ailleurs il s'agissait de capacité mentale, comme exposant une opinion différente.

Quant au Rapport des Commissaires (5e Rapport, 178), il parle de cette section comme traitant

de la vérification *préliminaire* qui se fait devant le juge (des testaments) qui ne sont pas faits en la forme authentique.

Il ajoute qu'il y a

intérêt à ce que (leur) validité subisse de suite une première épreuve.

(1) [1894] Q.O.R. 5 S.C. 273, at p. 291.

(2) [1905] Q.O.R. 14 K.B. 232.

On pourrait résumer le point de vue que nous venons d'exposer par une formule de la doctrine française, avec laquelle il ne faut cependant pas faire d'analogie, vu que le système est différent, mais qui est commode pour en exprimer la pensée: En principe, en ce qui regarde la force probante, le testament, même après sa vérification, n'est toujours qu'un acte sous seing privé. (2 Baudry-Lacantinerie, 3e éd., Des donations, vol. II, nº 1981 et suiv.; 13 Laurent, nº 239 et suiv.; 10 Aubry et Rau, 5e éd., parag. 669; 21 Demolombe, nº 143 et suiv.).

Pour décider la cause qui nous est soumise, cependant, on peut éviter d'aller aussi loin. On pourrait même admettre, pour les besoins de l'argument, que le jugement de vérification constitue une preuve provisoire. En l'absence de l'article 858 C.C., nous n'avons pas de doute que la requête civile serait un moyen efficace dans les cas prévus à l'article 1177 du Code de procédure pour faire mettre de côté un jugement de vérification; par suite de l'article 858 C.C., les intimés, dans la présente cause, pouvaient se contenter de demander l'annulation de la vérification par leur défense. C'est ce qui fut décidé dans *Migneault* v. *Malo* (1). C'est ce qu'ont fait les intimés. Or, le faux affidavit qui a servi de base à la vérification du codicille de Marie-Louise Amiot est une cause bien suffisante pour mettre de côté cette vérification. La déclaration erronée et inexacte qui s'y trouvait portait sur un point que l'officier qui a prononcé la vérification a pu tenir pour décisif, puisqu'il laissait entendre que le codicille était attesté par un témoin dont la signature était reconnue. Nous avons donc un élément qui, en matière ordinaire, ferait accueillir une requête civile: un jugement prononcé sur une preuve dont la fausseté a été depuis découverte (art. 1177 C.P.C.). Il importe peu, il nous semble, que la vérification soit mise de côté avant ou pendant le procès qui s'est engagé sur le codicille. La Cour du Banc du Roi a annulé la vérification du testament et nous sommes d'avis qu'elle a eu raison. En l'espèce, la vérification étant écartée, il est clair qu'à l'égard du codicille, les parties se trouvaient au même état qu'elles étaient auparavant. L'appelante avait donc à prouver le codicille qu'elle invoquait et elle n'y a pas réussi.

(1) L.R. 4 P.C. 123.

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Il s'ensuit que nous sommes d'accord avec la majorité de la Cour du Banc du Roi et que nous confirmons son jugement, avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Poulin & Demers.*

Solicitors for the respondents: *Duranleau, Angers & Monty.*

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*Aug. 3.
*Aug. 8.

IN RE SINGER

Habeas corpus—Jurisdiction of Judge of Supreme Court of Canada—Supreme Court Act, R.S.C., 1927, c. 35, s. 57—Commitment by Commissioner for contempt of order made under s. 22 of Combines Investigation Act, R.S.C., 1927, c. 26.

The jurisdiction of a judge of the Supreme Court of Canada, under s. 57 of the *Supreme Court Act,* R.S.C., 1927, c. 35, to issue a writ of *habeas corpus,* held not to extend to the case of a commitment by a commissioner appointed under the *Combines Investigation Act,* R.S.C., 1927, c. 26, for contempt of an order made by the commissioner under s. 22 thereof.

APPLICATION for a writ of *habeas corpus.* It was alleged on behalf of the applicant that the warrant under which he was restrained of his liberty and confined in gaol did not disclose on its face a right or justification so to restrain or confine. The warrant was made by a Commissioner appointed under the *Combines Investigation Act,* R.S.C., 1927, c. 26, and ordered the applicant's detention in gaol until he should have purged his contempt of an order made by the Commissioner under s. 22 of the said Act, for that the applicant did at Toronto, Ontario, on July, 22, 1929, "unlawfully refuse after being lawfully ordered to do so, to be examined under oath before me, a Commissioner under the said Act, by Order in Council P.C. No. 1311, of the Dominion of Canada; and for that he did at Toronto aforesaid on the said date unlawfully refuse to produce the documents, books, and papers of [certain associations named] ordered by me to be produced by him under the authority vested in me by the said Act as the Commissioner so appointed."

*Newcombe J. in Chambers.

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W. F. O'Connor K.C. and *F. D. Hogg K.C.* for the applicant.

No one *contra.*

NEWCOMBE J.—My jurisdiction to issue a writ of *habeas corpus ad subjiciendum* is limited by section 57 of the *Supreme Court Act,* and it may be exercised only " for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada."

My difficulty about this application is to bring it within the words of the statute. This is not the sort of commitment intended, and, moreover, the inquiry in which the commissioner was engaged was not " in any criminal case " within the meaning of the law. The statute evidently points to a criminal prosecution sanctioned by the Parliament of Canada and charging a case visited by commitment. When Parliament, for the purpose of defining jurisdiction, speaks in the general terms used of " commitment in a criminal case under an Act of the Parliament," I think it may safely be held to the distinct and unequivocal meaning, and therefore restricted to commitment for an offence which Parliament has constituted or declared; I would exclude a mere incidental or collateral exercise of the power which a commissioner for inquiry possesses to enforce attendance or obedience on the part of a witness, which, although conferred by reference upon a commissioner under sections 18 and 22 of the *Combines Investigation Act,* affects only his jurisdiction to make an order. There are provisions in this Act, under the caption " Offences and Penalties," sections 33, 34, 36 and 38, by which it is enacted that a person shall be guilty of an offence, and liable, on summary conviction or indictment, to fine or imprisonment, who wilfully interferes with the proceedings of a commissioner, or fails to attend, or to give evidence, or to produce books and papers, or who otherwise obstructs, impedes or prevents the investigation. These provisions, or some of them, doubtless sanction commitment in the sense in which the *Supreme Court Act* uses the term; but the jurisdiction to impose the appropriate penalty and to adjudge the commitment is conferred, not upon the commissioner, but upon the competent tribunals under the enactments of the *Criminal Code* with respect to summary convictions or indict-

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able offences; and the commitment in question is not, and does not profess to be, founded upon any of these provisions. It seeks to apply a common law remedy. I refuse the application.

Application refused.

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*April 29, 30.
*June 13.

HAROLD WILLIAM KEAY (PLAINTIFF) . . . APPELLANT;

AND

ALBERTA CO-OPERATIVE WHEAT PRODUCERS, LTD., AND ALBERTA POOL ELEVATORS, LTD. (DEFENDANTS) . . . . . } RESPONDENTS.

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

Arbitration—Action by member of Wheat Pool against the Pool—Whether statutory arbitration provisions applied to matters in question—Stay of action—C. 7 of 1924, Alta. (the Special Act), s. 18; Co-operative Associations Act, R.S.A., 1922, c. 160, s. 20; Arbitration Act, R.S.A., 1922, c. 98, s. 5.

Plaintiff entered into a "marketing agreement" with the defendant "Pool" (Alberta Co-operative Wheat Producers, Ltd.). It recited that plaintiff desired to co-operate with other growers in producing and marketing wheat, that the Pool had been formed with power to act as the agent of its members as to marketing, that plaintiff desired to become a member and to enter, with other growers, into the agreement, that the agreement, although individual in expression, was one of a series between the Pool and the growers of wheat in Alberta and should constitute one contract between the several growers signing it and the Pool. In the agreement plaintiff applied for a share of the capital stock of the Pool, which covenanted to allot same to him. Plaintiff agreed to deliver his wheat for certain years and the Pool agreed to market it. Provision was made for retention by the Pool, out of the returns for sale of the wheat, of its expenses, of 1% as a commercial reserve to be used for any of its purposes, and of an amount for investment in shares of an elevator company. After expiration of the agreement plaintiff brought action, claiming that he had not been given a proper accounting, nor payment of his proper proportion of the proceeds of the wheat sold, that certain excess earnings had been inequitably distributed among the Pool members, and that shares in an elevator company purchased with his money had not been put in his name; and he claimed an accounting, payment of his proper share, transfer into his name of said elevator company shares, and damages. The Pool moved to stay proceedings on the ground that the matters in controversy must be decided by arbitration. The Pool was in-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

corporated under the Alberta *Co-operative Associations Act*, which provided for appointment of trustees, whose duties should be to conduct and manage all the business of the association, and (s. 20) that "every dispute between any member or members of an association * * * and the trustees, treasurer or other officer thereof, shall be decided by arbitration in manner directed by the rules or by-laws of the association." By Special Act (1924, c. 7) the Pool's incorporation and existing by-laws were confirmed, and it was provided that the provisions of the *Co-operative Associations Act* should (except as superseded) continue to apply to it. Under its by-laws the trustees had power to conduct and manage all its business, and to enter into and carry into effect the marketing agreement. By-law 57 provided that "every dispute between any member * * * and the trustees, treasurer or other officer" of the Pool should be decided by arbitration (with a proviso that this provision should not apply as between the Pool and any member who failed to fulfil any covenant in the marketing agreement).

Held: (1) Existence of a "dispute" was shewn by the allegations and demands in the statement of claim. Although it would have been better practice to allege, in the affidavits supporting the Pool's motion, that a dispute had existed prior to the commencement of the action, failure to do so was not fatal, provided the allegations in the statement of claim were consistent only with the existence of such a dispute. The issue of a writ to enforce a right claimed is, of itself, some evidence of the existence of a dispute.

(2) As to plaintiff's contention that any dispute was with the Pool, and not with its "trustees, treasurer or other officer" within the meaning of said arbitration provisions:—As it was the trustees' duty to carry into effect the provisions of the marketing agreement, a dispute as to the proper manner of carrying out those provisions was properly termed a dispute with the trustees. But, in any case, in view of the purposes of the Pool and the whole scheme and purpose shewn in the Pool legislation (*Municipal Bldg. Soc.* v. *Kent*, 9 App. Cas., 260, at pp. 284-5) it must be taken that the legislative intention was that the arbitration provisions should apply to all disputes arising under the marketing agreement, unless expressly excepted in the by-laws. (This conclusion received support from the proviso of by-law 57. It was unnecessary had it not been intended that the arbitration provisions should apply to the marketing agreement. By c. 7 of 1924, the by-laws, including by-law 57 with its proviso, had received legislative sanction, the legislature thus impliedly declaring that the arbitration provision should apply to disputes under the agreement except those covered by the proviso).

Judgment of the Appellate Division, Alta., [1929] 1 W.W.R. 413, affirmed, except that it was varied so as to stay proceedings instead of dismissing the action.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1), which reversed the judgment of Walsh J. (2), and dismissed the plaintiff's action.

(1) [1929] 1 W.W.R. 413. (2) [1929] 1 W.W.R. 96.

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The defendant, Alberta Co-operative Wheat Producers, Limited, moved before Walsh J. for an order that all further proceedings in the action be stayed, pursuant to s. 5 of the *Arbitration Act*, R.S.A., 1922, c. 98, on the ground that the matters in controversy must be decided by arbitration. The other defendant moved for an order dismissing it from the action on the grounds of non-disclosure of cause of action and misjoinder, and, in the alternative, asked for an order staying proceedings. The motions were dismissed (1). On appeal by the defendants, the Appellate Division held (2) that the matters in dispute in the action were properly the subject of arbitration and not the proper subject of litigation, and that the action should be dismissed. Special leave to appeal to the Supreme Court of Canada was granted to the plaintiff by the Appellate Division.

The nature of the action, the material facts of the case, and the statutory provisions involved, are sufficiently stated in the judgment now reported. The appeal was dismissed with costs, but the order of the Appellate Division was varied so as to stay proceedings instead of dismissing the action.

A. A. McGillivray K.C. for the appellant.

A. Macleod Sinclair K.C. for the respondents.

The judgment of the court was delivered by

LAMONT J.—In this appeal we have to determine whether the appellant (plaintiff) is entitled to maintain the action or whether the matter in controversy between the parties must be decided by arbitration.

The appellant is a grower of wheat in the province of Alberta and also a member of the Alberta Co-operative Wheat Producers, Limited (hereinafter called the "Pool"). The Alberta Pool Elevators, Limited, is a company organized and controlled by the Pool for the purpose of furnishing the Pool members with the elevator facilities necessary for the handling of their wheat.

The Pool was incorporated in August, 1923, under the *Co-operative Associations Act*, and, on or about April 1, 1924, the appellant and the Pool entered into an agreement, which I shall hereinafter refer to as the "Marketing Agree-

(1) [1929] 1 W.W.R. 96. (2) [1929] 1 W.W.R. 413.

ment." That agreement recited that the appellant was desirous of co-operating with other growers in the producing and marketing of wheat; that the Pool had been formed with power to act as the agent of its members so far as marketing of grain was concerned; that the appellant was desirous of becoming a member of the Pool and of entering, with other growers, into the marketing agreement, and that the Marketing Agreement, although individual in expression, was one of a series between the Pool and the growers of wheat in Alberta and should constitute one contract between the several growers signing the same, and the Pool. In the agreement the appellant applied for a share of the capital stock of the Pool, and the Pool, on its part, covenanted to allot the same to him. The appellant also agreed to deliver to the Pool all the wheat produced or acquired by him, except his seed wheat, during the years 1924 to 1927 inclusive, and the Pool agreed to receive and market the same. The agreement provided that out of the gross return from the sale of the wheat delivered to it the Pool might retain and deduct sufficient sums to pay the marketing and other charges and expenses of the Pool and, in addition, might deduct one per cent. of the gross selling price as a commercial reserve to be used for any of the purposes of the Pool. It also provided for the deduction of an amount, not exceeding two cents per bushel, to be invested, in the discretion of the trustees, in shares of the capital stock of any elevator company formed for the acquisition of grain elevators wherewith to handle the wheat of the Pool members.

After the expiration of the Marketing Agreement the appellant brought this action. In his statement of claim he set out the material provisions of the agreement and alleged that during the years 1924 to 1927 inclusive, he delivered to the Pool the wheat produced by him; that this wheat the Pool sold; that it deducted 1% of the gross selling price of his wheat to form a commercial reserve, and two cents a bushel which it invested in shares of the capital stock of the respondent, the Alberta Pool Elevators, Limited; that of these sums no proper accounting had been given to him, nor had the shares in the Alberta Pool Elevators, Limited, purchased with his money, been put in his name. He also alleged that although the Pool had from

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time to time purported to account and make payments of the moneys payable to him, he had never had a proper accounting, nor had he received payment of his proper proportion of the proceeds of the wheat sold. He further alleged that in 1928 the Pool distributed one million dollars of excess earnings among the Pool members, not, however, on any equitable basis but in such a way as to favour those members who delivered their wheat at elevators owned by the Alberta Pool Elevators, Limited, as against those members at whose point of delivery the Pool had no elevator, and that such distribution was without moral or legal justification, and in derogation of the appellant's rights, and he claimed an accounting of the proceeds of the wheat he had delivered to the Pool, and of the deductions which had been made therefrom and payment to him of his proper share. He also claimed to have transferred into his own name the shares in the Alberta Pool Elevators, Limited, purchased with moneys deducted from the proceeds of his wheat, and $2,500 damages.

On being served with a writ in the action the Pool moved, pursuant to s. 5 of the *Arbitration Act,* for an order that all proceedings be stayed on the ground that, under the Special Act, c. 7 of 1924 (which confirmed the incorporation of the Pool and its existing by-laws), all the matters in controversy between the appellant and the Pool had to be decided by arbitration. The learned judge in Chambers (1), dismissed the application but struck out paragraph 42 of the statement of claim, in which the appellant claimed the right to inspect the books of the Pool, which right he said had been refused to him. On appeal the Appellate Division reversed the order of the Chamber judge and dismissed the appellant's action (2). Hence this appeal.

The statutory provisions material to the appeal are: Section 18 of chapter 7 of 1924; section 20 of the *Co-operative Associations Act;* and clause 57 of the By-laws. They read as follows:—

(18) All the provisions of the Co-operative Associations Act shall continue to apply to the corporation, except and so far only as the same are superseded by or are in conflict with any of the provisions of this Act or of any presently existing by-law of the corporation or of any by-law hereafter passed pursuant to the provisions of this Act.

(20) Every dispute between any member or members of an association

(1) [1929] 1 W.W.R. 96. (2) [1929] 1 W.W.R. 413.

under this Act, or any person claiming through or under a member, or under the rules or by-laws of the association, and the trustees, treasurer, or other officer thereof, shall be decided by arbitration in manner directed by the rules or by-laws of the association, and the decision so made shall be binding and conclusive on all parties without appeal, and application for the enforcement thereof may be made to the District Court.

(57) Every dispute between any Member or Members of this Association or under the By-laws and the Trustees, Treasurer or other officer thereof shall be decided by the arbitration as provided by the Arbitration Act, provided, however, that this provision shall not apply as between the Association and any Member who fails to fulfil any of the covenants contained in the Marketing Agreement.

The first question to be determined is, was there a dispute between the appellant as a member of the Pool and its trustees, treasurer or other officer? For the appellant it was contended, (1) that there was no evidence of the existence of any dispute, and (2) that if there was, the dispute was between the appellant and the Pool, and not with its trustees, treasurer or other officer.

In my opinion, the issue of a writ to enforce a right claimed is, of itself, some evidence of the existence of a dispute. In this case a perusal of the allegations set out and the demands made in the statement of claim establishes, beyond question, that the appellant was very decidedly disputing the correctness of the acts done and the proceedings taken on the part of those who were managing the affairs of the Pool, not only in reference to the payment to him of the proceeds of his grain and the investment of the two cents per bushel in shares of the capital stock of the Alberta Pool Elevators, Limited, in the name of the Pool, but also in reference to the distribution of the one million dollars excess earnings. It would, in my opinion, have been better practice if, in the affidavits filed in support of the motion, someone on behalf of the Pool had alleged that a dispute had existed prior to the commencement of the action. Failure to do so, however, is not fatal to the motion provided the allegations in the statement of claim are consistent only with the existence of such a dispute.

Then with whom was the appellant disputing? He claims it was solely with the Pool and not with its trustees; that the matters in dispute arose out of the Marketing Agreement which he had entered into with the Pool before he became a member thereof.

The Pool, being a corporate body, could have a dispute with the appellant only through its proper officers who

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would act on its behalf. Subs. 1 of s. 3 of the *Co-operative Associations Act* provides that to secure incorporation under that Act the persons desiring to become incorporated shall file in the office of the Registrar a memorandum of association duly verified, together with a copy of the rules or by-laws agreed upon.

Subs. 3 in part reads as follows:—

> The said rules or by-laws shall contain provisions in respect of the following matters: (*f*) The appointment of trustees * * * whose duties shall be to conduct and manage all the business of the association.

The by-laws filed provide:

> The Powers of the Trustees are:—
>
> (*a*) To conduct and manage all the business of the Association and to do all acts and perform all duties stipulated to be done or performed by the Trustees by the Co-operative Associations Act or these by-laws, and any amendments thereto * * *.
>
> (*e*) To enter into and carry into effect, with or without modification, the Contract attached to the Memorandum of Association * * * (Marketing Agreement).

As it was the duty of the trustees to carry into effect the provisions of the Marketing Agreement, I am unable to understand why a dispute as to the proper manner of carrying out these provisions is not properly termed a "dispute with the trustees." In my opinion it is, but I think there are other and broader grounds upon which this appeal may be disposed of.

In the first place I would adopt as applicable here the principle laid down by Lord Watson in *Municipal Building Society* v. *Kent* (1), where His Lordship said:—

> But the question whether certain proceedings are to be regarded as disputes between the society and its members, arising within the society, appears to me in the case of each statute to depend upon the intention of the legislature, to be gathered from the whole provisions of the Act.

The object of the promoters of the Pool as disclosed in the memorandum of association and by-laws filed, and the intention of the legislature as disclosed in the Special Act which confirmed and validated the incorporation of the Pool, under the *Co-operative Associations Act*, was to ensure the existence of a corporate body whose most important function would be to receive the wheat of its members and market the same and return to them the proceeds thereof, subject to the deductions therefrom provided for in the Marketing Agreement and in the by-laws. The Marketing Agreement provides that each grower signing the

(1) (1884) 9 App. Cas. 260, at pp. 284-5.

same shall become a member of the corporate body, and the by-laws provide that all members shall sign the standard Marketing Agreement current at the time of their entrance as members. It was by virtue of his membership in the Pool that the appellant was entitled to have the Pool market his wheat under the terms of the Marketing Agreement. It is true he signed the Marketing Agreement before a share of the capital stock of the Pool had been allotted to him, but in the agreement he applied for a share and obtained a covenant from the Pool that his application would be granted. The whole scheme of the Pool legislation was the co-operative marketing of the wheat of the Pool members through the medium of a corporate body composed of themselves, and upon terms agreed upon and embodied in the Marketing Agreement, which agreement, as its recital shews, was not to be considered as simply an individual contract with each grower, but was to constitute one contract of which one contracting party was the Pool and the other the members of the corporate body. Such being the purpose of the legislation, can it reasonably be contended that the appellant's rights under the Marketing Agreement are entirely disassociated from his membership in the Pool, or that the legislature did not contemplate the application to that agreement of the arbitration provisions found in the Act and in the by-laws? In view of the fact that the marketing of the wheat was the chief purpose of the Pool; that it was incorporated under the *Co-operative Associations Act* which provided that the trustees should conduct and manage all its business, and that all disputes between a member and the trustees should be decided by arbitration, and in view of the fact that the by-laws expressly provide that the trustees shall carry into effect the Marketing Agreement, and that the Special Act has not only confirmed the incorporation of the Pool but has declared that all the provisions of the *Co-operative Associations Act* shall continue to apply, except in so far as they are superseded, I am clearly of opinion that the legislative intention was that the arbitration provisions should apply to all disputes arising under the Marketing Agreement, unless expressly excepted in the by-laws.

This conclusion, in my opinion, receives support from the proviso of by-law 57, which expressly states that the

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arbitration provisions shall not apply as between the Pool and any member who fails to fulfil any of the covenants contained in the Marketing Agreement. If it had not been intended that the arbitration provisions should apply to the Marketing Agreement there was absolutely no object in inserting the proviso in the by-law. As the by-laws were, in the Special Act, declared to be valid and binding, clause 57, with its proviso, has received legislative sanction. Impliedly, therefore, the legislature, by sanctioning the proviso, has declared that the arbitration provision shall apply to disputes under the Marketing Agreement, except those covered by the proviso.

The only other point to which I need refer is: Should the appellant's action have been dismissed or only stayed? It was dismissed by the Appellate Division although the motion asked only that it be stayed. Under s. 20 of the *Co-operative Associations Act,* when the arbitration has taken place and the decision given, that decision shall be binding and conclusive on all parties without appeal. There is, however, nothing binding or conclusive until the arbitration has taken place. In his affidavit Mr. Sinclair states that he was informed by R. D. Purdy (Pool manager) that the Pool was, at the time this action was commenced, and still is, ready and willing to do all things necessary for the proper conduct of the arbitration. No doubt this was, and still is, so. As, however, the plaintiff's right of action would exist should the arbitration fail to decide the matters in dispute, the proper course, in my opinion, was to grant a stay of proceedings rather than to dismiss the action.

I would, therefore, dismiss the appeal with costs but would vary the order so as to stay proceedings instead of dismissing the action.

Appeal dismissed with costs; order below varied.

Solicitors for the appellant: *McGillivray, Helman & Mahaffy.*

Solicitor for the respondents: *A. Macleod Sinclair.*

A. MOYER & COMPANY (DEFENDANT) ....APPELLANT;

AND

SMITH & GOLDBERG LIMITED (PLAINTIFF) ..... } RESPONDENT.

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*May 30, 31.
*June 13.

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

Contract—Sale of goods—Statute of Frauds (now s. 5 of Sale of Goods Act, R.S.O., 1927, c. 163)—Revocation of agent's authority before signing by agent of memorandum.

Appellants claimed (by counterclaim) damages for breach of contract of sale of goods from respondent to them. They alleged an oral contract made by G. for respondent. To meet the requirements of s. 17 of the Statute of Frauds (now R.S.O., 1927, c. 163, s. 5), they relied upon a subsequent "confirmation" signed by G. for respondent. They also set up a subsequent written agreement of settlement made by G. for respondent, fixing the damages.

Held, that at the time G. signed the confirmation he was not respondent's "agent in that behalf" within the requirement of the Statute of Frauds. Assuming the oral contract, and that on its date G. had authority to sell and that this included authority to sign a memorandum evidencing such sale (*Rosenbaum* v. *Belson,* [1900] 2 Ch. 267), his authority could be effectively revoked at any time before he signed the memorandum (*Farmer* v. *Robinson,* 2 Camp., 339n; Bowstead, Agency, 7th Ed., p. 470; *Warwick* v. *Slade,* 3 Camp. 127; *Xenos* v. *Wickham,* L.R. 2 H.L. 296, at p. 314, referred to); and the evidence established such revocation and notification thereof to appellants before G. signed the confirmation.

Held, also, that, upon the evidence, G. had no authority, actual or ostensible, to make with appellants the agreement for settlement.

Judgment of the Appellate Division, Ont., 63 Ont. L.R. 388, dismissing appellants' counterclaim, affirmed.

APPEAL by the defendants from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which, reversing the judgment of Logie J., dismissed their counterclaim, which was the only matter in dispute.

The appellants carry on business at Fort Wayne, Indiana. The respondent company carries on business at Toronto, Ontario. The appellants claimed damages from respondent for failure to carry out an alleged contract of sale of hides from respondent to them, made in December, 1927. This alleged contract was made orally between one

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

(1) (1928) 63 Ont. L.R. 388.

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Goldberg (who was the secretary-treasurer of the respondent company) on behalf of the respondent company, and a member of the appellant firm. The appellants then gave instructions to their brokers in Toronto, MacNeillie & Co., who communicated with the respondent. Some controversy arose, and Smith, the president of the respondent company, refused to sign the "confirmation" note sent to respondent by the brokers. Thereafter, however, the "confirmation" was signed by Goldberg, purporting to act for the respondent company. Subsequently Goldberg, purporting to act for the respondent company, made a written agreement of settlement whereby the appellants' damages for breach of contract were fixed at $2,500. The appellants claimed for this sum, and, alternatively, for $3,000 damages for breach of contract. The respondent denied that any contract was ever arrived at, set up the Statute of Frauds (now the *Sale of Goods Act*, R.S.O., 1927, c. 163, s. 5), and denied Goldberg's authority to bind it by signing on its behalf the "confirmation" or the agreement of settlement. The further material facts (as found by this Court) appear in the judgment now reported.

At the trial Logie J. gave judgment for the defendants (the present appellants) on their said counterclaim. This judgment was reversed by the Appellate Division (1). The appeal to this Court was dismissed with costs.

I. F. Hellmuth K.C. and *I. Levinter* for the appellants.

R. H. Greer K.C. and *A. H. Brown* for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—In this action, begun on the 26th of January, 1928, the plaintiff (respondent) claimed $900 as a balance due it on account for goods sold and delivered to the defendants (appellants). Subject to their counterclaim for $2,500 as damages for breach of contract, which forms the sole subject of the present appeal, the defendants admitted owing the $900 claimed; and the plaintiff at present holds a judgment for that amount, the judgment at the trial in the defendants' favour on the counterclaim having been unanimously reversed by the Second Appellate Divisional Court (1), from whose judgment the present appeal is taken.

(1) (1928) 63 Ont. L.R. 388.

The counterclaim is based on a breach of an oral contract for the sale of a specific lot of hides to the appellants, alleged to have been made by one Goldberg, as salesman of the respondent company, on the 30th of December, 1927. The Appellate Divisional Court has upheld the respondent's plea of the Statute of Frauds in answer to this counterclaim in so far as it rests upon the oral contract of the 30th of December, 1927, and its plea of lack of authority in so far as the counterclaim rests on an alleged settlement in writing of the appellants' claim for damages, which Goldberg purported to make on behalf of the respondent on the 14th of February, 1928.

On the short ground that at the time he signed a so-called confirmation note, relied upon by the appellants to meet the requirements of s. 5 of R.S.O., 1927, c. 163 (Statute of Frauds, s. 17), Goldberg was not the "agent in that behalf" of the respondent company, we would affirm the judgment in appeal, in so far as the appellants' claim depends on the enforcement of the original oral contract. *Thirkell* v. *Cambi* (1). We assume, in the appellants' favour, that Goldberg actually made a verbal contract for the sale to them of the goods in question, and that he had, on the 30th of December, 1927, the date at which the oral contract is said to have been made, authority to sell and that this included authority to sign a memorandum evidencing such sale (*Rosenbaum* v. *Belson* (2)). Subject to two definite exceptions, within neither of which the case at bar falls, the authority conferred by an agency contract is, from its very nature, revocable at any time at the will of the principal. It may be effectively revoked, when writing is necessary, "even after a verbal contract has been made by the agent," at any time before he has signed the statutory memorandum. Lord Ellenborough, applying this doctrine, so held, as early as 1805, in *Farmer* v. *Robinson* (3), which is cited in Bowstead, Agency, (1924), 7th Ed., p. 470, as authority for this proposition. See also *Warwick* v. *Slade* (4), cited with approval in *Xenos* v. *Wickham* (5).

The only question in such a case is one of notice of the revocation to the third party dealing with the agent. The

(1) [1919] 2 K.B. 590, at p. 595.
(2) [1900] 2 Ch. 267.
(3) (1805) 2 Camp. 339n.
(4) (1811) 3 Camp. 127.
(5) (1867) L.R. 2 H.L. 296, at p. 314.

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admitted facts in evidence put it beyond doubt that the appellants had such notice from the 10th of January, 1928. They had actual knowledge that the president of the respondent company, Smith, repudiated the contract on behalf of the company and that the hides in question had in fact been sold to another purchaser.

The evidence of the broker, McNeillie, who was accredited by the learned trial judge, clearly establishes that he was exclusively the agent of the appellants in the transaction; that he knew on the 10th of January, 1928, that the president of the respondent company had refused to sign the confirmation note, sent him by Mr. McNeillie in the usual course for signature to bind that company, and was in fact repudiating any obligation on its part to carry out the contract sued upon; that the hides, the subject matter thereof, had already then been sold to another purchaser; and he, McNeillie, then communicated these facts to his principals. There is no suggestion of any subsequent authority having been given to Goldberg "to confirm" the contract in question.

McNeillie, nevertheless, procured Goldberg to sign a so-called confirmation note (dated back to the 30th of December, 1927) at some later time—within three weeks after the 10th of January, 1928, is his best recollection of the time, though he will not swear that it was not signed in February—with the obvious purpose of furnishing to the appellants an answer to the defence of the Statute of Frauds, should the respondent invoke it, and with the clear intent of rendering the respondent company liable to them for damages for breach of contract. These circumstances rebut any suggestion that Goldberg had ostensible authority to sign the confirmation note and that McNeillie took it in good faith from Goldberg, relying upon the latter having authority thereby to bind the respondent as his principal.

As to the alleged settlement of the appellants' claim, against the respondent for damages for breach of contract at $2,500, signed on February 14, 1928, by Goldberg at Fort Wayne, the difficulties in the way of the appellants' attempt to maintain Goldberg's authority to bind the respondent are even more formidable. Upon the evidence of Gurofsky, a witness for the appellants, to contend for

any actual authorization of Goldberg by the respondent company to make such settlement is impossible; and the antecedent circumstances preclude the view that the appellants dealt with him on any footing of ostensible authority, were it possible to support an agreement so far out of the course of a salesman's or secretary's ordinary powers and duties on the footing of mere ostensible authority. The attempt to prove that Goldberg went to Fort Wayne on the 14th of February to make a settlement with the appellants with the knowledge and tacit approval of the president of the respondent company, in our opinion, wholly fails. Goldberg's own evidence, when carefully read, does not support it; and the evidence of Smith is distinctly against it. All the surrounding circumstances render it incredible that anything of the kind occurred.

It is, perhaps, not without significance that within eight days afterwards, i.e., on the 22nd of February, 1928, Goldberg sold out all his interest in the respondent company. There is no evidence whatever that the respondent company, or its president, had any knowledge or notice either of the so-called confirmation note or of the agreement for settlement signed by Goldberg until the 23rd of March, 1928, the date of the appellants' statement of defence and counterclaim, which set them up, and that they had not notice or knowledge of them prior to that time is the proper inference from all the circumstances in evidence.

We are not presently concerned with the ethics of the respondent's repudiation of the oral contract of the 30th of December, 1927. It is not setting up an equitable defence; it pleads, by way of legal defence, a purely statutory right to have the contract alleged evidenced in writing; and it must not be forgotten, as Scrutton L.J., says, in *Thirkell* v. *Cambi* (1), that:

> It has often been said that the Statute of Frauds covers more frauds than it prevents. On the other hand those who have experience of disputes as to oral contracts and of findings rather prompted by sympathy than guided by evidence know the value of a statute which removes uncertainty as to the terms of a contract by prescribing that they shall be in writing; and it is a mistake in the administration of the law to whittle away this statute in order to do what is supposed to be justice in a particular case.

(1) [1919] 2 K.B. 590, at pp. 596-7.

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The appeal, therefore, fails and will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Luxenberg & Levinter.*

Solicitors for the respondent: *Brown & Smith.*

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*Apr. 23, 24, 25.

*June 13.

GEORGIA CONSTRUCTION COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

PACIFIC GREAT EASTERN RAILWAY COMPANY (DEFENDANT)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Railway construction—Method of doing work—"Extra haul" and "over-haul"—Meaning—Usage—When it forms an ingredient of the contract—Finding of the trial judge—Document filed at trial without objection—Exception to its admissibility taken on appeal.

The appellant had a contract with the respondent for a work on the respondent's line of railway, which work consisted of a cut and fill where the line crossed a deep ravine. The old line was carried on a trestle, and the new line was to be supported by a fill on a site adjacent to the trestle, which was to be made with the earth excavated from a bluff on the northerly side of the ravine through which the cut was to pass. The contract stipulated for unit prices including "overhaul per yard 1 cent"; and contained this clause: "12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing the material in embankments, crib work, and all other expenses connected therewith except extra haul, which will only be paid for where it exceeds five hundred (500) feet, at so much per yard per additional one hundred feet * * *." The appellant in excavating the cut proceeded from the foot of the northerly slope of the bluff, and by a circuitous route encircling the bluff on its westerly, southwesterly and southerly sides carried the earth to the site of the embankment. The appellant contended that it was entitled to be paid for "overhaul" at the rate mentioned, that is to say, at the rate of 1 cent per cubic yard for every 100 feet of haul calculated by reference to the length of the route actually followed in excess of 500 feet. The view of the contract advanced by the respondent was that the contract phrases "extra haul" and "overhaul" have, by usage, in construction contracts, or at all events in railway construction contracts, a special and specific meaning; and that they signify that the length of the haul in respect of which the contractor was entitled to charge

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

for overhaul, was to be ascertained by taking the distance (measured along the centre line of the railway in process of construction) between the projections, first, of the centre of mass of earth, to be excavated in making the cut, and second, of the embankment, and deducting therefrom 500 feet; the projections being for this purpose the several points on the centre line nearest the respective centres of mass. The trial judge (40 B.C. Rep. 81) held that the usage alleged had not been established, and that the proper construction of the contract was that contended for by the appellant. The Court of Appeal ([1928] 3 W.W.R. 466) disagreed with this conclusion and accepted the view advanced by the respondent.

Held, reversing the judgment of the Court of Appeal ([1928] 3 W.W.R. 466), that the alleged usage had not been proven. It had been established that there was a practice widely followed of inserting in railway construction contracts a clause providing for the computation of payment for overhaul according to the method contended for by the respondent; but in the text books, engineering manuals and writings by engineers produced, there was no basis for the view that the effect of the words used in the present contract is, apart from such special stipulations, what is contended by the respondent. Usage, of course, where it is established, may annex an unexpressed incident to a written contract; but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract. *Juggomohun Ghose* v. *Manickchund* (7 Moore's Indian Appeals 263, at p. 282).

Held, also, that in substance, the question presented to the trial judge was whether there was evidence to satisfy him judicially that the alleged usage was, to quote the language of Banks L.J., in *Laurie* v. *Dudin* (95 L.J., K.B. 191, at 193), "so all pervading and so reasonable and so well known that everybody doing business" in railway construction "must be assumed to know" it, and to contract subject to it; and the finding of the trial judge should not have been disturbed by the appellate court.

At the trial, a report by the Deputy Minister of Railways and the Chief Engineer of the respondent, approving the appellant's system of handling the works, tendered by the appellant's counsel, was admitted and no exception to its admissibility was taken at any stage of the proceedings prior to the oral argument in this court. According to the record, counsel for the respondent was aware that the document could have been excluded if he had pressed an objection against it, and, moreover, he did not call either of the gentlemen who signed the report as a witness. If the objection had been pressed, the appellant's counsel would no doubt have felt obliged to call them as witnesses himself, as counsel for the respondent must have realized; but the latter seemed to have elected deliberately not to press the obvious objection to the document.

Held, that, in these circumstances, an exception to the admissibility of the report taken by the respondent's counsel before this court should be considered as being raised too late.

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

(1) [1928] 3 W.W.R. 466. (2) (1928) 40 B.C. Rep. 81.

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action to recover for work done under a railway construction contract.

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

J. W. de B. Farris K.C. for the appellant.

Aimé Geoffrion K.C. and *R. W. Lane* for the respondent.

The judgment of the court was delivered by

DUFF J.—The controversies in this appeal relate to questions of fact turning to some extent upon the effect of documentary evidence, and in part upon an appreciation of the weight of oral evidence adduced at the trial; upon which the conclusions of the learned trial judge were set aside by the Court of Appeal.

The appellants had a contract with the respondents dated May 20, 1926, for a work on the respondents' line of railway, which work consisted of a cut and fill where the line crossed a deep ravine. The old line was carried on a trestle, and the new line was to be supported by a fill on a site adjacent to the trestle, which was to be made with earth excavated from a bluff, on the northerly side of the ravine, through which the cut was to pass.

The contract stipulated for unit prices including "overhaul per yard 1 cent"; and contained this clause:

12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing the material in embankments, crib work, and all other expenses connected therewith except extra haul, which will only be paid for where it exceeds five hundred (500) feet, at so much per yard per additional one hundred feet. No allowance or compensation whatever shall be due or paid to the contractor for any temporary roads, bridges or trestles he may make to facilitate his work.

The appellants in excavating the cut proceeded from the foot of the northerly slope of the bluff, and by a circuitous route encircling the bluff on its westerly, southwesterly and southerly sides carried the earth to the site of the embankment. The substantive issue is whether or not the appellants are entitled to be paid for "overhaul" at the rate mentioned, that is to say, at the rate of 1 cent per cubic yard for every 100 feet of haul calculated by reference to the length of the route actually followed in excess of 500 feet.

The view of the contract advanced by the respondents is that the contract phrases "extra haul" and "overhaul" have, by usage, in construction contracts, or at all events in railway construction contracts, a special and specific meaning. They signify, according to this contention, to summarize it broadly, that the length of the haul in respect of which the contractor is entitled to charge for overhaul, is to be ascertained by taking the distance (measured along the centre line of the railway in process of construction) between the projections, first, of the centre of mass of the earth to be excavated in making the cut, and second, of the embankment, and deducting therefrom 500 feet; the projections being for this purpose the several points on the centre line nearest the respective centres of mass. The learned trial judge held that the usage alleged had not been established, and that the proper construction of the contract is that contended for by the appellants. The Court of Appeal disagreed with this conclusion and accepted the view advanced by the respondents.

If the learned trial judge was right, two further questions will require consideration. First, whether on the facts proved, the appellants have established their right to have their claim passed upon in the absence of a certificate by the engineer sanctioning it, and second, whether, assuming that to be so, the appellants' method of proceeding was an unnecessarily expensive one, or was dictated by the physical conditions of the work and by the terms of the contract as to the time of performance.

I shall consider these questions in the order in which I have stated them. And first, as to the construction of the contract. Usage, of course, where it is established, may annex an unexpressed incident to a written contract; but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract, *Juggomohun Ghose* v. *Manickchund* (1). In the Court of Appeal there was some disagreement with the view of the learned trial judge, that the respondents' contention as to the effect of the contract was based upon the alleged existence of usage or custom, both Martin J.A. and M. A. MacDonald J.A. expressing the opinion that they were confronted with a question of interpreta-

(1) 7 Moore's Indian Appeals 263, at p. 282.

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tion, merely. The respondents themselves alleged the practice they sought to prove as a custom controlling the effect of the contract; and I do not know that it is very material whether you describe the subject of inquiry as a question of the existence of a usage imparting a special meaning to particular words when employed in contracts of a given class, or as a question as to the existence of a usage annexing an incident to such contracts in virtue of the presence of such words. I am disposed to think that the latter is the more apt description of the question presented in this case.

In substance, the question for the learned trial judge was whether there was evidence to satisfy him judicially that the alleged usage is, to quote the language of Banks L.J., in *Laurie* v. *Dudin* (1),

> so all pervading and so reasonable and so well known that everybody doing business

in railway construction "must be assumed to know" it, and to contract subject to it. I am not satisfied that the alleged usage has been established. There is no doubt that a practice widely prevails of inserting in railway construction contracts a clause providing for the computation of payment for overhaul according to the method contended for by the respondents; but in the text books, engineering manuals and writings by engineers produced, there is no basis for the view that the effect of the words used in the contract before us is, apart from such special stipulations, what is now contended. More than one of the witnesses called on behalf of the respondents admitted that he had never in his own experience encountered a case in which the earth excavated in making the cut had to be carried to the fill by a circuitous route, that is to say in which carriage along the line of railway was impracticable and the circuitous route was not adopted to serve the convenience of the contractor, where overhaul had not been calculated according to the length of the route actually traversed. Some said that they had never met a case in which carriage on that line was not practicable. Other witnesses gave instances in which overhaul had been calculated according to the rule advocated by the respondents, though a circuitous route had been followed for the con-

(1) 95 L.J. K.B. 191, at 193.

venience of the contractor, but not because a shorter route was impracticable. The engineer in charge, McMillan, admitted he had never known a case of carriage by a circuitous route being compensated for on the basis of measurement along the line of the railway. He had, he stated, adopted this course on one occasion when the earth had been taken from a borrow pit, that is to say, from an excavation entirely outside the line of the railway; in that case he had measured the distance from the point on the railway nearest the borrow pit, to the centre of mass of the fill, but he admitted that the alleged usage had no relation to such a case; and that in principle he had been wrong.

It was argued, that a method of computation of overhaul commonly in use, described as the method by "mass diagram," would be incapable of application to a case like the present unless the distance were measured along the centre line of the railway; and this, it is urged, is sufficient ground for treating that method of measurement as ordained by the contract. This argument involves obviously the proposition that the method of mass diagram is so essential to such computations, or at all events so universally employed as to require a direction to employ it to be implied as an incident of the contract. Taking the evidence as a whole, I do not think this has been established; but in any case there is evidence by witnesses called on behalf of the respondents which it was quite open to the learned trial judge to accept, that this method (by "mass diagram") is applicable or may be applicable for the purpose of computing compensation for overhaul where the material is taken from a place outside the line on the railway ("a borrow pit") where the distance taken is that of the actual haul; and one of the most important witnesses called on behalf of the respondents explicitly admits that such a case presents no distinction in principle from those cases where the earth is excavated on the line of the railway. Distinction in principle between the case of the "borrow pit" and the case before us is not suggested.

The appellants, on the other hand, called a number of engineers of long experience and high repute, who denied without qualification the existence of any usage such as that alleged. I refer particularly to the evidence of Mr.

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Hazen, the assistant chief engineer, of the Canadian National Railways. He stated that according to his experience, which had been chiefly in railway construction and which up to the time of the trial was of 39 years' duration, where it is impracticable to haul the excavated material from the cut to the fill along the line of the railway, and where a longer route is followed for this reason by the contractor, and not for his own convenience, the practice is to compute the compensation for overhaul by reference to the distance actually traversed, and not to the distance between the points on the centre line of the railway nearest the centres of mass measured along that line.

On this evidence the learned trial judge has held that the respondents failed to prove the alleged usage. I am unable myself to perceive any grounds, upon which, to quote the phrase of Scrutton L.J. in *Laurie* v. *Dudin* (1), the Court of Appeal could properly

> interfere with the learned judge who saw the witnesses and heard them cross-examined and heard the way in which they gave their evidence.

I may add that, with the learned trial judge, I am not satisfied by the evidence that there is any practice of measuring distance for computing overhaul in the manner contended for, so well recognized, so well known among persons engaged in railway construction, and so widely prevailing as to justify a presumption that everybody who enters into a contract for such work does so with the intention of being bound by that usage.

I do not doubt, I may add, that the learned trial judge, in considering whether such a widely prevailing and generally recognized usage had been established, took into account, as he was entitled to do, the fact that neither the Deputy Minister, a railroad engineer of a life time's experience, nor Mr. Randall, the company's chief engineer, was called as a witness to affirm the existence of such a usage; or that he did not fail to note the rather discreditable effort of the respondents to create the impression in Mr. Hazen's mind that he would be guilty of some impropriety in stating, as a witness on behalf of the appellants, his view that no such usage exists.

Second, as to the absence of an engineer's certificate recognizing the appellant's claim. The pertinent clauses

(1) 95 L.J. K.B. 191, at p. 198.

of the contract may conveniently be set out together, they are these:

1.* * * The word "engineer" shall mean the chief engineer of the company (unless otherwise specified), or his duly authorized agents limited by the particular duties respectively entrusted to them. * * *

8. The engineer shall be the sole judge of work and material in respect of both quantity and quality, and his decision on all questions in dispute with regard thereto shall be final, and no work under this contract shall be deemed to have been performed, nor materials nor other things provided, so as to entitle the contractor to payment therefor, until the engineer is satisfied therewith, and has issued to the contractor his certificate in writing in respect thereof.

9. The work shall, in every particular, be under and subject to the control and supervision of the engineer; and all orders, directions or instructions, at any time given by the engineer with respect thereto, or concerning the conduct thereof, shall be by the contractor promptly and efficiently obeyed, performed and complied with to the satisfaction of the engineer. In particular, and without limiting the foregoing, the engineer shall have the right to control blasting operations, so as to protect the interests of the company, and to avoid injury or damage from excessive or improper blasting.

10. The respective descriptions of work and materials, or portions of the works referred to, in or covered by the individual items in the schedule of prices embodied in the proposal annexed to this contract, include not only the particular kinds of work or materials mentioned in the said items, but also all and every kind of work, labour, tools, plant, materials, equipment and things, whatsoever necessary for the full execution, completion and delivery, ready for use, of such descriptions of work and materials, or of such respective portions of the works, in accordance with the said drawings and specifications and to the satisfaction of the engineer. The said schedule as a whole is designed to cover not only the particular descriptions of work and materials mentioned therein, but also all and every kind of work, labour, tools, plant, material, equipment and things whatsoever necessary for the full execution, completion and delivery, finished and ready for use, for the entire work as herein contracted for, in accordance with said drawings and specifications, and the satisfaction of the engineer; in case of dispute as to what work, labour, tools, plant, materials, equipment and things are included in the works contracted for, or in the said schedule, or any item thereof, the decision of the engineer shall be final and conclusive.

* * *

27. The company covenants with the contractor, that the contractor having in all respects complied with the provisions of this contract, will be paid for and in respect of the works the various prices set out in the schedule of prices embodied in the accepted proposal of the contractor hereto annexed.

* * *

28. Cash payments equal to about ninety per cent of the value of the work done, approximately estimated from progress measurements and computed at the applicable schedule prices, or the prices fixed with respect thereto, as the case may be, under the provisions of this contract, will be made to the contractor monthly, on the written certificate of the engineer stating that the work for, or on account of which, the certificate is granted, has been done, and stating the value of such work computed

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as above mentioned; and the said certificate shall be a condition precedent to the right of the contractor to be paid the said ninety per cent or any part thereof. The remaining ten per cent shall be retained until the final completion of the whole work to the satisfaction of the engineer, and will be paid within two months after such completion. The written certificate of the engineer, certifying to the final completion of the said works to his satisfaction, shall be a condition precedent to the right of the contractor to receive or to be paid the said remaining ten per cent or any part thereof.

The contractors appear to have commenced work under the contract in the beginning of July, 1926. A gentleman named McMillan appears to have acted from the outset as engineer in charge of this particular work, and to have been recognized as such by the directors of the respondent, although as far as we can see he was not formally appointed until December of that year. Not until much later, apparently not earlier than the end of March, 1927, was there a chief engineer of the company who intervened in the contract. The minutes of the directors show that on the 20th of July, 1926, the board decided that all progress estimates of the engineer in charge "of the diversion at Mile 13·7" should be submitted each month to the Deputy Minister of Railways for checking and for certification. There is no suggestion that the Deputy Minister of Railways, who signs as chief engineer of the railways as well as Deputy Minister, was ever appointed chief engineer of this company, and the resolution indicates that it was in his capacity as Deputy Minister that he was to check and certify the progress estimates. The engineer, for the purposes of the contract, as appears from the extracts already quoted, must be the chief engineer of the company or an agent of the chief engineer. The respondents allege in the statement of claim that McMillan was the "engineer" within the meaning and for the purposes of the contract. It is not alleged that he was chief engineer of the company, or that he was an agent of the chief engineer; admittedly he was not chief engineer and obviously he was not an agent of the chief engineer, prior at least to March, 1927, as there was no chief engineer to appoint an agent. Further, it is clear that McMillan had no authority even as agent of the company to grant progress certificates, all of which, in compliance with the resolution of the 20th July, 1926, down to the appointment of the chief engineer in 1927, are in fact the certificates of Mr. Griffith, the Deputy

Minister. Authority under the contract, to give a binding decision as to the contractors' right to a certificate, McMillan had none.

No express authority is given to the engineer by the contract, to pass on any question as to the construction of the contract. As the engineer is to certify to the performance of the work contracted for as a condition precedent of the contractors' right to be paid, he is necessarily obliged to read the contract and understand it, but it is his duty to, and it is the right of the contractor, that he shall give effect to the provisions of the contract according to their proper legal construction; and his only authority to pass upon that construction arises from, and is incidental to his authority to grant or withhold a certificate. It may perhaps be right to observe, although it adds nothing to what has already been said, that McMillan, having no authority to grant certificates, or to decide upon the contractors' right to a certificate, was endowed with no authority, even incidentally, to bind anybody or affect anybody's rights under the contract, by his views as to its meaning.

The learned trial judge held that the

> board of directors assumed the functions of the engineer under the contract.

That appears to be an inference fairly warranted by the correspondence and the resolutions passed by the board of directors; especially when read in light of the fact that for nine months after the signing of the contract, no engineer was appointed. In order of date these are as follows:

July 13, 1926.

Mr. D. McMillan,
Engineer,
Bridge 13·7,
Lillooet, B.C.

Referring to our conversation on Sunday last in connection with the overhaul claimed by the contractor, write me by return mail full particulars of this, together with their reason for claiming it.

T. KILPATRICK,
General Manager.

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Mile 13·7, Lillooet Sub-Div.,
July 14, 1926.

T. KILPATRICK, Esq.,
General manager,
P.G.E. Railway Co.,
Vancouver, B.C.

In answer to your letter of July 13, the contractor purposes and is making preparation to take out the cut north of the fill at 13·7 by hauling out of the north end of the cut around by the P.G.E. Railway track to the fill south of the cut in question.

In a short talk with him he said he expected to be paid overhaul on this route, as it is the only way to take the cut out given as reason why he should be so paid.

He was told that overhaul is a constant, the same as the number of cubic feet in a yard and that his contention could not be supported. Not much was said but he still had his idea in mind.

The route to be used lengthens the distance over a centre line direct haul by from 3,000 to 3,500 feet.

D. McMILLAN,
Engineer in Charge of Diversion.

Copy of resolutions in minute book of defendant.

July 20, 1926.

It was decided by the board that *all the progress estimates of the engineer in charge of the work of the diversion at mile 13·7* should be submitted each month to the Deputy Minister of Railways, *for checking and for certification.*

Moved by Mr. W. Kitchen and seconded by Mr. C. Spencer that with reference to the question of overhaul, the engineer in charge of the work at diversion at mile 13·7 be instructed that the board cannot consider any other than the shortest haul or nearest way.

July 21, 1926.

Mr. D. McMILLAN,
Engineer,
Mile 13·7,
Lillooet, B.C.

With reference to the question of overhaul, I am instructed to advise you that the board of directors cannot consider any other than the shortest haul or nearest way.

T. KILPATRICK,
General Manager.

September 10, 1926.

T. KILPATRICK, Esq.,
General manager, P.G.E. Ry.,
Vancouver Block.

Re contract overhaul.

Your engineer Mr. McMillan informs me he has instructions to the effect that overhaul on our contract at mile 13·7 Lillooet, is not to be

measured over the length of the dinky track but over a straight line from the point where the material originally lies to the fill.

You will recollect that when the writer was looking over the ground with yourself and others that I proposed the present method of doing the work and again on the day of signing the contract I was asked how I proposed to do the work, when I again proposed the present route for hauling as being the only feasible one. If it was the intention to allow overhaul by a direct line I should have been so advised at that time. I contend that the work cannot be effectively done by steam shovel in any other way and I am willing to submit the question to any practical two steam shovel men and abide by their decision.

For the above reasons I contend that overhaul must be allowed over the route the material has to be hauled and not over the direct line. If you decide otherwise, we may be compelled to close down the steam shovel part of the work. Please advise at your earliest convenience, and oblige,

GEORGIA CONSTRUCTION CO., LTD.
Per T. R. Nickson.

September 14, 1926.

A letter was read from the Georgia Construction Company Limited protesting the decision of the directors that they could not consider any other than the shortest haul or nearest way and on motion, duly seconded, it was resolved that they be advised that we expect them to carry out the terms of their contract and that our interpretation of its conditions regarding overhaul is as previously advised.

September 15, 1926.

GEORGIA CONSTRUCTION CO., LTD.,
Bank of Toronto Building,
Vancouver, B.C.

I am in receipt of your letter of 10th inst. which was submitted to the board of directors at a meeting here yesterday and I am instructed to advise you that we expect you to carry out the terms of your contract and that our interpretation of its conditions regarding overhaul is as previously advised you by our Mr. D. McMillan, engineer in charge.

T. KILPATRICK,
General Manager.

November 23, 1926.

MESSRS. GEORGIA CONSTRUCTION CO., LTD.,
Bank of Toronto Building,
Vancouver, B.C.

I beg to advise you that your letter of 12th instant was submitted to the board of directors at a meeting here yesterday and I was instructed to advise you that the board can see no reason for changing the decision made, which was communicated to you, at their meeting on July 20, namely, that no other than the shortest haul or nearest way would be considered.

T. KILPATRICK,
General Manager.

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These resolutions and communications all point to the conclusion at which the learned trial judge arrived and expressed in the sentence quoted above.

On behalf of the respondents, it was argued that the directors did nothing more than accept the decision of McMillan. The learned trial judge, while accepting McMillan's statement in his letter, as the expression of his own opinion, did not accept the view advanced by the respondents as to the conduct of the directors; it was his view that the directors had taken the matter into their own hands, and had issued instructions to McMillan as their own agent concerning the interpretation of the contract. The oral evidence adduced by the respondents in support of their allegations that the board had treated McMillan as an independent umpire and had deferred to his decisions as such, was not regarded by the trial judge as of sufficient weight to overbear the inferences arising from the tone and substance of the documents and from the undisputed facts.

I am not convinced that the learned trial judge was wrong; especially in view of the fact that neither Mr. Griffith, the Deputy Minister, who for nine months certified to the progress estimates, nor Mr. Rindal, who was appointed chief engineer, apparently in March, 1927, was called as a witness, although both of them must have had not a little knowledge of the relations between the board of directors and the company's engineers.

But the matter does not rest there. If McMillan had possessed power to certify under the contract, it is at least questionable whether he had not already disqualified himself, before the time came to grant a progress certificate, from passing upon the construction of the clause in question. At the trial he avowed without hesitation, that from the outset he had formed an opinion as to the effect of the clause, an opinion based upon his own experience, which had not, it appears, embraced a similar case, that is to say, any case in which compensation for a circuitous haul had been based upon the distance measured along the centre line of the railroad. This opinion was in accordance with the respondents' contention; he declared with emphasis that he had decided the question finally, without consulting other engineers, and that his mind was not open to influence from argument upon it.

The following is a passage from McMillan's evidence.

Q. Let me put it to you this way: You told me in discovery—I don't want to need to refer to it—that you had never known a case of this kind before?—A. Yes.

Q. And you also told me on discovery that so far as your experience was concerned you had never known a case where material was measured any other way than the way it was actually hauled?—A. Yes.

Q. Yes, so this was the first time in all your experience where you were confronted with the problem of saying whether you should measure overhaul in a way other than it was hauled?—A. Yes.

Q. Yes, and at that time you had read no authorities on it, had you? —A. Only in so far as I have followed the method used by the railway companies I was employed with.

Q. But that didn't deal with this special case. Don't nod your head? —A. No.

Q. So that you hadn't any experience then to help you on this special case, had you?—A. No.

Q. And you at that time had no opportunity, or took occasion to read any authorities to post yourself on the question?—A. No.

Q. Nor had you sought the advice of any independent engineer to advise you in it?—A. No.

Q. No. Well now, acting as a judge between the bodies, you would, at that time, with your limited experience, be quite open to receiving further information as authority, wouldn't you?—A. No, I didn't consider my experience limited.

Q. You did not; and yet you tell me that you never have had experience to meet the case?—A. No.

Q. And you say that your mind was so settled then that if authorities had been shown you dealing with such special case that you would not have given them consideration?—A. I didn't think authorities could be shown showing anything different.

Q. I see, so your mind was settled on this thing which you have never had any experience with right from the start, you hadn't an open mind to consider any authorities if they were suggested to you?—A. My mind was settled.

Q. Your mind was settled, you were not open to any argument on the matter?—A. No.

Q. So that if the Manual of Engineering had been produced and stated contrary, it would not have had any effect on you?—A. No.

Q. If authorities like Mr. Hazen of the Canadian National Railway had been quoted to you, or if you had seen him personally and he had told you that in his experience—that he had experience in special cases of this kind—that it should be paid for, that would have had no effect on you?—A. No.

Q. So that you are prepared to say that you had decided without authority and without seeing any?—A. No, I had the authority of my experience.

Q. Well, tell me any case in your experience that touched the case? —A. I had no experience that touched the case.

Q. No, so that the authority of your experience, being none, that was sufficient for your purpose?—A. The authorities of my experience taught me that in no other way was overhaul calculated.

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There is high authority for the proposition that an engineer or architect, who has lapsed into that attitude of mind, is disqualified from acting as umpire under such a contract as this. (Per Lindley L.J. in *Jackson* v. *Barry Railway Co.* (1).)

At a later stage a chief engineer was appointed, Mr. Rindal, and the appellants having in April, 1927, requested that the points in difference should be submitted to arbitration, a report was made by him in which he expressed an opinion which accorded with that expressed by the board of directors in its instructions to McMillan. But the board of directors long before that had assumed the function of chief engineer; they had thereby placed themselves in a position in which they were precluded from insisting on the observance of the stipulations of the contract requiring a certificate by an engineer clothed with authority under the contract.

The last question to be dealt with is that which arises upon the respondents' allegation that it was quite practicable to make the cut through the bluff by proceeding from the southerly slope, and in such a manner that the material excavated could be hauled to the fill by the direct route, that is to say, along the centre line of the railway.

The evidence is overwhelming that Nickson, the manager of the appellants, proceeded with the cut under the belief that this course was not practicable, and that the only practicable method was that adopted by him. He says that before the execution of the contract, he informed Kilpatrick, the respondents' superintendent, of his plan, and Kilpatrick, although he says he cannot remember this communication, will not deny that it took place. It is admitted that at no time did McMillan or Kilpatrick or any other person on behalf of the respondents, suggest to the appellants that their method was an unnecessarily expensive one. Indeed, it is not open to dispute that according to the view of the officials of the respondents, the appellants were proceeding in a proper and workmanlike manner. A report by Mr. Griffith, the Deputy Minister and chief engineer of the respondents on the 23rd of July, 1927, contains this paragraph:

(1) (1893) 1 Ch. at 244 and 245.

> In view of the knowledge we now have of the material in the bottom of the cut, we believe that the system chosen by the contractors of handling the work is the only way in which the contract could be completed anywhere near the time allotted for the work and there is no doubt that the material placed in the embankment has been placed there at a loss.

An objection was raised on the argument as to the admissibility of this report, which I shall discuss presently. In a practical sense this expression of opinion seems to be conclusive. Mr. Griffith, as already mentioned, had for nine months been responsible for progress certificates, and was no doubt fully acquainted with the work in every detail. It was the duty of the contractors to endeavour to complete the work within the time specified by the contract, and if in order to accomplish that object they adopted what they conceived to be the only practicable means of doing so, and if their view was based upon reasonable grounds and they acted in entire good faith, they are entitled to be paid for what they did according to the terms of the contract. This report seems to be conclusive upon the point that their plan was reasonable and that they were right in adopting it. Even if one were convinced by considerations *ex post facto,* that another course would have proved less expensive, that is not a ground for depriving them of the compensation, when it appears that the measures they adopted were reasonable and necessary not only in their own view, but in the view of the officials of the railway company as well.

As to the admissibility of the report. The document was tendered by Mr. Farris, and although no objection was taken to its admissibility, counsel for the respondents remarked that the letter was " without prejudice." The document was admitted and no exception to its admissibility was taken at any stage of the proceedings prior to the oral argument in this court. Obviously, counsel for the respondents was aware that the document could have been excluded if he had pressed an objection against it. And there appears to be not a little reason for thinking that he had his clients' interest in view in not doing so. I have already noticed the fact that the respondents called neither of the gentlemen who signed this report as a witness. Whatever be the explanation of that, no doubt the appellants had some good reason for not doing so. If the objection had been pressed, Mr. Farris would no doubt

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Duff J.

have felt obliged to call them as witnesses himself, as counsel for the respondents must have realized. He seems to have elected deliberately not to press the obvious objection to the document. In these circumstances, the objection comes, I think, too late.

The appeal should be allowed and the judgment of the learned trial judge restored, with costs in all the courts.

Appeal allowed with costs.

Solicitors for the appellant: *Farris, Farris, Stultz & Sloan.*

Solicitors for the respondent: *Mayers, Locke, Lane & Thomson.*

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*March 6, 7.
*June 13.

SARNIA BREWING COMPANY LIMITED (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY, THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Action by Crown to recover excise tax and sales tax under ss. 19B1 (b) and 19BBB(1) of The Special War Revenue Act, 1915 (Dom.), and amendments—Evidence failing to prove manufacture by defendant—Application to receive further evidence (Dom. Statutes, 1928, c. 9, s. 3).

The judgment of Maclean J., President of the Exchequer Court of Canada, [1928] Ex. C.R. 219, holding the Crown entitled to recover from the defendant certain sums claimed for excise tax and sales tax, under ss. 19B 1 (*b*) and 19BBB (1) of *The Special War Revenue Act, 1915,* and amendments, was reversed, on the ground that the evidence, although showing that defendant had sold the beer in question, failed to show that defendant had manufactured it. The Court refused an application by the Crown to receive further evidence, under s. 3 of c. 9 of the Statutes of 1928 (Dom.), holding that no special ground existed to justify it.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiff was entitled to recover from the

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

(1) [1928] Ex. C.R. 219.

defendant the amounts claimed for excise tax and sales tax in respect of beer alleged to have been manufactured and sold by defendant. The appeal was allowed.

S. G. Slaght K.C. for the appellant.

N. W. Rowell K.C. and *Gordon Lindsay* for the respondent.

The judgment of the court was delivered by

LAMONT J.—The sole question in this appeal is: Did the Crown in the court below on the evidence establish as against the appellant a statutory liability for the taxes sued for?

The action was brought to recover from the appellant the sum of $15,249.80 sales tax under s. 19BBB (1) of the *Special War Revenue Act, 1915,* and amendments, and $33,076.85 excise or gallonage tax under s. 19B 1 (*b*) of the same Act.

In the statement of claim the Crown alleged that the Brewing Company was, during the periods therein referred to, licensed to carry on the trade or business of a brewer. It also alleged that, on and after the first day of June, 1925, and prior to the first day of May, 1927, the company made sales of beer subject to the tax imposed by s. 19BBB (1), and thereby became liable to pay the tax. Further that the company had, during the same period, manufactured and sold beer subject to the tax imposed by s. 19B 1 (*b*) and became, therefore, liable to pay that tax also. These sections in part read as follows:—

19BBB 1. In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent. on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him.

* * *

Provided that the consumption or sales tax specified in this section shall not be payable on goods exported.

19B 1 (*b*). There shall be imposed, levied and collected upon all goods enumerated in Schedule II to this Part, when such goods are imported into Canada or taken out of warehouse or when any such goods are manufactured or produced in Canada and sold on and after the twenty-fourth day of May, one thousand nine hundred and twenty-two, in addition to

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any duty or tax that may be payable under this Act, or any other statute or law, the rate of excise tax set opposite to each item in said Schedule II.

* * *

Provided that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise.

Schedule II provides that the rate of excise tax on beer shall be twelve and a half cents per gallon.

A perusal of these sections makes it clear that under each of them the tax is imposed in respect of beer manufactured or produced in Canada and sold by the manufacturer or producer. The onus was, therefore, on the Crown to prove that the beer, in respect of which the taxes were claimed, had not only been sold by the company but had also been manufactured by it, unless such manufacture was admitted, or not denied. The statement of defence contains the following:—

(1) The Defendant does not admit that it was licensed to carry on the trade or business of a brewer or as such manufactured or sold beer.

(5) The defendant does not admit that it manufactured or sold beer subject to any tax and denies that it became liable to pay to His Majesty any of the sums referred to in paragraph 5 of the Information.

(6) The defendant expressly denies all the allegations contained in the Information herein and denies that any taxes or moneys are due or owing as alleged therein.

This defence was notice to the Crown that the company was not admitting anything and would require the Crown to establish the liability of the company to pay the tax.

We have carefully examined the evidence submitted on behalf of the Crown (no evidence was given on behalf of the company) but are unable to find anything therein which, in our opinion, establishes, either expressly or inferentially, that the company had manufactured the beer in respect of which the taxes are claimed. The only evidence of manufacture was that given by A. E. Nash, a member of the accounting firm of Clarkson, Gordon, Gilfoyle & Nash, which firm had been retained by the Crown to make an examination of the company's books. Mr. Nash, among other questions, was asked:—

Q. Has your firm made an examination of the accounts of defendants, the Sarnia Brewing Company, with a view of ascertaining the Crown's claim for gallonage and sales tax?—A. They have.

Q. Were you able to ascertain from the books of the Company the number of gallons manufactured and sold by them from the time they commenced business in 1925 up to the 30th of April, 1927, the period covered by the Information?—A. Yes.

* * *

Q. Then did you take off from the books, and prepare from the books, a statement showing the number of gallons produced and sold month by month during that period?—A. Yes, we did.

That statement was put in as Ex. No. 1. On cross-examination, however, Nash admitted that he had not personally examined the books or vouchers of the appellant, nor any of the documents on which Ex. No. 1 was based. Not having examined the company's books or documents, he was not in a position to testify as to what information could be ascertained from them. His evidence, therefore, in so far as it was directed towards establishing that the company had manufactured the beer sold by it, cannot be said to have any probative force.

The only other witness who gave evidence was G. R. Troop, who had personally examined the books, vouchers and documents of the company. Troop testified that he had verified in the company's books the figures that appeared in Ex. No. 1, that those figures were correct and had been taken by him from the books of the brewery. Unfortunately the books themselves were not put in evidence and an examination of Troop's evidence and of Ex. No. 1 fails to disclose any reference whatever in either of them to the manufacture or production of the beer.

The learned President of the Exchequer Court held that the evidence of Troop and Ex. No. 1 established that the beer in question had been manufactured and sold by the company. They did, without doubt, establish that it had been sold, but, as there is no reference in either of them to the manufacture of the beer, we are unable to find that such manufacture was established. The learned President evidently overlooked the defect in the Crown's proof, for in his judgment he says:

The real question for determination here is, upon whom lies the onus of establishing what, if any, of the goods in question, were sold for export and in fact exported, and therefore coming within the exemptions from taxation.

The company was contending that the onus was on the Crown not only to prove the sale of the beer, but also to prove that it had not been manufactured for export; while the contention of the Crown was that the onus was on the company to bring itself within the provisos of the sections quoted, in part, above. Nothing, however, was said or done at the trial on behalf of the company to mislead the Crown or to relieve it of the obligation of proving every fact neces-

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sary to establish the company's liability to pay the tax. That obligation, as we have said, involved proving that the company had manufactured the beer sold, and we are of opinion that the Crown failed to prove it. The parties were always at arms' length.

On behalf of the Crown we were asked to receive further evidence of manufacture if the court should be of opinion that it had not been sufficiently proved.

Section 3 of chapter 9 of the Statutes of 1928 (Can.) authorizes this Court, in its discretion, on special grounds, and by special leave, to receive further evidence on a question of fact. In this case, however, we are unable to find the existence of any special ground which would justify the receiving of further evidence.

The appeal, in our opinion, should be allowed and the action dismissed. The appellant is entitled to the costs in the court below but, as it raised no question there as to the absence of proof of manufacture, there will be no costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Slaght & Cowan.*

Solicitor for the respondent: *W. Stuart Edwards.*

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*May 17, 20.
*Nov. 4.

REGENT TAXI & TRANSPORT COMPANY (DEFENDANT) ..... APPELLANT;

AND

LA CONGREGATION DES PETITS FRERES DE MARIE, DITS FRERES MARISTES (PLAINTIFF) ..... RESPONDENT.

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

Negligence—Accident—Bodily injuries—Member of religious community injured—Loss of services—Disbursements—Right of action in damages by the community against negligent party—Whether right of action is limited to the "immediate victim"—Action de in rem verso—Quantum of damages—Prescription—Arts. 1053, 1056, 1074, 1075, 2261 (2), 2262 (2) C.C.

The respondent, a Montreal religious community, sued the appellant company to recover damages alleged to have been sustained by the community, as the result of one of its members, Brother Henri-Gabriel,

*PRESENT:—Anglin C.J.C. and Mignault, Rinfret, Lamont and Smith JJ.

being injured while travelling in an omnibus belonging to the appellant. The action was brought more than a year, but within two years, after the time of the accident. The claim consisted of $4,780 for expenses incurred by the community in medical and hospital care; of $118 for the value of clothing, etc., destroyed in the accident, alleged to be the property of the community; and of $10,000 for damages due to the loss of services of the injured brother. The trial judge assessed the respondent's damages at $4,000, of which $2,236.90 was allowed for out-of-pocket expenses, and the balance on account of the claim for other damages; and this decision was affirmed by the appellate court. It was also found by the trial judge and unanimously upheld on appeal that the injury was attributable to fault and negligence of an employee of the appellant for which it was responsible; and no appeal was taken to this court against that finding. The questions arising on this appeal are, (*a*) whether the respondent has, or ever had, the right of action which it asserts; and, (*b*) whether its claim is barred in whole or in part by the limitation provision of par. 2 of art. 2262 C.C.

Held, (affirming in part the decision of the Court of King's Bench (Q.O.R. 46 K.B. 96)), that the respondent has a right of action against the appellant company, but that it is entitled to recover only the sum of $2,236.90 for the expenses incurred by it as a result of the injuries sustained by the member of the community. Mignault and Rinfret JJ. dissenting.

Held, also, Mignault and Rinfret JJ. dissenting, that the plaintiff was within the purview of the word "another" ("autrui") as used in article 1053 C.C., and therefore entitled to maintain this action. Article 1053 C.C. confers on every person, who suffers injury directly attributable to the fault of a third person as its legal cause, the right to recover from the latter the damages sustained. The suggestion that the right of recovery under that article should be restricted to the "immediate victim" of the tort involves a departure from the golden rule of legal interpretation (Beal, Legal Interpretation, 3rd ed., p. 80) by refusing to the word "another" ("autrui") in article 1053 C.C. its ordinary meaning; and such interpretation would be highly dangerous and would result in the rejection of meritorious claims. Moreover, it is not necessary so to restrict the scope of article 1053 C.C. in order to give full operation to the terms of article 1056 C.C., as nothing in this latter article suggests an intent to narrow the scope of article 1053 C.C., save "where the person injured * * * dies in consequence" and the claim is for "damages occasioned by such death."

Held, also, that the respondent's action is not prescribed. The action is "for damages resulting from * * * (a) quasi-offence" and is prescribed by two years only (article 2261 (2) C.C.), and is not one for "bodily injuries" prescribed by one year (article 2262 (2) C.C.). Mignault and Rinfret JJ. not expressing any opinion.

Per Anglin C.J.C. and Smith J.—The provisions of article 1056 C.C. may not be necessary to support the actions for which it provides; but their presence cannot justify narrowing the purview of the clear terms in which article 1053 C.C. is couched, except so far as may be necessary to exclude from it the special cases for which article 1056 C.C. provides. The respondent is entitled to be adequately compensated on the footing of loss of benefits reasonably to be expected from a continuance of the services of the injured member. The appeal should be dismissed with costs.

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Per Mignault and Rinfret JJ. (dissenting).—The respondent had no status to bring the action, which should have been dismissed by the trial judge. Article 1056 C.C., together with article 1053 C.C., covers the whole ground of liability in cases of bodily injuries and both articles must be construed together. Article 1053 C.C. establishes the foundation upon which such liability will rest, and article 1056 C.C. enacts in what circumstances and in favour of what persons the liability will exist. Therefore, it follows that the word "*autrui*" ("another") in article 1053 C.C. connotes "*la partie contre qui le délit ou quasi-délit a été commis*" ("the person injured by the commission of an offence or a quasi-offence") contained in article 1056 C.C.; and that person cannot be any other than the "immediate victim." In the province of Quebec, in cases of bodily injuries caused by fault, the right of action belongs solely to the "immediate victim" during his lifetime and, after his death, exclusively to the persons enumerated in article 1056 C.C.

Per Mignault and Rinfret JJ. (dissenting).—The respondent might have had a right to recover the amount of expenses incurred by it for medical and hospital care, by means of the action *de in rem verso;* but, as such, it would be prescribed by the expiry of one year under article 2262 (2) C.C. Anglin C.J.C. and Smith J. *dubitantibus.*

Per Lamont J.—The respondent cannot succeed as to its claim for loss of services. To be entitled to maintain such an action, a legal right to such services, and the loss thereof, must be established. The contractual relation of master and servant did not subsist between the respondent and the injured brother and, upon the evidence, neither the brother nor the Congregation ever considered they were creating any legal relationship between them. Therefore, the fault of the appellant company did not deprive the respondent of the brother's services, to which it had no legal right. Anglin C.J.C. and Smith J. *contra.*

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the trial judge, Surveyer J., and maintaining the respondent's action in damages for $4,000.

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

A. Geoffrion K.C. and *L. Faribault K.C.* for the appellant.

J. Cartier for the respondent.

ANGLIN C.J.C.—The plaintiff (respondent) is a religious community incorporated by statute of the province of Quebec (50 Vic., c. 29) and possesses, as an incident of its corporate entity, the capacity to sue and be sued (s. 4). The defendant (appellant) is a common carrier engaged in the

(1) (1928) Q.O.R. 46 K.B. 96.

business of furnishing transportation for passengers by taxicab and omnibus. Brother Henri-Gabriel, a member of the plaintiff community, sustained serious injury, while travelling in an omnibus of the defendant, on the 14th of August, 1923.

It was found by the trial judge, and unanimously affirmed by the Court of King's Bench (1), that the injury sustained by Brother Henri-Gabriel was attributable to fault and negligence of an employee of the defendant for which it was responsible; and against that finding no appeal has been taken here.

The present action was brought to recover damages sustained by the community in consequence of Brother Henri-Gabriel being so injured. The claim consists of three parts: first, the sum of $4,780 expended by the community in medical and hospital care for the injured brother and in providing him with such necessaries as spectacles, etc.; second, the sum of $118 for the value of clothing and other personal effects, the property of the community, destroyed in the accident; and, third, the sum of $10,000 for other actual damages due to loss of services of Brother Henri-Gabriel, etc.

The learned trial judge (Surveyer J.) assessed the plaintiffs damages at $4,000, of which amount the sum of $2,236.90 was allowed for out-of-pocket expenses, admittedly incurred by the plaintiff as a necessary result of the injuries sustained by Brother Gabriel, and the balance on account of the claim for other actual damages.

This judgment was confirmed by the Court of King's Bench (1), although two members of that court, Mr. Justice Greenshields and Mr. Justice Cousineau (*ad hoc*), would have reduced the recovery—the latter to the sum of $2,236.90 allowed for out-of-pocket expenses, to which Mr. Justice Greenshields would, however, add the sum of $900 to cover an expenditure of the respondent in replacing Brother Henri-Gabriel on its teaching staff.

Two questions arise on the present appeal, viz., (1) whether the plaintiff has, or ever had, the right of action which it asserts; and (2) whether its claim is barred in whole or in part by the limitation provision of paragraph

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(2) of article 2262 of the Civil Code, which reads as follows:

The following actions are prescribed by one year:

* * *

(2) for bodily injuries, saving the special provisions contained in article 1056 and cases regulated by special laws.

The plaintiff being endowed, as a body corporate, with the capacity to sue, the question on the first branch of the appeal is whether it has a right of action to recover the damages it now claims.

Articles 1053 and 1054 C.C. read as follows:

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1054. He is responsible not only for the damage caused by his own fault, but also for that caused by the fault of persons under his control.

Is the present plaintiff, under the circumstances in evidence, within the purview of the word "another" ("*autrui*") as used in article 1053 C.C.? Such is the issue on this branch of the appeal.

A plaintiff has a right of action for all damages sustained by him against any person guilty of fault which caused such damages. (S. 1924.1.160; Zach., vol. 4 (Massé et Vergé, 1858) nos. 625-7; *Canadian Pacific Railway Co.* v. *Robinson*) (1). Article 1053 C.C. says so in terms so explicit that to deny the existence of such a right as that set up in the present action involves placing a restriction upon the *prima facie* generality of the language in which it is couched (8 De Lorimier, Bib., C.C., pp. 203-14), and which formulates the common law theretofore existing. *Ravary* v. *Grand Trunk Ry. Co.* (2).

The only alternative view suggested is that the right of recovery under art. 1053 C.C. should be restricted to "the immediate victim" of the tort of the defendant. (I use the phrase "immediate victim" for lack of a better—M. Demogue (Obligations, t. 4, no. 528) refers to "la victime matérielle"). Indeed, there can be no logical half-way position between so restricting the application of the article and admitting that, standing alone, it confers on every person, who suffers injury directly attributable to the fault of a third person as its legal cause, the right to recover from the latter the damages sustained. It must not be forgotten

(1) (1887) 14 Can. S.C.R., 105, at pp. 115-20, 125.

(2) (1860) 6 L.C.J. 49, at p. 51.

that on the principle enunciated in arts. 1053-4-5 C.C. depends practically the whole law of tort in Quebec, covering alike wrongs against person, property, honour and reputation, article 1053 C.C. embodying the general common law of the province on this subject. Articles 1054 and 1055 C.C. provide for vicarious responsibility, cover particular cases and create certain liabilities conditionally defeasible. *Quebec L.H. & P. Co.* v. *Vandry* (1). Accordingly, to narrow the *prima facie* scope of art. 1053 C.C. is highly dangerous and would necessarily result in most meritorious claims being rejected; many a wrong would be without a remedy. To those who urge the danger and inconvenience in multiplicity of actions and other evils which might result from giving to the word "another" (*"autrui"*) in art. 1053 C.C. its ordinary and unrestricted meaning, I reply, adapting the words of Lord Sumner in *Vandry's* case (2).

To all this the plain words of the article, if they are plain as their Lordships conceive them to be, are a sufficient answer. In enacting the Code the Legislature may have foreseen cases of the kind now in question many years before any of them arose * * * The positive words of the article stand and must have effect.

See, too, Fuz-Herm. III, Cod. Civ. Ann., arts. 1382-3, no. 694 (infra). The courts may be trusted to discourage unmeritorious claims.

As Sir François Langelier says, in his well known work on the Civil Law of Quebec, vol. III, at p. 468,

Pour qu'un délit ou un quasi-délit donne lieu à une action en dommages, il n'est pas nécessaire que ces dommages (*sic*) soient causés à la personne même qui les réclame: il suffit que la conséquence en rejaillisse sur elle, alors que le délit ou le quasi-délit a porté sur une autre. C'est ainsi, par exemple, qu'une compagnie d'assurance a une action en dommages contre l'auteur de l'incendie d'une propriété qu'elle avait assurée. Le mari a une action en dommages pour les dommages causés à sa femme. Le père a une action en dommages pour les dommages causés à ses enfants. Il a même été décidé, il y a une trentaine d'années, par la Cour de Cassation, que les parents même collatéraux de quelqu'un qui est décédé ont une action en dommages contre ceux qui ont attaqué sa mémoire. Mgr. Dupanloup, le célèbre évêque d'Orléans, fut condamné à payer des dommages à la famille de Mgr. Rousseau, un de ses prédécesseurs décédé depuis longtemps, parce qu'il avait outragé sa mémoire.

En un mot, pour que celui qui n'a pas souffert directement de la faute d'un autre ait une action en dommages, il suffit qu'il ait eu un intérêt actuel, moral ou matériel, à ce que cette faute ne soit pas commise.

(1) [1920] A.C. 662, at pp. 673-7. (2) [1920] A.C. 662, at pp. 677-8.

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Mignault, in his work, "Droit Civil Canadien," vol. 5, at pp. 333-4, says:

Quiconque, par *sa faute,* cause un dommage à autrui, est obligé de le réparer. * * * La faute est tout ce qui blesse injustement le droit d'autrui. Elle peut, donc, consister dans une *action* ou dans une *omission d'action.* La faute est un délit lorsque l'agent du dommage l'a causé avec intention; un quasi-délit, dans le cas contraire. * * * Le quasi-délit est l'acte volontaire et illicite d'une personne qui, par imprudence ou négligence, cause du dommage à autrui.

The present action is founded on a *quasi-délit.*

An instance of the broad application of art. 1053 C.C. occurs in the judgment of Mathieu J., in *Larrivé* v. *Lapierre* (1), in an action by a father to recover damages personally sustained by him because of an injury to his son. We find, at pp. 4, 5, the following *considérants*:

Considérant que, par l'article 1053 du Code Civil, toute personne capable de discerner le bien du mal est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par son imprudence, négligence ou inhabilité et que, par l'article 1054, elle est responsable non seulement du dommage qu'elle cause par sa faute, mais encore de celui causé par les choses qu'elle a sous sa garde;

Considérant que le demandeur allègue, dans sa déclaration, que l'accident dont il est question a eu lieu par la faute du défendeur, qui se serait servi dans sa manufacture d'une machine impropre à l'usage duquel il l'employait;

Considérant que le demandeur allègue que, par suite de cet accident, il est privé du salaire de son fils qui le faisait vivre, et qu'il éprouve des dommages directs au montant de deux cents piastres;

Considérant que les dommages-intérêts doivent comprendre, non seulement la réparation du préjudice éprouvé par la partie lésée, mais aussi celui que souffre la famille, lorsque le fait dommageable rejaillit sur elle, et *que tous ceux auxquels le fait a causé un dommage sont admis à réclamer;*

Considérant que le demandeur allègue qu'il a éprouvé un préjudice personnel de l'accident arrivé à son enfant qui l'a empêché de travailler, et qu'il est ainsi privé du bénéfice qu'il retirait du travail de son dit enfant;

Considérant qu'entre le père et le fils, il y a obligation, de la part de ce dernier, de fournir des aliments au premier, et que, tant en raison de cette obligation, qu'en raison des circonstances particulières alléguées dans la déclaration, et, spécialement du fait qu'il vivait du salaire de son fils, cet accident lui a causé un préjudice réel.

Again, in *Sheehan* v. *Bank of Ottawa* (2), reversed on another ground (3), although the judgment should probably have been rested on art. 1056 C.C., a similar right under art. 1053 C.C. was recognized for a father whose son had been shot by a young man to whom the bank had

(1) (1890) 20 R.L. 3. (2) (1920) Q.O.R. 58 S.C. 349.
(3) (1923) Q.O.R. 35 K.B. 432.

negligently entrusted a revolver. Fault causing damage entails delictual responsibility; without fault, actual or presumed (except in the case of damage caused by things under defendant's care), such responsibility does not exist: *Allard* v. *Frigon* (1). In both the above instances the right of recovery under art. 1053 C.C., was not restricted to "the immediate victim" of the defendant's fault.

Moreover, with the utmost respect for those who think that the words "to another" ("*à autrui*") of art. 1053, C.C., should be construed as embracing only "the person injured" (la partie contre qui le délit ou quasi-délit a été commis), i.e., "the immediate victim" of a tort of the defendant, to the exclusion of others who also suffer damages directly attributable to such tort (e.g. the master who loses the benefit of the services of his injured employee, (Demogue, Obligations, t. 4, no. 530)—the husband, separate as to property, whose affections have been outraged by the ravishment of his wife), this suggested restriction on the purview of these words involves a departure from the golden rule of legal construction, applicable to all writings, that

> the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case (that) sense may be modified so as to avoid that absurdity, and inconsistency, *but no further* (Beal, Legal Interpretation, 3rd ed., p. 80).

The words "to another" ("*à autrui*") of art. 1053 C.C. are clear and present no ambiguity.

But, it is said, the decision of the Privy Council in the *Vandry case* (2), and Article 1018 C.C., applicable by analogy, require us to read art. 1056 C.C. with art. 1053 C.C., and it is urged that, in order to give to art. 1056 C.C. some operation, the scope of the words under discussion in art. 1053 C.C. should be so restricted as to cover only "the immediate victim" of the tort—at least where the claim arises out of bodily injuries. I shall proceed at once to consider the argument based on the presence of art. 1056 in the Civil Code, as it was practically the sole ground urged for the restriction of the purview of art. 1053 C.C. and the rejection of all the French authorities which give to the word "*autrui*" its *prima facie* meaning, the Code Napoléon containing no provision corresponding to art. 1056 C.C.

(1) (1922) 28 R.L.N.S. 223. (2) [1920] A.C. 662.

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No doubt, "the plainest words may be controlled by a reference to the context" (Beal, *Ibid.*, pp. 83, 84); *noscuntur a sociis;* but not only must the words to be so controlled be consistent with the suggested limitation, *Garbutt* v. *Durham Joint Committee* (1), but

> you must have the context even more plain, or at least as plain * * * as the words to be controlled

Bentley v. *Rotherham and Kimberworth Local Board* (2), These principles of legal interpretation, being founded on common sense, apply equally under the civil and the common law systems. (De Chassat, Interprétation des Lois, (1822) pp. 100, 205 et seq.; Langelier, Droit Civ., vol. 1, pp. 20, 22 and 91; art. 12 C.C.

A difference between the two authentic versions of the text of art. 1056 C.C.—the words "ascendant and descendant relations" of the English version (which would include grand-parents and grand-children) being translated in the French text "père, mère et enfants"—is not here material. (See s. 6 of c. 78 of Con. Stats. (1859) of Canada; and *Bonin* v. *The King* (3). There is nothing in art. 1056 C.C. that suggests an intent to narrow the scope of art. 1053 except "where the person injured * * * dies in consequence" and the claim is for "damages occasioned by such death"; and the chief purpose of art. 1056 may well have been to preclude such claims, which would often be preferred on flimsy grounds, by persons other than those designated in art. 1056 C.C., who might otherwise regard them as within the purview of art. 1053 C.C. *Hunter* v. *Gingras* (4). Given that effect, art. 1056 C.C. has a distinct and useful office; and, so treating it, there is no infraction of the provision of the golden rule, that the grammatical and ordinary sense of plain and unambiguous terms is not to be modified to a greater extent than is necessary to avoid absurdity, repugnance or inconsistency. Notwithstanding any apparent violence to logic in excluding claims by persons other than those named in art. 1056 C.C., when the immediate victim of the tort dies, for damages occasioned by his death, while allowing all who sustain direct loss to claim, if the immediate victim survives,

(1) [1904] 2 K.B. 514, at pp. 521-2.
(2) (1876) 4 Ch. D. 588, at p. 592.
(3) (1918) 18 Ex. C.R., 150.
(4) (1921) Q.O.R. 33 K.B. 403.

there is not here such inconsistency, repugnance or absurdity as requires the courts to deny their plain meaning and effect to the words of article 1053 C.C., *Abley* v. *Dale* (1).

Moreover, it seems to me not improbable, although article 1056 C.C. differs in some important respects from Lord Campbell's Act of 1846 (*Miller* v. *Grand Trunk Ry. Co.*) (2), that its predecessor, viz., chapter 6 of the Statutes of Canada (1847), 10-11 Vic. (c. 78 of the Con. Stats. of Can., 1859), was imported into the law of Quebec from the English Statute (*Robinson* v. *Canadian Pacific Railway Co.* (3)), either in order to forestall defences based on the maxim "*actio personalis moritur cum persona*" or, rather, on the quaint (Lord Sumner outlined its history in *Admiralty Commissioners* v. *S.S.* "*Amerika*," (4)), and, in the view of ardent civilians, probably the crude, if not semi-barbarous, doctrine of the English common law (See observations of Farwell, L.J., in *Jackson* v. *Watson* (5)) —*ex morte hominis non oritur actio; Baker* v. *Bolton* (6); *Admiralty Commissioners* v. *S.S.* "*Amerika*" (7), which might be invoked by some defendant to an action within the scope of that article, or to assimilate in this particular the law of Upper and of Lower Canada, *Canadian Pacific Ry. Co.* v. *Robinson* (8). In English law, as clearly appears in the two English cases last cited, damages sustained by the plaintiff before the death of the immediate victim are recoverable, although his death in consequence of the injury should subsequently ensue. The actions for which it provides art. 1056 C.C. itself expressly styles "independent" (*a*) i.e., personal (*Miller* v. *Grand Trunk Ry. Co.* (2)), and without effect, whether by way of assistance or of defeasance, on other rights of action (except actions by persons other than those named in art. 1056 C.C. "for damages occasioned by such death," which its terms no doubt preclude), the maxim "*expressio unius est exclusio*

(*a*) The French translation (Preface to Civil Code—1867—by Thomas McCord, one of the secretaries of the Codifying Commission, pp. VIII and IX) of the last paragraph of art. 1056 C.C. is glaringly inaccurate and misleading.

(1) (1851) 11 C.B. 378, at p. 391.
(2) (1906) 75 L.J.P.C. 45.
(3) [1892] A. C. 481, at p. 486.
(4) [1917] A.C. 38, at pp. 54-60.
(5) [1909] 2 K.B. 193, at p. 204.
(6) (1808) 1 Camp. 493.
(7) [1917] A.C. 38.
(8) 14 Can. S.C.R., 105, at p. 124.

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alterius" being applicable and the words of art. 1056 C.C. "all damages" being given due effect. To support the actions for which it provides article 1056 C.C. may have been unnecessary; and we are not unfamiliar with otiose provisions in legislation. The presence of such a provision, whether introduced *per incuriam* or *ex majore cautela*, cannot, I think, justify cutting down the purview of the clear terms in which article 1053 C.C. is couched, except so far as may be necessary to exclude from it the special cases for which article 1056 C.C. provides. (Art. 2613 C.C.) Had the legislature intended to exclude from the application of art. 1053 C.C. other cases so plainly within its *ex facie* purview, as is that at bar, a more direct method would assuredly have been found to effectuate that purpose.

The suggestion that, because the damages claimed could not reasonably have been foreseen by the defendant, they cannot be recovered, seems to indicate a confusion of the bearing of such considerations on the determination of the question of the existence of negligence or fault on the part of the defendant, where they may often be of moment, with their application to the measure of compensation, where, responsibility having been admitted or established, they are quite immaterial. Here the negligence or fault of the defendant and its responsibility to those thereby injured, who are within the scope of art. 1053 C.C., is no longer in question. Merely as illustrative of this view reference may be permissible to the very recent judgment of the Appellate Division (Ontario) in *Harding* v. *Edwards et al* (1), and to an English case therein discussed: In re *Polemis* and *Furness, Withy & Co.* (2), since the decision in which, says Mr. Justice Middleton, at p. 105 of the report of the Ontario case:

> That which had been in earlier cases indicated as exonerating the defendant from liability, that the damage was too remote because it could not reasonably have been anticipated as a consequence of the wrongful act done, can no longer be urged as a defence. The causal connection in the *Polemis* case (2) was clearly shewn, but the *damnum* would not have resulted had there not been a most extraordinary and unforeseeable concurrence of contributing factors. None of these factors in that case was the conscious intervention of a third party. The court adopted as the basis of its decision what had been said by Lord Summer in the case of

(1) (1929) 64 O.L.R. 98, at pp. 103-6.

(2) [1921] 3 K.B. 560.

Weld-Blundell v. *Stephens* (1): What a defendant ought to have contemplated as a reasonable man is material when the question is whether or not he was guilty of negligence. * * * This, however, goes to culpability, not to compensation; and by Sir Samuel Evans in *H. M. S. London* (2): The court is not concerned in the present case with any inquiry as to the chain of causes resulting in the creation of a legal liability from which such damages as the law allows would flow. The tortious act —i.e. the negligence of the defendants which imposes upon them a liability in law for damages—is admitted. This gets rid at once of an element which requires consideration in a chain of causation in testing the question of legal liability, namely, the foresight or anticipation of the reasonable man. * * * When it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for the consequences, whether he could have foreseen them or not.

I would refer to an earlier decision of Lord Sumner, when he was Lord Justice Hamilton, in *Latham* v. *R. Johnson & Nephew, Ltd.*, (3) where he says, at p. 413: "Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause.

See too *Great Lakes SS. Co.* v. *Maple Leaf Milling Co.* (4).

While judgments resting on English law are not authoritative in determining Quebec cases of which the decision rests upon the principles of the civil law, there would seem to be no good ground for excluding from consideration in a Quebec case the reasoning on which rest the conclusions reached in England and in Ontario, respectively, in the two decisions cited. Moreover the Court of Review expressed the like opinion in 1916 in *Makkinge* v. *Robitaille* (5)—a case of liability *ex contractu*. So, too, while *arrêts* of the French courts are not binding authority in our courts (*Maclaren* v. *Att. Gen. for Quebec* (6); *McArthur* v. *Dominion Cartridge Co.* (7), nevertheless they are entitled to the most respectful consideration at our hands where, as here, the texts of law which they expound (art. 1382-1383 C.N.) are substantially the same as, and are the prototypes (1st Report of the Codification Commissioners, (1865) vol. 1, p. 16) of that of the Civil Code of Quebec (art. 1053 C.C.), *Shawinigan Carbide Co.* v. *Doucet* (8), per Fitzpatrick, C.J.; *Quebec L., H. & P. Co.* v. *Vandry* (9).

(1) [1920] A.C. 956, at p. 984.
(2) [1914] P. 72, at p. 76.
(3) [1913] 1 K.B. 398.
(4) (1924) 41 T.L.R. 21.
(5) (1916) Q.O.R. 51 S.C. 17, at p. 21.
(6) [1914] A.C. 258, at p. 279.
(7) [1905] A.C. 72, at p. 77.
(8) (1909) 42 Can. S.C.R. 281, at pp. 286-7.
(9) [1920] A.C. 662, at pp. 671-2.

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That, excluding such contingencies as Brother Henri-Gabriel's premature death or abandonment of his religious vocation, the plaintiff had a reasonable expectation, amounting to a moral certitude, that it would enjoy the full benefit of his services during the two years immediately following his injury, admits of no doubt; and that such expectation of gain or advantage (whether the legal character of the relationship borne by the injured brother to the respondent should be regarded as that of an employee or as that of an *associé* (Rev. Trim., 1902, p. 904, n. 44)) having been unlawfully interfered with by the act of the defendant (Beullac, C. C. P. Ann., art. 77, nos. 5 and 15), suffices to create the interest requisite to give a status to sue (art. 77 C.C.P.) for damages caused by such harmful interference, is, I think, in the Civil Law equally clear. *Contra spoliatorem omnia praesumuntur.*

Any difficulty that might be suggested because of the fact that the plaintiff is a religious congregation is fully met by the statutory incorporation of the Quebec community to which Brother Henri-Gabriel belonged. (See Fuzier-Herman, Rep., vbo. Comm. Relig., nos. 119, 234). The contract, or arrangement, under which he became a member of the community and undertook to place his services entirely at its disposal in return for the obligation on its part to maintain him and provide him with all necessaries, etc., gave to the plaintiff an interest in his health and welfare sufficient to justify its claim for damages occasioned by inability on his part to render to it the services stipulated for caused by fault of the defendant. (*Ibid.*, 190 *bis*, 191). Indeed that right seems to be a necessary correlative of the civil responsibility of religious communities for delicts or quasi-delicts of one of their members "dans l'exercise des fonctions auxquelles elles l'ont préposé." (*Ibid.*, no. 460).

That a plaintiff, holding towards another, who is injured by the fault of a third party, relations such as those which his community had with Brother Henri-Gabriel, has a cause of action against such third party for damages sustained by him through the fault of such third party seems to be very clearly the opinion of leading French text-writers. In 20 Laurent, no. 534, we read:

La loi donne l'action pour le dommage causé, donc à tous ceux qui sont lésés par le fait dommageable. Ce principe résulte de la généralité

des termes de l'article 1382; il est consacré par la jurisprudence. La cour de cassation l'a formulé dans les termes suivants, à l'occasion de la mort instantanée d'une personne par suite d'un accident de chemin de fer: "Le fait dommageable ouvre une action en dommages-intérêts au profit de toute personne qui a souffert un préjudice direct résultant de ce fait" (Rejet, 21 juillet 1869, D. 72, 5, 386, n. 1.)

Huc thus states the same principle in vol. 8, at no. 420:

Selon la formule de la cour de cessation: "Le fait dommageable ouvre une action en dommages-intérêts au profit de toute personne qui a souffert un préjudice direct résultant de ce fait" (Cass. 21 juillet 1869, D. 72, 5, 386, n. 1), qu'elle soit ou non héritière de la victime. (Alger, 23 mai 1892, S. 94, 2, 62.)

In 2 Planiol, 9e éd., at no. 890, we read:

Quand la faute est dommageable, elle produit à la charge de son auteur une obligation d'indemniser la victime. Cette obligation de payer des dommages-intérêts est, en matière civile, la sanction nécessaire de toutes les obligations légales, aussi bien que de toutes les obligations conventionnelles. La faute est donc *un fait productif d'une obligation nouvelle.*

and, at no. 892:

Toute personne lésée par la faute a le droit d'être indemnisée. Il doit donc y avoir en principe autant d'indemnités distinctes qu'il y a de personnes lésées: toutefois, cela n'est pas toujours nécessaire.

See also, 1 Sourdat, Responsabilité, nos. 103, 659, 690, 691, 692.

Commenting on articles 1382 and 1383 C.N., Larombière, in his Treatise on Obligations (1857), vol. V, at no. 36 (p. 713), says:

Quant au droit qui appartient à la partie lésée, de poursuivre la réparation du dommage qui lui a été causé, l'action qui en résulte existe également en sa faveur, soit que le délit ou quasi-délit lui ait fait éprouver un dommage matériel ou un tort moral, d'une manière directe ou indirecte. Mais elle doit, dans tous les cas, commencer par établir que ce dommage existe, et qu'il existe par la faute de l'auteur du fait.

Lorsqu'elle a été directement et individuellement atteinte dans sa fortune, sa personne, sa considération et son honneur, la réalité du préjudice est plus manifestement sensible et plus aisément appréciable. Mais il n'en est plus moins vrai qu'elle peut être indirectement lésée dans les biens, dans la personne d'un tiers, et éprouver le contrecoup des atteintes portées aux droits de ce dernier. Il suffit alors que le délit ou quasi-délit ait été *la cause* d'un dommage quelconque à son égard, sans qu'elle s'y soit elle-même volontairement et imprudemment exposée, pour qu'elle ait une action personnelle en réparation.

See also no. 27 and Domat's Œuvres Complètes (1830), vol. I, p. 480, no. 1; p. 483, no. 10.

As to what is "indirect" damage not recoverable, see 43 Rev. Crit. de Leg. (1914), pp. 229 et seq. and S. 1911, 1, 545. It is damage of which the fault (fait) of the defendant has been merely the occasion, not the cause.

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The jurisprudence fully supports the views thus expressed by "the authors," and is by no means wholly modern. To quote a few reports of decisions, selected from many: In *Ragon* v. *Chanfrault* (1), we read:

L'action civile en réparation d'un crime ou délit appartient à tous ceux qui, directement ou indirectement, en ont souffert un préjudice réel; il n'est pas nécessaire pour que leur action soit recevable, que des obligations naturelles et légales les rattachent à la victime.

Nos. 441-2, Pandectes Belges (1889), vol. 32, vbo. Domm.-Ints., read as follows:

441. La loi donne l'action en dommages-intérêts à tous ceux qui sont lésés par le fait dommageable. Ce principe résulte des termes mêmes de l'art. 1382, et il a été consacré par la jurisprudence.

442. Un intérêt quelconque ne suffit pas, toutefois: il faut que le dommage soit personnel à la personne qui se prétend lésée, c'est-à-dire il faut qu'elle soit atteinte dans des droits ou des intérêts individuels.

In no. 1010, Sirey, Codes Ann. (Civ.), vol. 3, arts. 1382-3, we find:

Décidé, dans le même sens, que s'il ne suffit pas pour autoriser une action civile en dommages-intérêts qu'il soit justifié d'un lien de parenté ou d'affection entre la victime d'un crime ou d'un délit et ceux qui réclament réparation, il n'est pas non plus nécessaire que des obligations naturelles et légales les rattachent l'un à l'autre; il suffit qu'il y ait préjudice réel pour donner droit à réparation. * * * (Bourges, 16 déc. 1872, S. 74, 2, 71.)

In S. 1894. 2. 22, we have a decision of the Court of Appeal at Lyons indicating that it is of slight importance in the case of a claim by a brother or sister that there did not exist on the part of the injured person any alimentary obligation towards the plaintiffs.

Again, in Pandectes Belges, 1881, vol. 5, vbo., Act. Civ., at no. 51, we read:

Bien que le dommage éprouvé doive être personnel au demandeur, il n'est pas nécessaire que l'infraction ait été dirigée contre lui-même; il suffit que, en frappant directement d'autres personnes, elle ait porté en même temps atteinte à son honneur ou à sa fortune.

See *Chemins de fer de l'Est* c. *Lucioni* (2). Demolombe says (vol. 31 (1882), par. 675), at p. 579:

Une seule question se pose: ce demandeur, en responsabilité civile, a-t-il éprouvé un dommage résultant du délit ou du quasi-délit, imputable au défendeur? Si l'on répond affirmativement, cela suffit; or, l'associé privé de son associé, le chef peut-être et l'âme de l'entreprise commune, peut avoir éprouvé un dommage considérable; donc, il a droit à une réparation.

Finally, from Fuzier-Herman, III Cod. Civ. Ann., arts. 1382-3, nos. 686 et seq., I take the following summary:

(1) D. 1873, 2, 197. (2) Gaz. du Palais, 1926, 1, 262.

686. L'action en dommages-intérêts appartient à toute personne qui, soit directement, soit indirectement, éprouve un préjudice à raison du délit ou du quasi-délit commis par le défendeur Aubry et Rau, t. 4, p. 748; nº 445; Reuter, Cours de législ. crim., t. 2, p. 444; Huc, t. 8 nº 420; Laurent, t. 20, nº 534; Larombière, sur les arts, 1382-3, nº 36; Demolombe, t. 31, nºs 673 et seq.

686 *bis*. Comme l'action en dommages-intérêts appartient à ceux qui indirectement éprouvent un préjudice, il faut admettre que la compagnie d'assurances qui, à la suite de meurtre d'un assuré, a dû verser à ses héritiers le montant de l'assurance stipulée en cas de décès, est en droit de réclamer des dommages-intérêts à l'assassin, à raison du préjudice que lui a fait éprouver le paiement prématuré de l'assurance. Cour d'ass., Jura, 28 juin 1884, S. 85, 2, 219.

686 *ter*. De même, l'assureur qui a indemnisé l'assuré des suites de l'incendie a une action en dommages-intérêts contre l'auteur de l'incendie pour le préjudice qu'il lui a causé en donnant lieu par son fait à l'exercice de l'action de l'assuré contre l'assureur. Cass. 22 déc. 1852, S. 53, 1, 109.

688. L'action en réparation du préjudice causé par un accident (spécialement par un accident suivi de mort) n'appartient donc pas seulement à la victime de l'accident ou à ses héritiers, mais encore à quiconque, héritier ou non de la victime, se trouve directement lésé par les conséquences de l'accident. Alger, 23 mai, 1892 (S. 94, 2, 62; D. 94, 2, 47).

694. Vainement l'auteur de l'accident objecterait qu'il pourrait être ainsi exposé à l'infini à des actions successives de la part de tous ceux qui, à titre quelconque, tiraient avantage de la vie ou du travail de la victime; l'action en responsabilité n'est ouverte qu'à celui qui prouve l'existence d'un dommage, et à la condition de justifier d'un préjudice personnel et direct. Alger, 23 mai 1892, précité.

695. Le bénéfice des réparations peut être ainsi étendu même à des parents à l'égard desquels n'existe pas l'obligation de se fournir réciproquement des aliments. Cass. 20 févr. 1863 (S. 63, 1, 321.)

699. En résumé, l'action civile en dommages-intérêts pour réparation d'un crime ou délit, appartient à tous ceux qui, directement ou indirectement, en ont souffert un préjudice réel, sans qu'il soit nécessaire que des obligations naturelles et légales les rattachent à la victime. Bourges, 16 déc. 1872 (S. 74, 2, 71), 706. Au surplus, si tout individu peut réclamer la réparation du préjudice à lui causé par la faute d'un tiers, soit à ce dernier, soit aux personnes sur lesquelles pèse une responsabilité légale, il faut qu'il justifie de l'existence actuelle et certaine de ce préjudice. Et c'est au juge du fond à apprécier en fait si cette justification a été ou non rapportée. Cass. 15 avr. 1890 (S. 90, 1, 501).

See too Demogue "Obligations," t. 4, nos. 528, 530-1-3-5-7.

That the interest of the present plaintiff depends upon its relation, contractual or other, with the injured person, it is said presents a difficulty. But, apparently, all that it is required to prove, under art. 1053 C.C., is that, as the result of an interference with that relation attributable in law to fault of the defendant, it has sustained damage, which it becomes the duty of the jury (or of the judge discharging its functions) to assess.

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I find it impossible to distinguish in principle from the case at bar that of *Cedar Shingles Co.* v. *Comp. d'Ass. de Rimouski* (1), cited by Greenshields, J., where, not as the result of any subrogation, but solely because it was held to be directly within art. 1053 C.C., the loss sustained by a fire insurance company, obliged by contract to indemnify the owner of the property destroyed, was held to give it a right of action against the defendant, a third party, who was responsible for the fire.

L'assureur qui a payé le montant de l'assurance à l'assuré, a, pour se faire rembourser, contre l'auteur du sinistre, le recours en dommages de l'art. 1053 C.C.

So reads the fifth paragraph of the head-note to the report of that case.

Bossé, J., delivering the judgment of the court, after stating that the claim of the plaintiff was based on art. 1053 C.C., and depended upon the soundness of its contention that, having been obliged to pay because of the fault of the defendant, the latter was bound to reimburse it, said, at p. 382:

Cette doctrine a été acceptée par Pardessus, vol. 2, nº 595, cité par les codificateurs sous l'art. 2584, et Pardessus rapporte, dans ce sens, un arrêt de la cour de cassation du 18 décembre 1827, D. 28, 1, 63. Depuis lors, Ruben de Couder, nº 252, 252 (*sic*) et DuHail, nº 176, cités par Dalloz, ont adopté cette opinion, et elle a été sanctionnée par la cour de cassation dans l'affaire de La Prudence, D. 53, 1, 93, et par la cour d'Appel de Chambéry, dans l'affaire de la Compagnie L'Europe, D. 82, 2, 238.

See, also, Alauzet, "Assurances," vol. 2, pp. 388-9.

This decision of the Quebec court finds full support in French and Belgian jurisprudence of long standing. In D. 1882. 2. 238, mentioned by Bossé, J., the following notable paragraph occurs in the report of *Compagnie L'Europe* c. *Gruffart et al.*

Attendu, en effet, que les dispositions des arts. 1382 et 1383 sont aussi générales dans leurs termes qu'étendues dans leur application; qu'elles ne font aucune distinction ni aucune réserve et constituent en quelque sorte un droit commun, applicable à tous les citoyens, quelles que soient leur situation, ou leurs entreprises particulières:—Que, dès lors, il n'y a aucune raison d'exclure une compagnie d'assurances de ce droit commun et de la cantonner exclusivement dans ses droits respectifs avec ses assurés, en l'excluant des droits et actions qui peuvent lui compéter personnellement à l'égard des tiers.

See, also, D. 1853. 1. 93; D. 1859. 1. 429; D. 1872. 1. 293; D. (J. du R.) 1828. 1. 62-3; D. Rep. de Leg., Supp. 15, vbo.

(1) (1893) Q.O.R. 2 Q.B. 379.

"Responsabilité," nos. 215-6, 218, 220; Lyon-Caen et Renault, Tr. de Dr. Comm., vol. 6, nos. 1312 et seq.

Modern French jurisprudence, however, denies a right of action under arts. 1382-3 C.N. to a life or accident insurance company against a wrong-doer who has killed or injured the assured and thus subjected the company to immediate liability on its contract. It has been suggested that the fact that such insurance is not by way of indemnity distinguishes it from fire insurance and takes the case out of the operation of arts. 1382-3 C.N. See *L'Abeille* c. *May*, (1); Juris-Classeur Civ., arts. 1382-3, Délits et quasi-délits, Div. Al, no. 138; *Phoenix Assur. Co.* c. *Chemin de fer du Midi* (2); S. 1903. 2. 257n., 259; S. 1911. 2. 171; Gaz. des Trib., 1913. 1. 182. Compare *Merchants' and Employers' Guarantee & Accident Co.* v. *Blanchard* (Rev.) (3); *Merchants' and Employers' Guarantee & Accident Co.* v. *Brunet* (Rev.) (4); *Lloyd's Plate Glass Ins. Co.* v. *Pacaud* (5); *Animals' Insurance Co.* v. *Montreal Tramways Co.* (*Rev.*) (6); and *Motor Union Ins. Co.* v. *Sacks et al* (7). Recovery by life or accident insurance companies against third parties, who, by their fault, have injured the assured, thus entailing liability on such companies, is made in modern cases to depend on the presence in the contracts of insurance of a clause which can be treated as a cession by the assured to the company of his ultimate rights. See *La Mutuelle Générale Française c. Antoniotti* (8). Whether there is a sufficient logical basis for this distinction (Lefort, "L'Assurance sur La Vie, vol. 2, pp. 5-20) does not presently concern us; and it may be that the view expressed by Martineau, J., against recovery under art. 1053 C.C., was, in the *Blanchard* case (3), correct in principle, although his deductions from the judgment of the Privy Council, delivered by Baron Parke, in *Quebec Fire Insurance Co.* v. *Molson* (9), seem quite unwarranted. But the right of a fire insurance company to recover under article 1053 C.C. from a third party whose fault occasioned the loss for which, under its contract, it

(1) Rec. Pér. des Ass. (1929), 56.
(2) D. 1918, 1, 57n.
(3) (1919) Q.O.R. 56 S.C. 278.
(4) (1920) 58 Q.O.R. S.C. 77.
(5) (1907) 22 R.L.N.S. 150.
(6) (1915) Q.O.R. 48 S.C. 425.
(7) (1923) Q.O.R. 62 S.C. 14.
(8) (1928) 46 Rec. Pér. des Ass., pp. 463-5.
(9) (1851) 1 L.C.R. 222, at p. 230.

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has been obliged to indemnify its assured, seems to be well recognized in the jurisprudence of the province of Quebec. *Stemus decisis*. In principle there can be no distinction for the purpose of art. 1053 C.C. between the position, *quoad* the third party tort-feasor, of the fire insurance company and that of the master whose loss is caused by the defendant having tortiously injured his servant, or that of a religious community similarly damnified by an injury inflicted upon one of its members. In each case alike, the plaintiff must shew (*a*) fault of the defendant; (*b*) that such fault was in law the cause of the damage for which it seeks to recover; and (*c*) that such damage was actually suffered by it.

The existence of the relation between the respondent and Brother Henri-Gabriel is in no sense the equivalent of a *novus actus interveneins* such as would break the causal connection between the appellant's fault and the injury sustained by the respondent from it. That relation was, at the most, a *causa sine qua non*, or condition of the defendant having damnified the respondent. It was the occasion, not the cause of its being injured. 43 Rev. Crit. de Lég. (1914), pp. 230-1.

Moreover, while in cases of responsibility for breach of contract the degree of fault, and foreknowledge of the probability of its affecting the plaintiff adversely, intent and even motive may be material (Art. 1074 C.C. et seq.), comparative slightness of the fault shewn affords no answer even in mitigation of damages, nor can the absence of foreknowledge, intent or motive be invoked to support a defence based on remoteness of damage in cases of quasi-délit entirely independent of any breach of contract by the defendant; Ortenberg's case (infra) affords an illustration. See also *Loranger* v. *Dominion Transport Co.* (1); *Leclerc* v. *Montreal* (2). As the slightest degree of fault or negligence (*culpa levissima*) (S. 1927. 1. 201; S. 1924. 1. 105) suffices to entail liability in cases of quasi-délit, so the damage must, as far as practicable, be assessed in such cases under the civil law at a figure adequate to give complete compensation to the injured plaintiff. Juris-Class. Civ., art. 1382-3, Délits et quasi-délits, Div. A 1, nos. 2, 8.

The presence in the Civil Code of arts. 1074-5, which im-

(1) (1896) Q.O.R. 15 S.C. 195. (2) (1898) Q.O.R. 15 S.C. 205.

pose explicit limitations on the measure of damages recoverable for breach of contract, sharply contrasts with the utter absence of any such textual restriction in cases where délits or quasi-délits form the basis of action under art. 1053 C.C. In cases of contractual obligation the presumed intention of the parties affords the basis for restricting or extending the damages to what they may reasonably be supposed to have contemplated. See *Jackson* v. *Watson* (1); and *Griffiths* v. *Harwood* (2). In the ordinary case of a délit or quasi-délit causing damage, there is no such ground for thus confining or restricting the recovery against the wrong-doer. There can, therefore, be no justification for the application by analogy of restrictions, similar to those imposed by articles 1074-5 C.C., to cases of délits or quasi-délits. The very suggestion seems to me heretical. But see 1 Sourdat, Responsabilité, nos. 105, 107. In 5 Larambière (1857), arts. 1382-3, nos. 26 and 37, we read:

Les dommages et intérêts dus pour la réparation d'un délit ou d'un quasi-délit ne doivent néanmoins comprendre, pour la perte éprouvée ou le gain manqué, que ce qui en est une suite immédiate et directe. Mais, comme il n'est intervenu aucune convention, ils ne doivent pas être limités à ce que l'auteur du fait a pu prévoir au moment où il l'a commis, alors même qu'il n'y aurait pas eu de sa part dol, malice et dessein de nuire.

La responsabilité civile comprend l'obligation de réparer totalement le dommage causé. * * *

Il est indifférent au point de vue du droit civil (says Zachariæ (Massé et Vergé, vol. 4, p. 16)) que le dommage ait été causé sciemment ou par négligence: la négligence la plus légère suffit pour motiver une action en dommages et intérêts, arg. art. 1383. (See also foot-note n° 4, *ibid.*).

This is well pointed out in Juris-Classeur Civil, arts. 1382-3, div. A, nos. 3 and 4.

Perhaps the best known, if not the only kind of tort in respect of which lack of foreknowledge of the interest of the plaintiff, actual or reasonably possible, may be invoked as a defence is that of inducing a person to act in contravention of the contractual rights of another. *Quinn* v. *Leatham* (3). A., who, in ignorance of the obligations of a servant to B., induces him (the servant) to undertake a service inconsistent therewith, merely exercises his own right and commits no fault. Therefore the case is not within article 1053 C.C. But intent to defeat the rights of the former employer, importing malice, may render such

(1) [1909] 2 K.B. 193. (2) (1899) 2 Q.P.R. 485.
(3) [1901] A.C. 495.

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conduct actionable. *Girard* v. *Wayagamack Pulp & Paper Co.* (1). Compare *Pruneau* v. *Fortin* (2), a case where the defendant exercised his legal right, not in order to injure the plaintiff, but to advance what he conceived to be his own interest. English law admits this departure from the usual rule, that where there is question of actionable responsibility for tort (délit or quasi-délit) the motive and intent of the tort-feasor are immaterial. An act which does not amount to a legal injury cannot be actionable because done with bad intent. *Allen* v. *Flood* (3).

An interesting observation upon the juridical basis of the two notable decisions of the House of Lords above cited, from the point of view of the civilian, may be found in Gérard's work "Les Torts ou Délits Civils en Droit Anglais," at pp. 426 et seq. Most of the discussion in the French cases (S. 1925. 1. 249) and in the works of the French text-writers, however, bears upon the much-debated question whether, when the victim of an accident caused by the defendant's fault has a claim against him for breach of contract, he may, either concurrently or alternatively, prefer a claim based on quasi-délit under arts. 1382-3 C.N. See *Robillard* v. *Wand* (4). There is, of course, no such aspect of the case at bar. That is common ground.

Another case illustrative of the wide scope of art. 1053 C.C. is *Ortenberg* v. *Plamondon* (5), where, at p. 388, Mr. Justice Cross, holding the defendant liable to the plaintiff for damages for slander in the course of a public lecture, although it would seem certain that reference to the plaintiff had not been intended by the lecturer, said:

> The respondent pleaded that the statements made in his lecture were true, but he has failed to prove the ground of defence. He is in the position of having maliciously caused damage to the appellant. It is merely a case of applying the article 1053 C.C.

The plaintiff's right of action to recover on its claim for $118 for loss of its own property, which Brother Gabriel had with him when injured, admits of no question. Although this item is not specifically mentioned in the judgment, it was probably taken into account by the learned trial judge in fixing the damages at $4,000.

(1) (1916) Q.O.R. 51 S.C. 317.
(2) (1917) Q.O.R. 51 S.C. 517.
(3) [1898] A.C. 1.
(4) (1900) Q.O.R. 17 S.C. 456, at p. 475.
(5) (1914) Q.O.R. 24 K.B. 69; 385.

The plaintiff's recovery of the portion of its claim for out-of-pocket expenses ($2,236.90), as fixed by the trial judge, can be supported, in the opinion of the majority of the learned judges of the Court of King's Bench, upon another and distinct basis, suggested by Mr. Justice Greenshields, viz., that the negligence of the defendant being proved to have been the cause of the injuries of Brother Henri-Gabriel, it incurred an obligation to furnish to him all care necessary to alleviate his sufferings, and, as far as possible, to bring about his recovery, or at least to pay for such care.

Payment may be made by any person, although he may be a stranger to the obligation (Art. 1141 C.C.).

He whose business has been well managed is bound to fulfil the obligations that the person acting for him has contracted in his name, to indemnify him for all the personal liabilities which he has assured, and to reimburse him for all necessary or useful expenses. (Article 1046 C.C.)

The expenses incurred by the plaintiff for doctor's bills, and hospital care, etc., for Brother Henri-Gabriel may well be regarded as outlay made by it in the discharge of an obligation of the defendant and for its benefit. On similar grounds, in *Paquin* v. *Grand Trunk Rly. Co.* (1896) (1), cited by Greenshields, J., the defendant railway company was held liable to the plaintiff, who had rendered medical services to persons injured in an accident caused by its negligence, although such services had not been requested or sanctioned by anyone authorized on its behalf. Reference may also be made to the authorities cited by Larue, J., at p. 338; and to *La Cité de St. Hyacinthe* v. *Brault* (2). Subject to the question of the application of art. 2262 (2) C.C., the right of the plaintiff to maintain an action on the basis *de in rem verso* for the sum of $2,236.90 would seem to be reasonably clear.

As to the amount of the total damages, assessed at $4,000, even if the practice of this court permitted a revision thereof, I agree with Mr. Justice Cannon that

La privation des services du Frère Gabriel a certainement causé des dommages et des embarras à la communauté dont il faisait partie,

and with Mr. Justice Bernier that the amount allowed for actual damages beyond the out-of-pocket expenses, viz., $1,767.10, was "not exorbitant—bien loin de là." Reference may again be made to 5 Larombière, Obligations, 1857, arts. 1382-3, no. 26 (p. 704) quoted above; to

(1) (1896) Q.O.R. 9 S.C. 336. (2) (1921) Q.O.R. 60 S.C. 234.

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Fuz.-Herman, III Code Civ. Ann. Arts. 1382-3, nos. 699, 688; and to Juris-Class. Civ., Arts. 1382-3, Délits et quasi-délits, Div. A. 1; nos. 2 and 8.

The accident to Brother Henri-Gabriel happened on the 14th of August, 1923. The present action was begun on the 8th of August, 1925. More than one year and less than two years had elapsed in the interval.

The defendant, claiming that this is an action "for bodily injuries" within art. 2262 (2) C.C. above quoted, asserts that it is prescribed. The plaintiff, on the other hand, argues that the action falls within art. 2261 (2), by which actions

> for damages resulting from offences or quasi-offences, whenever other provisions do not apply * * * are prescribed by two years,

and contends that the action was begun in time and is not prescribed.

These provisions of the Civil Code are found in section 5 of chapter 6, of Tit. XIX, that section being headed, "Of certain short prescriptions."

In the province of Quebec, as in France, the general rule is that

> all things, rights and actions, the prescription of which is not otherwise regulated by law, are prescribed by thirty years. (Art. 2242 C.C.; Cf. Art. 2262 C.N.)

These short prescriptions are exceptions to this general rule and, as is pointed out in 32 Laurent, at no. 373, they are subject to the principles which govern all exceptions: "on ne peut pas les étendre, même par voie d'analogie." Baudry-Lacantinerie Droit Civil (De la prescription), vol. 28 no. 24, citing Cass. 26 juin 1859, S. 59. 1. 858), says:

> Ainsi que l'a jugé la cour de cassation: les lois qui établissent des prescriptions ou des déchéances sont de droit étroit et ne peuvent pas être étendues par analogie d'un cas à un autre.

An illustration of the application of this rule is to be found in 32 Laurent, no. 377, where it is pointed out that, although "la loi sur l'impôt foncier de 3 frimaire, an VII (Art. 149)" establishes a special prescription of three years in favour of contributories, that prescription does not apply to a third person who has paid the impost for the debtor, and the author gives as a reason that the action is entirely different:

> le tiers qui paye pour le contribuable a l'action de mandat, de gestion d'affaires, ou au moins l'action de *in rem verso*. Cette action n'a rien de commun avec la loi de l'an VII: c'est une action ordinaire qui se prescrit d'après le droit commun par trente ans.

And he makes reference to a decision of the Court of Cassation of 15th March, 1841, reported in Dalloz, Rep., vbo. Prescription, no. 1046 1° and to Pasicrisie (1829), p. 342. The author proceeds:

Il en est de même de toutes les autres prescriptions: on doit les limiter strictement aux cas pour lesquels elles ont été établies: en dehors de ces cas, elles n'ont plus de raison d'être. Les intérêts se prescrivent par cinq ans entre le créancier et le débiteur; si un tiers avance les deniers, il aura une action ordinaire de trente ans, parce que, à son égard, il n'y a pas une dette d'intérêts, il y a une dette ordinaire.

In volume IX of Mr. Justice Mignault's work "Droit Civil Canadien," at p. 518, we find the statement:

la prescription courte est une prescription d'exception; elle n'existe que lorsqu'elle a été expressement décrétée par le législateur.

That the limitation of one year imposed by art. 2262 (2) C.C. applies to all actions by a person who has sustained bodily injury to recover damages therefor, or for the consequences thereof, and that such prescriptive period runs from the date when the injury was suffered admits of no doubt in view of the decision of this court in *City of Montreal* v. *McGee* (1); by which the decision in *Caron* v. *Abbott* (2), cited by Dorion J., was impliedly overruled. See *Versailles* v. *Dominion Cotton Co.* (3).

But an action brought, as is that now before us, not by the person who has suffered bodily harm, but by someone else who has sustained damages distinct from his by reason of the fault of the defendant, although such damages be a consequence of the bodily injuries, is certainly not the same action which the person so injured might himself have brought. For instance, in it the plaintiff can recover nothing for the pain and suffering which the injuries caused to the victim, but is strictly limited to such damages as he can prove he has himself actually sustained. The cause of action before us is not "for (the) bodily injuries" suffered by Brother Henri-Gabriel as the immediate result of the fault, by him "actionable *per se*;" it is rather for the loss sustained by the community owing to the expense to which it was put and to its having been deprived of the services of one of its members through the fault of the defendant; *per quod* only is such fault actionable by it. *Robert Mary's* case (4). Its cause of action for damages

(1) (1900) 30 Can. S.C.R. 582, at p. 592.
(2) (1887) M.L.R. 3 S.C. 375.
(3) (1907) Q.O.R. 32 S.C. 281.
(4) (1612) 5 Coke's Pt. 9, 111b at 113a.

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other than out-of-pocket expenses would have been the same had the defendant illegally detained Brother Henri-Gabriel for the period in question, or had it wrongfully induced him to absent himself from the community. In each case alike the plaintiff would claim for "damages caused (to it) by (the) fault" of the defendant (Art. 1053 C.C.), or by that of "persons under its control" (Art. 1054 C.C.).

This leads us to a brief consideration of the precise terms in which art. 2262 (2) C.C. is couched. In the first place, the words "for bodily injuries" of the English version are very inaptly rendered in the French version by the words "pour injures corporelles," the meaning of the latter as intended, no doubt, being "pour lésions ou blessures corporelles." While not of present importance, it is, perhaps, not out of place here to suggest legislative action in regard to the French versions of articles 2262 (2) C.C. and of article 1056 C.C. above referred to. What, however, is of moment at present is the contrast between the language of art. 2261 (2) C.C. "for *damages resulting* from offences *or* quasi-offences" ("*pour dommages résultant* de délits *et* quasi-délits") and the terms of art. 2262 (2) "*for bodily injuries.*" The latter paragraph is grouped with no. (1) "for slander or libel" ("pour injures verbales ou écrites") and no. (3) "for wages of domestic or farm servants" ("pour gages des domestiques de maison ou de ferme") and no. (4) "for hotel or boarding-house charges" ("pour dépenses d'hotellerie ou de pension"). This context seems to make the contrast between art. 2262 (2) and art. 2261 (2) even more significant, the words "damages resulting from" being introduced into the latter (art. 2261 (2)) although other provisions of the same article, nos. (1) and (3), read: (1) "for seduction and lying-in expenses" ("pour séduction et frais de gésine") and (3) "for wages of workmen, etc." (pour salaires des employés, etc."). There can be no justification in my opinion for reading art. 2262 (2) C.C. as if its terms were "for *damages resulting from* bodily injuries." To do so would involve a distinct extension of its application. In introducing into the Code art. 2262 (2) C.C. (See Codifiers' 4th Report, p. 194, no. 103a), the legislature probably had in mind only the right of action of the person suffering such injuries ("the immedi-

ate victim"), who alone can sue to recover *for* them. Had it intended to cover by the very short prescription of one year, which art. 2262 (2) C.C. enacts, all actions for "*damages resulting from, or arising out of*" bodily injuries, having before it the language of art. 2261 (2) C.C., it is scarcely possible that terms similar to those therein employed would not have been used. The statement of Lacoste, C.J., in *Griffith* v. *Harwood* (1),

> Article 2262 * * * rend prescriptible par un an tout dommage résultant de lésions corporelles,

is *obiter*, and is, no doubt inadvertently, too broad—in fact distinctly broader than the authority cited justifies, viz., *Canadian Pacific Ry. Co.* v. *Robinson* (2). There the question was as to the effect of art. 2262 (2) C.C. on the right of recovery of "the immediate victim," as it was in the later case of *City of Montreal* v. *McGee* (3).

The plaintiff does not seek to affect the defendant by its understanding with Brother Henri-Gabriel. It complains that the defendant has unlawfully deprived it of the benefit which it would otherwise have derived from its arrangement with its member and, for the damage thus done to it, it seeks compensation. Compare S. 1925. 1. 249n, refusing to apply art. 433 C. Comm., limiting actions by railway passengers, to an action brought by a mother for the death of her son, who was killed while a passenger.

I agree with the following considérant of Mr. Justice Surveyer:

> Considérant cependant que la demanderesse ne poursuit pas pour le frère Henri-Gabriel et en son lieu et place, mais qu'elle réclame un droit qui lui est personnel, et qui est distinct de celui qu'avait le frère Henri-Gabriel; que ce droit ne résulte pas des injures corporelles subies par ce dernier, mais des dépenses auxquelles la demanderesse a été contrainte et des dommages qui lui ont été causés par la privation des services du dit frère Henri-Gabriel.

The prescription of one year imposed by art. 2262 (2) C.C. could only apply by analogy, or by implication from its mention of art. 1056 C.C. For such a case as that now before us this prescription has not been "expressément décrétée par la législature." *A fortiori* is this so in so far as the claim for out-of-pocket expenses incurred by the plaintiff on account of Brother Henri-Gabriel's injuries is concerned,

(1) 2 Q.P.R. 485, at p. 488.

(2) [1890] 19 Can. S.C.R. 292; [1892] A.C. 481.

(3) 30 Can. S.C.R. 582.

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if that claim be regarded, not as based on art. 1053 C.C., but as resting on art. 1046 C.C.; whether, if the action be regarded as *de in rem verso*, the prescription of art. 2262 (2) C.C. applies, I find it unnecessary to determine. My learned brothers Mignault and Rinfret think it does; and from their considered opinion on this point I am not at present prepared to dissent. But see 32 Laurent, no. 377 (*supra*). Of course, to the claim for destruction of clothing and personal effects, the property of the plaintiffs, art. 2262 (2) C.C. can have no application. As to this latter item of the plaintiff's demand, it is, in my opinion, beyond question that art. 2261 (2) C.C. applies. Indeed, I am of the opinion not only that the entire cause of action, so far as it rests on arts. 1053-4 C.C., is maintainable, but that it falls within art. 2261 (2) C.C. rather than within art. 2262 (2) C.C.

I, accordingly, accept the following *considérants* of Mr. Justice Surveyer:

Considérant que l'action qui compétait au frère Henri-Gabriel était une action pour injures corporelles (bodily injuries), prescriptibles par un an (C.C., art. 2262, par. 2);

Considérant, cependant, que la demanderesse ne poursuit pas pour le frère Henri-Gabriel et en son lieu et place, mais qu'elle réclame un droit qui lui est personnel, et qui est distinct de celui qu'avait le frère Henri-Gabriel; que ce droit ne résulte pas des injures corporelles subies par ce dernier, mais des dépenses auxquelles la demanderesse a été contrainte et des dommages qui lui ont été causés par la privation des services dudit frère Henri-Gabriel;

Considérant que la demanderesse cherche la réparation civile d'un quasi-délit qui lui cause un préjudice réel et lui fait éprouver un dommage positif et matériel;

Considérant que l'accident arrivé au frère Henri-Gabriel s'est produit le 14 août 1923, et que la demande a été signifiée le 8 août 1925, par conséquent dans les deux ans du quasi-délit (C.C. art. 2261).

For the foregoing reasons, which are substantially the same as those of the learned trial judge and of Greenshields, J., I would affirm the judgment *a quo* and would dismiss the appeal with costs.

MIGNAULT, J. (dissenting).—L'appel est d'un jugement de la cour du Banc du Roi (1), confirmant à l'unanimité le jugement de la cour supérieure, Surveyer, J. Il n'y a eu différence d'opinion que quant au montant de la condamnation.

(1) Q.O.R. 46 K.B. 96.

La compagnie appelante exploite des automobiles de louage (taxis) ainsi que des autobus, pour le transport des voyageurs, surtout dans la région de Montréal. Elle existe en vertu de lettres patentes de la province de Québec.

La congrégation intimée est une congrégation religieuse d'hommes, qui a été constituée civilement par une loi de la province de Québec de 1887, 50 Vict., c. 29. Cette loi lui permet de s'agréger des membres, et d'adopter des règlements non incompatibles aux lois de cette province. Elle a plusieurs maisons dans la province de Québec où elle se voue à l'enseignement. Ses membres prononcent des vœux perpétuels de pauvreté, de chasteté et d'obéissance, mais il n'est pas question de ces vœux dans la loi constitutive de l'intimée. Les frères maristes ont des maisons ailleurs que dans la province de Québec, et notamment à New-York. L'Acte 50 Vict., c. 29, se borne naturellement aux établissements que les frères maristes ont faits ou feront en cette province.

Le frère Henri-Gabriel, dont il sera question plus loin, était membre de cette congrégation lors de l'accident qui a donné lieu au procès, et il enseignait à la maison des frères maristes à Iberville, province de Québec. Il avait prononcé des vœux perpétuels, et aussi ce qu'on appelle des vœux de stabilité, dont l'objet est d'obliger le religieux (en conscience, bien entendu) à demeurer membre de la congrégation pendant toute sa vie.

Au mois d'août 1923, les frères maristes établis à New-York, et qui ne font pas partie de la corporation établie par la loi 50 Vict., c. 29 (il n'appert pas s'ils ont obtenu une constitution civile de l'Etat de New-York), avaient un campement d'été pour leurs élèves sur l'île Lamothe, dans l'Etat du Vermont, près de Rouses Point, New-York, et à une cinquantaine de milles de Montréal. Ils avaient organisé une excursion pour les enfants de leur camp jusqu'à Montréal, et avaient contracté avec la compagnie appelante pour transporter les enfants et les frères qui les accompagnaient à travers cette dernière ville, et de là à Rouses Point. L'appelante leur fournit deux autobus avec chauffeurs, contenant chacun une vingtaine de personnes. Le contrat de transport n'était donc pas entre l'intimée et l'appelante, mais entre cette dernière et des frères maristes

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qui ne faisaient pas partie de la corporation intimée. Il s'ensuit qu'aucune question de responsabilité contractuelle ou de faute contractuelle ne peut se soulever entre l'intimée et l'appelante.

L'excursion se fit le 14 août 1923. L'appelante avait promené les excursionnistes dans la cité de Montréal, et vers la fin de l'après-midi elle les ramenait dans la direction de Rouses Point. Le frère Henri-Gabriel était du voyage, probablement sur l'invitation des frères maristes de New-York, et il prit place sur la première banquette d'une des voitures. Entre lui et l'appelante, pas plus qu'entre l'intimée et l'appelante, il n'y avait aucun contrat de transport.

Pendant le trajet entre Montréal et Rouses Point, la voiture où se trouvait le frère Henri-Gabriel fit arrêt à Saint-Philippe de Laprairie pour prendre de la gazoline. Le chauffeur en demanda cinq gallons à un garage au bord de la route. Il avait cependant mal calculé la quantité de gazoline qui pouvait entrer dans le réservoir placé sous les premières banquettes. Il s'en répandit donc dans la voiture, et la présence d'un tuyau surchauffé de la machine causa un incendie. Le frère Henri-Gabriel fut très grièvement brûlé, et il est hors de question que ses brûlures furent causées par la faute du chauffeur de la voiture, faute dont l'appelante était civilement responsable. Il avait donc une action de ce chef contre l'appelante, et il me paraît clair qu'on n'aurait pu invoquer comme fin de non-recevoir contre cette action son vœu de pauvreté, ni son consentement, qui en découlait, que tous ses biens fussent la propriété de la congrégation dont il faisait partie.

Le frère Henri-Gabriel ne fit jamais de réclamation contre l'appelante à raison de l'accident dont il avait été victime. L'intimée l'avait fait soigner, et elle paya tous les frais des traitements médicaux et chirurgicaux qu'on dut lui donner. Elle en réclame maintenant le coût à l'appelante et elle demande en sus une indemnité pour privation des services du frère blessé, ainsi que pour les frais de son entretien alors qu'il était dans l'impossibilité de travailler. Elle base son droit d'action sur la faute délictuelle dont elle tient l'appelante responsable. Le premier juge lui accorda $2,236.90 pour frais médicaux et autres dépenses, et $1,763.10 pour la privation des services du blessé. La

cour du Banc du Roi (1) confirma ce jugement, mais deux des juges (Greenshields J. et Cousineau J. *ad hoc*) auraient restreint l'indemnité au premier item, sauf que le juge Greenshields, après une nouvelle étude du dossier, ajoute qu'il aurait été disposé à donner à l'intimée $900 qu'elle avait payés à un remplaçant du frère Henri-Gabriel.

La défense de l'appelante doit maintenant nous occuper. Elle oppose deux moyens à l'action: 1° L'intimée n'a pas le droit d'action qu'elle prétend exercer; 2° cette action, étant pour "injures corporelles", est éteinte, vu qu'elle n'a été intentée que le 7 août 1925 et signifiée le lendemain, près de deux ans après l'accident (art. 2262 C.C.). Si le deuxième moyen est bien fondé, le premier importe peu. Cependant, il paraît difficile de les séparer, et il me semble plus avantageux de les étudier ensemble.

En effet, sur cette question de prescription, tout dépend du fondement juridique de l'action. Si nous étions en présence de la violation d'un contrat, c'est-à-dire de la faute contractuelle, je crois que l'article 2262 C.C., que l'appelante invoque, serait sans application. Mais j'ai dit qu'il n'y a pas eu de contrat entre les parties en litige. Le frère blessé n'a rien payé pour son passage et l'intimée n'a rien déboursé pour son transport. Il n'en est pas moins certain qu'on ne peut se prononcer sur la question de prescription que lorsqu'on sera fixé sur la nature du recours que peut exercer l'intimée dans les circonstances dévoilées par la preuve.

D'autre part, l'action qui compétait au frère Henri-Gabriel—la cour supérieure le reconnaît expressément—était une action pour "injures corporelles" prescriptible par un an. Et c'est parce que le savant juge de première instance était d'avis que l'action qui appartenait à l'intimée avait une autre base juridique qu'il a écarté le plaidoyer de prescription.

Considérant (dit-il) que la demanderesse ne poursuit pas pour le frère Henri-Gabriel et en son lieu et place (elle n'aurait pu le faire, art. 81, code de procédure civile), mais qu'elle réclame un droit qui lui est personnel, et qui est distinct de celui qu'avait le frère Henri-Gabriel; que ce droit ne résulte pas des injures corporelles subies par ce dernier, mais des dépenses auxquelles la demanderesse a été contrainte et des dommages qui lui ont été causés par la privation des services dudit frère Henri-Gabriel.

(1) Q.O.R. 46 K.B. 96.

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Et le savant juge ajoute, donnant à l'article 1053 C.C. une extension qu'il convient de discuter à fond, " que toute personne lésée par une faute doit être indemnisée; qu'il y a en principe autant d'indemnités distinctes qu'il y a de personnes lésées (j'omets les autorités citées par le savant juge); que Demolombe (vol. 31, n° 675, p. 579) approuve un arrêt qui a reconnu la réclamation d'un associé pour la mort de son associé, réclamation qui serait repoussée par notre article 1056 C.C., qui est d'origine anglaise, et qui fait exception pour les cas de décès, aux principes de notre droit en matière de responsabilité."

Avant de citer nos textes de loi, je suis bien prêt à reconnaître que la jurisprudence française moderne a donné aux articles 1382 et 1383 du Code Napoléon une extension absolue, et qui est bien telle que la représente le savant juge. Ainsi, quoique le Code Napoléon n'ait pas une disposition semblable à notre article 1056 C.C., la jurisprudence reconnaît l'existence d'un droit d'action au profit de toute personne qui souffre un préjudice à cause du décès d'un individu qui meurt des suites d'un délit ou quasi-délit. Ce sont les enfants, le conjoint par mariage, et même un tiers, comme dans le cas typique que mentionne Demolombe, qui avait fait un contrat de société avec le défunt.

Il est digne de remarque que notre code expose toute la loi de la responsabilité civile dans quatre articles d'une rédaction nécessairement générale, dont le dernier, l'article 1056 C.C. est, dit-on, d'origine anglaise. Je vais citer le premier et le dernier de ces quatre articles, qui suffisent pour la discussion de la question de principe, très importante, assurément, dont il s'agit en cette cause.

Art. 1053. Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabileté.

Art. 1056. Dans tous les cas où la partie contre qui le délit ou quasi-délit a été commis décède en conséquence, sans avoir obtenu indemnité ou satisfaction, son conjoint, ses père, mère et enfants ont, pendant l'année seulement à compter du décès, droit de poursuivre celui qui en est l'auteur ou ses représentants, pour les dommages-intérêts résultant de tel décès.

Au cas de duel, cette section peut se porter de la même manière non seulement contre l'auteur immédiat du décès, mais aussi contre tous ceux qui ont pris part au duel soit comme seconds, soit comme témoins.

En tout cas il ne peut être porté qu'une seule et même action pour tous ceux qui ont droit à l'indemnité et le jugement fixe la proportion de chacun dans l'indemnité.

Ces poursuites sont indépendantes de celles dont les parties peuvent être passibles au criminel, et sans préjudice à ces dernières.

Il s'agit en cette cause de la responsabilité qui incombe à l'appelante à raison d'un quasi-délit commis par elle, et qui a infligé des "injures corporelles" au frère Henri-Gabriel; c'est là le fait générateur du dommage qu'invoque l'intimée. L'article 1056 C.C. ne peut s'appliquer que lorsque

la partie contre qui le délit ou quasi-délit a été commis décède en conséquence.

Il n'est question là encore que d'"injures corporelles". L'article 1053 C.C., il est évident, envisage les délits et quasi-délits de tout genre, et non pas seulement ceux qui occasionnent des injures de cette sorte. Cependant, en interprétant cet article, je ne veux pas sortir de l'espèce que nous avons devant nous, et tout ce que j'en dirai se bornera au cas où le délit ou quasi-délit a causé de ces injures. J'envisage donc une espèce qui entre, ou qui peut entrer, si la mort s'ensuit, dans le cadre et de l'article 1053 C.C. et de l'article 1056 C.C.

Envisageant maintenant l'article 1053 C.C., je puis dire qu'il ne diffère guère des articles 1382 et 1383 du Code Napoléon. C'est le fait "qui cause à autrui un dommage", pour me servir de l'expression du code français, qui engendre la responsabilité de celui par la faute duquel il arrive.

On peut admettre que l'expression "autrui", si elle n'est pas restreinte par le contexte (et si on ne doit pas la regarder comme étant équivoque, surtout dans un texte législatif, et partant comme se plaçant dans la catégorie des expressions que l'interprète doit restreindre plutôt qu'étendre), est d'une portée très générale. Elle comprendrait, suivant la prétention de l'intimée, non seulement "la partie contre qui le délit ou quasi-délit a été commis" (c'est l'expression qu'emploie l'article 1056 C.C.), mais aussi toute personne qui souffre, je pourrais dire par ricochet, un préjudice comme conséquence du dommage éprouvé par cette partie elle-même.

Sauf à discuter plus loin les arrêts que cite l'intimée, la jurisprudence de la province de Québec n'a jamais donné une telle extension à l'article 1053 C.C. Le principe qui me paraît dominer en matière de dommages-intérêts, c'est que seuls les dommages directs, à l'exclusion des dommages

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indirects ou éloignés, peuvent faire la base d'une action en justice. Le code en a une disposition expresse quand il s'agit de l'inexécution des obligations. Dans le cas même où l'inexécution de l'obligation résulte du dol du débiteur, les dommages-intérêts ne comprennent que ce qui est une suite *immédiate* et *directe* de cette inexécution (art. 1075 C.C.). Si le débiteur a agi sans dol—c'est le cas du quasi-délit qui est un dommage causé illégalement, mais sans intention de nuire—il n'est tenu que des dommages qui ont été prévus et qu'on a pu prévoir (art. 1074 C.C.). Il est vrai qu'il s'agit là surtout, mais non pas uniquement, cependant, de l'inexécution d'une obligation contractuelle, mais il n'y a pas plus de raison d'accorder des dommages indirects ou éloignés, surtout à des tiers, lorsque l'obligation découle d'un délit ou quasi-délit, que lorsqu'elle provient d'un contrat.

Sur ce point j'accepte pleinement le principe que le juge Mathieu a formulé dans la cause de *Kimball* v. *City of Montreal* (1), savoir, que pour pouvoir se plaindre d'un quasi-délit, il ne suffit pas que le fait imputé ait été l'une des causes premières et éloignées du dommage, mais il est nécessaire que ce fait ait lui-même déterminé directement le dommage, et qu'il n'en ait pas été seulement l'occasion indirecte et pour ainsi dire de seconde main. Le savant juge a déclaré aussi que les principes énoncés dans l'article 1075 C.C. sont applicables aux dommages réclamés en vertu de l'article 1053 C.C.

L'article 1056 C.C. nous fournit à l'appui de cette solution un argument de texte. Il y est bien question de dommages indirects et éloignés, mais le code accorde ces dommages par une disposition expresse et par exception à la règle de l'article 1053 C.C. qui, sans cette disposition, les exclurait. Si l'article 1053 C.C. comporte l'interprétation qui a prévalu en cette cause, c'est-à-dire s'il faut suivre la faute jusqu'à ses dernières conséquences et accorder autant d'indemnités qu'il y a de personnes lésées directement ou indirectement, l'article 1056 C.C. est une disposition inutile. Il s'harmonise au contraire avec l'article 1053 C.C., si l'expression "autrui" doit être restreinte à "la partie

(1) [1887] M.L.R. 3 S.C. 131.

contre qui le délit ou quasi-délit a été commis", et alors l'article 1056 C.C. admet une exception à la règle générale de l'article 1053 C.C. ainsi comprise.

On a beaucoup discuté au sujet de l'origine de l'article 1056 C.C. Il vient des statuts refondus du Canada, 1859, chap. 78, qui reproduit le statut 10-11 Victoria, chap. 6 (1847). D'après le préambule de cette dernière loi,

> une personne qui, par sa malveillance, sa négligence ou son impéritie, peut avoir causé la mort d'une autre personne, doit être responsable des dommages causés par son fait.

L'article 1056 C.C. est entré au code sans avoir passé par les Rapports des codificateurs, et sans avoir figuré parmi les amendements que la législature fit au projet du code par la loi 29 Vict., c. 41. Cependant, il se trouve dans l'édition officielle du code imprimée en 1866 par l'imprimeur de la Reine, et on a déclaré que cette édition avait toujours eu force de loi dans la province (disposition formelle du statut 31 Vict. (Qué.), c. 8, art. 10). Dans la cause de *Robinson* v. *Canadian Pacific Ry. Co.* (1), Lord Watson dit que cet article diffère "substantially" du Lord Campbell's Act, et il est aussi beaucoup plus restreint, quant aux personnes qui peuvent en bénéficier, que le chapitre 78 des statuts refondus du Canada qui s'étendait aux alliés aux mêmes degrés que les père et mère et enfants. Peu importe, d'ailleurs, l'origine de l'article 1056 C.C.; il a force de loi tout autant que l'article 1053 C.C.

L'article 1056 C.C. donne, contre l'auteur du délit ou quasi-délit dont meurt la victime, un recours en indemnité au conjoint, aux père et mère et aux enfants de cette dernière, indemnité qui comprend, non pas les dommages éprouvés par la victime et qu'on réclamerait à titre de succession, mais ceux que leur cause son décès. Cette indemnité, que les intéressés doivent réclamer dans l'année du décès, et par une seule et même action, est accordée à la condition que la victime n'ait pas elle-même obtenu "indemnité ou satisfaction". Si, donc, l'auteur du délit ou quasi-délit a indemnisé la victime, aucun recours n'est ouvert à son conjoint, ses père et mère et enfants, quel que soit le préjudice qu'ils éprouvent par suite du décès. En d'autres termes, le paiement de la créance en indemnité de

(1) [1892] A.C. 481, at p. 487.

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la victime éteint l'action de ses proches. Cette constatation est d'une grande importance pour montrer que de droit commun " la partie contre qui le délit ou quasi-délit a été commis " est celle qui possède l'action en indemnité contre l'auteur du fait délictueux.

Si donc le délit ou quasi-délit est assez grave pour causer la mort de la victime, et si celle-ci n'a pas obtenu avant son décès " indemnité ou satisfaction ", les personnes mentionnées en l'article 1056 C.C., et pas d'autres, peuvent recourir contre l'auteur du fait délictueux, et lui réclamer les dommages qui leur résultent du décès. Leur action, lorsqu'il y a ouverture, est indépendante de celle de la victime, sa prescription court à partir du décès, et il importerait peu que l'action de la victime eût été éteinte par prescription avant son décès (*Robinson* v. *Canadian Pacific Ry. Co.* (1).

Or, d'après le jugement frappé d'appel, si la victime ne décède pas des effets du délit ou quasi-délit, si même elle a obtenu elle-même " indemnité ou satisfaction ", les personnes mentionnées en l'article 1056, et non seulement ces personnes, mais tous autres intéressés, tels que l'associé de la victime, peuvent réclamer, contre l'auteur du délit ou quasi-délit, les dommages qui leur résultent par contrecoup de ce délit ou quasi-délit.

Si je comprends bien le raisonnement sur lequel s'appuie la jurisprudence en France, et qui rend inutile une disposition dans le code Napoléon semblable à notre article 1056, il repose sur la considération suivante: Toute faute, qu'elle soit délictuelle ou contractuelle, trouble l'ordre social, et une indemnité doit être payée à tous ceux qui en souffrent. Ainsi un ouvrier est blessé et rendu incapable de travailler par la faute de quelqu'un. Cet ouvrier perd le salaire qu'il aurait pu gagner, ses proches perdent le soutien qu'ils auraient reçu de lui, le maître qui l'employait perd ses services, et si le travail de l'ouvrier était essentiel à l'entreprise du maître, celui-ci ne pourra pas tenir ses engagements envers ses créanciers, et ainsi de suite *ad infinitum*. (Voyez Demogue, Obligations, tome IV, p. 13, n^{os} 525 et suivants.) On se perd à suivre le lien de causalité aussi loin.

(1) [1892] A.C. 481.

Cependant, où peut-on s'arrêter dans le système adopté par le savant juge de première instance? Toute personne lésée par une faute, dit-il, doit être indemnisée, et il y a autant d'indemnités distinctes qu'il y a de personnes lésées. Si on ne se borne pas à indemniser la partie contre qui le délit ou quasi-délit a été commis, il faut suivre la faute jusqu'en ses plus lointaines conséquences, et c'est la dernière alternative qui résulterait de l'interprétation extensive de l'article 1053 C.C.

Cette dernière alternative, je le dis sans hésitation mais avec toute déférence possible, n'a jamais été admise, avant ce litige, par une jurisprudence digne de ce nom dans la province de Québec. Les complications de la vie moderne sont telles que cette doctrine aurait chez nous les conséquences les plus graves. On ne peut léser un membre de la société sans porter préjudice, par ricochet, à un grand nombre de personnes qui ont avec lui des relations, soit de famille, soit d'affaires. Un individu blessé et rendu incapable de travailler peut se trouver dans l'impossibilité de payer ses dettes. Ses créanciers pourraient-ils prétendre que la perte de leur créance est directement attribuable à la blessure causée par la faute d'un tiers, et partant à cette faute même? Un grand peintre ne peut plus exercer son art à la suite d'un accident occasionné par l'imprudence d'un conducteur d'automobile. Le peintre indubitablement a droit à une indemnité, mais les membres de sa famille, le marchand qui lui avait commandé un tableau, le client de ce marchand à qui ce tableau avait été vendu avant sa confection, le propriétaire de la galerie où cet œuvre d'art devait être exposé, ne diront-ils pas qu'ils subissent un préjudice directement attribuable à l'imprudence du conducteur?

Je ne puis concevoir que le législateur, en rédigeant en termes généraux l'article 1053 C.C., ait voulu admettre une responsabilité s'étendant ainsi indéfiniment, et presque à l'infini, à travers les rouages si compliqués de l'existence moderne. C'est toujours à la jurisprudence française de nos jours que reviennent les partisans de l'interprétation extensive de cet article. Pour me contenter d'une seule autorité, citée du reste sans commentaires par le président de cette cour, Fuzier-Herman, Code Civil annoté, art. 1382-

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1383, n° 686, enseigne que l'action en dommages-intérêts appartient à toute personne qui, *soit directement, soit indirectement,* éprouve un préjudice à raison du délit ou quasi-délit commis par le défendeur. Cette jurisprudence ne nous lie pas, et dans une espèce où on l'invoquait comme régissant notre article 1054, et l'étendant aux actes du préposé faits à l'occasion de l'exercice de ses fonctions, cette cour a refusé de la suivre: *Curley* v. *Latreille* (1). On a généralisé tellement les règles de la responsabilité civile en France, qu'on n'est pas très loin du système préconisé par certains auteurs, savoir que toute activité, même sans faute, engage la responsabilité de celui qui s'y livre.

Je crois qu'on serait bien en peine de trouver de semblables doctrines dans les vieux jurisconsultes, tels que Pothier et Domat. Et il est possible que la jurisprudence française moderne ait été influencée, à son insu, par des considérations d'ordre social.

Je ne puis accepter ce système. Il rendrait, je l'ai déjà dit, l'article 1056 C.C. inutile, et cette disposition serait de plus déraisonnable, puisque, dans un cas grave, celui de la mort de la victime, le recours des intéressés serait strictement limité à certains proches, et une personne dans la situation de l'intimée serait exclue; tandis que dans un cas moins grave où la victime survit à ses blessures, toute personne qui pourrait attribuer un préjudice personnel à la faute primitive, aurait, en vertu de l'article 1053 C.C., un recours contre l'auteur de cette faute.

Le juge Dorion objecte que l'article 1056 C.C. ne prévoit que le cas de mort. Et il ajoute:

> S'il semble illogique d'accorder dans le cas de survie l'indemnité que l'on refuse dans le cas de mort, il faut se résigner à l'illogisme créé par l'article 1056 C.C., qui introduit les dispositions du Lord Campbell's Act en marge de notre droit civil.

Il me semble qu'un raisonnement qui se résigne aussi facilement au reproche d'illogisme perd beaucoup de sa force persuasive. Dans le cas d'une loi comme le Code civil, surtout dans une matière où le législateur s'est montré si sobre de formules, il faut assurément suivre la règle d'interprétation de l'article 1018 C.C. qui s'applique aux lois comme aux contrats et dire que les articles du code

(1) [1919] 60 Can. S.C.R. 131.

s'interprètent les uns par les autres, en donnant à chacun le sens qui résulte de l'ensemble de ses dispositions.

C'est bien là ce que reconnaissait Lord Sumner dans la cause de *Quebec Railway, Light and Power Co.* v. *Vandry* (1):

> It must not be forgotten, disait-il, what the enactment is, namely, a Code of systematized principles and rules, not a body of administrative directions or an institutional exposition. Il ajoutait: Of course also the Code, or at least the cognate articles, should be read as a whole, forming a connected scheme; they are not a series of detached enactments.

Et en définitive le raisonnement qu'on nous oppose s'appuie moins sur les textes—car on établit une véritable antinomie entre l'article 1053 C.C. et l'article 1056 C.C.—que sur l'autorité qu'on attribue à des arrêts des tribunaux français qui ne nous lient en aucune façon. Du reste, ces tribunaux font l'application d'un code qui ne contient aucune disposition de la portée de l'article 1056 C.C. Je crois aussi que l'interprétation constante qu'on a donnée dans la pratique à l'article 1053 C.C. en matière d' " injures corporelles ", en indemnisant uniquement la partie contre qui le délit ou quasi-délit a été commis, quand d'autres considérations ne s'appliquaient pas, s'y oppose nettement.

On dit aussi que l'article 1056 C.C. déclare " indépendantes " les poursuites qu'elle autorise, et on en tire la conclusion que le droit d'action en vertu de l'article 1053 C.C. en faveur de toute personne lésée par le délit n'est pas affecté par le recours spécial et " indépendant " de l'article 1056 C.C. Qu'on me permette de faire observer que c'est mal lire l'article 1056 C.C., dont le dernier alinéa dit seulement que ces poursuites sont indépendantes " *de celles dont les parties peuvent être passibles au criminel* ". L'emploi de l'expression " poursuites indépendantes " n'a donc pas la portée que lui prête cet argument. J'ajoute qu'il s'agit tant dans l'article 1056 C.C. que dans l'article 1053 C.C. d'un recours purement civil, et le recours donné par l'article 1056 C.C. est si loin d'être " indépendant " du recours accordé par l'article 1053 C.C. qu'il exclut absolument ce dernier recours dans les cas qui entrent dans le champ d'application de l'article 1056 C.C.

(1) [1920] A.C. 662, at p. 672

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L'intimée invoque certaines décisions des tribunaux de la province de Québec. Elle n'a trouvé cependant que trois arrêts qu'elle croit être favorables à sa thèse.

La première décision est celle de la cour du Banc de la Reine dans la cause de *Cedar Shingle Co.* v. *La Cie d'Assurance de Rimouski* (1). L'appelante était locataire d'un moulin qui fut incendié par son imprudence. Le propriétaire du moulin l'avait fait assurer dans la compagnie intimée, et celle-ci dut lui payer l'indemnité convenue. La compagnie poursuivit alors l'appelante, invoquant subrogation aux droits de l'assuré, qui avait une action contre son locataire en vertu de l'article 1629 C.C. Elle se basait également sur l'article 2584 C.C., qui permet à l'assureur, lorsqu'il paie l'indemnité, d'exiger la subrogation aux droits de l'assuré contre la personne responsable du sinistre. Elle invoquait de plus l'article 1053 C.C. La cour du Banc de la Reine fut cependant d'avis qu'il n'y avait ni subrogation légale, ni subrogation conventionnelle, car toute l'indemnitée n'avait pas été payée lors de la quittance. Mais elle fut d'opinion que l'article 1053 C.C. justifiait le jugement de la cour de première instance contre l'appelante.

J'ai lu bien attentivement ce jugement. Le juge Bossé, qui parla au nom de la cour du Banc de la Reine, ne discute pas la question de principe et d'interprétation que j'ai envisagée plus haut, mais cite certaines autorités françaises en matière d'assurances, qui donnent effet, dans un cas semblable, aux articles 1382 et 1383 du Code Napoléon. Je ne crois pas qu'une semblable décision puisse clore le débat.

Le deuxième arrêt est celui d'*Ortenberg* v. *Plamondon*, cour d'appel (2). L'intimé Plamondon avait fait à Québec une conférence publique où il accusait les juifs généralement de pratiques criminelles. Ortenberg, un juif de Québec, prétendit que de telles déclarations l'exposaient au mépris du public et lui causaient des dommages dans ses affaires. On appliqua l'article 1053 C.C., décidant qu'Ortenberg, bien qu'il n'eût pas été nommé, avait raison de se plaindre des accusations générales de Plamondon. Le juge Carroll exprima l'avis que comme il s'agissait d'une collectivité peu nombreuse, 75 familles juives à Québec sur une population de 80,000 âmes, l'accusation ne se perdait pas

(1) Q.O.R. 2 Q.B. 379. (2) Q.O.R. 24 K.B. 69, 385.

dans le nombre, et que le demandeur pouvait être considéré comme suffisamment visé par les propos diffamatoires. Mais en tout cela on ne donnait aucune extension à l'article 1053 C.C., car Ortenberg, en tant que juif, était une des victimes du fait délictueux.

Le troisième arrêt, *Paquin* v. *Grand Trunk Ry. Co.* (Cour de Revision (1), n'autorise certainement pas l'interprétation extensive qu'on donne à l'article 1053 C.C. Un accident était survenu sur le chemin de fer de la défenderesse, et le Dr Paquin, avec d'autres médecins, avait donné des pansements aux blessés le jour de l'accident. Dans l'espèce, la cour a appliqué les règles qui régissent l'action dite *de in rem verso,* trouvant que la défenderesse, qui aurait été obligée de faire soigner les personnes blessées par son imprudence, avait bénéficié des traitements donnés par le demandeur. Il n'y avait pas lieu d'invoquer l'article 1053 C.C., et, de fait, il n'en a pas été question dans le jugement du juge Larue qui parlait au nom de la cour de revision.

Je crois donc que l'intimée n'a pas réussi à établir le bien-fondé de sa réclamation en la basant, ainsi qu'elle le fait, sur l'article 1053 C.C. Cela ne me paraît souffrir aucun doute quant au chef de sa demande qui se rapporte à la privation, par suite de l'accident, des services du frère Henri-Gabriel.

L'autre chef de la demande, la réclamation du coût des soins médicaux et chirurgicaux que l'intimée a fait donner au frère Henri-Gabriel, à première vue, semble rentrer dans la *ratio decidendi* de la cause de *Paquin* v. *Grand Trunk Ry. Co.* (1) que j'ai citée plus haut. L'intimée, dans son factum, invoque cet arrêt par voie d'analogie, mais elle s'en tient toujours à sa prétention que son droit d'action découle du quasi-délit commis contre le frère Henri-Gabriel, ce dernier ayant eu droit, dit-elle, de recevoir ces soins de l'intimée en vertu du contrat qui existait entre eux.

L'arrêt dans *Paquin* v. *The Grand Trunk Ry. Co.* (1), je l'ai dit, est basé sur les règles qui régissent l'action *de in rem verso.* J'ai donc voulu examiner la question que soulève cette décision, afin de voir si l'intimée aurait pu justifier sa réclamation du coût des soins donnés au frère Henri-

(1) Q.O.R. 9 S.C. 336.

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Gabriel par les principes d'équité sur lesquels se fonde le recours que donne cette action.

Dans le champ d'opération des quasi-contrats, nous rencontrons d'abord la gestion d'affaires, et ensuite l'action *de in rem verso* qu'on aurait tort de confondre avec l'action que donne cette gestion.

L'action *de in rem verso* n'est pas nommée dans notre code, pas plus que dans le Code Napoléon; elle existe pourtant dans notre droit comme dans le droit français qui la tiennent tous deux du droit romain. Son fondement juridique est le grand principe d'équité que nul ne doit s'enrichir au détriment d'autrui.

On la compare quelquefois à l'action qui découle de la gestion d'affaires, mais j'ai dit qu'il ne faut pas la confondre avec elle. Des différences essentielles, en effet, existent entre les deux actions.

Il y a gestion d'affaires, *negotiorum gestio,* quand quelqu'un assume *volontairement* la gestion de l'affaire d'un autre, sans la connaissance de ce dernier (art. 1043 C.C.). La gestion doit donc être volontaire et intentionnelle (Baudry-Lacantinerie et Barde, *Obligations,* t. 4, n° 2792), et elle s'exerce pour le compte du maître, avec les mêmes effets, si l'affaire a été bien administrée, que s'il y avait eu mandat entre le gérant et le maître (arts. 1043, 1046 C.C.).

Autre chose est l'action *de in rem verso.* Elle suppose que le demandeur a fait une dépense d'argent ou d'activité dont résulte l'enrichissement du défendeur. Ainsi, comme dans l'espèce de *Paquin* v. *Grand Trunk Ry. Co.* (1), un médecin a donné des soins à des personnes blessées par la faute du défendeur, et celui-ci a bénéficié de ces soins. Le demandeur a une action, dite *de in rem verso,* dont la mesure est le montant du bénéfice, existant à la date de l'action, que le défendeur a retiré de la dépense ou de l'activité du demandeur.

Nous pouvons écarter ici l'hypothèse de la gestion d'affaires. L'intimée n'a jamais eu l'intention de gérer aucune affaire de l'appelante. Elle a fait traiter médicalement le frère Henri-Gabriel, et elle a payé tous les frais du traitement, parce qu'elle considérait qu'elle en avait l'obligation, soit en vertu d'un contrat, soit parce que le frère blessé

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était membre de sa congrégation. Mais il pouvait bien y avoir lieu à l'action *de in rem verso* en faveur de l'intimée, si les conditions qui régissent ce recours se trouvaient accomplies.

La principale de ces conditions est l'existence de l'enrichissement—c'est le terme dont se servent les auteurs—au moment de la demande. Ainsi nous lisons dans Fuzier-Herman, *vo Gestion d'affaires,* n° 163, où il est question de l'action *de in rem verso,* ce qui suit:

Cette action se distingue de l'action *negotiorum gestorum* en ce que pour celle-ci il suffit que l'acte du gérant ait été utile au moment où il a été entrepris, tandis que pour celle-là (l'action *de in rem verso*), quand il s'agit de déterminer la somme à payer par le propriétaire qui s'est enrichi par le fait du gérant, il faut se placer au moment de la demande et ne considérer que l'utilité finale.

Il y a un cas—et cela nous rapproche de l'espèce—où il y a ouverture à l'action *de in rem verso.* C'est lorsqu'un tiers paie au créancier la dette du débiteur, comme l'article 1141 C.C. lui permet de faire. Le recours du tiers contre le débiteur (je suppose qu'il n'y a pas mandat exprès ou tacite entre eux et que le tiers a payé en son nom) est par voie de l'action *de in rem verso.* Mais observons avec Baudry-Lacantinerie et Barde, *Obligations,* t. 2, n° 1399, p. 505:

Si le tiers non intéressé (l'intérêt à faire le paiement n'a aucune importance ici) a payé en son propre nom, il pourra, en principe, agir contre le débiteur par l'action *de in rem verso,* car on ne doit pas supposer qu'il y a eu donation de la part du tiers. Cette action a sa source dans ce principe d'équité que nul ne doit s'enrichir au détriment d'autrui, mais elle ne permet d'agir que dans la mesure de l'enrichissement procuré à celui contre qui elle est dirigée. Ainsi, dans notre cas, s'il est prouvé que le créancier eût accordé au débiteur des remises partielles ou des délais, il faudrait en tenir compte. De même, si la prescription était sur le point d'être acquise au débiteur, l'action *de in rem verso* se prescrirait par le laps de temps qui aurait suffi pour parfaire la prescription de la dette payée.

Pour compléter la pensée des auteurs que je viens de citer, je dois dire qu'avant ce passage, ils avaient envisagé le cas où le tiers a payé la créance au nom du débiteur, et alors, disaient-ils, il y a lieu à l'action de gestion d'affaires. Rien de tel n'existe en cette cause.

Je puis encore citer Huc, t. 8, n° 10, p. 20:

Si le paiement a été fait dans les conditions ordinaires, sans protestations de la part du débiteur, le recours du *solvens* se traduira, selon le cas, soit par l'action de mandat, soit surtout par l'action de gestion d'affaires (arts. 1375, 2001 C.N.), soit, si le *solvens* a payé en son propre nom, par

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l'action *de in rem verso*. Ces deux actions ne sont pas régies par les mêmes principes; ainsi, dans le cas de l'action *de in rem verso*, le *solvens* n'aura pas interrompu la prescription, il l'aura au contraire interrompue dans le cas de gestion d'affaires.

Il est inutile de multiplier les citations. Elles indiquent que la condition du débiteur poursuivi par voie de l'action *de in rem verso* ne doit pas être rendue pire parce qu'un tiers a payé sa dette à son créancier. Spécialement, si la prescription était en cours lors du paiement, elle ne sera pas interrompue, et l'action *de in rem verso* se prescrira par le laps de temps qui aurait suffi pour parfaire la prescription de la dette payée.

Appliquons cette doctrine à l'espèce. Si, comme je le crois, la véritable action qui appartenait à l'intimée à cause de son paiement des soins médicaux et chirurgicaux donnés au frère Henri-Gabriel, était l'action *de in rem verso*, comme dans le cas de *Paquin* v. *Grand Trunk Ry. Co.* (1), l'intimée devait, à peine de déchéance, l'intenter dans l'année de l'accident (art. 2262 C.C.). Car le frère Henri-Gabriel était, à raison des " injures corporelles " qu'il avait subies par la faute de l'appelante, créancier de celle-ci, et en payant le coût des soins nécessités par ces " injures ", l'intimée a payé la créance qu'il avait de ce chef contre l'appelante.

Je conclus donc que la réclamation de l'intimée ne peut se justifier par l'article 1053 C.C. L'intimée aurait bien pu, en temps utile, se pourvoir contre l'appelante par l'action *de in rem verso* pour réclamer le coût des soins qu'elle a fait donner—sans aucun mandat à cet effet, et sans prétendre exercer aucune gestion d'affaires pour le compte de l'appelante—au frère Henri-Gabriel; mais la poursuite ayant été intentée après l'expiration de l'année, et alors que le droit d'action du frère Henri-Gabriel était éteint, cette poursuite n'est plus recevable par les tribunaux.

J'ai examiné avec soin les nombreux arrêts de la province de Québec que cite le président de cette cour. Aucune de ces décisions ne nous lie, et les plus extrêmes sont absolument isolées. Beaucoup d'entre elles se rapportent au recours de l'assureur contre le feu contre, les auteurs fautifs du sinistre. Les plus récentes s'inspirent du jugement de

(1) Q.O.R. 9 S.C. 336.

la cour du Banc de la Reine dans *Cedar Shingle Co.* v. *La Cie d'Assur. de Rimouski* (1) que j'ai cité plus haut. J'aime mieux l'ancienne décision de *Quebec Fire Insurance Co.* v. *Molson et al* (2), sur laquelle les codificateurs basent l'article 2584 du code civil. Quelle est l'utilité de cet article si l'assureur, sans subrogation, peut fonder son recours sur l'article 1053 C.C.?

Encore une fois, nous n'avons pas chez nous une jurisprudence digne de ce nom qui nous autoriserait à admettre l'interprétation extensive de l'article 1053 C.C., avec ses conséquences d'une telle gravité pratique. Pour ma part, je ne puis accueillir cette interprétation. L'espèce est sans doute intéressante, mais ce ne serait pas une raison de faire fléchir les principes dans une matière qui est d'ordre public. J'ai démontré d'ailleurs que l'intimée n'était pas sans recours pour recouvrer les sommes qu'elle a dépensées pour faire soigner le frère Henri-Gabriel. Son malheur est de n'avoir pas exercé ce recours en temps utile.

Il s'ensuit que l'appel doit être accordé, et que l'action de l'intimée doit être renvoyée avec dépens dans toutes les cours contre l'intimée.

RINFRET, J. (dissenting).—Nous ne sommes pas appelés, pour la solution de cette cause, à interpréter l'article 1053 du code civil dans son application générale.

Il s'agit ici d'un cas que, pour employer les expressions du code, il me faut désigner sous le nom d' " injures corporelles ".

En France, tout le sujet des délits et des quasi-délits est régi par les articles 1382, 1383, 1384, 1385 et 1386 du code civil, qui correspondent aux articles 1053, 1054 et 1055 du code de la province de Québec. Mais le code français ne contient pas d'article équivalent à l'article 1056 du code de Québec. C'est là une différence extrêmement importante, car elle a pour effet et pour résultat, dans une question comme celle qui nous est soumise, de rendre inapplicable la doctrine exposée par les auteurs français et la jurisprudence établie par les tribunaux français.

Dans la province de Québec, en effet, alors que tous les autres cas de délits et de quasi-délits sont régis uniquement

(1) Q.O.R. 2 Q.B. 379. (2) 1 L.C. R. 222.

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par l'article 1053 C.C. (avec les additions qui y sont apportées par les articles 1054 et 1055 C.C.) les cas d' " injures corporelles " sont, en plus, subordonnés à l'article 1056 C.C., qui les concerne exclusivement. Le législateur a manifesté son intention d'envisager ces cas d'une façon particulière en édictant ce dernier article et en leur imposant la prescription spéciale d'un an prévue par l'article 2262 C.C. Il faut donner effet à cette intention.

Le jugement de notre collègue, M. le Juge Mignault, n'entend pas sortir du cadre d'un délit ou quasi-délit causant des " injures corporelles ". Tout ce qu'il dit de l'article 1053 C.C., modifié en pareil cas par l'article 1056 C.C., se borne à une espèce de ce genre. Je suis d'accord avec ses vues sur ce point; et comme, par ailleurs, j'accepte également l'opinion qu'il exprime sur le recours *de in rem verso,* j'en arrive donc aux mêmes conclusions que les siennes.

Il est important de préciser d'abord que la demanderesse, du vivant de " la partie contre qui le * * * quasi-délit a été commis " (c'est le texte même de l'article 1056 C.C.) avait réclamé à titre de dommages-intérêts une somme de $4,780

pour frais de médecins, frais d'hôpitaux et de garde-malades, médicaments et opérations;

$10,000 pour dommages généraux; et $118 parce que

les habits du frère (Henri-Gabriel) ont été en partie détruits, ainsi que des effets qu'il avait avec lui et qu'il a fallu payer pour le transport du frère à Montréal.

Le tribunal de première instance lui a accordé la somme de $2,236.90 pour les

soins de médecins, frais d'hôpitaux et de garde-malades, médicaments et opérations,

suivant des chiffres qui sont soigneusement détaillés dans le jugement. Il a accordé, en outre, une somme de $1,763.10 (soit: la différence entre le montant de $2,236.90 et celui de $4,000 qui représente le total de l'adjudication) parce que

la demanderesse a subi des dommages à raison de la perte des services d'un professeur qui était en même temps un auteur estimé, de l'obligation de le remplacer et des dépenses qu'il lui a occasionnées jusqu'à sa mort, étant devenu un membre inutile dans la communauté.

Le jugement accorde donc une indemnité pour des dommages spécifiés qui n'incluent pas la somme de $118 qui avait été réclamée pour les habits que le frère portait lors de

l'accident, " ainsi que les effets qu'il avait avec lui." Il me faut signaler cela, car les habits et les effets du frère appartenaient à la demanderesse; et si la Cour Supérieure lui en avait accordé la valeur à titre de dommages, cet item devrait probablement faire l'objet de considération toutes différentes de celle qui s'appliquent aux dommages résultant des " injures corporelles ". Je tiens donc à établir le fait que mon jugement, non plus que celui de M. le Juge Mignault (comme je le comprends), ne s'adresse en aucune façon à cette réclamation de $118.

Pour décider si l'action de la demanderesse était recevable pour réclamer les dommages-intérêts qui lui ont été accordés, il faut examiner non pas une doctrine et une jurisprudence édifiées uniquement sur une législation correspondant à notre seul article 1053 C.C.; mais il faut déterminer jusqu'à quel point la généralité de cet article est, en matière d'" injures corporelles ", modifiée par l'article 1056 C.C.

La Cour Supérieure a résumé dans le " Considérant " suivant la doctrine des auteurs et des tribunaux français ou belges sur laquelle elle a appuyé son jugement:

Considérant que toute personne lésée par une faute doit être indemnisée; qu'il y a, en principe, autant d'indemnités distinctes qu'il y a de personnes lésées.

C'est ce principe qui a également servi de base au jugement de la Cour du Banc du Roi. Or, il me semble très respectueusement que l'article 1056 du Code civil de Québec dit précisément le contraire. De toute évidence, il n'y a pas, en vertu de cet article, " autant d'indemnités distinctes qu'il y a de personnes lésées ". L'action appartient exclusivement aux personnes mentionnées dans l'article, qui est restrictif et doit être interprété à la lettre. *St-Laurent* v. *La Compagnie de Téléphone de Kamouraska* (1); *Gohier* v. *Allan* (2).

Il est sans doute préférable de mettre sous nos yeux le texte des articles qui font l'objet de la discussion:

1053. Toute personne capable de discerner le bien du mal, est responsable du dommage causé par sa faute à autrui, soit par son fait, soit par imprudence, négligence ou inhabileté.

Il est suffisant de reproduire le premier et le troisième paragraphe de l'article 1056 C.C., vu que le second para-

(1) [1905] 7 Q.P.R. 293. (2) [1906] 8 Q.P.R. 129.

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graphe n'a trait qu'au duel et que le quatrième paragraphe s'occupe seulement de l'effet de l'action civile sur l'action criminelle:

1056. Dans tous les cas où la partie contre qui le délit ou quasi-délit a été commis décède en conséquence, sans avoir obtenu indemnité ou satisfaction, son conjoint, ses père, mère et enfants ont, pendant l'année seulement, à compter du décès, droit de poursuivre celui qui en est l'auteur ou ses représentants, pour les dommages-intérêts résultant de tel décès.

* * *

En tout cas il ne peut être porté qu'une seule et même action pour tous ceux qui ont droit à l'indemnité et le jugement fixe la proportion de chacun dans l'indemnité.

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death.

* * *

In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

J'ai reproduit la version française et la version anglaise pour qu'on puisse tenir compte, s'il y a lieu, des divergences qui existent entre elles.

Il me paraît suffisant de lire ce texte pour constater qu'on ne saurait lui appliquer la doctrine sur laquelle on s'est appuyé en Cour Supérieure et en Cour du Banc du Roi, comme par exemple celle-ci (Huc, vol. 8, n° 420):

Selon la formule de la Cour de Cassation: "Le fait dommageable ouvre une action en dommages-intérêts au profit de toute personne qui a souffert un préjudice direct résultant de ce fait", qu'elle soit ou non héritière de la victime,

ou encore celle-ci que l'on extrait de Laurent (vol. 20, n° 534):

La loi donne l'action pour le dommage causé à tous ceux qui sont lésés par le fait dommageable. Ce principe résulte de la généralité des termes de l'article 1382; il est consacré par la jurisprudence. La Cour de Cassation l'a formulé dans les termes suivants, à l'occasion de la mort instantanée d'une personne par suite d'un accident de chemin de fer: "Le fait dommageable ouvre une action en dommages-intérêts au profit de toute personne qui a souffert un préjudice direct résultant de ce fait." (Rejet, 21 juillet 1869, D. 72, 5, 386, n. 1.)

ou encore celle-ci, qu'on nous cite de la part de l'intimée et qui est tirée de Fuzier-Herman, III, Code civil annoté, sous les articles 1382 et 1383:

688. L'action en réparation du préjudice causé par un accident (spécialement par un accident suivi de mort) n'appartient donc pas seulement à la victime de l'accident ou à ses héritiers, mais encore à quiconque, héritier ou non de la victime, se trouve directement lésé par les conséquences de l'accident. Alger, 23 mai 1892 (S. 94, 2, 62; D. 94, 2, 47).

J'ai choisi ces citations simplement comme exemple pour mieux démontrer le danger qu'il y aurait de s'inspirer de la doctrine et de la jurisprudence françaises pour interpréter la loi de la province de Québec dans la cause qui nous est soumise.

Comme l'a déjà dit M. le Juge Taschereau dans la première cause du *Canadian Pacific Railway* v. *Robinson* (1), et tel que l'a répété M. le Juge en chef Lamothe dans la cause de *Hunter* v. *Gingras* (2), if faut bien remarquer que l'article 1056 C.C. n'a pas accordé un droit nouveau aux personnes qui y sont énumérées. Il a, au contraire, restreint et limité le recours qui pouvait appartenir antérieurement au code à ceux qui subissaient des dommages à raison d' " injures corporelles " infligées à une personne. En effet, M. le Juge Taschereau et M. le Juge Lamothe soulignent quatre restrictions apportées par l'article 1056 C.C.:

The statute and the code entirely changed the laws. 1st, As to prescription; by article 2261 C.C. it would be two years; 2nd, As to the parties entitled to the action; 3rd, In giving only one action to all the parties injured; 4th, In denying, as in England, the action where the deceased party had himself obtained an indemnity.

Je ne crois pas que l'article 1056 C.C. ne prévoit que le " cas de mort ", comme on le prétend. Cet article, combiné avec l'article 1053 C.C., couvre l'ensemble de la responsabilité en matière d' " injures corporelles ". L'on ne saurait décider cette cause uniquement en vertu de l'article 1053 C.C. sans tenir compte de l'article 1056 C.C. L'article 1053 C.C. établit la base de la responsabilité, l'article 1056 C.C. déclare dans quels cas et vis-à-vis de quelles personnes cette responsabilité existera pour des dommages résultant d' " injures corporelles ".

La réclamation de l'intimée est pour les dommages-intérêts qu'elle allègue avoir soufferts par suite des " injures corporelles " infligées au frère Henri-Gabriel. Il n'y a pas de distinction d'ordre juridique entre la base, le caractère et la nature de cette réclamation et ceux de la réclamation

(1) 14 Can. S.C.R. 105, at pp. 123 to 136.

(2) Q.O.R. 33 K.B. 403, at pp. 404-408.

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qui appartiendrait aux " conjoint, père, mère et enfants " de la victime immédiate de l'accident. Que les " injures corporelles " soient, ou non, suivies de mort, la responsabilité vis-à-vis des personnes autres que la victime est, du point de vue légal, absolument du même ordre. Le législateur a indiqué expressément que ce genre de réclamation est classé dans la catégorie des actions résultant d' " injures corporelles " puisque, par l'article 2262 C.C., il excepte spécialement de la prescription édictée contre ces actions " les dispositions contenues en l'article 1056 C.C."

Pour décider s'il y a lieu d'admettre la réclamation de l'intimée, il faut donc lire et analyser ensemble les articles 1053 et 1056 C.C. et les interpréter l'un par l'autre.

Pour les fins de cette interprétation, nous ne pouvons mettre de côté la règle posée par le Conseil privé:

> An appeal to earlier law and decisions for the purpose of interpreting the provisions of a statutory Code can only be justified on some special ground, such as the doubtful import or previously acquired meaning of the language used therein (*Robinson* v. *Canadian Pacific Ry. Co.* (1)
>
> The Quebec Civil Code should be interpreted in the first instance solely according to the words used, the code, or at least cognate articles, being read as a whole forming a complete scheme. It is only if the meaning is not plain that light should be sought from exterior sources, such as decisions in Quebec earlier than the code or the exposition of similar articles of the Code Napoléon. (*Quebec Ry. L.H. & P. Co.* v. *Vandry*) (2).

S'il faut appeler à l'aide de cette règle, l'apport que peut ajouter le côté historique d'une législation, nous savons déjà par les jugements de M. le juge Taschereau et de M. le juge Lamothe que l'article 1056 C.C. n'introduit pas un droit nouveau, mais qu'il vient modifier, pour le cas particulier des " injures corporelles ", le principe général posé par l'art. 1053 C.C. Il s'ensuit qu'il n'a pas eu pour but d'accorder aux parents d'une victime décédée un recours qu'ils n'auraient pas eu autrement, puisqu'il est concédé que ce recours a toujours existé dans le droit du Québec et que la règle: " *Actio personalis moritur cum persona* " n'y a jamais été acceptée.

L'article 1056 C.C. n'est donc là que pour modifier l'article 1053 C.C.

Ni M. le Juge Taschereau, ni M. le Juge Lamothe ne me paraissent avoir eu l'intention, dans les jugements précités,

(1) [1892] A.C. 481, at p. 487. (2) [1920] A.C. 662.

de limiter à celles qu'ils ont énumérées les restrictions apportées à l'article 1053 C.C. par l'article 1056 C.C.

La combinaison de ces deux articles indique que le mot "autrui" dans 1053 C.C. correspond à "la partie contre qui le délit ou quasi-délit a été commis" (person injured) dans 1056 C.C. Ces derniers mots sont limités à la victime immédiate, puisque l'article se lit:

> Dans tous les cas où la partie contre qui le délit ou le quasi-délit a été commis *décède* en conséquence.

Cela ne peut s'appliquer qu'à la victime immédiate des "injures corporelles".

Or, ce n'est que dans ce cas: lorsque la victime immédiate "décède en conséquence" et, en outre, "sans avoir obtenu indemnité ou satisfaction", que certaines autres personnes, parmi lesquelles ne figure pas l'intimée, ont droit à un recours en dommages-intérêts.

Ces personnes seules ont le "droit de poursuivre"; les autres sont éliminées. Même elles n'ont ce droit que si la victime immédiate "décède en conséquence, sans avoir obtenu indemnité"; et alors, seulement "pour les dommages-intérêts résultant de tel décès"; et ils doivent les réclamer par "une seule et même action".

Il ne s'agit pas de nier le droit d'action. Il s'agit de le concentrer dans la personne de la victime tant qu'elle vit. Nul ne conteste que le frère Henri-Gabriel eût eu le droit, en l'espèce, de recouvrer les $2,236.90 qui ont été octroyés à l'intimée pour dépenses médicales, mais ce droit appartenait à lui seul. L'intimée ne peut prétendre avoir subi ces dépenses que parce qu'elle les a payées; mais elle les a payées pour le frère Henri-Gabriel et en ses lieu et place.

On ne subit pas des dommages, au sens légal, parce qu'on juge à propos d'acquitter les comptes de médecin d'une autre personne. Et, en tout cas, on ne les subit pas par la faute de l'auteur du délit.

On peut les payer à titre de libéralité et alors il n'en résulte aucun recours en remboursement.

On peut le faire pour le compte du malade ou du blessé. Dans ce cas, il n'y a certainement pas subrogation légale. Il pourrait peut-être y avoir subrogation conventionnelle dans les droits de la victime contre l'auteur du délit. Mais alors le recours n'existera que par suite de cette subrogation et, comme conséquence, ce recours se bornera aux

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droits que la victime elle-même aurait pu exercer. En fait, ce seront les propres droits de la victime que celui qui a payé pourra exercer.

On peut encore supposer le cas où le tiers a payé les frais médicaux et les réclame par voie de l'action *de in rem verso*. Ce point est discuté au long dans le jugement de M. le juge Mignault.

Dans aucun cas, le tiers qui paie les frais médicaux d'un autre ne peut réclamer ces frais à titre de dommages subis par lui-même. L'action par laquelle il les réclame ne peut donc être basée sur les articles 1053 et 1056 du code civil.

Il en est de même des autres sommes accordées à l'intimée

à raison de la perte des services d'un professeur estimé, de l'obligation de le remplacer et des dépenses qu'il a occasionnées, etc.

Tous ces dommages eussent été couverts par une indemnité au frère Henri-Gabriel pour perte de temps et incapacité résultant du quasi-délit commis contre lui. C'est la manière ordinaire de réclamer ce genre de dommages-intérêts et c'est sous cette forme qu'ils sont toujours octroyés. En l'espèce, on les a présentés sous une autre forme et on leur a donné un autre nom, pour tenter d'obvier à l'objection de prescription qui frappait l'action personnelle du frère. J'éprouve une difficulté insurmontable à admettre que l'on puisse ainsi obtenir indirectement ce que l'on ne peut plus réclamer directement.

Si l'on y réfléchit bien, l'indemnité que la victime est en droit de réclamer couvre tous les dommages qui résultent directement des " injures corporelles " qu'elle a subies. Les tiers ne sont affectés que par les conséquences qui en découlent indirectement par suite de l'incapacité de la victime. L'indemnité que la victime a le droit de recevoir de l'auteur du délit ou du quasi-délit est présumée être une compensation entière et adéquate pour cette incapacité.

Tant que survit la victime immédiate, le recours pour réclamer les dommages qui résultent de ses " injures corporelles " appartient donc à elle seule.

C'est par cette interprétation seulement qu'on empêche l'illogisme qui existerait autrement—et qui est signalé par M. le juge Dorion—que l'art. 1056 " accorderait dans le cas de survie l'indemnité qu'il refuse dans le cas de mort ".

Il y en a d'autres:

1. La prescription serait d'un an contre l'action de la victime (art. 2262-2 C.C.); elle serait de deux ans contre l'action de l'étranger (art. 2261-2 C.C.).

2. Si l'on admet que les parents n'ont droit à une indemnité que dans les cas prévus à l'art. 1056 C.C., le code accorderait à n'importe quel étranger le recours général de l'article 1053 C.C. et le refuserait aux parents, excepté dans les cas limités mentionnés dans l'article 1056 C.C.

3. Si l'on prétend que l'art. 1056 C.C. n'enlève pas aux parents le "droit de poursuivre", du vivant de la victime, à quel moment cette action pourra-t-elle être intentée? Il est clair qu'en cas de mort de la victime, les parents ne peuvent poursuivre que si elle n'a pas obtenu satisfaction et indemnité, et seulement "pour les dommages résultant du décès". Si les parents veulent intenter une action, du vivant de la victime, comment décidera-t-on si cette dernière va décéder, ou non, "en conséquence" du délit? Et tant que la victime n'a pas intenté sa propre action, de quelle façon va-t-on s'y prendre pour savoir si elle mourra sans obtenir "indemnité ou satisfaction"? Et cependant comment, en vertu de l'article 1056 C.C., pourrait-on accueillir l'action des parents, du vivant de la victime, sans que ces conditions-là soient déterminées? A tout événement, si toutes les autres réclamations de ce genre ne sont pas éliminées tant que la victime immédiate survit, le droit de poursuite des parents et des autres, pour leurs dommages résultant immédiatement des "injures corporelles" de la victime, dépendrait uniquement de la hâte qu'ils mettraient à intenter leur action avant que la victime n'en meure, puisque, après sa mort, le seul droit qui subsiste est celui des plus proches parents pour réclamer "les dommages-intérêts résultant de tel décès".

Une citation de Demogue, sur laquelle on s'appuie, fait voir la difficulté d'appliquer la doctrine française moderne, même en vertu d'une législation qui ne contient pas l'art. 1056 C.C. La voici (Demogue, Traité des Obligations—vol. 4, n° 528):

528. S'il y a eu accident de personne, l'action est ouverte non seulement à la victime matérielle, mais à tous ceux qui sont atteints dans leurs droits.

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Ainsi une personne qui était le soutien de sa famille devenant incapable de travailler, une action lui est ouverte à lui et en même temps aux personnes qu'elle soutenait.

Toutefois, il faut éviter d'arriver à prononcer ainsi une indemnité supérieure au préjudice. Si l'ouvrier qui gagnait 6,000 francs par an obtient une rente de cette somme, il n'y a plus lieu d'attribuer une indemnité à ses proches puisqu'il peut continuer à leur payer la même pension alimentaire. Mais le tribunal fera bien de préciser qu'une autre action serait irrecevable.

Ainsi, même sous la loi française, la théorie qu'on préconise entraîne presque nécessairement le double emploi des indemnités. Il y a danger qu'on accorde aux proches une indemnité que la "victime matérielle" aura déjà reçue. C'est tellement là que peut conduire cette doctrine que Demogue écrit:

> Mais le tribunal fera bien de préciser qu'une autre action serait irrecevable.

Je n'ai pas à me demander en vertu de quel raisonnement juridique, si la théorie est bonne, l'action des proches pourrait être déclarée irrecevable en pareil cas. Il me suffit de constater que les auteurs français modernes, qui préconisent cette théorie, sont contraints de lui assigner des limites, même en l'absence de l'article 1056 C.C. dans le code qu'ils commentent. A plus forte raison doit-on conclure, en vertu de la loi du Québec, que ces actions sont irrecevables du vivant de la victime et que le législateur a voulu éviter ainsi les conséquences d'une interprétation de l'art. 1056 C.C. différente de celle que nous soumettons.

Qu'arriverait-il, dans le cas que suppose M. Demogue, si l'action des proches avait anticipé celle de la victime et s'ils avaient déjà obtenu indemnité? On ne saurait déclarer irrecevable l'action de la victime et, dès lors, l'auteur du délit serait-il appelé à payer double indemnité?

La véritable solution imposée par notre article 1056 C.C., c'est que, en dernière analyse, les dommages-intérêts résultant d' "injures corporelles" appartiennent seulement à la victime "contre qui le délit ou quasi-délit a été commis", et qu'il n'y a pas de responsabilité vis-à-vis des autres. Ce n'est que si la victime décède sans avoir obtenu ces dommages, qu'une responsabilité limitée existe à l'égard de certains proches mentionnés dans l'article. Ni dans l'un, ni dans l'autre cas, il n'y a place pour l'intimée.

Si l'on prétend que l'art. 1056 C.C. ne pourvoit qu'au cas de mort de la victime, va-t-on ajouter que le conjoint, le

père, la mère ou les enfants, pourvu qu'ils soient en deçà des délais de prescription, pourront réclamer à la fois les dommages subis par eux du vivant de cette victime et les dommages résultant de sa mort, comme, par exemple: le temps qu'ils ont consacré à la soigner ou le gain qu'elle a perdu et dont ils ont, en conséquence, été privés pendant son invalidité d'une part; et, d'autre part, la perte du soutien et des aliments résultant de son décès? L'article dit qu'ils ont droit aux seuls dommages résultant du décès. Et si leur droit est subordonné à la mort de la victime et au fait qu'elle n'a pas obtenu indemnité, il faut bien qu'ils attendent pour exercer leur action que ces deux conditions se soient produites.

Il est d'ailleurs très significatif que depuis que ces deux articles sont en vigueur (1867),—comme les procureurs des parties l'ont déclaré,—il n'y a pas d'exemple d'action semblable à celle de l'intimée dans la province de Québec.

La revue aussi complète que possible que nous avons pu faire des rapports judiciaires ne nous a révélé que l'arrêt de *Larrivé* v. *Lapierre* (1) où il s'agissait d'un père qui réclamait les dommages personnels qu'il avait subis par suite d'un accident à son fils, qui lui remettait son salaire. Le défendeur avait soulevé le point " qu'en loi il n'y a pas en faveur du père ouverture à l'action qu'il a intentée ". Après la production de cette défense en droit, le demandeur a présenté une motion demandant qu'il lui fût permis d'amender sa déclaration, en ajoutant que son fils était mineur.

Il s'agissait donc d'un cas où ces mêmes dommages—perte du salaire du fils—eussent pu être réclamés par le père comme tuteur. C'est là peut-être la raison pour laquelle le jugement, qui accorda ces dommages (d'ailleurs au montant minime de $200), ne paraît pas avoir été porté en appel.

Le souci du législateur de limiter le droit de poursuivre en matière d'injures corporelles ne se trouve pas d'ailleurs que dans le code civil. Il est également dans la *Loi concernant les Accidents du Travail* (Stat. de Qué. (1928). c. 79), en vertu de laquelle seuls ont un recours la victime, le

(1) 20 R.L. 3.

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conjoint survivant, les enfants, et les ascendants et descendants dont la victime était le principal soutien.

On peut très raisonnablement supposer que, dans cette matière, le législateur a voulu empêcher la possibilité de la multiplicité ou de l'enchaînement d'actions dont parle notre collègue, M. le Juge Mignault, et que signalait, en semblable cas, Lord Cairns rendant jugement à la Chambre des Lords dans la cause de *Simpson* v. *Thomson* (1), que je cite à titre d'exemple:

> This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance. The principle involved seems to me to be this—that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.
>
> This, I say, is the principle involved in the Respondents' contention. If it be a sound one, it would seem to follow that if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction.
>
> But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relation is daily created by contract, might be both numerous and novel.
>
> My Lords, I have given these illustrations because I fail to see any distinction in principle between them and the right asserted by the underwriters in the present case; and if I am right in so regarding them, they shew at least how much would be involved in a decision by your Lordships whereby that right should be affirmed.

De ce passage on pourrait rapprocher ce que dit notre collègue, M. le juge Duff, rendant le jugement du Conseil

(1) [1877] 3 App. Cas. 279, at p. 289.

privé dans la cause de *McColl* v. *Canadian Pacific Ry. Co.* (1).

Quoi qu'il en soit, pour les raisons que j'ai données au cours de ce jugement, je suis d'avis que les réclamations faites par l'intimée et pour lesquelles on lui a accordé une indemnité ne représentent pas des dommages subis par l'intimée, mais plutôt des dommages soufferts par le frère Henri-Gabriel. Quant aux frais de médecin et d'hôpitaux, ce sont ceux du frère Henri-Gabriel et non pas ceux de l'intimée.

Quant aux autres dommages réclamés, d'après leur véritable caractère, ils ne représentent pas une perte pour l'intimée, mais une perte pour le frère Henri-Gabriel résultant de son incapacité. Par surcroît, ils sont indirects et sont trop éloignés (arts. 1074 et 1075 C.C.).

Je répète que je concours avec M. le juge Mignault pour faire droit à l'appel et rejeter l'action avec dépens.

LAMONT J.—In this case I will briefly state the conclusions at which I have arrived. The facts and circumstances as disclosed by the evidence have been set out in the judgments of my learned brothers and need not be repeated here.

Two questions are involved in this appeal: (1) Did a right of action against the appellant (defendant) accrue to the respondent (plaintiff) by reason of the injuries received by Brother Henri-Gabriel? and (2) If so, was the respondent's claim barred at the time it commenced these proceedings?

The point really involved in the first of these questions, which is one of considerable practical importance, is this: Does art. 1053 C.C., on its true construction, when read with art. 1056 C.C., limit the right of action therein provided for to the immediate victim of the fault, or does it give a right of action to any one who, although not the immediate victim, has suffered damage as a direct result of that fault?

Arts. 1053 to 1056 of the Civil Code embody practically the whole law of the province of Quebec relating to the subject of torts. On their construction therefore depend the rights of a person against whom a wrong has been com-

(1) [1923] A.C. 126, at pp. 129, 130.

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mitted whether the wrong was committed against his person, honour, or reputation.

Arts. 1053 and 1056 C.C. read as follows:

1053. Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

1056. In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by his death.

In the case of a duel, action may be brought in like manner not only against the immediate author of the death, but also against all those who took part in the duel, whether as seconds or as witnesses.

In all cases no more than one action can be brought on behalf of those who are entitled to the indemnity and the judgment determines the proportion of such indemnity which each is to receive.

These actions are independent and do not prejudice the criminal proceedings to which the parties may be subject.

In construing these articles we must bear in mind two rules of interpretation. The first is that laid down by the Privy Council in *Quebec Railway L.H. & P. Co.* v. *Vandry* (1). The head-note of that case states the rule, which is as follows:

The Civil Code of Quebec should be interpreted in the first instance solely according to the words used, the Code, or at least cognate articles, being read as a whole forming a complete scheme. It is only if the meaning is not plain that light should be sought from exterior sources, such as decisions in Quebec earlier than the Code, or the exposition of similar articles of the Code Napoléon.

See also the judgment of Lord Herschell in *Bank of England* v. *Vagliano* (2).

The other rule applicable is the well-known rule of interpretation of statutes, namely, that we are to construe legislative provisions according to the ordinary sense of the words unless such construction would lead to some unreasonable result or be inconsistent with, or contrary to, the declared intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified.

Art. 1053 C.C. in so many words declares that everyone capable of discerning right from wrong is responsible for the damage caused by his fault to another. The word "another" (*autrui*) in its ordinary signification is a word

(1) [1920] A.C. 662.

(2) [1891] A.C. 107, at pp. 144, 145.

of very wide import. It is, unless restricted by the context, wide enough to include not only the immediate victim of the fault but also all those who have suffered damage as the direct result of that fault. Taken by itself there is nothing in the language of art. 1053 C.C. which would indicate a legislative intention of limiting the liability, for fault causing damage, to the immediate victim of such fault only. The wording of the section clearly gives a right of action for indemnity to every person to whom the fault caused damage. This view has found support in a number of judicial decisions in the province of Quebec: *Larrivé* v. *Lapierre* (1); *Paquin* v. *Grand Trunk Ry. Co.* (2).

It is contended, however, that arts. 1053 and 1056 C.C. must be read together and that as the "person injured by the commission of the offence or quasi-offence" in art. 1056 C.C. is clearly limited to the immediate victim, the same restrictive meaning should be given to the person who suffered damage by the fault of another within the meaning of art. 1053 C.C. That these two articles should be read together is clear. When read together, however, what are the rights which they have secured, and the obligations which they have imposed? Art. 1053 C.C. deals generally with the rights of persons who have suffered damage when that damage was caused by the fault of another person who was capable of discerning right from wrong. It provides for the enforcement of those rights by imposing liability on the one guilty of the fault. To be entitled, therefore, to maintain an action under this article against a defendant capable of discerning right from wrong (and liability is imposed only upon such a defendant) the plaintiff must establish (1) that he has suffered damage, and (2) that such damage was caused by the fault of the defendant. Art. 1056 C.C. does not in any way deal with these general rights and has no application unless and until the

person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction.

When that situation arises art. 1056 C.C. becomes operative and determines who may sue; the cause of action upon which, and the time within which, suit may be

(1) 20 R.L. 3.

(2) Q.O.R. 9 S.C. 336.

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brought; and, by declaring that only one action shall be brought on behalf of all those who are entitled to indemnity, it limits the right of action for damage, occasioned by the death, to those relatives mentioned in the article. In the case of a duel resulting in the death of one of the parties thereto, a similar action may be brought against the author of the death and against all those who took part in the duel whether as seconds or witnesses. Art. 1056 C.C. was designed to give special rights and to impose special obligations in those cases in which the fault caused the death of the immediate victim. That, in my opinion, is the effect, and the whole effect, of that article. It limits, it is true, the effect which art. 1053 C.C. otherwise would have, but the limitation it imposes is a limitation of the field within which art. 1053 C.C. would otherwise operate by excluding therefrom all cases in which the commission of the offence or quasi-offence is followed by the death of the person injured as a consequence thereof, before such person has obtained indemnity or satsifaction. In France under the Code Napoléon the rights of those damnified by the death of the immediate victim of the fault are governed by the general law which corresponds to our art. 1053 C.C., while in the province of Quebec these rights have been given special and exclusive treatment by art. 1056 C.C. The language of the first part of the latter article is descriptive of the circumstances required to bring the article into operation, but beyond that I cannot see that it has any bearing on the problem before us.

With deference, therefore, to those who take the opposite view, I am of opinion that there is nothing in the context of these articles to limit the meaning which the word "another" in art. 1053 C.C. would ordinarily bear, or restrict its meaning to the immediate victim of the fault.

There being nothing in the articles referred to which would deprive the respondent of its right to sue, it is necessary to see if the articles relating to prescription had barred the respondent's claim before this action was brought. The pertinent articles read as follows:

2242. All things, rights and actions the prescription of which is not otherwise regulated by law, are prescribed by thirty years, without the party prescribing being bound to produce any title, and notwithstanding any exception pleading bad faith.

2261. The following actions are prescribed by two years:

* * *

2. For damages, resulting from offences or quasi-offences, whenever other provisions do not apply;

2262. The following actions are prescribed by one year:

* * *

2. For bodily injuries, saving the special provisions contained in article 1056 and cases regulated by special laws.

The prescriptive period in arts. 2261 (2) and 2262 (2) C.C. being exceptions to the general rule are to be strictly construed. This is stated in Mignault's "Droit Civil Canadien," vol. 9, page 518, in the following language:

La prescription courte est une prescription d'exception, elle n'existe que lorsqu'elle a été expressément décrétée par le législateur.

In order to determine within which of these articles relating to prescription the respondent's claim falls it is necessary to inquire just what it is that is claimed and the ground upon which the claim is based. As I read the statement of claim the respondent claims to be entitled in its own right to recover damages which it alleges it has suffered and which were caused by the fault of the appellant. These damages are claimed under three headings:

(1) Sums disbursed for medical treatment and attention in an effort to relieve the sufferings and bring about the recovery of Brother Henri-Gabriel. (2) $118 damage done to the clothes that the injured brother had on, and the effects he had with him at the time of the accident. (3) For loss of his services. Such a claim, in my opinion, is a claim for damages resulting from a quasi-offence and is based upon art. 1053 C.C. The prescriptive period of the action would, therefore, be two years, unless some other provision applies. It was contended that art. 2262 (2) C.C. applies and that this is really an action for bodily injuries and, as the action was not begun for almost two years after the accident occurred, the respondent's right of action was prescribed before the action was brought. An action for bodily injuries, in my opinion, implies, *prima facie* at least, that the action is brought, by one who has suffered injury to his person, to recover compensation therefor and indemnity for the loss resulting therefrom. It was however argued that the saving clause in art. 2262 (2) C.C. shewed that the term "bodily injuries" must be given a wider construction in that article, as, in view of that clause, an action under art. 1056 C.C. would impliedly

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be an action for bodily injuries, although the persons for whose benefit the action was brought had not suffered any injuries to their persons. Whether upon a true construction of art. 1056 C.C., an action brought thereunder would be held to be an action for bodily injury, we need not inquire, for, even if it were, that construction would apply only where the statute expressly so provided and would not be extended by analogy to actions under art. 1053 C.C. and thus cut down the time within which an action under that article might be brought. In this case the respondent who brought the action being a corporation could not, and did not, receive any bodily injury. If, therefore, it had a right of action in its own right—and I think it had—it is difficult to see how that action can be said to be for bodily injuries. An action to recover for the damage done to a suit of clothes is clearly an action for damage to property. So also is an action for loss of services. In Clerk & Lindsell on Torts, 8th ed., at p. 201, the learned author says:

> Where the relation of master and servant exists the right which the one has to the service of the other is regarded by the law as a species of property or interest, a wrongful infringement of which causing actual damage is a good cause of action.

So far, therefore, as these two claims are concerned the action cannot be said to be an action for bodily injuries.

A more plausible argument may be made for the moneys paid out for medical treatment. Had the injured brother brought an action for compensation for the injuries he received, and had he claimed therein for medical treatment the sums claimed under that heading in this action, he would, in my opinion, *provided he had made himself liable for those sums,* be entitled to recover them in his action for personal injuries. But that would be because the treatment, and therefore the payments made on account thereof, would be the natural and probable consequence of the injuries received, and would be incidental thereto. Here, however, the action is for those claims only which would be incidental to an action for bodily injuries. To those claims the respondent could not add a claim for bodily injuries, since it has not received any such injuries. In my opinion art. 2262 (2) C.C. has no application to the present case. The respondent's claim was, therefore, not prescribed when it brought its action.

There remains only to ascertain if the evidence established that the respondent suffered the damage claimed and if such damage was occasioned by the fault of the appellant. I will consider the items in the order above mentioned.

(1) That the respondent paid out the sum of $2,236.90 for medical treatment and attention in an effort to alleviate the sufferings of Brother Henri-Gabriel is not disputed. Was that expenditure caused by the default of the defendant?

The word "caused" as used in art. 1053 C.C. means "brought about," "that from which something proceeded." The word, in my opinion, implies not merely that the fault is a *sine qua non* of the damage, but that it is the *causa causans*—the efficient cause thereof.

The fault of which the appellant was guilty was negligence on the part of its servant for which, under art. 1054 C.C., it is responsible. That negligence caused an explosion of gasoline which very severely injured Brother Henri-Gabriel. That injury, in my opinion, rendered necessary expenditures for his relief which would not otherwise have been made. The injury and the expenditures may therefore be considered as cause and effect. For this reason I agree with the unanimous view of the court below affirming the judgment of the Superior Court that these expenditures were caused by the fault of the appellant and that the appellant is liable therefor.

(2) The $118 claimed as damage done to the clothes and effects of Brother Henri-Gabriel were not, as I read the judgments, allowed either by the Superior Court or the Court of King's Bench. In my opinion this item was properly disallowed. The clothes and effects were given to the brother by the respondent in recognition of his services to the congregation and the relationship existing between them, and there is no evidence of any intention on the respondent's part to retain any property in them. Had the brother himself sued for the damage claimed in this item, he could, in my opinion, have recovered on the ground that the articles were his own.

(3) As to the claim for loss of services. This is a well-established form of action. If the relationship of master and servant existed between the respondent and Brother

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Henri-Gabriel, the respondent should recover on this claim, for it is a tort actionable at the suit of the master to so injure the servant that the master is deprived of the servant's services. *Martinez* v. *Gerber* (1). To be entitled to maintain an action for loss of services a legal right to such services, and the loss thereof, must be established. In *Admiralty Commissioners* v. *SS. Amerika* (2), Lord Sumner said:

> It is the loss of service which is the gist of the action, and loss of service depends upon the right to the service, and that depends upon the contract between the master and the servant.

In 20 Halsbury, p. 276, the law is stated as follows:

> 638. The right of the master being based upon loss of service, it is necessary for him to prove the existence of a valid contract of service, though he need not show that the servant was hired at wages or at a salary.

In some cases, however, it is sufficient for the master to shew a *de facto* service, that is service rendered in fact but not under any binding contract. In an action for loss of the services and society of his wife of which he had been deprived by the wrongful act of the defendant, it is sufficient if the husband establishes loss of service. And the same applies to a father who brings an action for loss of the services of a child living with him and under age who is not under a binding contract to serve another exclusively. That, however, is because the law recognizes that the husband has a legal right to the services of his wife and the father a legal right to the services of his child. But, where no legal right to the services of another is presumed by law from the relationship of the parties, the existence of a valid contract must be established.

The relationship existing between the respondent and Brother Henri-Gabriel was not that of the family tie. It arose from the fact that the brother joined the congregation and took the vows of perpetuity and stability. Joining the congregation rendered him subject to its constitution, of which art. 48 reads as follows:

> Les produits des travaux des Frères et les dons qui leur seraient faits comme religieux, de quelque part qu'ils viennent et de quelque nature qu'ils soient, appartiennent à l'Institut et doivent retourner uniquement à son profit.

By his vows the brother engaged himself to remain with the congregation for the rest of his life, and to maintain its

(1) [1841] 133 E.R. 1069. (2) [1917] A.C. 38, at p. 55.

object, spirit and constitution. On its part the congregation considered that the obligation of maintaining him devolved upon it. In his evidence Frère Gabriel-Marie testified as follows:

Q. Les vœux perpétuels et les vœux de stabilité sont bien ceux qu'a définis le Frère Garvaisius?

R. Parfaitement.

Q. De sorte que le frère est irrévocablement à votre charge?

R. Oui. Devant Rome, nous ne pouvons absolument renvoyer le sujet, ni le laisser à sa propre charge, il est à notre charge, il est à notre charge pour toujours.

Brother Henri-Gabriel performed his vows for many years and worked faithfully as a member of the congregation, and, but for his accident, would doubtless have continued to do so. The question, however, is: Can it reasonably be inferred from the fact of the brother's joining the congregation and taking the vows and from the congregation's recognition of its obligation to maintain him, that the parties intended to create, and did create, the contractual relation of master and servant? I am very clearly of opinion that such never was the intention of either of the parties, nor did they effectuate such a result. I am unable to see anything in the evidence which justifies the conclusion that either the brother or the congregation ever considered they were creating a legal relationship between them. The obligations undertaken were, no doubt, considered as binding on the conscience, but the vows were not taken by the brother in consideration of any agreement on the part of the congregation to maintain him, nor was the obligation of maintenance incurred in consideration of the vows. The attitude of both parties, as disclosed by their acts and the nature of the transaction, seems to me to repel any idea on the part of either of creating contractual obligations. So far as I can see Brother Henri-Gabriel might legally have ceased at any time to give his services to the congregation. As the legal relation of master and servant was not created, and as the respondent did not obtain a legal right to the services of the brother the respondent cannot succeed on this item; for it cannot be said that the fault of the appellant has deprived the respondent of the brother's services when, in fact, the respondent never had any legal right to those services.

Counsel for the respondent called our attention to certain decisions of French tribunals and certain opinions of French

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text writers which indicated that, under an article in the Code Napoléon similar to our art. 1053 C.C., it was not necessary to establish a contractual relationship to be entitled to recover for loss of services. In the *Vandry* case (1), the Privy Council, in addition to the rule quoted above, said, at p. 671:

> however stimulating and suggestive the reasoning of French Courts or French jurists upon kindred subject and not dissimilar texts undoubtedly is, "recent French decisions, though entitled to the highest respect... are not binding authority in Quebec" (*McArthur* v. *Dominion Cartridge Co.* (1905) A.C. 72, 77) still less can they prevail to alter or control what is and always must be remembered to be the language of a Legislature established within the British Empire.

Under art. 1053 C.C., the legislature has imposed liability where the damage suffered was caused by the fault. It is a question of causation. The right to service gives the master a property in the labour of his servant. Smith's Law of Master and Servant, p. 86.

In the present case the respondent did not suffer the damage claimed unless he had a property in the brother's services. For the reasons I have given I think it had not. It had, therefore, nothing of which it could be deprived.

The appeal, therefore, should be dismissed as to the $2,236 awarded for medical treatment and attention, and allowed as to the claim for damage for loss of services.

I would not allow any costs of appeal.

SMITH J.—I concur with the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Elliott & David.*

Solicitors for the respondent: *Cartier & Barcelo.*

(1) [1920] A.C. 662.

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APPEAL—*Concluded*

CHURCH CONGREGATIONS—*United Church of Canada—Congregational meetings—Authority to call—Session—Whether meeting regularly called—Validity of proceedings—The United Church Of Canada Act, (D)* 14-15 *Geo. V, c.* 100; *(N.S.)* (1924) *c.* 122.] The St. Luke's Presbyterian Congregation of Salt Springs in the County of Pictou, was a congregation in connection with the Presbyterian Church in Canada. Under the provisions of "The United Church of Canada Act" (Can.) it voted on December 22, 1924, not to concur in union. The minister, Rev. S. C. Walls, who was in the minority, resigned. On May 5, 1925, the Presbytery of Pictou (the appellant congregation being within its bounds), appointed one Rev. Robert Johnston of New Glasgow, N.S., interim (*pro tempore*) moderator of its session, and until after July 27, 1925, no minister was inducted to the charge. In that month, requisitions were signed by a large number of the members of the congregation asking the elders to convene a congregational meeting for the purpose of taking a second vote under the provisions of "The United Church of Canada Act" (N.S.). Some of the elders called a meeting for the 27th of July. One hundred of those who attended voted to become part of the United Church; none opposing. Members opposed to union then brought this action for a declaration *inter alia* that the meeting and proceedings so taken were null and void; that the congregation is a Presbyterian congregation and not a congregation of or in connection with the United Church of Canada.—*Held*, Duff J. dissenting, that, under the circumstances of this case and in view of the enactments of the federal and provincial Acts respecting the United Church of Canada, the vote given at the meeting of the 27th of July, 1925, was ineffective to carry either the congregation or its property into the Union.—*Per* Newcombe, Rinfret and Smith JJ.—The power of non-concurrence which the appellant congregation duly exercised under the Dominion Act, having been

incorporated or not, it is common practice, founded upon general principle, that the court will interfere to restrain *ultra vires* or illegal acts by a statutory body, and, when it is charged, as in this case, that the proceedings in question, though authorized by the letter of the statute, are nevertheless incompetent, by reason of defect in the enacting authority of the legislature, the court has jurisdiction so to declare, and to restrain the *ultra vires* proceedings, although directed by the statute and in strict conformity with the legislative text (*Nireaha Tamaki* v. *Baker*, [1901] A.C., 561, at pp. 575-6, cited).—Judgment of the British Columbia Court of Appeal (39 B.C. Rep. 523) affirmed in the result. RATTENBURY *v.* LAND SETTLEMENT BOARD.. **52**

2 —— *Water-powers — Navigable river — Public right of navigation—Right of the Dominion as to the use of the bed of a river and as to expropriation of provincial property—Relative rights of the Dominion and provinces over water-power created by works done by the Dominion—Boundary waters—Interprovincial and provincial rivers — B.N.A. Act, ss.* 91, 92, 102 *to* 126.] The questions referred to this court by the Governor General in Council were answered as follows:—Question 1 (*a*). Where the bed of a navigable river is vested in the Crown in the right of the province, is the title subordinate to the public right of navigation?—Question 1 (*b*). If not, has the Dominion the legislative power to declare that such title is subordinate to such right?—Answer: The questions as framed postulate the existence of a public right of navigation in the rivers to which they refer, as well as their navigability.—The title to the bed of the river is subject to that public right, except in so far as, at the date of the Union, the Crown possessed by law or has since acquired, under Dominion legislation, a superior right to use or to grant the use of the waters of the river for other purposes, such for example, as mining, irrigation or industry.—Question 2. Where the bed of a navigable river is vested in the Crown in the right of the province, has the Dominion power, for navigation purposes, to use or occupy part of such bed or to divert, diminish, or change the flow over such bed (*a*) without the consent of the province; (*b*) without compensation?—Question 3. Has the Parliament of Canada the power, by appropriate legislative enactment, to authorize the Dominion Government to expropriate the lands of the Crown in the right of the province for the purposes of navigation with provision or without provision for compensation?—Answer: These questions cannot be answered categorically either in the affirmative or

in the negative.—The conditions controlling the exercise of Dominion legislative powers for purposes embraced within the comprehensive phrase, "navigation purposes," depend in part upon the nature of the "purpose," in part upon the nature of the means proposed for accomplishing it, and in part upon the character of the particular power called into play. Reference is respectfully made to the observations in the accompanying reasons, as indicating the governing principles with as much definiteness as is safe or practicable.—Question 4. By section 108 of the British North America Act, 1867, and the first item of the Third Schedule thereto, the following public works and property of each province, amongst others, shall be the property of Canada, namely "Canals with lands and water-power connected therewith." Has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power which, though connected with the said canals, is created or made available by reason of extensions, enlargements or replacements of said canals made by the Dominion since Confederation and which is not required from time to time for the purpose of navigation?—Question 5. Where the bed of a navigable river is vested in the Crown in the right of the province, has the province any proprietary interest in or beneficial ownership of or legislative control over the water-power created or made available by works for the improvement of navigation constructed thereupon in whole or in part by or under the authority of the Dominion since Confederation which is not required from time to time for the purposes of navigation?—Answer: Whatever subjects are comprehended under the phrase "Water-Power" in the 1st item of the third schedule, by section 106 passed to the Dominion, there was left to the provinces neither proprietary interest in, nor beneficial ownership of such subjects; and under section 91 (1) legislative control over them is exclusively committed to the Dominion.—As to water-powers (and these of course, are not comprised within that item) "created or made available by reason of extensions, enlargements or replacements made by the Dominion since Confederation" or "by works for the improvement of navigation constructed * * * in whole or in part since Confederation," it is impossible to ascertain the respective powers or rights of the Dominion and the provinces in relation thereto, in the absence of a more precise statement as to the character of the works, as to the legislative authority under which the works were executed, and as to the circumstances pertinent to the question whether or not the conditions of such

authority were duly observed.—Question 6 (*a*). Has the Dominion exclusive proprietary interest in or beneficial ownership of or legislative control over water-powers created or made available by works authorized by Parliament to be erected in any boundary waters for the purpose of carrying out a treaty between His Majesty and a foreign country providing for the erection of joint works for (1) the improvement of navigation in such waters, or (2) for the development of power, or (3) for both?—The expression "boundary waters" in this question means the waters defined by the preliminary article of the Treaty dated 11th January, 1909, between His Britannic Majesty and the United States of America.—Question 6 (*b*). If the Dominion has not the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers, has the province the exclusive proprietary interest in or beneficial ownership of or legislative control over such water-powers?—Answer: The nature and extent of the respective powers, rights and interests of the Dominion and the provinces in, and in respect of such water-powers, would depend upon a variety of facts, including, *inter alia*, the terms of the Treaty, and the respective rights of the Dominion and the provinces in, and in relation to, the waters affected. In the absence of information as to such facts, it is impracticable to give an intelligible answer to the questions propounded.—Question 7. Has the Parliament of Canada legislative power to authorize the construction and operation by the Dominion Government of works wholly for power purposes and the acquisition by purchase or expropriation of the lands and property required for the purposes of such works including lands of the Crown in the right of a province (*a*) in interprovincial rivers; and (*b*) in provincial rivers?—"Interprovincial rivers" in this question means rivers flowing along or across the boundaries between provinces.—Answer: As to both "provincial rivers" and "interprovincial rivers," Parliament has jurisdiction in respect of such works, if they fall within the ambit of sec. 92 (10*a*). With reference to the expropriation of provincial Crown lands "for the purposes of such works," the answer to the question would, to some extent, depend upon the particular purpose for which such lands were required. In answering this question, sec. 92 (10*c*) is not taken into account. Reference is respectfully made to what has been said upon that subject in the accompanying reasons.—Question 8. May a province notwithstanding the construction by the Dominion for the purposes of navigation of works in a river the bed of which is

within such province, control, regulate and use the waters in such river so long as such control, regulation and use does not interfere with navigation? In the case of a river flowing between two provinces may such provinces jointly control, regulate and use the water in the same manner?—Question 9. Has a province the right to control or use the waters in provincial rivers and to develop or authorize the development of water-powers within the province provided that in so doing navigation is not prejudiced and that the province complies with Dominion requirements as to navigation?—Answer: These two questions mutually overlap, and it is convenient to deal with them together. If there is no valid conflicting legislation by the Dominion under an overriding power—the power for example bestowed upon the Dominion by sec. 92 (10*a*)—the several provinces have the rights which are the subject of interrogatory number 9. —As to the first branch of the eighth question. The authority of the provinces to "control, regulate and use" such waters, in the circumstances mentioned, is subject to the condition that, in the exercise thereof, the provinces do not interfere in matters the control of which is reserved exclusively for the Dominion, and that all valid enactments of the Dominion, in relation to the navigation works, or in relation to navigable waters, be duly observed.—This condition is not necessarily identical with the condition expressed in the question by the words "so long as such control, regulation and use does not interfere with navigation." The question therefore, in the form in which it is put, cannot be answered in the affirmative; and, as the exercise of legislative jurisdiction, in the comprehensive terms of the question, might encroach upon the exclusive jurisdiction of the Dominion, the proper answer seems to be in the negative.—As to the second branch, considering the variety of meanings which might attach to the phrase "jointly control, regulate and use," no precise or useful answer is possible.—The answers to these questions, conformably to the views adverted to above, also proceed upon the assumption that the questions have no reference to any jurisdiction which might be acquired by the procedure laid down in sec. 92 (10c).—Question 10. (*a*) If question 4 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?—(*b*) If question 5 is answered in the affirmative, what is the nature or extent of such interest or ownership or control?—(*c*) If the answers to both questions 6 (*a*) and 6 (*b*) are in the negative, what are the respective rights and interests of the Dominion and the pro-

CONTRACT—*Continued*

6 —— *Railway construction — Method of doing work—"Extra haul" and "overhaul" — Meaning — Usage—When it forms an ingredient of the contract—Finding of the trial judge—Document filed at trial without objection—Exception to its admissibility taken on appeal.*] The appellant had a contract with the respondent for a work on the respondent's line of railway, which work consisted of a cut and fill where the line crossed a deep ravine. The old line was carried on a trestle, and the new line was to be supported by a fill on a site adjacent to the trestle, which was to be made with the earth excavated from a bluff on the northerly side of the ravine through which the cut was to pass. The contract stipulated for unit prices including "overhaul per yard 1 cent"; and contained this clause: "12. The contract prices for the several classes of excavation shall be taken to include the cost of depositing the material in embankments, crib work, and all other expenses connected therewith except extra haul, which will only be paid for where it exceeds five hundred (500) feet, at so much per yard per additional one hundred feet * * *." The appellant in excavating the cut proceeded from the foot of the northerly slope of the bluff, and by a circuitous route encircling the bluff on its westerly, southwesterly and southerly sides carried the earth to the site of the embankment. The appellant contended that it was entitled to be paid for "overhaul" at the rate mentioned, that is to say, at the rate of 1 cent per cubic yard for every 100 feet of haul calculated by reference to the length of the route actually followed in excess of 500 feet. The view of the contract advanced by the respondent was that the contract phrases "extra haul" and "overhaul" have, by usage, in construction contracts, or at all events in railway construction contracts, a special and specific meaning; and that they signify that the length of the haul in respect of which the contractor was entitled to charge for overhaul, was to be ascertained by taking the distance (measured along the centre line of the railway in process of construction) between the projections, first, of the centre of mass of earth, to be excavated in making the cut, and second, of the embankment, and deducting therefrom 500 feet; the projections being for this purpose the several points on the centre line nearest the respective centres of mass. The trial judge (40 B.C. Rep. 81) held that the usage alleged had not been established, and that the proper construction of the contract was that contended for by the appellant. The Court of Appeal ([1928] 3 W.W.R. 466) disagreed with this conclusion and accepted the view advanced by the respondent.—*Held*, reversing the judgment of the Court of Appeal ([1928] 3 W.W.R. 466), that the alleged usage had not been proven. It had been established that there was a practice widely followed of inserting in railway construction contracts a clause providing for the computation of payment for overhaul according to the method contended for by the respondent; but in the text books, engineering manuals and writings by engineers produced, there was no basis for the view that the effect of the words used in the present contract is, apart from such special stipulations, what is contended by the respondent. Usage, of course, where it is established, may annex an unexpressed incident to a written contract; but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form an ingredient of the contract. *Juggomohun Ghose* v. *Manickchund* (7 Moore's Indian Appeals 263, at p. 282).—*Held*, also, that in substance, the question presented to the trial judge was whether there was evidence to satisfy him judicially that the alleged usage was, to quote the language of Banks L. J., in *Laurie* v. *Dudin* (95 L.J., K.B. 191, at 193), "so all pervading and so reasonable and so well known that everybody doing business" in railway construction "must be assumed to know" it, and to contract subject to it; and the finding of the trial judge should not have been disturbed by the appellate court.—At the trial, a report by the Deputy Minister of Railways and the Chief Engineer of the respondent, approving the appellant's system of handling the works, tendered by the appellant's counsel, was admitted and no exception to its admissibility was taken at any stage of the proceedings prior to the oral argument in this court. According to the record, counsel for the respondent was aware that the document could have been excluded if he had pressed an objection against it, and, moreover, he did not call either of the gentlemen who signed the report as a witness. If the objection had been pressed, the appellant's counsel would no doubt have felt obliged to call them as witnesses himself, as counsel for the respondent must have realized; but the latter seemed to have elected deliberately not to press the obvious objection to the document.—*Held*, that, in these circumstances, an exception to the admissibility of the report taken by the respondent's counsel before this court should be considered as being raised too late. GEORGIA CONSTRUCTION CO. *v.* PACIFIC GREAT EASTERN RY. CO..... **630**

7 —— *Sale of land — Misrepresentation — Rescission.* HOWSON *v.* LEWIS..... **174**

CRIMINAL LAW — *Indictment containing three counts, charging: manslaughter (Cr. C., s. 268); causing grievous bodily injury (Cr. C., s. 284); and causing bodily harm by wanton or furious driving, etc., of motor vehicle (Cr. C., s. 285)—Acquittal on first two counts, and conviction on third count—Joinder of counts—Right of jury to find guilty on third count, while finding not guilty on other counts.*] The appellant was tried on an indictment containing three counts (referring to the same occurrence), viz., (1) manslaughter (Cr. C., s. 268); (2) causing grievous bodily injury (Cr. C., s. 284); and (3) causing bodily harm by wanton or furious driving, etc., of a motor vehicle (Cr. C., s. 285). The jury found him not guilty on the first and second counts, but guilty on the third count. From the affirmance by the Appellate Division, Ont., of his conviction on the third count, he appealed, on the ground that, as the facts upon which the three counts were based were the same as to each of the three offences charged, it was not open to the jury, after acquitting him upon the first two counts, to convict him upon the third.—*Held* It was open to the jury to find as they did. It was permissible to join the other counts to the first one charging manslaughter (Cr. C., s. 856). Whether the three counts should be tried together was in the discretion of the trial judge (Cr. C., s. 857). Had appellant been charged only with manslaughter, but so described as to include the offences charged in the said second and third counts, then, under s. 951, Cr. C., he could properly have been convicted of either of these latter offences, as "other offences" the commission of which was included in the offence "as charged in the count," if, in the jury's opinion, "the whole offence charged was not proved." (*R.* v. *Shea*, 14 Can. Cr. Cas. 319, if it implies the contary, overruled). In the case at bar, that the jury had found that the whole offence charged either in the first count or in the second count had not been proved, was an intendment which must be made in support of the verdict; and it was within the jury's province so to find, while finding that the offence charged in the third count was proved; and it was not open to this Court to consider the evidence for the purpose of determining whether upon it the jury, as reasonable men, could have negatived the existence of any element necessary to constitute either of the offences charged in the first and second counts, consistently with their finding of guilty on the third count. —*R.* v. *Forseille*, 35 Can. Crim. Cas. 171, overruled.—Judgment of the Appellate Division, Ont., (35 Ont. W.N. 172; Middleton J.A. dissenting) affirmed.—Smith J. dissented, agreeing with the dissenting judgment of Middleton J.A., in the Appellate Division, and with the judgment in *R.* v. *Forseille*, and holding that, where injuries have been caused by the accused to a deceased person (as found in this case) and these injuries have caused the death, as was unquestionably so in this case, counts under ss. 284 and 285, Cr. C., should not be allowed to go to the jury; an acquittal on the charge of manslaughter is necessarily a finding that there was no criminal negligence, which negligence is necessary to constitute a crime under ss. 284 and 285. BARTON *v.* THE KING..... **42**

2——*Conviction under Customs Act, R.S.C.* 1927, *c.* 42, *s.* 217—*Harbouring goods unlawfully imported into Canada—Summary jurisdiction under s.* 217 (2)—*Value of goods not shown to be under* $200.] Appellant was convicted before a stipendiary magistrate (the conviction being affirmed, on appeal, by the County Court Judge) for harbouring spirits unlawfully imported into Canada whereon the duties had not been paid, contrary to s. 217 of the *Customs Act*, R.S.C. 1927, c. 42. The warrant of commitment did not show that the value of the goods was under $200, and was, on that ground, attacked as bad on its face, as not showing jurisdiction in the convicting court.—*Held* (Mignault J. *dubitante*): In not showing such value to be under $200 the warrant of commitment did not fail to show jurisdiction.—*Per* Anglin C.J.C., Newcombe and Smith JJ.: Subs. 3 of said s. 217, introduced by amendment in 1925 (c. 39), does not impliedly limit the summary jurisdiction to cases where the value of the goods is less than $200. The special jurisdiction conferred by subs. 3 to proceed, alternatively, by indictment, for a more rigorous penalty, where the value is $200 or over, does not, so long as the procedure by indictment is not invoked, detract from the power exerciseable by magistrates under subs. 2, interpreted independently.—*Per* Rinfret J.: The warrant recited a conviction of an offence described in terms strictly following those of subs. 1 of s. 217; then subs. 2 enacts that "every such person" guilty of the offence so described is "liable on summary conviction," etc. Therefore it could not be said that, on its face, the warrant did not show jurisdiction. It may be that subs. 3 makes the offence indictable when the goods are

PRIVILEGE—*Claim to, by supplier of materials—Houses built on different lots of land at the same time and by the same builder—Registration of single or separate privileges—Arts.* 376, 2013, 2013*e*, 2167, 2168 *C.C.—Bankruptcy Act, s.* 24.] The appellants, Gadbois and Collé, were owners of nine lots bearing subdivision numbers 185 to 193, inclusive, of lot No. 37, in the parish of Montreal. They entered into a contract in writing with the builders, now defendants, Boileau and Cordeau, for the construction of nine duplex houses (one detached and the other eight semi-detached) on the above mentioned lots. The plan prepared by the architect shewed that each house should be wholly situate on one of the subdivision lots. The builders made arrangements with the respondent company for the purchase of materials to be used in the construction of these houses

and obtained materials from it to the amount of $18,288.53. Before the builders had completed their contract, the appellants became bankrupt and trustees in bankruptcy were appointed; as a result, the builders were also compelled to make an assignment and a trustee was appointed. Before the completion of the last house, the respondent, to preserve the privilege given by law to a supplier of materials, registered against the above mentioned lands its account for all the materials supplied to the builders for the construction of the nine houses, showing a balance of $12,193.30 still unpaid; and within three months thereafter the respondent brought action against the builders personally and their trustee in bankruptcy and impleaded the appellants (mis-en-cause) as owners of the property burdened with the privilege and also their trustees in bankruptcy.—*Held*, reversing the judgment appealed from, that the respondent was not entitled to claim any privilege as supplier of materials. His notice of registration had not been given in conformity with the enactments of the civil code, if one considers the provisions which give to the supplier of materials a privilege on the immovable of the proprietor on whose lot or lots a building is erected (art. 2013e C.C.) in conjunction with the provisions of the law relating to the registration of titles to land according to the cadastral numbers of the lots into which it is subdivided (art. 2167-8 C.C.). —*Munn & Shea Limited* v. *Hogue Limitée* ([1928] S.C.R. 398) discussed and distinguished.—The principle laid down in that case that a supplier of materials may register, under certain circumstances, a single privilege for the full amount of his claim against several lots as a whole, must be limited, in its application to the present case, to each pair of semi-detached houses, i.e., the respondent here, provided he registered a proper memorial, was entitled to a privilege on each pair of semi-detached houses for the unpaid price of its materials entering into the construction of each pair respectively; but it was not entitled to a single privilege on all the lots and houses for the balance of its claim for materials supplied which entered into the different buildings erected on the nine lots.—*Held*, also, that the respondent was not obliged to obtain leave of the bankruptcy court (s. 24 of the *Bankruptcy Act*) before taking its action against the appellants (owners of the lots), as the present proceedings so far as they relate to the enforcement of the privilege against the appellants' immovable are not proceedings "against the property or person of the debtor," the defendants being in this case the "debtors." The fact that

STREET RAILWAYS — *Negligence — Tramcar at night overtaking and striking sleigh on track—Degree of care required of railway company—Duty as to power of headlight.*] Defendant operated a street railway between Winnipeg and Selkirk, its line running along the west side of a highway. Between the railway and the

STREET RAILWAYS—*Continued*

main travelled road there was a ditch. The ties and rails were above the ground level. There were built up crossings across the ditch and railway. Plaintiff was driving along the road after dark on January 2, 1926, when his horses ran away. They turned over one of said crossings on to the prairie, made a circuit and came back to the crossing and turned and ran along the railway where they were, further on, overtaken and struck by defendant's tramcar, the motorman, who was going at 30 miles an hour, not having seen them in time to stop before hitting them. Plaintiff sued for damages. The headlights used on defendant's cars were the standard equipment of similar cars on this continent. But the motorman testified that he had had trouble on his trip that evening from Winnipeg to Selkirk with dimness of the light; he had changed the carbon at Selkirk, but still had trouble with dimness on the trip back to Winnipeg, on which the accident happened; when the light was working with full efficiency he could see about seven "pole lengths" ahead; he had made emergency stops in about three pole lengths; he did not see plaintiff's outfit until he was about one pole length away. Evidence was given that after the accident the light was tested and found in good condition. An expert testified that in all arc lights there is a variation in brightness, due to automatic adjustment in the carbon, causing momentary dimness, and to the light being affected by line voltage. The jury found defendant negligent in "not having any man on duty at Selkirk capable of making adjustments to the lights or other equipment to the car before leaving Selkirk on the night of the accident"; but this finding being deemed unsatisfactory in view of the pleadings, the jury, after further directions, added: "as the evidence submitted shows the headlight was not sufficiently powerful to illuminate the track for the motorman to see an object far enough ahead to avoid the accident." Plaintiff recovered judgment, which was sustained by the Court of Appeal (37 Man. R. 320).—*Held* (Anglin C.J.C. and Lamont J. dissenting): The judgment below should be reversed, and the action dismissed.—*Per* Newcombe and Smith JJ.: Defendant had no obligation to keep a man on duty at Selkirk; moreover, plaintiff had not alleged failure to do so as a ground of negligence. As to the added clause, it did not, in view of the evidence and the judge's charge, imply a finding of excessive speed; nor did it imply that the headlight in question had some particular defect causing it to function less effectively than defendant's headlights ordinarily functioned—there was no evidence on which a jury could

STREET RAILWAYS—*Continued*

reasonably so find, and they had not found any such defect in terms; the only negligence found was failure in a duty which, in the jury's opinion, as indicated by their finding, was on defendant, to have a headlight sufficiently powerful to enable the motorman to see plaintiff in time to stop before hitting him; and defendant's duty in law did not go that far; it was bound to operate its cars with the care that a reasonably prudent person would exercise under the circumstances: in view of the position and construction of the railway it had no reason to anticipate that a person might be going along on the railway with his team; and it was not bound to use such a degree of care as to insure against accident under such extraordinary circumstances as had placed the plaintiff in such a situation. Its duty to use reasonable care required it to have a headlight of reasonable efficiency, having regard to the state of the art, and such duty was complied with.—*Per* Rinfret J.: The added clause indicated no intention of introducing a new and independent finding of negligence; it left the verdict as it stood formerly, except that it disclosed the reason for the original answer. It did not improve the unsatisfactory finding. But, looking upon it as a separate finding of negligence—if it meant that defendant was under the duty to have on its cars headlights of sufficient power to illuminate the track so as, under all circumstances, to avoid an accident, the verdict was without legal grounds to maintain it; if it meant that the headlight on this particular car was insufficient, the answer was twofold: (1) the uncontradicted evidence was that it was the best type of light to be found; (2) there was no evidence that the headlight was out of order. The dimness which, for some reason not explained, temporarily existed, and which was not common to the type nor due to any defect in the particular light, might have been a reason for finding the motorman at fault in driving at that rate of speed under the circumstances; but that was not the finding; moreover, the question of speed had been withdrawn from the jury. In view of the position and construction of the railway, defendant could not reasonably be held to have been bound to anticipate what occurred.—*Per* Anglin C.J.C. and Lamont J. (dissenting): The jury found, in effect, that, under the circumstances, defendant was negligent in not having on the car a headlight functioning with sufficient power to enable the motorman to see objects on the track in time to stop before hitting them. Whether defendant's common law duty to exercise "that care which a reasonably prudent man would exercise under the circumstances" was complied with, was a question of fact; and there