1943

CANADA
LAW REPORTS

Supreme Court of Canada

REPORTERS

ARMAND GRENIER K.C.

S. EDWARD BOLTON K.C.

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1943

90231—1

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:
The Hon. Louis St-Laurent, K.C.

90231—1½

MEMORANDA

On the thirteenth day of April, 1943, the Honourable Oswald Smith Crocket, Puisne Judge of the Supreme Court of Canada, retired from the bench, pursuant to section 9 of the Supreme Court Act, 1927, c. 35.

On the twenty-second day of April, 1943, Ivan Cleveland Rand, one of His Majesty's King's Counsel, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Honourable Oswald Smith Crocket, retired.

ERRATA

in volume 1943

Page 41, at the foot, the following paragraph should be added:

> After consideration of the very full and able arguments presented by counsel for both parties, I am satisfied that the majority in the Court of Appeal have come to a correct conclusion and have nothing more to add to what is said by them on the construction of the contract.

Page 118, at the 12th line of the head-note, "preambule" should be "preamble".

Page 142, at the 10th line, "(2)" should be "(1)"; at the 23rd line, "(3)" should be "(2)" and "(4)" should be "(3)"; at the 31st line, "(5)" should be "(4)"; and foot-note "(5)" should be taken off.

Page 216, in foot-note (1), "(1959)" should be "(1859)".

Page 265, at the 8th line of the head-note, "see" should be "sec."

Page 276, at the 19th line of the head-note, "joint" should be "joined".

Page 278, "R. L. Palmer" should be "R. M. Palmer".

Page 372, at the 14th line, add the following:

> Donovan J. held that the *Vacant Property Act,* Man. 1940, c. 57, was *intra vires,* but that the filing of the petition by the province was premature. The Court of Appeal held that its previous judgment ([1939] 3 W.W.R. 232; [1939] 4 D.L.R. 75) precluded the province from claiming the moneys in question under the *Vacant Property Act,* and on that ground it dismissed the petition. It held also that Donovan J. was wrong in allowing the province the privilege of filing another petition when the 12-year period had expired.

Page 375, at the second last line, "fail" should be "fall".

Page 397, at the second line, "489" should be "498"; at the 12th line, "(1)" should be omitted.

Page 460, in marginal note, "1942" should be "1943".

Page 470, at end of outline and at the last line of the page, "559" should be "599".

Page 471, at the 17th line, "559" should be "599".

Page 484, at the 17th line, "1912" should be "1942".

In [1941] S.C.R., at page 141, at the 24th line, "Langlois J." should be "Langlais J."

NOTICE

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

Anthony et al. v. *The Attorney-General for Alberta et al.* [1943] S.C.R. 320. Special leave to appeal refused, 11th November, 1943.

Atlantic Smoke Shops Limited v. *Conlon and others.* [1941] S.C.R. 670. Appeal dismissed, order varied, 30th July, 1943.

Joy Oil Limited v. *McColl-Frontenac Oil Co. Limited.* [1943] S.C.R. 127. Special leave to appeal refused, 26th July, 1943.

Keystone Transports Ltd. v. *Dominion Steel & Coal Corporation Ltd.* [1942] S.C.R. 495. Special leave to appeal refused, 2nd June, 1943.

Philco Products Ltd. et al. v. *Thermionics Ltd. et al.* [1943] S.C.R. 396. Leave to appeal granted, 29th November, 1943.

Reference as to Validity of Section 16 of The Special War Revenue Act, as amended. [1942] S.C.R. 429. Special leave to appeal refused, 26th July, 1943.

Reference as to Validity of The Debt Adjustment Act, Alberta. [1942] S.C.R. 31. Appeal dismissed, 2nd February, 1943.

Reference by The Board of Transport Commissioners for Canada, in the Matter of The Transport Act, 1938. (2 Geo. VI, c. 53). [1943] S.C.R. 333. Leave to appeal granted, 11th November, 1943.

Vigneux et al. v. *Canadian Performing Right Society, Ltd.* [1943] S.C.R. 348. Leave to appeal granted, 11th November, 1943.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF THE REGULATIONS IN RELATION TO CHEMICALS ENACTED BY THE GOVERNOR GENERAL OF CANADA ON THE 10TH DAY OF JULY, 1941, P.C. 4996, AND OF AN ORDER OF THE CONTROLLER OF CHEMICALS, DATED THE 16TH DAY OF JANUARY, 1942, MADE PURSUANT THERETO.

1942
*Dec. 14, 15.
1943
*Jan. 5.

Constitutional law—Power of the Governor General in Council, under the War Measures Act, 1914, to delegate his powers to subordinate agencies—Order in Council same as Act of Parliament—Final responsibility for acts of Governor General in Council resting upon Parliament—Enactment contained in Order in Council not open to review by courts of law—Regulations as to chemicals and Order by Controller of Chemicals declared intra vires—Applicability of the maxim: Delegatus non potest delegare.

Held: Regulations respecting chemicals established by an Order in Council, which is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act,* are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires.*

Paragraph four of the Order in Council provides that the compensation, to which a person may be entitled whenever the Controller of Chemicals takes possession of any chemicals, or equipment, or real or personal property, shall be as prescribed and determined by the Controller, with the approval of the Minister of Munitions and Supply. Such paragraph is in conflict with section 7 of the *War Measures Act,* which enacts that, whenever any property has been expropriated by the Crown, the claim for compensation must be referred by the Minister of Justice to the Exchequer Court of Canada or to other mentioned courts.

Held, also: An Order of the Controller of Chemicals, appointed by these Regulations, relating to the control of the production and consumption of, as well as the dealing in, glycerine, is not *ultra vires* of the Controller either in whole or in part.

No opinion was expressed by the Court, such questions not having been referred to it, as to the meaning or the application of any of the Regulations or of the Order of the Controller.

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

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The authority vested in the Governor General in Council by the *War Measures Act*, (its constitutional validity having been finally determined in *Re Gray*, 57 S.C.R. 150 and *Fort Frances* case, [1923] A.C. 695), is legislative in its character; and an order in council passed in conformity with the conditions prescribed by, and the provisions of, that Act, i.e. a legislative enactment such as should be deemed necessary and advisable by reason of war, have the effect of an Act of Parliament: *In re Gray, supra.*

Held, further, that the Governor General in Council has the power, under section 3 of the *War Measures Act*, to delegate his powers, whether legislative or administrative, to subordinate agencies (Boards, Controllers and other officers) to make orders, rules and by-laws generally of the nature of those the Controller of Chemicals is empowered to make by the Regulations above mentioned.

But, under the *War Measures Act*, the final responsibility for the acts of the Executive Government rests upon Parliament.

Per Rinfret and Taschereau JJ.:—Parliament has not abdicated its general legislative powers nor abandoned its control. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.

Per Davis J.—Parliament has not effaced itself, and has full power to amend or repeal the *War Measures Act* or to make ineffective any of the orders in council passed in pursuance of its provisions.

Per Kerwin J.—If at any time Parliament considers that too great a power has been conferred upon the Governor General in Council, the remedy lies in its own hand.

Per Rinfret and Taschereau JJ.—The advisability of the delegation of his powers to other agencies is in the discretion of the Governor General in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it.

Comments as to the applicability of the maxim *Delegatus non potest delegare.*

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35) of the following questions: 1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent? 2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The Order in Council referring these questions to the Court is as follows:—

"Whereas section three of the *War Measures Act*, chapter 206 of the Revised Statutes of Canada, 1927, provides as follows:

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

(*a*) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

(*b*) Arrest, detention, exclusion and deportation;

(*c*) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;

(*d*) Transportation by land, air, or water and the control of the transport of persons and things;

(*e*) Trading, exportation, importation, production and manufacture;

(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

"And whereas by reason of the state of war now existing, the Governor General in Council has deemed it necessary or advisable for the security, defence, peace, order and welfare of Canada to authorize acts and things to be done and, from time to time, to make orders and regulations pursuant to the *War Measures Act* aforesaid and in particular to control, restrict and regulate by means of Controllers the production, sale, distribution, consumption and use of essential supplies and thereby powers have been conferred upon the said Controllers in the exercise of which numerous orders and regulations have been made by the aforesaid Controllers affecting the community at large and a question of general application has arisen as to the authority of the Governor General in Council to establish this method and system of control;

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"And whereas the Minister of Justice reports that a charge of an offence against an order duly made by a Controller was recently dismissed by a County Court Judge of the county of York in the province of Ontario on the ground that the order of the Governor General in Council conferring power upon the Controller was invalid inasmuch as it constituted a delegation of the authority of the Governor General in Council under the *War Measures Act*, and that magistrates who have heard other complaints have as a result of this decision either dismissed the complaints or withheld their decisions for the time being;

"That the aforesaid method or system of control of essential supplies is in principle identical to that adopted in other fields in connection with the conduct of the war.

"And whereas orders and regulations have been made,—

(*a*) to empower ministers of the Crown and other authorized persons, under the Defence of Canada Regulations, to act in relation to matters affecting the security and defence of Canada;

(*b*) to empower the Wartime Prices and Trade Board and Administrators appointed by the said Board, with the approval of the Governor General in Council, to make orders and regulations to provide against undue enhancement in the prices of goods and services and in rentals for real property;

(*c*) to provide, under the direction of the National War Labour Board, for the stabilization of wage rates and for the payment of cost of living bonuses;

(*d*) to empower the Foreign Exchange Control Board to make regulations for the control of the importation and exportation of money, securities and foreign exchange;

"And whereas the Minister of Justice further reports that in these circumstances it is urgently required in the public interest that the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained with the least possible delay, which in the opinion of the Minister is an important question of law touching the interpretation of Dominion legislation; and

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"That typcal of the method and system of control adopted are the regulations in relation to chemicals enacted by the Governor General in Council on the 10th day of July, 1941, P.C. 4996, providing for a Controller of Chemicals exercising wide powers and an order made by the Controller of Chemicals pursuant thereto dated January 16, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and under and by virtue of the authority conferred by section fifty-five of the *Supreme Court Act*, is pleased to refer and doth hereby refer the following questions to the Supreme Court of Canada for hearing and consideration, namely:

1. Are the regulations in relation to chemicals dated the 10th of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

(Sgd.) A. D. P. HEENEY,
Clerk of the Privy Council."

The respective Attorneys-General of the provinces of Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan were, pursuant to order of the Court, notified of the hearing of the Reference.

Aimé Geoffrion K.C. and *David Mundell* for the Attorney-General of Canada.

D. L. McCarthy K.C. and *John J. Robinette*, counsel appointed by the Supreme Court of Canada pursuant to the provisions of sub-section 5 of section 55 of the *Supreme Court Act*.

Rosario Genest K.C. for the Attorney-General of Quebec.

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Duff C.J.

THE CHIEF JUSTICE: His Excellency the Governor General in Council by an order in council of November 30th, 1942, has been pleased to refer to this Court for hearing and consideration two questions, namely:—

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The Regulations in relation to chemicals (the subject of the first interrogatory) were enacted by an order in council of July 10th, 1941. In this order it is stated that the Minister of Munitions and Supply has, amongst other duties, those of organizing the resources of Canada contributory to the production of munitions of war and supplies and of mobilizing the economic and industrial facilities in respect thereof for the effective prosecution of the present war. It is also recited that it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals necessary or useful in connection with the production and supply of munitions of war and for the needs of the Government or of the community in war; and the order in council is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act*.

By the Regulations a Controller of Chemicals is appointed and his duties and powers are enumerated.

The Order of the Controller of Chemicals, dated the 16th day of January, 1942 (the subject of the second interrogatory) relates to the control of the production and consumption of, as well as the dealing in, glycerine.

Although the Regulations of the 10th of July, 1941, were enacted pursuant to the powers conferred by the *Department of Munitions and Supply Act*, as well as by the *War Measures Act*, it will be unnecessary to discuss the first mentioned statute. The question of substance concerns the scope and effect of the *War Measures Act*. By section 3 of that Act it is enacted as follows:—

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

(*a*) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

(*b*) Arrest, detention, exclusion and deportation;

(*c*) Control of the harbours, ports and territorial waters of Canada, and the movement of vessels;

(*d*) Transportation by land, air, or water and the control of the transport of persons and things;

(*e*) Trading, exportation, importation, production and manufacture;

(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

This is a convenient place to notice that the *War Measures Act* contains specific provisions relating to particular subjects in sections 4, 5, 6, 7, 8, 9, and in the second limb of paragraph 2 of section 3. It may be said at once that in so far as they have not been affected by subsequent legislation, the enactments of these sections would appear to have primacy over the orders and regulations of the Governor General in Council under section 3, and it would seem that in case of any inconsistency between these provisions and any order or regulation made under section 3, it is the statute which prevails. The same rule governs the relation between the *Department of Munitions and Supply Act* and orders and regulations made under the authority of that statute. It would appear that section 4 of the Regulations is not consistent with section 7 of the *War Measures Act*. Subject to this observation, it is apparent, from inspection, that the subject matters dealt with in the Regulations are matters to which the powers of the Governor General in Council extend

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under section 3. They are indeed obviously within the scope of the subject matters enumerated in sub-paragraphs (*e*) and (*f*).

The order of His Excellency in Council directing the Reference proceeds *inter alia* upon these recitals:—

And whereas the Minister of Justice reports that a charge of an offence against an order duly made by a Controller was recently dismissed by a County Court Judge of the county of York in the province of Ontario on the ground that the order of the Governor General in Council conferring power upon the Controller was invalid inasmuch as it constituted a delegation of the authority of the Governor General in Council under the *War Measures Act*, and that magistrates who have heard other complaints have as a result of this decision either dismissed the complaints or withheld their decisions for the time being;

That the aforesaid method or system of control of essential supplies is in principle identical to that adopted in other fields in connection with the conduct of the war.

And whereas orders and regulations have been made,—

(*a*) to empower ministers of the Crown and other authorized persons, under the Defence of Canada Regulations, to act in relation to matters affecting the security and defence of Canada;

(*b*) to empower the Wartime Prices and Trade Board and Administrators appointed by the said Board, with the approval of the Governor General in Council, to make orders and regulations to provide against undue enhancement in the prices of goods and services and in rentals for real property;

(*c*) to provide, under the direction of the National War Labour Board, for the stabilization of wage rates and for the payment of cost of living bonuses;

(*d*) to empower the Foreign Exchange Control Board to make regulations for the control of the importation and exportation of money, securities and foreign exchange;

And whereas the Minister of Justice further reports that in these circumstances it is urgently required in the public interest that the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained with the least possible delay, which in the opinion of the Minister is an important question of law touching the interpretation of Dominion legislation; and

That typical of the method and system of control adopted are the regulations in relation to chemicals enacted by the Governor General in Council on the 10th day of July, 1941, P.C. 4996, providing for a Controller of Chemicals exercising wide powers and an order made by the Controller of Chemicals pursuant thereto dated January 16, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

From these recitals it appears that the primary purpose of the Reference is the determination of the question that has been raised as to the power of the Governor General in Council under section 3 of the *War Measures Act* to delegate

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authority to subordinate agencies (Boards, Controllers and other officers) to make orders, rules and by-laws generally of the nature of those the Controller of Chemicals is empowered to make by the Regulations of the 10th of July, 1941.

No doubt has been suggested that the various subject matters which have been dealt with by regulation and order, whether by the Governor General in Council direct or by subordinate agencies under a delegated authority, are within the ambit of the powers with which His Excellency is invested by force of section 3. The cardinal matter for consideration is that which concerns the validity of delegation to subordinate agencies of the character explained.

The Attorneys-General of the provinces were informed of the Reference, but, in view, no doubt, of the fact that the constitutional validity of the *War Measures Act* was finally determined by the Privy Council in the *Fort Frances* case (*Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.* (1)), no argument was presented on the part of any of the provinces.

The Court invited Mr. D. L. McCarthy K.C. and Mr. J. J. Robinette to file a factum and address to us an argument in opposition to the argument on behalf of the Dominion in support of the validity of the instruments in question, and, accordingly, we had the advantage of a very able argument from them in this sense.

The *War Measures Act* came before this Court for consideration in 1918 in *re Gray* (2), and a point of capital importance touching its effect was settled by the decision in that case. It was decided there that the authority vested in the Governor General in Council is legislative in its character and an order in council which had the effect of radically amending the *Military Service Act, 1917,* was held to be valid. The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the *War Measures Act* may have the effect of an Act of Parliament.

In the same case it was also decided, and the point was subsequently settled by the decision of the Judicial Com-

(1) [1923] A.C. 695. (2) (1918) 57 Can. S.C.R. 150.

mittee in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co. supra* (1) that the *War Measures Act* was validly enacted.

There is, however, an observation which ought to be made touching the sweeping language of section 3, in which are set forth the subject matters to which the authority of the Governor General in Council extends and in which the scope of his powers in relation to those subject matters is indicated. The judgment of the Privy Council in the last mentioned case laid down the principle that, in an emergency such as war, the authority of the Dominion in respect of legislation relating to the peace, order and good government of Canada may, in view of the necessities arising from the emergency, displace or overbear the authority of the provinces in relation to a vast field in which the provinces would otherwise have exclusive jurisdiction. It must not, however, be taken for granted that every matter within the jurisdiction of the Parliament of Canada, even in ordinary times, could be validly committed by Parliament to the Executive for legislative action in the case of an emergency.

It is not necessary for the purposes of the present Reference to consider whether it is within the power of Parliament, even in an emergency, to give authority to the Governor General in Council to exercise legislative powers in relation to such matters as, for example, those within the scope of sections 53 and 54 of the *British North America Act*. It is in the highest degree unlikely that any such question will ever arise touching such matters. But it ought to be observed that, apart from the conditions expressed in the *War Measures Act*, the validity of any Order, or Regulation, made under the authority of section 3, is affected by a two-fold condition: that it could be enacted as a statute, by Parliament, in execution of its emergency powers, or otherwise; and, furthermore, that Parliament is not precluded by the *British North America Act*, or by any later lawful enactment concerning its legislative powers, from committing the subject matter of it to the Executive Government for legislative action. The application of this two-fold condition does not require consideration on this Reference.

(1) [1923] A.C. 695.

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Duff C.J.

I turn now to the conditions prescribed by the *War Measures Act* itself. As already observed, any Order or Regulation made under the *War Measures Act* is subject to the specific provisions mentioned above of that statute. Subject to that, the *War Measures Act* by its terms requires only that the act or thing done, or the order or regulation made, shall be such that the Governor General in Council by reason of (in the present case) "real * * * war" deems it to be necessary or advisable for the security, defence, peace, order and welfare of Canada.

I do not think that in their natural meaning the scope of these words is so narrow as to preclude the Governor General in Council from acting through subordinate agencies having a delegated authority to make orders and rules.

The duty of the Governor General in Council to safeguard the supreme interests of the state, as contemplated by section 3, may, it seems plain, necessitate for its adequate performance the appointment of subordinate officers endowed with such delegated authority. I find it impossible to suppose that the authors of that enactment did not envisage the likelihood of the Executive finding itself obliged, in discharging its responsibility in relation to the matters enumerated in sub-paragraphs (*a*) to (*f*), to make use of such agencies. As is well-known, during the last war, in the United Kingdom under the statutes known generally as *The Defence of the Realm Acts,* in which the grant of authority to the Executive was expressed in words less comprehensive than those implied in the *War Measures Act,* extensive powers were delegated to Boards and Controllers under Regulations enacted by orders in council, and the acts of these subordinate agencies were again and again before the courts without question being raised as to the legality of these delegations. The necessity of this procedure is recognized in the *Defence of the Realm Act* of 1939.

Mr. McCarthy, in his admirable argument, contended that, if such had been the intention of the framers of the statute, explicit provision would have been made for such devolution, as was done in the *Defence of the Realm Act* of 1939 in the United Kingdom. There would be much force in the suggestion that if the *War Measures Act* were now being re-enacted the legislation might well be cast in

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some such form; but the function of a court of law is to give effect to the language which the legislature itself has selected for expressing its intention. I repeat, there is nothing in the words of section 3 that, when read according to their natural meaning, precludes the appointment of subordinate officials, or the delegation to them of such powers as those in question. *Ex facie* such measures are plainly within the comprehensive language employed, and I know of no rule or principle of construction requiring or justifying a qualification that would exclude them.

As in respect of any other measure which the Executive Government may be called upon to consider, the duty rests upon it to decide whether, in the conditions confronting it, it deems it necessary or advisable for the safety of the state to appoint such subordinate agencies and to determine what their powers shall be.

There is always, of course, some risk of abuse when wide powers are committed in general terms to any body of men. Under the *War Measures Act* the final responsibility for the acts of the Executive rests upon Parliament. Parliament abandons none of its powers, none of its control over the Executive, legal or constitutional.

The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above, (and the specific provisions enumerated), when Regulations have been passed by the Governor General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country —the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor General in Council (not the courts) deems necessary or advisable.

True, it is perhaps theoretically conceivable that the Court might be required to conclude from the plain terms of the order in council itself that the Governor General in Council had not deemed the measure to be necessary or advisable, or necessary or advisable by reason of the existence of war. In such a case I agree with Clauson L.J. (as he then was) that the order in council would be invalid as showing on its face that the essential conditions of jurisdiction were not present (*Rex* v. *Comptroller General of Patents* (1)); but such theoretical speculations cannot affect the question we have to decide.

It is perhaps advisable to observe also that subordinate agencies appointed by the Governor General in Council are not, by the *War Measures Act,* outside the settled rule that all statutory powers must be employed in good faith for the purposes for which they are given, although here again, as regards the present Reference, that rule has only a theoretical interest.

One observation of a general character remains. It is possible that in what has been said above it has not been sufficiently emphasized that every order in council, every regulation, every rule, every order, whether emanating immediately from His Excellency the Governor General in Council or from some subordinate agency, derives its legal force solely from the *War Measures Act,* or some other Act of Parliament. All such instruments

> derive their vadidity from the statute which creates the power, and not from the executive body by which they are made (*The Zamora* (2));

and the *War Measures Act* does not, of course, attempt to transform the Executive Government into a legislature, in the sense in which the Parliament of Canada and the legislatures of the provinces are legislatures.

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires.* No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The Order is not *ultra vires* of the Controller of Chemicals either in

(1) [1941] 2 K.B. 306, at 316. (2) [1916] 2 A.C. 77, at 90.

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whole or in part. Here again no question is before us concerning the meaning, or the application, of the Order or any part thereof.

The judgment of Rinfret and Taschereau JJ. was delivered by

RINFRET J.—The *War Measures Act* (now c. 206 of the Revised Statutes of Canada, 1927) was adopted by Parliament in 1914 to confer certain powers upon the Governor in Council in the event of war, invasion or insurrection.

By reason of the state of war now existing, the Governor General in Council has deemed it necessary or advisable for the security, defence, peace, order and welfare of Canada to authorize acts and things to be done, and from time to time to make orders and regulations pursuant to the Act aforesaid and, in particular, to control, restrict and regulate by means of controllers the production, sale, distribution, consumption and use of essential supplies; powers have been conferred upon these controllers in the exercise of these numerous orders, and regulations have been made by the controllers affecting the community at large.

A question of general application has arisen as to the authority of the Governor in Council to establish this method and system of control.

It has been found in the public interest that, by virtue of the authority conferred by section 55 of the *Supreme Court Act,* the opinion of the Supreme Court of Canada upon the question of the extent of the powers of the Governor General in Council under the *War Measures Act* be obtained; and, for that purpose, as typical of the method and system of control adopted, the Governor General in Council has chosen the regulations in relation to chemicals enacted on the 10th day of July, 1941 (P.C. 4996), providing for a controller of chemicals exercising wide powers, and an order made by the controller of chemicals pursuant thereto, dated January 16th, 1942, respecting glycerine (referred to as Order No. C.C. 2-B).

Two questions were referred to the Court for hearing and consideration, namely:

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

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In the recitals of the Order in Council P.C. 4996, it is stated that the Minister of Munitions and Supply has, amongst other duties, those of organizing the resources of Canada contributory to the production of munitions of war and supplies and of mobilizing the economic and industrial facilities in respect thereof for the effective prosecution of the present war.

It is further recited that it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals necessary or useful in connection with the supply of munitions of war and for the needs of the community in war.

The order in council is expressed to be made pursuant to the powers conferred by the *Department of Munitions and Supply Act* and by the *War Measures Act.*

A Controller of Chemicals is appointed, and certain powers are conferred upon him which it is not necessary to enumerate for the present purposes.

Under other orders in council, either anterior or posterior to that of the 10th of July, 1941 (P.C. 4996), a Wartime Industries Control Board was established, and it was provided that the power of every controller to fix prices shall be exercised only with the concurrence of the Wartime Prices and Trade Board, and further that no controller's order of general effect throughout Canada, or part of Canada, except an order fixing prices, shall be effective, unless approved by the Chairman of the Wartime Industries Control Board in writing.

The order of the Controller of Chemicals respecting glycerine provides for a very wide control of crude, refined or dynamite glycerine, as to its sale, dealing in, consumption, import or export; the general scheme being that none of these things may be done, except under either a permit issued by the controller or a licence issued by the Minister of Trade and Commerce or by the Minister of National Revenue respectively.

In my view, it is not necessary to consider the provisions of the *Department of Munitions and Supply Act.* The reference would appear to have been made because the

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regulations enacted by the order in council were adopted, as set out in the recital, to assist the Minister of Munitions and Supply in carrying out the duties imposed upon him by that Act, and it is sufficient, for the purpose of answering the questions submitted, to limit our considerations to the *War Measures Act*. In turn, no question of constitutionality under the *B.N.A. Act* is raised with regard to the *War Measures Act*. The Act is within the legislative field of the Dominion Parliament (*Fort Frances Pulp and Power Co.* v. *Manitoba Free Press* (1); and it is well established that it is within the power of Parliament, when legislating within its legislative field, to confer subordinate administrative and legislative powers (*Hodge* v. *The Queen* (2); *Re Gray* (3); *Shannon* v. *Lower Mainland Dairy Products Board* and *Attorney-General for British Columbia* (4)).

The question of the powers of the Governor in Council under the *War Measures Act* is, therefore, solely one of interpretation of the provisions of that Act, and it is to be determined by reference to those provisions by which the powers were conferred.

The Act has already received authoritative interpretation, both in this Court and in the Judicial Committee of the Privy Council. In the *Gray case* (3), Fitzpatrick C.J., at page 158, said:

> It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section (i.e. section 3 of the Act) contains unlimited powers.

The present Chief Justice of this Court, at p. 166, expressed the following view of the Act:

> The words are comprehensive enough to confer authority for the duration of the war to "make orders and regulations" concerning any subject falling within the jurisdiction of parliament—subject only to the conditions that the Governor in Council shall deem such orders and regulations to be by reason of the existence of real or apprehended war, etc., advisable.

And, at page 167:

> The judgments of the Law Lords in *Rex.* v. *Halliday* (5), afford a conclusive refutation of the contention that a general authority to make "orders and regulations" for securing the public defence and safety and for like purposes is, as regards existing law resting on statute, limited to the

(1) [1923] A.C. 695.
(2) (1883) 9 App. Cas. 117.
(3) (1918) 57 Can. S.C.R. 150.
(4) [1938] A.C. 708.
(5) [1917] A.C. 200.

functions of supplementing some legislative enactment or carrying it into effect and is not adequate for the purpose of super-session. The authority conferred by the words quoted is a law-making authority.

And it is as well immediately to set out here the following further quotations from the judgment of my Lord the Chief Justice in the *Gray* case (1):

It is the function of a court of law to give effect to the enactments of the legislature according to the force of the language which the legislature has finally chosen for the purpose of expressing its intention. Speculation as to what may have been passing in the minds of the members of the legislature is out of place, for the simple reason that it is only the corporate intention so expressed with which the court is concerned (p. 169).

* * *

The authority devolving upon the Governor in Council is, as already observed, strictly conditioned in two respects: First—It is exercisable during war only.

(*Nota bene.* In connection with this first condition, reference may be had to the subsequent judgment of the Privy Council in the *Fort Frances case* (2), whereby it was decided that a Dominion Act passed after the cessation of hostilities for continuing the control of newsprint paper until the proclamation of peace, with power to conclude matters then pending, was *intra vires,* in view of certain circumstances there mentioned.)

Secondly—The measures passed under it must be such as the Governor in Council deems advisable by reason of war (p. 170).

* * *

In the case of the *War Measures Act* there was not only no abandonment of legal authority

(by Parliament),

but no indication of any intention to abandon control and no actual abandonment of control in fact, and the council on whom was to rest the responsibility for exercising the powers given was the Ministry responsible directly to Parliament and dependent upon the will of Parliament for the continuance of its official existence (p. 171).

There follows from the principles so enunciated these consequences:

The powers conferred upon the Governor in Council by the *War Measures Act* constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the

(1) (1918) 57 Can. S.C.R. 150. (2) [1923] A.C. 695.

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same nature as those of Parliament itself (Lord Selborne in *The Queen* v. *Burah* (1)). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power.

The conditions for the exercise of that power are: The existence of a state of war, or of apprehended war, and that the orders or regulations are deemed advisable or necessary by the Governor in Council by reason of such state of war, or apprehended war.

Parliament retains its power intact and can, whenever it pleases, take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies and how long it shall continue them in existence, are matters for Parliament and not for courts of law to decide. Parliament has not abdicated its general legislative powers. It has not effaced itself, as has been suggested. It has indicated no intention of abandoning control and has made no abandonment of control, in fact. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence.

As a result of what precedes, and to use the words of Sir Barnes Peacock delivering the judgment of the Privy Council in *Hodge* v. *The Queen* (2), the powers conferred upon the Governor in Council by the Dominion Parliament are

> not in any sense to be exercised by delegation from or as agents of the Parliament.

Within the limits prescribed, the authority of the Governor in Council is as plenary and as ample as the Parliament "in the plenitude of its power possessed and could bestow". The "devolution effected by the *War Measures Act*" (to borrow the expression of my Lord the Chief Justice in the *Gray* case (3)) is not to be assimilated to a so-called delegation; and such a devolution has no analogy with agency.

The maxim *Delegatus non potest delegare* is a rule of the law of agency. It has no reference to an authority to legislate conferred by statute of Parliament. Indeed, the power

(1) (1878) 3 App. Cas. 889. (2) (1883) 9 App. Cas. 117.
(3) (1918) 57 Can. S.C.R. 150.

of delegation being absolutely essential, in the circumstances for which the *War Measures Act* has been designed, so as to have a workable Act, that power of delegation must be deemed to form part of the powers conferred by Parliament in the Act. The Governor in Council, within the ambit of the Act, is not a delegate. The Act constitutes a devolution of the legislative power of Parliament, and, within the prescribed limits, it can legislate as Parliament itself could. Therefore, it can delegate its powers, whether legislative or administrative.

Assuming his powers have been delegated without express reference to any standard, as mentioned in the United States Supreme Court in the *Panama Refining Company* case (1), the standard, in the words of Cardozo J., is "implicit within the Act".

In like circumstances, the Legislature

> confides to a municipal institution or body of its own creation authority to make bylaws or resolutions as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect. (*Hodge* v. *The Queen* (2)).

Here, Parliament was confronted with a tremendous emergency and it had to meet the situation with a workable Act. Hence the *War Measures Act*.

That Act conferred on the Governor in Council subordinate legislative powers; and it is conceded that it was within the legislative jurisdiction of Parliament so to do. In fact, delegation to other agencies is, in itself, one of the things that the Governor in Council may, under the Act, deem "advisable for the security, defence, peace, order and welfare of Canada" in the conduct of the war. The advisability of the delegation is in the discretion of the Governor in Council; and once the discretion is exercised, the resulting enactment is a law by which every court is bound in the same manner and to the same extent as if Parliament had enacted it, or as if it were part of the common law—subject always to the conditions already stated. For a court to review the enactment would be to assume the roll of legislator.

It need not be added that in discussing these questions it should not be assumed that the powers granted will be abused. We are warned by the Privy Council, in many of

(1) (1934) 55 S.C. Rep. (U.S.) 241.

(2) (1883) 9 App. Cas. 117, at 132.

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its judgments on Canadian Constitutional Law, against such a line of discussion. In laying down the general principles whereby one is to be guided in answering the questions referred to the Court, one must remain within the bounds of reasonableness, and a broad view of the situation must be envisaged. It need not be assumed that, for example, the Governor in Council would substitute a Board to exercise in his place the entirety of the powers which have been conferred upon him by the *War Measures Act;* nor, to use an illustration at the other extreme end of possibilities, that the Governor in Council might deem it advisable to confer upon a Controller of his choice the power to amend or abrogate a statute of Parliament. The answer to such objections based upon unexpected occurrences is that, in my view, it is hardly conceivable that the powers of the Governor in Council would be exercised in such a way, and they are not to be taken into account in the ordinary and normal interpretation of the *War Measures Act.*

It is, of course, impossible to foresee every case that may occur in the practical application of the principles discussed; but a careful examination of Order P.C. 4996 and of the Controller of Chemicals' Order No. C.C. 2-B has failed to reveal any exercise of powers in excess of the authority conferred upon the Governor in Council under the *War Measures Act,* or upon the Controller of Chemicals by Order P.C. 4996; except that I agree that paragraph 4 of the latter Order is in conflict with section 7 of the *War Measures Act,* in as far as, under section 7, whenever any property has been expropriated by His Majesty and compensation is to be made therefor and has not been agreed upon, the claim must be referred by the Minister of Justice to the Exchequer Court of Canada, or to a Superior Court, or County Court, of the province within which the claim arises, or to a judge of any such court. While, if paragraph 4 of the order in council should be followed, whenever the Controller takes possession of any chemicals, or equipment, or real or personal property and the Minister of Munitions and Supply determines that any person is entitled to compensation, then the compensation to be paid in respect thereof, in default of agreement, shall be as prescribed and determined by the Con-

troller, with the approval of the Minister. In other cases, by force of the same paragraph 4, the compensation is to be such as is determined by the Exchequer Court of Canada on reference thereto by the Minister of Munitions and Supply. The method adopted for fixing compensation under paragraph 4 of Order 4996 is different from that provided for in section 7 of the *War Measures Act,* and, in my opinion, section 7 of the *War Measures Act* must prevail over paragraph 4 of the order in council, since it is not open to the Governor in Council to derogate from the provisions of the *War Measures Act,* except in so far as that Act may have been amended or modified by a subsequent Act of Parliament.

Subject to the above, my answers to the questions as put are, therefore, in the negative; and I join with the other members of the Court in formally answering them as follows:

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires.* No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

DAVIS, J.—The Order of the Governor General in Council, the validity of which is in question in this Reference to the Court, was passed pursuant to the provisions of the *War Measures Act,* R.S.C. 1927, ch. 206. This statute was enacted by Parliament soon after the outbreak of the last war, being ch. 2 of the statutes of the 2nd Session, 1914. The validity of the statute itself is not in question; its validity was determined by the Judicial Committee of the Privy Council in the *Fort Frances* case (1). But the constitutional question now raised before us did not arise in that case.

The Order in Council recites:

> And whereas it is deemed necessary to control, restrict and regulate the production, sale, distribution, consumption and use of chemicals which

(1) [1923] A.C. 695.

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are, or are likely to be, or may be, necessary or useful for, or in connection with, the production, storage, transportation, and/or supply of munitions of war, or necessary or useful for the needs of the Government or of the community in war, with a view to conserving the financial, material and other resources of Canada and facilitating the production of munitions of war and supplies essential for fulfilling the present and potential needs of Canada and her allies;

The Order in Council then appoints a named Controller of Chemicals and vests in him the widest sort of powers. I shall only take time to refer to a couple of the numerous specific powers which the Controller may exercise from time to time:

2. (1) (*m*) To make orders regulating, fixing, determining and/or establishing the kind, type, grade, quality, standard, strength and/or quantity of any chemicals and/or any equipment that may be made and/or dealt in by any person; and to prohibit any making and/or dealing in any chemicals and/or any equipment, contrary to any such order or orders;

2. (1) (*t*) To regulate and control, by prohibition or otherwise any or all dealings or transactions between any person making and/or dealing in any chemicals and/or any equipment and any other such person in respect of, or in connection with, any making and/or dealing in any chemicals and/or any equipment and/or the acquisition and/or use of any real and/or personal property, including any equipment, for or in connection therewith.

Section 3 of the Order in Council is very wide and is as follows:

3. Wherever herein any power is given to the Controller whether or not subject to the consent or approval of the Minister or of the Governor General in Council, to make or give any order to, or with respect to, or impose any restriction, prohibition or requirement on, or with respect to, any person or thing, the Controller may exercise such power either generally with respect to the whole subject matter thereof, or partially or selectively with respect only to a portion or portions of the subject matter thereof, and, without restricting the generality of the foregoing, the provision or provisions of this Order in Council granting such power shall be deemed and construed to mean that such power is given, and may be exercised, in respect of, and/or in relation to:

(i) * * *

(ii) * * *

(iii) such person and/or thing either generally throughout Canada or in any particular province, place, area, zone or locality designated by the Controller; and

(iv) such a person of any particular trade, industry, occupation, profession, group, class, organization or society, and/or such a thing of any particular kind, type, grade, classification, quality or species; and

(v) an indefinite, undetermined or unspecified time or such period or periods of time as the Controller may specify.

While the *War Measures Act* limits its operation "during war," the powers given to the Controller are by the Order in Council to be deemed and construed to mean that such powers are given and may be exercised for

> an indefinite, undetermined or unspecified time or such period or periods of time as the Controller may specify.

As the Order in Council derives its validity from the statute itself and not from the executive body by which it is made, the Order must be read as subject to an implied proviso that nothing in it shall be considered to sanction a departure from the limitation of time fixed by the statute itself.

The questions propounded for our consideration and advice are of grave concern in that it is admitted by the Attorney General of Canada that the regulations in relation to chemicals enacted by the Governor in Council in the Order before us, providing for a Controller of Chemicals exercising wide powers, and the order before us made by the Controller of Chemicals pursuant thereto, are "typical of the method and system of control adopted" in this country at this time. Since the argument, information has been furnished us on behalf of the Attorney General of Canada of the different boards, administrators and controllers now functioning along similar lines. To take only one case for illustration, the Wartime Prices and Trade Board functions in relation to price levels and rentals of real property. The Board has already appointed 68 Administrators and 4 Coordinators. All these officers and the Board, it is stated, have power to make orders of varying natures. The Board has already made 209 orders, and the Administrators have made 574 orders, including amendments.

The *War Measures Act* is extraordinarily wide in its scope, even wider than the (English) *Defence of the Realm Consolidation Act, 1914*. It may be observed that the *Emergency Powers (Defence) Act, 1939*, being ch. 62 of the English statutes of 1939, gave authority to His Majesty by Order in Council to make such Regulations (in the Act referred to as "Defence Regulations") as appear to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His

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Majesty may be engaged, and for maintaining supplies and services essential to the life of the community. But by section 11 this Act was only to continue in force for the period of one year beginning with the date of the passing of the Act,

and shall then expire: Provided that, if at any time while this Act is in force, an address is presented to His Majesty by each House of Parliament praying that this Act should be continued in force for a further period of one year from the time at which it would otherwise expire, His Majesty may by Order in Council direct that this Act shall continue in force for that further period.

Fundamentally, the function of Parliament is to legislate—the function of the Executive is to administer. The exercise of supreme legislative power, the outward and visible sign of sovereignty, rests with Parliament. But Parliament, by our statute, in effect lifted much of its wartime legislative authority and handed it over to the Executive, subject only to two limitations, firstly, "such acts and things" as the Governor in Council may by reason of the existence of war "deem necessary or advisable for the security, defence, peace, order and welfare of Canada" (sec. 3); and, secondly, "during war" (sec. 6). All orders and regulations made under the special powers entrusted to the Governor in Council "shall have the force of law" (sec. 3 (2)). That Parliament may so legislate is no longer a matter of any doubt, but to the extent of the wide powers of legislative authority entrusted to what is normally the executive branch of government such a statute may constitute a virtual resignation during war of the essential character of Parliament as a legislative body. It may well be, however, as Lord Finlay said in the *Halliday* case (1):

that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised.

Viscount Maugham as recently as November, 1941, in the House of Lords in *Liversidge* v. *Anderson* (2), stated, at p. 219, what he thought to be the proper approach to the construction of such an Order in Council, in these words:

My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention.

(1) [1917] A.C. 260, at 268. (2) [1942] A.C. 206.

Lord Macmillan in the same case, at p. 251, said:

In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the courts ought to adopt in war time canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time.

And Lord Wright added at p. 261:

I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannous conduct. But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency.

The effect of the *War Measures Act* is to entrust to the Executive the making of orders and regulations which shall have the force of law. If the appointment of the Controller and the vesting of the powers in him were in the statute itself, that is in the *War Measures Act,* there could be no valid objection to the enactment. But it is said that the Governor in Council has passed on to a named individual the legislative power that was by the statute entrusted to and conferred upon the Executive itself, and that there is no authority, either express or necessarily implied, in the statute to permit the Executive to do this—that it may confer administrative functions is of course admitted, but not legislative functions.

There may be ground for complaint in the system adopted by the Executive of giving the most extensive and drastic powers of control into the hands of individuals or boards who are in no way responsive to the will of the electorate. The orders made from time to time by all these controllers and boards may well appear to the people to constitute an

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arbitrary abuse of government by persons not representative of or responsible to the people. But the safety valve of our constitutional system of government remains intact. Parliament has not effaced itself. In the ultimate analysis the House of Commons as representative of the people has, in a practical sense, full power to amend or repeal the *War Measures Act* or to make ineffective any of the Orders in Council passed in pursuance of its provisions. The Judicial Committee of the Privy Council in *Hodge* v. *The Queen* (1), said:

> It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature and not for Courts of Law, to decide.

In 1922 the House of Lords had to deal with an information at the suit of the Attorney-General where under the *Defence of the Realm Acts* and regulations the Food Controller had imposed as a condition of the granting of a licence to purchase milk in certain areas a charge of 2d. per gallon payable to him by the purchaser, the charge being part of a scheme for the regulation of prices. That was the case of *Attorney-General* v. *Wilts United Dairies* (2). Lord Buckmaster in delivering judgment said this in part:

> The question before this House is not whether or not that was a wise and necessary step to take having regard to the difficulties by which the whole question of the milk supply was surrounded; the only question which we have to decide is whether there was any power conferred upon the Food Controller to do what he did. The Attorney-General has urged your Lordships to consider the extreme difficulty of the situation in which this country found itself owing to the war, and the importance of all the officials who had charge of our vital supplies being enabled to act under the powers conferred upon them without the fear of technical and vexatious objections being taken to the powers which they used. All that may be readily accepted, but it cannot possibly give to any official a right to act outside the law; nor can the law be unreasonably strained in order to legalise that which it might be perfectly reasonable should be done if in fact it was unauthorized. The real answer to such an argument is to be found in this, that in times of great national crisis Parliament should be, and generally is, in continuous session, and the powers which are required for the purpose of maintaining the integrity of the country, both economic and military, ought always to be obtained readily from loyal Houses of Parliament. The only question here is, were such powers granted?

(1) (1883) 9 App. Cas. 117, at 132. (2) [1922] 91 L.J. (K.B.) 897.

I should like now to quote a passage from the judgment of Lord Dunedin in the House of Lords in the *Halliday* case (1), at page 271:

> That preventive measures * * * may be necessary under the circumstances of a war like the present is really an obvious consideration. Parliament has in my judgment in order to secure this and kindred objects, risked the chance of abuse which will always be theoretically present when absolute powers in general terms are delegated to an executive body; and has thought the restriction of the powers to the period of the duration of the war to be a sufficient safeguard.

And Lord Wrenbury in the same case (1) (at p. 307):

> There is room for difference of opinion whether what I may call legislation by devolution is expedient; whether a statute ought not to be self-contained; whether it is desirable that a statute should provide that regulations made by a defined authority or in a defined matter shall themselves have the effect of a statute. But I think it clear that this statute has conferred upon His Majesty in Council power to issue regulations which, when issued, will take effect as if they were contained in the statute.

In the light of the foregoing statements of the proper principles to apply and of the fact that the Order in Council has by statute "the force of law," I have come to the conclusion, subject to the reservation which I shall presently mention, that the Order in Council except section 4 thereof is valid.

The second question submitted is as to the validity of the Controller's order. The individual Controller, having been vested with the wide powers given to him by the Order in Council, issues an "order" so sweeping and drastic that "the method or system of control adopted," of which this order is said to be typical, may well be regarded by many as an abuse of government. But once granted the validity of the Order in Council, the Controller is within his authority so long as he does not exceed the general powers conferred upon him by the Order in Council. Those powers, as I have already said, are so extensive that it is not possible to say, as a general proposition, that the Controller has acted in excess of them.

The whole matter is for Parliament, not for the courts.

We should reserve for consideration any particular question which may hereafter arise on specific facts or in a particular case under the Order in Council or the Controller's order (or under any such orders of which those before us are said to be typical).

(1) [1917] A.C. 260, at 271.

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REFERENCE As to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto.

Kerwin J.

KERWIN J.—This is a reference to the Court by His Excellency the Governor General in Council of the following two questions for hearing and consideration:—

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C.2-B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The order of the Controller of Chemicals, mentioned in question 2, is stated to be made pursuant to the powers granted by Order in Council P.C. 4996 (referred to in question 1), and also with the approval of the Minister of Munitions and Supply and the Wartime Industries Control Board. The approval of the Minister and Chairman and the relations between them and the Board and the Controller need not be further noticed because the validity of the order of the Controller and of P.C. 4996 depend primarily upon the proper construction of the *War Measures Act*, R.S.C. 1927, chapter 206.

We are not concerned with any constitutional question, that is, as to whether the Dominion Parliament itself could enact into law all the provisions either of the order in council or of the order of the Controller of Chemicals. When, under the provisions of the *War Measures Act*, a state of war is declared to exist by the Governor in Council, Parliament may do many things which in ordinary times would be held, under the terms of *The British North America Act*, clearly to be within the competence of the provincial legislatures. The only question is whether the order in council and the order of the Controller are authorized by what Parliament itself has done in enacting the *War Measures Act*.

That Act was first enacted in 1914 at the outbreak of the first great war and now appears as chapter 206 of the last revision of the Dominion statutes in 1927. By section 2, the issue of a proclamation is conclusive evidence that war, invasion or insurrection, real or apprehended, exists, and of its continuance. Such a proclamation has been issued.

Sections 3 and 4 of the Act read as follows:—

3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

(*a*) Censorship and the control and suppression of publications, writings, maps, plans, photographs, communications and means of communication;

(*b*) Arrest, detention, exclusion and deportation;

(*c*) Control of the harbours, ports and territorial waters of Canada and the movements of vessels;

(*d*) Transportation by land, air, or water and the control of the transport of persons and things;

(*e*) Trading, exportation, importation, production and manufacture;

(*f*) Appropriation, control, forfeiture and disposition of property and of the use thereof.

(2) All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation: but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.

4. The Governor in Council may prescribe the penalties that may be imposed for violations of orders and regulations made under this Act, and may also prescribe whether such penalties shall be imposed upon summary conviction or upon indictment, but no such penalty shall exceed a fine of five thousand dollars or imprisonment for any term not exceeding five years, or both fine and imprisonment.

The provisions of subsection 1 of section 3 are in as wide terms as may be imagined. As Mr. Justice Anglin stated in *In Re Gray* (1) "more comprehensive language it would be difficult to find." Unless there is found to be some rule to the contrary or some valid reason why the provisions of the *War Measures Act* cannot operate to their fullest extent, they authorize, in the main, both the order in council and the order of the Controller. In a reference such as this, the Court is not bound by any admission of counsel or by the omission to urge any point that might be open either for or against the validity of these documents. I have been unable to envisage any objections

(1) (1918) 57 Can. S.C.R. 150.

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against the validity of either, as a whole, other than those raised by Mr. McCarthy and Mr. Robinette and these I now proceed to examine.

Mr. McCarthy sought to read the first part of subsection 1 of section 3 of the Act in such a way as to draw a distinction between "acts or things" and "orders and regulations". He pointed out that the Governor in Council might do and authorize the first of these while the Governor in Council might make, from time to time, the second, and he also pointed out the comma after the word "things". I am unable so to read this subsection. In my view such a method would be to lose sight of the purpose and intent of the Act, which was to place in the hands of the Governor General in Council all possible power in order that the war should be carried to a successful conclusion. In so concluding, it may be pointed out that one would be but carrying out the provisions of section 15 of the *Interpretation Act,* R.S.C. 1927, chapter 1:—

> 15. Every Act and every provision and enactment thereof shall be deemed remedial, whether its immediate purport is to direct the doing of any thing which Parliament deems to be for the public good, or to prevent or punish the doing of any thing which it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

The purpose of the Act would not be carried out by confining the Governor in Council, under the words "do and authorize such acts and things" to the doing and authorization of a single specified act or thing, and under the words "make from time to time such orders and regulations" to the making of a provision of general application. Parliament intended by the *War Measures Act* to confer upon the Governor in Council the widest possible powers of legislation and devolution, because of the necessity of acting speedily and in the realization that celerity could not be accomplished by Parliament itself, or even by the Governor in Council, when it might be most urgently required. If at any time Parliament considers that too great a power has been conferred upon the Governor in Council, the remedy lies in its own hands.

The burden of the argument is that the Governor in Council, by re-delegating or sub-delegating the powers vested in him by the *War Measures Act,* to make orders

and enforce them, to persons without the purview of the Act has gone beyond the prescribed limits and beyond the powers vested in him under the Act.

We need not, I think, concern ourselves with certain decisions in the United States, of which *Panama Refining Co.* v. *Ryan* (1), cited by Mr. Robinette, may be taken as typical. That and similar cases depend upon the language of the United States constitution and the theory of government which underlies it. Nor is the question the same as that considered in the courts of the province of Ontario in discussing the ability of municipal councils to delegate their powers. At common law the maxim *delegatus non potest delegare* is not confined to agency, although it there has its widest application, but in my opinion there is no foundation in principle or authority for applying it in answering the questions submitted to us.

It is suggested, however, that the maxim may be at least used as a canon of construction and that unless a power to delegate legislative functions appears expressly or by necessary implication in the terms of the *War Measures Act,* it should be declared that such a power had not been conferred. While I think that that would be putting the matter too strictly, I am of opinion that even on that basis the *War Measures Act* does confer such a power. The Judicial Committee of the Privy Council found no difficulty in deciding that this had been done by the legislation under review in *Hodge* v. *The Queen* (2) and in *Shannon* v. *Lower Mainland Dairy Products Board* (3). In the latter case, it appears that counsel for the respondent was not called upon to argue the question of delegation and Lord Justice Atkin, in delivering the judgment of the Judicial Committee, approved the judgment of Chief Justice Martin of British Columbia on that point. It would be idle to compare the provisions of the provincial statutes in question in either of these cases with the terms of the *War Measures Act.* Speaking generally, however, I am of opinion that the terms of the *War Measures Act* authorize the provisions of P.C. 4996 and that the latter, in turn, authorize the provisions of the order of the Controller of Chemicals.

(1) (1934) 55 S.C. Rep. (U.S.) 241.
(2) (1883) 9 App. Cas. 117. (3) (1938) A.C. 708.

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Questions may arise from time to time as to the exact meaning of the clauses of either document, just as in England similar questions arose under *The Defence of the Realm Act* as, for instance, in *Attorney General* v. *De Keyser's Royal Hotel Limited* (1); *Chester* v. *Bateson* (2); *Newcastle Breweries Limited* v. *The King* (3). It is impossible on a reference such as this to conceive of all the issues that might arise in the carrying out of the provisions of the order in council and of the order of the Controller but attention should be called to paragraph 4 of the order in council:—

> 4. If the Controller takes possession of any chemicals and/or any equipment and/or of any real and/or personal property, or if the Minister determines that any person is entitled to compensation by reason of any order, then the compensation to be paid in respect thereof, in default of agreement, shall be such, in the case of any chemicals and/or any equipment, as is prescribed and determined by the Controller with the approval of the Minister, and in other cases shall be such as is determined by the Exchequer Court on reference thereto by the Minister.

This is certainly in conflict with section 7 of the *War Measures Act*:—

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefore and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.

and possibly also in conflict with subsection 5 of section 12 and subsection 2 of section 16 of *The Department of Munitions and Supply Act*.

I would therefore answer the questions as follows. (1) The regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the regulations.

(2) The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

(1) [1920] A.C. 508. (2) [1920] 1 K.B. 829.
(3) [1920] 1 K.B. 854.

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REFERENCE As to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and of an Order of the Controller of Chemicals made pursuant thereto.

Hudson J.

HUDSON J.—The questions submitted by His Excellency the Governor General in Council to this Court for hearing and consideration are the following:

1. Are the regulations in relation to chemicals dated the 10th day of July, 1941, P.C. 4996 aforesaid, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

2. Is the order dated the 16th day of January, 1942, respecting glycerine (referred to as Order No. C.C. 20B) *ultra vires* of the Controller of Chemicals either in whole or in part and, if so, in what particular or particulars and to what extent?

The terms of the Order in Council referred to in the first question and the order of the Controller of Chemicals referred to in the second have already been quoted by other members of the Court, and it is not necessary for me now to repeat them.

It is quite clear that in time of war Parliament has power to legislate in respect of the subject matter of the orders under consideration.

It is equally clear that Parliament could delegate such powers to the Governor General in Council or to others.

So much is conclusively established by a decision of this Court in *Re Gray,* (1) and by the Judicial Committee of the Privy Council in *Fort Frances Pulp and Power Company Ltd.* v. *Manitoba Free Press Company Ltd.* (2).

The subject matter of the orders in question falls within the provisions of section 3 of the *War Measures Act,* and in particular paragraphs (*e*) and (*f*) *of* such section.

That the Governor General in Council himself could deal with this matter is not open to serious question.

But it is contended that under the terms of the statute the Governor General in Council had no power to delegate to others the authority to make orders and regulations such as is done here.

The statute does not in express terms provide for delegation and the maxim *delegatus non potest delegare* is invoked to support a construction as would deny any implication of such an authority.

The general principle is stated in Broom's Legal Maxims at page 570, as follows:

This principle is that a delegated authority cannot be re-delegated: *delegata potestas non potest delegari,* that is, one agent cannot lawfully

(1) (1918) 57 Can. S.C.R. 150 (2) [1923] A.C. 695.

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appoint another to perform the duties of his agency. This rule applies wherever the authority involves a trust or discretion in the agent for the exercise of which he is selected, but does not apply where it involves no matter of discretion, and it is immaterial whether the act be done by one person or another, and the original agent remains responsible to the principal.

The principle thus stated is somewhat qualified by Broom, at page 572, as follows:

> Although, however, a deputy cannot, according to the above rule, transfer his entire powers to another, yet a deputy possessing general powers may, in many cases, constitute another person his servant or bailiff, for the purpose of doing some particular act; provided, of course, that such act be within the scope of his own legitimate authority.

And again:

> The rule as to delegated functions must, moreover, be understood with this necessary qualification, that, in the particular case, no power to re-delegate such functions has been given. Such an authority to employ a deputy may be either express or implied by the recognised usage of trade.

The maxim is most frequently applied in matters pertaining to principal and agent but it is also applied in respect of legislative grants of authority; for example in *Re Behari Lal et al,* (1), it was held that the power conferred on the Governor General in Council by section 30 of the *Immigration Act* to prohibit the landing of immigrants of a specified class could not be delegated to the Minister of the Interior. Mr. Justice Clement said:

> ***In my opinion, nothing short of express words would avail to enable His Excellency in Council to delegate to another or others a power of this nature, the exercise of which is conditioned upon his consideration of its necessity or expediency.

Again in *Geraghty* v. *Porter,* (2), it was held that a delegated power of legislation must be exercised strictly in accordance with the powers creating it; and in the absence of express power so to do the authority cannot be delegated to any other person or body.

The maxim, however, is at most a rule of construction, subject to qualifications, some of which are referred to by Broom.

In the case of a statute, there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects.

(1) (1908) 13 B.C.R. 415.

(2) (1917) New Zealand Law Rep. 554.

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Hudson J.

The *War Measures Act* was passed soon after the commencement of the war in 1914. Section 3 provided that:

> The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations as he may, by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada;

In the course of that war, under the authority of this Act, the Governor General in Council appointed many controllers who actively exercised powers in general not dissimilar from those here under consideration. In no case was it ever held that such delegation was *ultra vires*. On the contrary, in the case of *Fort Frances Pulp and Power Company Ltd.* v. *Manitoba Free Press Company Ltd.* (3), it was expressly held by Mr. Justice Riddell at the trial (4) that such delegation by the Governor in Council to a controller of pulp and paper was valid. Mr. Justice Riddell said at page 119:

> Moreover, if the Dominion have regulative power over any class of subjects, it may exercise such power through any agency selected by itself —the power of the Dominion is not delegated, and the maxim *Delegatus non potest delegare* has no application.

And again:

> The Governor in Council in effect regulated the trading, etc., so far as it consisted in paper, etc., by directing those concerned to obey the orders and regulations of the Minister: I think that this was perfectly valid.

The case went to the Ontario Court of Appeal, but this question was not there dealt with, the appeal being dismissed on another ground. In the Judicial Committee of the Privy Council the appeal was again dismissed. Their Lordships held that the *War Measures Act* and the Orders in Council thereunder were *intra vires*. At the conclusion of his judgment Lord Haldane accepted in general the views of Mr. Justice Riddell, although guarding himself against accepting his statement on one point which is not here relevant.

At the commencement of the present war the *War Measures Act* again came into operation. Since then the practice of 1914-1918 has been followed and extended, commensurate with the vastly increased national obligations.

(3) (1923) A.C. 695.

(4) (1922) 52 O.L.R. 118.

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Hudson J.

It is manifest that the business of government in war time cannot be effectively carried on without delegation by the Executive of a very great part of its duties.

This was found to be the case in Great Britain during the last war. There was first a general delegation of powers to His Majesty in Council, and then a sub-delegation by His Majesty in Council to controllers or directors of different governmental activities arising out of the prosecution of the war. Notwithstanding that His Majesty in Council had no express power of sub-delegation, none of the acts of the controllers or directors were ever declared to be *ultra vires* because of such sub-delegation. The attitude of the courts in England is sufficiently shown by the following extracts from Halsbury's Laws of England, vol. 6, p. 527:

> Presumptions in favour of the liberty or property of the subject, which are usually of great effect in interpreting statutes in time of peace, become relatively weak in time of war when the safety of the realm is in danger.

Again at page 533:

> Note (d). The main Act was the *Defence of the Realm Consolidation Act,* 1914 (5 Geo. 5, c. 8), which was in form declaratory, though it undoubtedly introduced some new law*** It was held, on more than one occasion, that no regulation which was made with the honest intention of securing the public safety and defence of the realm could be treated by the Courts as invalid, unless it was clear, upon the face of it, that it could not possibly aid in securing the public safety or the defence of the realm.

After the conclusion of the war several emergency Acts were passed, and the latest which came into effect at the commencement of the present war contained express authority to His Majesty in Council to delegate. It was pressed upon us as an argument that it was then recognized in England that the prior legislation was insufficient. This, however, would not be conclusive even in England and much less so when construing the Canadian Act.

Bearing in mind that we are not now called upon to construe a constitutional Act but an Act which the Canadian Parliament passed in war time for the security, defence and welfare of Canada, I do not think that the maxim *delegatus non potest delegare* is applicable.

By the statute the Governor in Council is given power

> to do and authorise such acts and things and make from time to time such orders and regulations as he may deem necessary or advisable for the security, defence, peace, order and welfare of Canada, and by subsection 2 such orders and regulations shall have the force of law.

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Hudson J.

In the light of the necessity for delegation and what took place during the last war, and the decision of the courts in the case of *Fort Frances Pulp and Paper Co.* v. *Manitoba Free Press* (1), I think it must be held that the Governor in Council has the power to delegate to others the performance of such duties as has been done in the present case. Any such delegation would, of course, not confer on the delegate power to do anything in conflict with other provisions of the *War Measures Act*. One of such provisions has been called to our attention, namely clause 4 of Order in Council No. 4996, in regard to compensation. This conflicts with section 7 of the *War Measures Act* and, for that reason, is invalid.

For these reasons, I concur in the following answers to the questions referred to us:

The answer to interrogatory number one is: The Regulations are not *ultra vires* of the Governor General in Council either in whole or in part, except paragraph four which is *ultra vires*. No question is before us concerning the meaning, or the application, of any of the Regulations.

The answer to interrogatory number two is: The order is not *ultra vires* of the Controller of Chemicals either in whole or in part. Here again no question is before us concerning the meaning, or the application, of the order or any part thereof.

MERCURY OILS LIMITED (DEFENDANT) ..... APPELLANT;

AND

VULCAN - BROWN PETROLEUMS LIMITED (PLAINTIFF) ..... RESPONDENT.

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*May 13, 14, 15.
*Dec. 24.

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

Gas and oil leases—Effect upon lease of subsequent legislation preventing performance of a condition—Whether lease frustrated—Constitutional law—Validity of Oil and Gas Wells Act, Alberta, 1931, c. 46.

The appellant held under a lease from the owner "the right and interest of the lessor in all the petroleum" in a certain parcel of land. The respondent held under a prior sublease the petroleum and natural gas

*PRESENT:—Rinfret, Kerwin, Hudson and Taschereau JJ. and Gillanders J. *ad hoc*.

(1) [1923] A.C. 695.

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rights in the same parcel of land. Under the last agreement, it was agreed that the respondent should drill an oil well within a certain time, and within twelve months after completion of the first well it would drill a second well and that, in default of so doing, it should be deemed to have abandoned the property, except the first well and the five acres surrounding it, and the appellant was to be entitled to re-enter. The respondent drilled the first well, but did not drill the second well owing to the fact that certain regulations under *The Oil and Gas Wells Act*, Alberta, 1931, c. 46, enacted after the execution of the lease, prohibited the drilling of a well within 440 yards of any producing well. The effect of these regulations was to make it impossible for the respondent to drill a second well on a forty-acre plot such as was covered by the lease. The respondent brought an action for a declaratory judgment that there was no default or abandonment and that its rights in the premises still continued. The trial judge held that the respondent was entitled to the declaration as claimed and a majority of the appellate court affirmed his decision.

Held that the judgment appealed from ([1942] 1 W.W.R. 138) should be affirmed. When all the provisions of the sublease agreement are read together, it cannot be said that the respondent was in default within the contemplation of the particular clause providing for the drilling of the second well.

The Oil and Gas Wells Act, Alberta, 1931, c. 46, is not *ultra vires* of the provincial legislature.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Shepherd J. (2), and maintaining the respondent's action for a declaratory judgment.

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

S. J. Helman K.C. for the appellant.

George Steer K.C. for the respondent.

W. S. Gray K.C. for the Attorney-General for Alberta, intervenant.

The judgment of Rinfret, Kerwin, Hudson and Taschereau JJ. was delivered by

HUDSON J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta which, by a majority of four to one, dismissed an appeal from a judgment of Mr. Justice Shepherd awarding the plaintiff a declaration as claimed in its statement of claim.

(1) [1942] 1 W.W.R. 138; [1942] 1 D.L.R. 209.

(2) [1941] 3 W.W.R. 384; [1942] 1 D.L.R. 210.

The material facts in the case are not in dispute. They are fully set forth in the judgments below.

Briefly, the defendant appellant holds under a lease from the owner

> the right and interest of the lessor in all the petroleum which may be found within or upon a parcel of land consisting of forty acres in the provinve of Alberta.

The plaintiff holds under a prior sublease the petroleum and natural gas rights in the said parcel of land. The lease to the plaintiff provides that the plaintiff as lessee shall pay as a rental or royalty for the premises: (1) twenty per cent of all merchantable products received from the demised premises; (2) a rental of forty dollars per annum payable half yearly; (3) that the lessee should drill a well of a defined character and capacity upon the land; and (4) that within twelve months after completion of the first well it would drill a second well and that, in default of so doing, it should be deemed to have abandoned the property, except the first well and the five acres surrounding it.

The plaintiff has fulfilled the first three obligations as above mentioned but did not drill the second well because meanwhile new regulations under *The Oil and Gas Wells Act*, 1931, chapter 46, Alberta, were passed. These regulations made by order in council dated January 11th, 1939, provided that the Board constituted under the Act may prescribe the points at which wells may be drilled, and provided that no person shall commence to drill a well without a licence and that no licence shall be issued for any well at any point which was within 440 yards of any producing well. These regulations ordinarily made it impossible to drill a second well on a forty-acre plot such as was covered by the lease here. The plaintiff respondent applied to the Board for a licence under the regulations to drill a second well on the leased premises but such application was refused.

The defendant appellant (to whom the plaintiff had attorned) took the position that the agreement to drill the second well was absolute, that the plaintiff's failure to drill amounted to a default under the terms of the lease and that it must thereby be deemed to have abandoned its interest in all, except the first well and the five acres surrounding same. The plaintiff respondent thereupon com-

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menced this action claiming a declaration that there was no default or abandonment and that its rights in the premises still continued.

The trial judge held that the plaintiff was entitled to the declaration as claimed and the court of appeal by a majority affirmed his decision.

The clause in the sublease providing for the second well is as follows:

28. It is understood and agreed by and between the parties hereto that upon the completion of the first well agreed to be drilled under the terms of this lease, to commercial production or upon the abandonment of the said well, that the lessee shall within a period of four months thereafter commence the actual drilling of another well on the premises hereby demised, *and that in case of default of the lessee in so doing, he shall be deemed to have abandoned the property* hereby demised excepting only that in case the first well hereby agreed to be drilled shall recover commercial production then and in such case the lessee shall be entitled to retain the five acres immediately surrounding the said well and of which the said well shall be the centre; and in case the lessee shall abandon the said well or any part thereof under the provisions of this clause, the lessor shall be entitled to re-enter upon the said premises or such part thereof as shall have been abandoned and the same to have again to repossess and enjoy, anything herein contained to the contrary notwithstanding.

There are several other clauses in the sublease which have a bearing on this question. Clause 9 provides:

9. The lessee shall in respect to the premises hereby demised, faithfully and punctually do and perform all covenants and conditions, acts, matters and things as are required in the original lease from The Calgary and Edmonton Corporation Limited, or which may be contained in any regulations from time to time in force or promulgated by any proper authority.

The original lease referred to in this clause 9 contained a provision as follows:

The lessee shall and will carry on all drilling operations in strict compliance with the statute and regulations and all other provisions of law applicable thereto.

This provision, therefore, must be taken to be incorporated in the sublease. Then, it should be stated that the original lease referred to above was surrendered and a new lease to the defendant appellant substituted therefor. This new lease contained a provision as follows:

That the lessee shall and will carry on all drilling operations in strict compliance with the statute and regulations and all other provisions of law applicable thereto, also in accordance with the regulations of the Government of the province of Alberta applicable to Crown leases.

Subsequently, by agreement between the lessor, the plaintiff respondent and the defendant appellant, the respondent attorned to and became tenant of the appellant and acknowledged itself to be bound by the covenants and conditions of the said sublease and all amendments thereto and of such assignment.

The position then is that the defendant claims that the plaintiff has made default in not doing something which if done would be contrary to another covenant in the lease and at the same time contrary to a covenant made by the plaintiff appellant in its own lease, and which act if done might jeopardize the defendant's own title.

In view of this paradoxical situation let us next look at two other provisions of the sublease:

> 8. The lessee covenants and agrees that he will from and after the commencement of drilling operations as herein agreed, carry on such drilling operations continuously thereafter in a skillful and workmanlike manner with competent workmen and efficient machinery and equipment until the said well shall be drilled to commercial production or shall be abandoned, subject only to such interruptions and delays as may occur from causes beyond the control of the lessee, provided that lack of funds shall not be considered a cause beyond the control of the lessee.
>
> 16. It is distinctly understood and agreed between the parties hereto that drilling, pumping or other operations for procuring or producing petroleum and natural gas in, upon or from the said premises shall be suspended only in the event that said operations are prevented by causes beyond the control of the lessee and such operations shall be carried on for so long a time as petroleum and natural gas or other products can be produced and marketed at a price that shall be remunerative to the parties hereto.

Reading all of these provisions together as we must, can it be said that the plaintiff is in default within the contemplation of clause 28? I do not think so.

The present is not a case of frustration or of unjust enrichment. There is no total failure of consideration. The plaintiff has paid the money rental in the past and is under an obligation to pay it in the future. The plaintiff is, so far as we know, operating the first well and paying the defendant the royalty on production provided for by the sublease. Nor is it shown that there is any special hardship imposed upon the defendant. It does not appear that the defendant could get a licence to drill where the plaintiff has failed. If the regulations are altered to permit the drilling of another well, then both parties will profit. The defendant will get the royalty and the plaintiff the remaining share of the products.

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MERCURY OILS LTD. v. VULCAN-BROWN PETROLEUMS LTD.

Hudson J.

Apart from the construction of the contract itself, it was argued that the *Oil and Gas Wells Act* was *ultra vires* of the provincial legislature, and that the order in council establishing the regulations was beyond the power of the Lieutenant-Governor in Council. All of the judges in the courts below have held this argument to be unfounded. With this conclusion I agree.

The title in fee simple passed from the Crown in the right of the Dominion in 1906 and thereafter the provincial legislature had power to legislate in respect of same. The statement of the Chief Justice in the *Spooner* case (1) is quite in accord with this conclusion.

I would, therefore, dismiss the appeal with costs to the respondent, but there shall be no costs in respect of the intervention of the Attorney-General.

GILLANDERS J. (*ad hoc*)—I am of the opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs; no costs as to intervention.

Solicitors for the appellant: *Helman & Mahaffy.*

Solicitor for the respondent: *John W. Moyer.*

Solicitor for the Attorney-General for Alberta: *W. S. Gray.*

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*Nov. 27.
*Dec. 24.

FINE FOODS OF CANADA, LIMITED (PETITIONER) ..... APPELLANT;

AND

METCALFE FOODS, LIMITED (RESPONDENT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade marks—Petition to expunge respondent's mark from Register—Whether petitioner's and respondent's marks "similar" within meaning of s. 2 (k) of The Unfair Competition Act, 1932 (Dom., c. 38).

The appellant and respondent companies were canners of vegetables, etc. Appellant used the trade mark "Garden Patch", registered in 1929, and the trade mark "Summer Pride", which appellant commenced to

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

(1) *Spooner Oils Limited* v. *The Turner Valley Gas Conservation Board,* [1933] S.C.R. 629, at 644.

use in 1935 but which by oversight was not registered. Respondent in 1940 commenced to use, and registered, the trade mark "Garden Pride". Appellant petitioned to have respondent's said trade mark expunged from the Register, on the ground that its registration did not accurately express or define respondent's existing right in respect of the mark since respondent was not entitled to use it owing to the reasonable apprehension of confusion consequent upon its use between appellant's goods and those of respondent bearing it.

Held: Said trade marks "Garden Patch" and "Garden Pride" were not, nor were said trade marks "Summer Pride" (assuming that the Court could take it into consideration, notwithstanding its non-registration) and "Garden Pride", "similar", within the meaning of s. 2 (*k*) of *The Unfair Competition Act, 1932* (Dom., c. 38); and therefore the dismissal of appellant's petition by Maclean J., [1942] Ex. C.R. 22, should be affirmed.

APPEAL from the judgment of Maclean J., late President of the Exchequer Court of Canada (1), dismissing the present appellant's petition for a direction that a certain trade mark of the respondent be expunged from the Register of Trade Marks. The material facts sufficiently appear in the judgment now reported.

O. M. Biggar K.C. for the appellant.

A. G. McHugh K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal by Fine Foods of Canada Ltd. from a judgment of the late President of the Exchequer Court dismissing a petition under section 52 of *The Unfair Competition Act, 1932,* to expunge the trade mark "Garden Pride", registered by the respondent, Metcalfe Foods Ltd., under No. NS14074 on October 17th, 1940, as applied to canned fruits, vegetables, jams, jellies and pork and beans.

The respondent, whose principal place of business is at Whitby, in the province of Ontario, commenced to make use of that trade mark in or about the month of June, 1940. Before 1929, the predecessor in title of the appellant, whose principal place of business is at Tecumseh in Ontario, commenced to use a trade mark "Garden Patch" for the purpose of distinguishing its products, which products are similar to those of the respondent, and caused the said trade mark to be registered on October 2nd, 1929,

(1) [1942] Ex. C.R. 22; [1942] 2 D.L.R. 59; 2 Fox Pat. C. 113; 1 Can. Pat. Rep. 301.

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FINE FOODS OF CANADA, LTD. v. METCALFE FOODS, LTD.

Kerwin J.

as number 219/47728. In the year 1935, the appellant commenced to use the trade mark "Summer Pride" also for the purpose of distinguishing its products, and shortly thereafter instructed agents in Ottawa to cause the said mark to be registered but, by oversight, no registration was made.

The appellant and respondent have continued to use their respective trade marks with reference to their products, and the ground for the application to the Exchequer Court is stated in the appellant's petition as being that the registration of the respondent's trade mark "Garden Pride"

> does not accurately express or define the respondent's existing right in respect of the said mark since the respondent is not entitled to use the same owing to the reasonable apprehension of confusion consequent upon its use between your petitioner's goods and those of the respondent bearing it.

Clause (*k*) of section 2 of *The Unfair Competition Act, 1932*, reads as follows:—

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

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The learned President decided that the two trade marks "Garden Patch" and "Garden Pride" are not similar within the meaning of this clause and I agree with him. In coming to a conclusion as between the appellant's unregistered mark "Summer Pride" and respondent's registered mark "Garden Pride", the President considered that he was not entitled to take into consideration the use of the former because it was not registered. I express no opinion on this point, for, even assuming that the Court may take into consideration the unregistered mark, the two marks are not "similar" within the meaning of that expression as used in the Act.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *McHugh & Macdonald.*

JOHN F. BOLAND, EXECUTOR OF WALTER JOSEPH BOLAND, DECEASED (DEFENDANT) } APPELLANT;

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*Dec. 10, 11.
*Dec. 24.

AND

EDWARD T. SANDELL (PLAINTIFF) AND THE SAID JOHN F. BOLAND (DEFENDANT) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Limitation of actions—Sufficiency of notice filed under s. 67 (1) of The Surrogate Courts Act, R.S.O. 1937, c. 106, to save claim from being affected by The Limitations Act, R.S.O. 1937, c. 118—Material particulars lacking in notice but supplied in affidavit attached—Whether delivery of a certain unsigned memorandum was effective to avoid operation of The Limitations Act.

This Court affirmed the judgment of the Court of Appeal for Ontario, [1942] O.R. 226, holding that plaintiff was entitled to recover from defendant, executor of B. deceased, upon a certain promissory note made by the deceased to plaintiff, and that defendant was not entitled to recover against plaintiff the amount of a certain account, claimed as owing by plaintiff to the deceased's estate, on the ground that defendant's remedy was barred by *The Limitations Act*, R.S.O. 1937, c. 118.

Held (1) That a certain notice of claim which plaintiff had filed under s. 67 (1) of *The Surrogate Courts Act*, R.S.O. 1937, c. 106, was a substantial compliance with said s. 67 (1), so as to save plaintiff's claim upon the promissory note now sued upon from being affected by *The Limitations Act*, notwithstanding that certain material particulars regarding the promissory note were not given in the notice itself but were given in a verifying affidavit attached thereto.

(2) That the delivery by plaintiff to defendant of a certain memorandum, not signed by plaintiff, in which appeared the sum now claimed as owing by plaintiff to the deceased's estate and a list of payments made which in amount more than covered it (which payments, defendant claimed, were in fact not made on the account now claimed for) did not (even if the memorandum could be regarded as an admission by plaintiff that there was a pending unsettled account; and, *semble*, it could not be so regarded) have the effect of avoiding the operation of *The Limitations Act* against the account claimed to to be owing to the deceased's estate.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) dismissing his appeal from the judgment of Roach J.

In the action, which was commenced by writ issued on June 21, 1940, the plaintiff sued the defendant as executor of W. J. Boland, late of the City of Toronto, in the County

PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

(1) [1942] O.R. 226; [1942] 2 D.L.R. 404.

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of York, deceased, upon a promissory note made by the said deceased in favour of the plaintiff, dated April 28, 1932, payable three months after date.

On or about April 25, 1938, the plaintiff caused to be filed in the office of the Registrar of the Surrogate Court of the County of York a notice of claim, expressed to be filed pursuant to the provisions of *The Surrogate Courts Act,* R.S.O. 1937, c. 106, s. 67 (1). Sec. 67 (1) of that Act provides that the provisions of *The Limitations Act* shall not affect the claim of any person against the estate of a deceased person "where notice of such claim giving full particulars of the claim and verified by affidavit" is filed as provided for in said section prior to the date upon which the claim would be barred by the provisions of *The Limitations Act.* The notice in question gave the amount claimed to be due and owing and the computation of such amount, in which computation was stated the face amount of the note and its date; but the notice itself did not say whether said deceased became liable on the note as maker or as endorser; it did not say that plaintiff was the payee or that he became a subsequent holder; it did not say when the note matured, nor where it was made payable. The notice stated that "the amount of the said indebtedness is verified by affidavit hereto attached." The attached affidavit said that the deceased signed the note as promissor, that it was dated at Toronto on April 28, 1932, that it was in the principal sum of $3,500 and was payable to the plaintiff's order three months after date at the Bank of Toronto, at St. Catherines, Ontario, and that the note did not specify the rate of interest.

The Court of Appeal held that, "having regard to the nature and purpose of s. 67 (1), what was done in this case was a substantial compliance with it, and accordingly the provisions of *The Limitations Act* do not affect the claim upon the promissory note."

The defendant alleged, by way of defence and by counterclaim, an indebtedness of plaintiff to said deceased for professional services rendered in 1927, as set out in a bill of costs for $5,001.90 forwarded to plaintiff on or about April 20, 1932. Against this claim the plaintiff pleaded (*inter alia*) *The Limitations Act,* R.S.O. 1937, c. 118, particularly ss. 48 and 49 thereof.

The account for said services was rendered in the name of Macdonell & Boland, the members of which firm were

the deceased and the defendant, but the defendant claimed that the account belonged to the deceased himself and had been so regarded and treated by the deceased. At defendant's request, the trial judge made an order adding defendant in his personal capacity as a party defendant and a party plaintiff by counterclaim. The Court of Appeal held that all necessary parties were before the Court to overcome any technical difficulty there might have been, arising from the fact that the account stood or was rendered in the name of Macdonell & Boland, and that, for the purposes of set-off or counterclaim in the action, the account might be treated as if it were the account of said deceased alone.

To avoid *The Limitations Act* the defendant relied upon a certain memorandum of account, not signed by plaintiff, which had been delivered by plaintiff to defendant, in which appeared the said sum of $5,001.90 and a list of payments made which in amount covered it and left a balance against Macdonell & Boland (1). Defendant claimed that the payments set out in the memorandum were in fact not made on said account now claimed for.

Dealing with said memorandum the judgment in the Court of Appeal said:

> This memorandum is not signed by the respondent, even if its contents can be taken to be sufficient to prevent the operation of *The Limitations Act,* and s. 54 of *The Limitations Act,* which requires that to take a case out of the operation of the statute an acknowledgment or promise by words only must be made or contained by or in some writing signed by the party chargeable thereby or by his agent, would seem to prevent the appellant from avoiding the operation of *The Limitations Act* and succeeding in respect of the account.
>
> Counsel for the appellant argued, however, that there is a class of case, of which this is one, where the provisions of s. 54 of *The Limitations Act* do not apply. As I understand his argument it is that, while s. 54 requires some writing signed by the party to be charged or by his agent in the case of an acknowledgment of a debt or a promise to pay, either conditional or unconditional, yet where there is an admission of a pending unsettled account between the parties that is neither an acknowledgment nor a promise to pay coming within s. 54 of the statute, it is as effective as either of them to take the claim out of the operation of the statute. * * *

The Court of Appeal held against that contention. It further said:

> Even if the signature of the party to be charged could be regarded as unnecessary, I find it difficult to read Ex. 13 [the said memorandum] as an admission by the respondent that there is a pending unsettled account. * * *

(1) The memorandum is set out in the judgment of the Court of Appeal, [1942] O.R. 226, at 235; [1942] 2 D.L.R. 404, at 410.

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In the appeal to this Court, defendant's counsel raised the question of defendant's right of "retainer"—his right, notwithstanding the barring of remedy by *The Limitations Act,* to retain and apply, as against any balance due to plaintiff from the deceased's estate on the promissory note sued upon, the said indebtedness claimed to be owing by the plaintiff to the estate and which remains and forms part of the estate; referring to *Noecker* v. *Noecker* (1), *In re Akerman; Akerman* v. *Akerman* (2), and other cases.

D. L. McCarthy K.C. for the appellant.

J. L. Y. Keogh for the respondent.

The judgment of the Court was delivered by

KERWIN J.—At the conclusion of the argument of counsel for the appellant, the Court intimated that it would not require to hear from the respondent on the question as to the effect of subsection 1 of section 67 of *The Surrogate Courts Act.* This is a comparatively new provision but we see no reason to disagree with the decision of the Court of Appeal for Ontario as to its meaning. The provisions of *The Limitations Act,* therefore, do not affect the respondent's claim upon the note.

As to the account of $5,001.90, which is set up as being an account for services rendered by the late Walter J. Boland to the respondent, an examination of the record convinces us that this account was an account of the legal firm of Macdonell and Boland. The question, therefore, raised for the first time in this Court, that there is a right of retainer by the appellant as executor of his brother's estate, does not arise and need not be considered.

On the remaining point that, irrespective of section 54 of *The Limitations Act,* there was an admission of a pending unsettled account between the respondent and Walter J. Boland, effective to take the claim out of the operation of the statute, we agree with the Chief Justice of Ontario and have nothing to add.

The appeal should be dismissed with costs to be paid by the appellant John F. Boland as executor of the estate of Walter Joseph Boland according to the usual form in such cases.

Appeal dismissed with costs.

Solicitor for the appellant: *F. H. Snyder.*

Solicitors for the respondent (plaintiff): *Bench & Cavers.*

(1) (1917) 41 Ont. L.R. 296. (2) [1891] 3 Ch. 212.

HIS MAJESTY THE KING (PLAINTIFF)..APPELLANT;

AND

ELGIN REALTY COMPANY, LIMITED (DEFENDANT) AND J. P. CRERAR AND G. W. McNAUGHTON (LIQUIDATORS; ADDED AS PARTIES RESPONDENT, BY SUGGESTION)..... RESPONDENTS.

1942
*Dec. 3, 4, 7
1943
*Feb. 2

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Expropriation of land—Amount of compensation—Appellate Court not interfering with award by Court of first instance when latter has acted on proper principles of law and amount awarded is supported by the evidence—Consideration of factors in arriving at award, including postponed value over present market value—Date to which interest allowed on amount awarded—Expropriation Act, R.S.C. 1927, c. 64, s. 32.

On an expropriation by the Crown under the *Expropriation Act,* R.S.C. 1927, c. 64, of certain city property, the Crown offered $408,640 and the owner claimed $600,000. Maclean J., late President of the Exchequer Court of Canada, awarded $497,500. The Crown appealed.

Held: The President did not act on any wrong principles of law, and this Court should not interfere in the amount awarded.

In expropriation cases, when a Court of first instance, in determining the amount to be awarded, has acted upon proper principles, has not misdirected itself on any matter of law, and when the amount arrived at is supported by the evidence, an Appellate Court should not disturb its finding. (*Vézina* v. *The Queen,* 17 Can. S.C.R. 1, at 16, referred to).

In arriving at his conclusion, the President took many factors into consideration and examined them in a very detailed and precise manner. He did so with the view of giving to the property its value at the time of the expropriation, and, in doing so, dealt properly with its postponed value over its present market value.

The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value. (*Cedars Rapids Manufacturing and Power Co.* v. *Lacoste,* [1914] A.C. 569, at 576).

Held, also, that the owner was entitled to interest at 5 per cent. per annum from the date the land was taken by the Crown to the date of the judgment of this Court, for, an appeal having been taken to this Court, the date of its judgment becomes "the date when judgment is given" within the meaning of s. 32 of the said *Expropriation Act.* (The discretion of the Minister of Finance to allow interest under s. 53 of the *Exchequer Court Act* may be exercised only from the date of the final determination of the amount until payment by the Government).

PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

1943

THE KING v. ELGIN REALTY CO. LTD.

APPEAL by the Crown, plaintiff, from the judgment of Maclean J., late President of the Exchequer Court of Canada, dated February 26, 1942, awarding to the defendant the sum of $497,500, together with interest thereon at the rate of 5 per cent. per annum from August 17, 1939 (the date of expropriation) to the date of the judgment, in full compensation for the lands and premises in question, expropriated by the Crown under the *Expropriation Act*, R.S.C. 1927, c. 64, and also for all damages arising out of the said expropriation. The Crown had offered $408,640. The defendant had claimed $600,000, and it entered a cross-appeal, but this was later abandoned. The lands taken by the Crown are in the City of Ottawa, on Elgin street, between Queen street and Albert street, and have a frontage of 198 feet, 8 inches, on Elgin street, and a frontage of about 132·64 feet on both Queen street and Albert street, and have a superficial area of 26,388 square feet.

F. P. Varcoe K.C. and *W. R. Jackett* for the appellant.

J. R. Cartwright K.C. and *H. P. Hill Jr.* for the respondents.

The judgment of the Court was delivered by

TASCHEREAU, J.—This is an appeal from the judgment of the late Mr. Justice Maclean, President of the Exchequer Court of Canada, pronounced on the 26th of February, 1942, granting to the Elgin Realty Company, Limited, a sum of $497,500, with interest from the 17th of August, 1939, in full compensation for its lands and premises expropriated by the appellant. The Crown offered $408,640 and the defendant claimed $600,000. The Crown now appeals, and the respondent also entered a cross-appeal, which was later abandoned, so that we are concerned only with the main appeal.

The lands taken are located in Ottawa on Elgin street, between Queen and Albert streets; they have a frontage of 132 feet on both streets, and of 198 feet and 8 inches on Elgin street, and the superficial area is of 26,388 square feet. On these expropriated lands, were originally three buildings: one, which was the largest, known as the Grand Union Hotel; the second, the Elgin Building Annex, and the third was the Elgin Cottage. In 1918, additional floors

were added to the Annex and alterations were made so that they could be used as an office building. From that time until the date of expropriation, the building has been used by the appellant under a lease subject to cancellation on three months notice. The total costs of the lands, buildings and repairs amounted to approximately $350,000.

The only point in issue, apart from the question of interest, and with which I will deal later, is whether the amount awarded by the learned President should be varied by this Court.

In expropriation cases it is settled, I think, that when determining the amount, a court of first instance has acted upon proper principles, has not misdirected itself on any matter of law, and that when the amount arrived at is supported by the evidence, a Court of Appeal ought not to disturb its finding. This rule has for many years been the guiding principle in this Court, and a reference may be made to *Vézina* v. *The Queen* (1). At page 16, Mr. Justice Patterson, with whom concurred Strong J., Fournier J., and Taschereau J., said:—

> Where the tribunal of first instance has proceeded on correct principles and does not appear to have overlooked or misapprehended any material fact, an appeal against the amount awarded will in most cases resemble an appeal against an assessment of damages in an action, which would be a hopeless proceeding unless some very special reason for the interference of the appellate court can be shown.

In order to arrive at the conclusion he has reached, the President of the Exchequer Court has taken many factors into consideration and has examined them in a very detailed and precise manner. After giving a full and complete description of the property, after taking into account its purchase price, all the expenditures made for repairs, alterations and improvements, the annual rent derived from the property and its gross and net incomes and the particular conditions of the lease, the learned President examined with much care the special adaptability of the property for particular purposes, by reason of its size and location, and the most advantageous use that could be made of it; he considered the value given to the property by the widening of Elgin street, the public improvements made in the vicinity, the value of neighbouring properties, the prices paid when the Sun Life property and the

(1) (1889) 17 Can. S.C.R. 1.

1943

THE KING v. ELGIN REALTY CO. LTD.

Taschereau J.

Russell Hotel were purchased, and after weighing the evidence of the experts, and the various reasons brought forward by them, he came to the conclusion that the sum of $497,500 was a fair compensation to be paid to the respondents.

All these various factors were examined in view of giving to the property its value at the time of the expropriation. And as to the postponed value of the property over its present market value, the President said that it was:

> the present worth of that postponed value that is to enter into the computation of the compensation to be awarded.

He also said:

> I do not mean to say that the defendant, by reason of the special adaptability of its property for particular purposes on account of its size, shape and location, is thereby entitled to a hypothetical or speculative value which has no real existence, and therefore any remote future value must be adequately discounted.

I believe that this is an accurate statement of the law, for the value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value. (*Cedars Rapids Manufacturing and Power Co.* v. *Lacoste et al.*) (1).

My conclusion is, therefore, that the President did not act on any wrong principles of law, and I see no reason for interfering in the amount of the award.

In his reasons for judgment, the learned trial Judge does not deal with the question of interest, but, the formal judgment grants interest at the rate of 5 per cent. from the 17th of August, 1939, until the date of the judgment of the Exchequer Court. The respondents claim that interest should now be granted until the date of the judgment of this Court.

The appellant submits that in the event of the appeal being dismissed, no direction as to interest can be given by this Court, and that the Exchequer Court judgment should remain unaltered.

(1) [1914] A.C. 569, at 576.

It was pursuant to sections 27 and 28 of the *Expropriation Act* (R.S.C. 1927, Chapter 64) that the Attorney General of Canada caused to be exhibited the information in this matter. Section 32 of the same Act deals with the question of interest and reads as follows:—

> 32. Interest at the rate of five per centum per annum may be allowed on such compensation money from the time when the land or property was acquired, taken or injuriously affected to the date when judgment is given; but no person to whom has been tendered a sum equal to or greater than the amount to which the Court finds him entitled shall be allowed any interest on such compensation money for any time subsequent to the date of such tender.

An appeal having been taken to this Court, I believe that the date of the judgment of this Court becomes "the date when judgment is given" within the meaning of the above section.

It would indeed be unfair to hold otherwise. The property was producing a very substantial revenue, of which the respondent is now deprived; and the only compensation that can be given for this loss is by way of interest on the money awarded, which stands in place of the property which has been expropriated and from which the appellant derives revenues.

It has been submitted that under section 53 of the *Exchequer Court Act*, the payment of interest is left to the discretion of the Minister of Finance. The Minister has under this section power to allow interest at the rate of 4 per cent., but this discretion may be exercised only from the date of the final determination of the amount, until the moneys are paid by the Government.

My conclusion is that the respondent is entitled to interest at the rate of 5 per cent. per annum, from the date the land has been taken, to the date of the judgment of this Court, and that this appeal should be dismissed with costs.

Appeal dismissed with costs. Respondent entitled to interest as stated in above reasons for judgment.

Solicitor for the Attorney-General of Canada: *F. P. Varcoe.*

Solicitors for the respondents: *Hill, Hill & Hill.*

1942
*June 16, 17
1943
*Feb. 2

MERCO NORDSTROM VALVE COMPANY AND PEACOCK BROTHERS LIMITED (PLAINTIFFS) ..... } APPELLANTS;

AND

J. F. COMER (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Infringement—Invention of improvement in plug valves—Specification and claims limiting invention to improved method of attaining an old object—Monopoly limited to particular mode described—No infringement unless same thing taken and same result attained in substantially the same way.

Plaintiffs claimed that defendant had infringed their rights under a patent for an invention relating to an improvement in plug valves (used, e.g., in pipe lines) of the type in which lubrication of the bearing or seating surfaces of the valve is effected by forcing lubricant under pressure into the contact joint between the plug and the valve seat in the casing. An object of the invention was to provide the valve with a system of lubricating grooves of such arrangement as to prevent leakage, with the arrangement being such as to effect the cutting off from the supply of lubricant under pressure of any grooves becoming exposed to the line fluid when the plug was being turned.

Held: Plaintiffs' patent in suit and every claim therein were limited to a tapered plug valve, while defendant did not make use of a "tapered valve" but used a cylindrical valve; and that fact was sufficient, in view of the nature of the patent, to defeat the claim for infringement, as the principle of the valves was different; defendant's type of valve was entirely different from that of plaintiffs. On this ground, the dismissal of the action by Maclean J. ([1942] Ex. C.R. 138 and 156) was affirmed. (This Court also stated that "other material differences and distinctions in important particulars" might be pointed out between the methods adopted respectively in plaintiffs' patent and by defendant to accomplish their results).

The patented invention could not be said to consist in the discovery of a new principle or of a method of attaining a new result; the specification and the claims limited the invention to an improved method of attaining an old object. In such a case the monopoly is limited to the particular mode described (*Tweedale* v. *Ashworth*, 9 R.P.C. 121, at 128, and other cases, cited). The patentee was limited by the patent claims to the precise mechanism described and there could be no infringement unless defendant had taken the same thing and attained the same result in substantially the same way.

APPEAL by the plaintiffs from the judgment of Maclean J., late President of the Exchequer Court of Canada (1), dismissing their action, which was brought

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

(1) [1942] Ex. C.R. 138 and 156; [1941] 2 D.L.R. 10, and [1942] 1 D.L.R. 316.

for relief (declaration of validity of patent, declaration of infringement, injunction, damages, etc.) because of alleged infringement of their rights under patent no. 270,557, dated May 10, 1927, granted to the plaintiff Merco Nordstrom Valve Company, assignee of Sven Johan Nordstrom, the inventor. The plaintiff Peacock Brothers Limited was the licensee of the plaintiff Merco Nordstrom Valve Company under the patent. The invention related to an improvement in plug valves (used, e.g., in pipe lines) of the type in which lubrication of the bearing or seating surfaces of the valve is effected by forcing lubricant under pressure into the contact joint between the plug and the valve seat in the casing. An object of the invention was to provide the valve with a system of lubricating grooves of such arrangement as to prevent leakage, with the arrangement being such as to effect the cutting off from the supply of lubricant under pressure of any grooves becoming exposed to the line fluid when the plug was being turned.

Maclean J. held that there had been no infringement, and further held that, as between the parties, the patent was invalid for want of invention. (This latter question is not dealt with in the judgment of this Court, now reported, the dismissal of the action being affirmed on the ground of non-infringement).

R. S. Smart K.C. and *E. L. Medcalf* for the appellants.

E. G. Gowling and *G. F. Henderson* for the respondent.

The judgment of the Court was delivered by

RINFRET, J.—This is an action alleging that the respondent has infringed the rights of the appellants under Canadian Patent No. 270557, dated May 10th, 1927, for an invention of one Sven Johan Nordstrom relating to valves.

The learned President of the Exchequer Court of Canada dismissed the action on the ground that the appellants' patent was invalid, null and void as between the parties, and further that there had been no infringement on the part of the respondent.

The patent relates to a pipe line valve of the plug type, comprising a casing which is connected into a pipe line and has passages forming a continuation of the pipe line and a

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round plug inserted in the casing, with its axis at right angle to the line or passages for closing or stopping flow through the line.

In the specification, the invention is described as being an improvement in valves, and more particularly an improvement in plug valves of the type in which lubrication of the bearing or seating surfaces of the valve is effected by forcing lubricant under pressure into the contact joint between the plug and the valve seat in the casing.

The claims are five in number. It is not necessary to reproduce each of them, as they are rather lengthy. Claim No. 4 may be chosen as typical. It reads as follows:

> A valve comprising, a casing having a passageway therethrough and a tapered valve seat formed transversely of the passageway, a tapered plug seated in the valve seat and having a hole adapted to register with the passageway, longitudinal and transverse grooves in the seating surface of the valve arranged to form when the plug is in either its closed or open position two diametrically opposed closed circuit grooves, and means for introducing a plastic substance under presssure into the grooves, the longitudinal grooves being so arranged that they are only supplied with lubricant under pressure when they are not exposed to the fluid passing through the valve, but are cut off from the supply of lubricant under pressure when they are exposed to the fluid passing through the valve.

It is important to notice that in each of the claims the invention is referred to as having "a tapered valve seat formed transversely of the passageway, a tapered plug seated in the valve seat", etc.

The respondent does not make use of a "tapered valve," but uses a cylindrical valve; and, in my opinion, in view of the nature of the patent in suit, this is sufficient to defeat the claim for infringement, as the principle of the two valves is different.

Nordstrom's invention can certainly not be said to consist in the discovery of a new principle or of a method of attaining a new result. The specification and the claims limit the invention to an improved method of attaining an old object. In such a case, the monopoly is limited to the particular mode described (*British United Shoe Machinery Company Ltd.* v. *A. Fussell & Sons Ltd.* (1); *Clarke* v. *Adie* (2); *Curtis* v. *Platt* (3); *Gillette Safety Razor Co. of Canada, Ltd.* v. *Pal Blade Corporation, Ltd.* (4)).

(1) (1908) 25 R.P.C. 631.
(2) (1877) 2 App. Cas. 315.
(3) (1863) 3 Ch.D. 135 (note).
(4) [1933] S.C.R. 142, at 150.

As was stated by Lord Watson, in *Tweedale* v. *Ashworth* (1),

> The plain object of the invention as described in the Specification is to substitute better mechanical equivalents for those already known and used as a means to the same end. It follows that, in construing the Appellant's Specification, the doctrine of mechanical equivalents must be left out of view. He cannot bring within the scope of his invention any mechanical equivalent which he has not specifically described and claimed.

A similar observation was made by Lord Davey in *Consolidated Car Heating Company* v. *Came* (2).

I agree, therefore, with the learned President, when he says, in his judgment:

> Nordstrom is limited by his claims to the precise mechanism described and he must abide by the result of his limitation, and there can be no infringement unless the defendant has taken the same thing and attains the same result in substantially the same way.

The appellants' patent, and every claim therein, are limited to a tapered plug valve. The type of valve of the respondent is entirely different.

In relation to this point, I may refer to the cross-examination of Matheson, an engineer of the appellant company:

> Q. Does your own company not make a close distinction between a tapered and cylindrical valve?—A. Certainly. We are not now making any cylindrical valve.
>
> Q. But would you not make a distinction in referring to the two types of valves?—A. Yes. We and our engineers talking between ourselves certainly make a distinction as well as we do to other mechanical details.
>
> Q. How would you classify the defendant's valve; as a cylindrical or tapered valve?—A. It is for practical purposes a cylindrical valve even though some specimens might show a slight taper.
>
> Q. The taper to which you referred showed a little over 1/1000 inch? —A. Yes.
>
> Q. Did the taper vary in the different valves you measured?—A. The other ones I examined—some other two sizes, I did not have any taper measuring instrument to use.
>
> His LORDSHIP: Are you suggesting there is a distinction between a cylindrical and tapered valve?
>
> Mr. GOWLING: Yes, my Lord.
>
> His LORDSHIP: Other than a patentable distinction?
>
> Mr. GOWLING: Yes sir. That is one of our main defences to the action, my Lord.

It appears by the evidence that the appellants have manufactured and sold, as well as taken patents on, both valves; but they have decided to sue the respondent on a patent which is specifically limited to a tapered valve.

(1) (1892) 9 R.P.C. 121, at 128. (2) [1903] A.C. 509 at 516-518.

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Other material differences and distinctions in important particulars may be pointed out between the two methods adopted respectively in the appellants' patent and by the respondent to accomplish their results; but, from the viewpoint of infringement, the fundamental difference between the precise mechanism described in Nordstrom's claims and the means adopted by the respondent is, in my opinion, sufficient to dismiss the contention that Patent No. 270,557 has been and is being infringed by the respondent.

The above conclusion disposes of the appellants' action; and I do not find it necessary to decide whether, as between the parties, the letters patent of the appellants are valid. On that point, I express no opinion, so far as the present case is concerned.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Smart & Biggar.*

Solicitors for the respondent: *Herridge, Gowling, MacTavish & Watt.*

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*Nov. 30

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*Feb. 2

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

AND

THE KELLOGG COMPANY OF CANADA, LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Deductions in computing income—Legal expenses incurred in defending suit against using certain words in connection with sale of products—Income War Tax Act, R.S.C. 1927, c. 97, s. 6 (a) (b).

In computing income for purposes of income tax under the *Income War Tax Act,* R.S.C. 1927, c. 97, in the ordinary course legal expenses are simply current expenditures and deductible as such. In the present case it was held that legal fees and expenses incurred by respondent in successfully defending a suit for an injunction against alleged infringement of registered trade marks by using certain words in connection with the sale of respondent's products, fell within that general rule; in that suit the question in issue was whether or not said trade marks were valid, and the right upon which respondent relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe its goods in the manner in which it was describing them.

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

The Minister of National Revenue v. *The Dominion Natural Gas Co., Ltd.*, [1941] S.C.R. 19, distinguished.

Appeal from judgment of Maclean J., [1942] Ex. C.R. 33, dismissed.

APPEAL by the Minister of National Revenue from the judgment of Maclean J., late President of the Exchequer Court of Canada (1), allowing the appeal of The Kellogg Company of Canada, Limited, the present respondent, from the decision of the Minister of National Revenue affirming certain assessments against said company for income tax under the *Income War Tax Act*, R.S.C. 1927, c. 97, which assessments disallowed as deductions, in computing the company's income, the amounts of legal fees and expenses incurred in defending a suit brought against it in which there was claimed an injunction to restrain an alleged infringement of registered trade marks by the present respondent's use of certain words in connection with the sale of some of its products. In that suit the present respondent succeeded throughout, in the courts of Ontario and before the Judicial Committee of the Privy Council. It was held that the said trade marks were not valid (2).

The respondent claimed that the legal fees and expenses incurred in defending the said suit were "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" (s. 6 (*a*) of said Act). The Minister claimed that they were not so, and that they constituted an outlay or payment on account of capital within s. 6 (*b*) of said Act.

C. W. R. Bowlby K.C. and *A. A. McGrory* for the appellant.

O. M. Biggar K.C. for the respondent.

The judgment of the Court was delivered by

THE CHIEF JUSTICE—Mr. Bowlby rested his case on the decision of this Court in *The Minister of National Revenue* v. *The Dominion Natural Gas Company, Limited* (3). That decision was concerned with a deduction

(1) [1942] Ex. C.R. 33; [1942] 2 D.L.R. 337.
(2) The judgment in the Privy Council is in 55 R.P.C. 125; [1938] 2 D.L.R. 145.
(3) [1941] S.C.R. 19.

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Duff C.J.

claimed by the respondents in respect of the costs of litigation which in its result affirmed the right of the respondents under certain by-laws of the Township of Barton to sell gas in certain localities in the City of Hamilton, Ontario. The boundaries of Hamilton having been extended to include parts of the Township, the United Company, which had certain exclusive rights under by-laws of the city, advanced the claim that under these by-laws it had the exclusive right to sell gas in the whole area embraced within the extended boundaries of Hamilton, including the localities in question. This claim was disputed and, in the course of the litigation, there was an appeal to the Judicial Committee of the Privy Council and in the result the right of the respondent company under the by-laws of the Township was sustained.

It was held by this Court that the payment of these costs was not an expenditure "laid out as part of the process of profit earning," but was an expenditure made "with a view of preserving an asset or advantage for the enduring benefit of the trade," and, therefore, capital expenditure.

The present appeal concerns expenditures made by the respondent company in payment of the costs of litigation between that company and the Canadian Shredded Wheat Company. To quote from the judgment of the Privy Council, delivered by Lord Russell of Killowen in *Canadian Shredded Wheat Co. Ltd.* v. *Kellogg Co. of Canada, Ltd.* (1), the Canadian Shredded Wheat Company claimed

> an injunction to restrain [the respondent] from infringing the registered trade marks consisting of the words "Shredded Wheat" by the use of the words "Shredded Wheat", or "Shredded Whole Wheat" or "Shredded Whole Wheat Biscuit", or any words only colourably differing therefrom.

As regards this payment, the question in issue was whether or not the registered trade marks of the plaintiffs in the action were valid trade marks, or, in other words, whether or not the present respondents, The Kellogg Company, and all other members of the public were excluded from the use of the words in respect of which the complaint was made. The right upon which

(1) [1938] 2 D.L.R. 145, at 149.

the respondents relied was not a right of property, or an exclusive right of any description, but the right (in common with all other members of the public) to describe their goods in the manner in which they were describing them.

It was pointed out in *The Minister of National Revenue* v. *The Dominion Natural Gas Company, supra,* at p. 25, that in the ordinary course legal expenses are simply current expenditures and deductible as such. The expenditures in question here would appear to fall within this general rule.

It is very clear that the appellant does not succeed in bringing his case within the decision upon which he relies.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. S. Fisher.*

Solicitors for the respondent: *Smart & Biggar.*

IN THE ESTATE OF GEORGE HARMES, DECEASED

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ERNEST W. HINKSON.....APPELLANT; *May 19, 20, 21

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AND

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PAUL HARMES AND THE CUSTODIAN OF ENEMY PROPERTY. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Will—Validity—Will prepared by one who benefits under it—Attitude of suspicion to be taken by the Court—Onus to remove suspicion—Evidence—Findings at trial.

Where a will is prepared by one who benefits under it, it should be viewed with suspicion and the Court should be vigilant and jealous in examining the evidence in support of the instrument and should not pronounce in its favour unless the suspicion is removed and unless it is judicially satisfied that the paper propounded is the true will of the deceased.

In the present case (where a beneficiary under a will had prepared it and conducted its execution) the trial Judge pronounced in favour of the validity of the will. His judgment was reversed by the Court of Appeal for Saskatchewan, [1942] 1 W.W.R. 385, which held (Martin,

*Present:—Rinfret, Kerwin, Hudson and Taschereau JJ., and Gillanders J. *ad hoc*.

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C.J.S., dissenting) that the trial Judge had failed to assume adequately the attitude of suspicion required by the rule above stated, and that, under the circumstances in question and on the evidence, a finding in favour of the validity of the will was not justified. Appeal was brought to this Court.

Held (Hudson J. dissenting): The appeal should be allowed and the judgment of the trial Judge restored. He was, as shown by a careful reading of his judgment, well aware of said rule of law and had it in mind when considering the evidence. His findings, made in face of contradictory evidence and based on the credibility of the witnesses, should not lightly be disturbed. Reasons of Martin, C.J.S., dissenting, in the Court of Appeal (cited *supra*) approved.

Per Hudson J., dissenting: Under the circumstances of the case, the onus was heavily on appellant, and, on the evidence, he had completely failed to remove the suspicion created by those circumstances; and had failed to establish that the deceased fully understood what he was doing in disposing of his property in the terms of the alleged will. The trial Judge failed to realize the strength of said onus.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1).

The Canada Permanent Trust Company, the executor named in a document purporting to be the last will and testament of George Harmes, late of the City of Regina, in the Province of Saskatchewan, deceased, petitioned the Surrogate Court of the Judicial District of Regina, Province of Saskatchewan, for an order for proof in solemn form of the said will.

The will had been prepared by Ernest W. Hinkson, the appellant, while present with the deceased, and he (the appellant) conducted its execution. He was not a relative of the deceased. He was the residuary legatee under the will. The will was dated April 3, 1941. The deceased died on April 4, 1941.

It was ordered that proceedings be taken to prove in solemn form the alleged will or such part or parts thereof as might be established in evidence. By a subsequent order it was directed (*inter alia*) that at the trial of the proceedings the question of the validity of the will, in whole or in part, be determined, including the following issues:

(*a*) the testamentary capacity of the said deceased at the time of his purported execution of the said alleged will;

(*b*) the due execution of the said alleged will by the said deceased;

(1) [1942] 1 W.W.R. 385.

(*c*) the knowledge and volition of the testator as to the contents of the said alleged will so far as knowledge and volition are necessary to the validity thereof;

(*d*) the allegation of Paul Harmes and the Custodian that the execution of the said alleged will was procured by the undue influence of the said Ernest W. Hinkson.

The validity of the will was contested by Paul Harmes (a nephew of the deceased, and a beneficiary under the will) and by The Custodian of Enemy Property (on behalf of next of kin of the deceased, residing in Greece), who were the respondents in the present appeal.

The trial Judge, Hannon J.S.C. (Judge of the said Surrogate Court), held the will to be valid. He found as follows (as recited in the formal judgment):

(*a*) That the said George Harmes, deceased, duly executed the said alleged will on the 3rd day of April, A.D. 1941;

(*b*) That at the time of the making and execution of the said alleged will the said deceased had sufficient testamentary capacity to make and execute the same;

(*c*) That the said alleged will was made and executed with the knowledge and volition of the said deceased;

(*d*) That the allegation of Paul Harmes and The Custodian that the execution of the said alleged will was procured by the undue influence of the said Ernest W. Hinkson has not been established;

and that the said will of the said deceased is valid and has been duly proven as a whole, and is entitled to be admitted as a whole to probate;

and he decreed probate of the will, as a whole, in solemn form of law.

The said Paul Harmes and the said Custodian appealed to the Court of Appeal for Saskatchewan, which, by a majority (Mackenzie and MacDonald JJ.A.) allowed the appeal, and (by the formal judgment) set aside the judgment of Hannon J.S.C. (except certain paragraphs as to costs, stay of proceedings, and administration of property) and ordered and adjudged that the whole of the alleged will was invalid and be not admitted to probate and that the application to prove it in solemn form be dismissed.

The majority of the Court of Appeal held that the trial Judge failed to assume adequately the attitude of suspicion rendered necessary by the circumstances in question and that, under those circumstances and upon the evidence, a finding in favour of the validity of the will was not justified.

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Martin, C.J.S., dissented and would dismiss the appeal, holding that the trial Judge was, as shown by a careful reading of his judgment, well aware of the rule of law requiring an attitude of suspicion in the circumstances, and had it in mind when considering the evidence; that the trial Judge had an opportunity of observing the demeanour of the witnesses and judging of their credibility and honesty in a way that no appellate tribunal could have, and his findings that Hinkson was a truthful witness and that the deceased was of testamentary capacity and signed the will of his own volition and with a knowledge of its contents, should not be disturbed; that, in view of the circumstances in connection with the life of the deceased, the will was not an unnatural one; and that, upon the evidence, the will was properly executed, and when the deceased executed it he was of testamentary capacity and fully aware of what he was doing; and that the will was entitled to be admitted to probate, failing affirmative proof of the allegation that the deceased was prevailed upon to execute it by the undue influence of Hinkson; and that there was no evidence to support the allegation of undue influence.

Ernest W. Hinkson appealed to this Court.

E. C. Leslie K.C. for the appellant.

S. R. Curtin K.C. for the respondent The Custodian of Enemy Property.

R. M. Balfour for the respondent Paul Harmes.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

RINFRET, J.—In my opinion, this appeal should be allowed and the judgment of the trial judge should be restored.

The case went to trial on the following issues:

1. The testamentary capacity of the deceased at the time of the execution of his will;

2. The due execution of the will;

3. The knowledge and volition of the testator as to the contents of the will, so far as they were necessary to the validity thereof;

4. The allegation that the execution of the will was procured by the undue influence of the appellant.

On all these issues, the learned trial judge decided that the will was duly proven in solemn form as a whole; and he directed that probate should issue to the executors named therein.

In the Court of Appeal, the Chief Justice of Saskatchewan, in a very elaborate and exhaustive judgment, was in favour of confirming the trial judge and of dismissing the appeal, which, however, was allowed as a result of the judgments of Mackenzie and MacDonald, JJ.A.

In this Court, there does not seem to have been any question about the issues concerning the testamentary capacity of the deceased or the due execution of the will; but the argument was mainly, if not exclusively, directed to the two other issues.

The will was written by the appellant, who benefits under it; and, under such circumstances, the principle is that it should be viewed with suspicion and that

> the Court should be vigilant and jealous in examining the evidence in support of the instrument and should not pronounce in its favour unless the suspicion is removed and unless it is judicially satisfied that the paper propounded is the true will of the deceased.

In *Riach* v. *Ferris* (1), Crocket J., speaking on behalf of the Court, after a review of the authorities, stated that the testator, in that case, was shown to have been

> of sound and disposing mind and memory when he executed [this will] * * * and that that will was consequently entitled to be admitted to probate, failing affirmative proof of the defendants' allegation that he was prevailed upon by fraud and undue influence on the part of [the beneficiary] to execute it.

And the Chief Justice of this Court, after having declared that he entirely agreed in the conclusion of Crocket J. as well as in the reasons by which this conclusion was supported, added a statement, with regard to cases of wills prepared under circumstances which raised well-grounded suspicions, to the effect that the law on the subject was well established and was best and completely stated in a passage of Lord Davey in *Tyrrell* v. *Painton* (2):

(1) [1934] S.C.R. 725.

(2) L.R. [1894] P. 151, at 159-160.

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* * * the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed.

In the present case, the reason expressed by the majority of the Court of Appeal for interfering with the judgment of the Court of first instance was that, in the view of the learned Judges, the trial Judge did not pay sufficient attention to the rule of law above stated.

With due respect, we cannot agree with that impression of the trial judgment. Like the Chief Justice of Saskatchewan, we are convinced, "from a careful reading of the judgment, that the trial Judge was well aware of the rule of law and had it in mind when considering the evidence of Hinkson as well as that of the medical men and the nurses."

Applying the rule, the learned trial Judge stated that, on the whole, the appellant left on him "an impression of honesty as a witness" and "that he was worthy of credence". Moreover, he thought "the evidence tends strongly to establish that [the appellant] was to the end a close and staunch friend" of the deceased, which cogently goes to show that the will was not an unnatural one.

The important point about these findings of the trial Judge is that he made them in face of contradictory evidence, that he believed the appellant and that his conclusions were based on the credibility of the witnesses. He found that the appellant was a truthful witness, that the deceased was of testamentary capacity and signed the will of his own volition and with a full knowledge of its contents.

Findings such as these, based as they are on the credibility of the appellant and of other witnesses, should not lightly be disturbed. "It must be an extraordinary case in which the appellate tribunal can accept the responsibility of differing as to the credibility of witnesses from the trial Judge who has seen and watched them, whereas the appellate Judge has had no such advantage." (Lord Wrenbury in *Wood* v. *Haines* (1); *Powell* v. *Streatham* (2) per Lord Sankey, at p. 250, and Lord Wright, at pp. 265-266).

For these reasons, which I find much more completely developed by the Chief Justice of Saskatchewan in his able judgment with which I fully agree and to which I find

(1) P.C. (1917), 38 O.L.R. 583. (2) [1935] A.C. 243.

nothing to add, I would allow the appeal and restore the judgment of the trial Judge. The costs of all parties to the appeal to the Court of Appeal should be taxed on the scale applicable on appeals from the Court of King's Bench and be paid out of the estate, the taxation of the costs of The Canada Permanent Trust Company to be on a solicitor and client basis. The costs of all parties to the appeal before this Court should be paid out of the estate.

HUDSON, J. (dissenting)—The proceedings in this case originated in a petition by the Canada Permanent Trust Company for proof in solemn form of a will alleged to have been made by the late George Harmes, deceased. In this petition it was alleged in part:

> 3. That your petitioner was informed by the said Ernest W. Hinkson that the said will was prepared by the said Ernest W. Hinkson, the blanks in the printed form of the said will being filled in by the handwriting of the said Ernest W. Hinkson, who conducted its execution by the said deceased and that the said Ernest W. Hinkson is not a relative of the said deceased. The total value of the property to which he would be entitled under the residuary devise in the said will (exclusive of succession duty) would be approximately the sum of $52,000. Your petitioner is desirous of having the said will proved in solemn form, or in the alternative of having such part or parts of the said will proved in solemn form as may be established in evidence.

The beneficiaries under the will, other than the said Ernest W. Hinkson, were either relatives of the deceased or educational or charitable institutions in the Provinces of Saskatchewan and Alberta.

The validity of the will was contested by the present respondents, Paul Harmes, a nephew of the deceased, and the Custodian of Enemy Property, representing other next of kin, at present residing in Greece.

After a somewhat lengthy trial before the Judge of the Surrogate Court of the Judicial District of Regina, that learned judge declared the will to be valid and ordered probate thereof to issue to the Canada Permanent Trust Company, named as executor.

On appeal this decision was reversed and the will declared to be invalid, Chief Justice Martin dissenting.

The evidence was on some points conflicting but in respect of a large part of the material facts is not open to dispute.

Harmes, the deceased, was born in Greece, came to America as a youth and finally settled in Regina where he

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lived for many years and accumulated the estate which is now in question. He had little education but was evidently shrewd and intelligent.

Hinkson was a barrister and solicitor residing in Regina for about thirty years and practising law there for about twenty years, but was not Harmes' solicitor.

The trial Judge held that these two men were very good friends and I see no reason to question this finding.

About the 1st of March, 1941, Harmes became ill and was taken to the Grey Nuns Hospital in Regina, where he was found to be suffering from uraemic poisoning. He did not improve under treatment and eventually his doctors decided that an operation was advisable. This operation took place on the 1st of April. It was successful in the sense that he had practically no shock, but his kidneys were too far gone and he received no help at all. His condition rapidly became worse.

On the 3rd of April the will in question was signed and its validity must be in large part determined by the events of that day which may be stated as follows:

At noon, Hinkson, who had made frequent visits to the hospital during the preceding month, came in to see Harmes and says his condition "wasn't any too good." "He didn't seem to be improving as fast as he had hoped he would be improving after the operation."

At about 2.00 p.m., another friend of Harmes visited him at the hospital. This was a Mr. Hendricks who was Manager of the Bank of Montreal at the branch where Harmes did his business. During Harmes' illness Hendricks had been keeping an eye on his affairs and also on two or three occasions discussed with him the matter of making a will. Hearing that Harmes was ill, he called up Dr. Kraminsky and told him that he wished to see Harmes about making a will and some other business affairs and asked him if he would be permitted to see him. The doctor replied that he might see him but he did not know whether Harmes would be in a position to discuss business or not, that he was a very sick man, that he might find him so that he could discuss things with him temporarily and that he might not, the thing to do was to go and see. When Mr. Hendricks arrived, he found Harmes in very poor condition. He said that he thought he succeeded in arousing him so that

he knew who he was, but found it very difficult to converse with him, and, after a very few minutes, gave up trying to do so. He had a power of attorney which he asked Harmes to sign, but Harmes was unable to do this. The power of attorney was then torn up and Hendricks went away.

At 3.00 p.m. there is a note on the hospital sheet made by the nurse as to Harmes' condition: "Listless, does not respond readily and irritable."

Between 4.30 and 5.00 p.m., Hinkson went in to see Dr. Kraminsky, who was Harmes' attending physician, for the purpose of inquiring just what was wrong. He says that the doctor told him that Harmes had practically committed suicide, that he should have had medical attention five years previously, and he said that he was not in good condition at all and that he might live for weeks, he might live for months, he might only live for days, and then during the conversation he told him that Mr. Hendricks of the Bank of Montreal had just phoned him.

Q. That would be the Bank of Montreal in the Wheat Pool Building?

A. Yes, in the Wheat Pool Building—had just phoned him that afternoon, also inquiring as to the condition both physically and mentally of George Harmes and wanted to know if he would—if he was in a fit condition to have his will made, and Dr. Kraminsky told me at the time that, yes, he was quite sure that he was in a good condition to have his will made but for Mr. Hendricks to have that attended to right away. And I said, "Well," I said, "I am also a personal friend of the deceased and interested in his welfare and," I said, "I don't know whether Mr. Hendricks will have the will made or not, but," I said, "I know that during my conversations with George Harmes that he had certain wishes and certain bequests and," I said, "what do you think about me going out there?" And "well," he said, "it would be all right," he said, "if you wanted to see that the will was made," he said, "I will tell you something, as I told Mr. Hendricks, to have the thing attended to immediately."

Q. Did he say why?

A. Yes, he said—he said that the nature of the disease was such that if he should sink into a state of coma that he wouldn't then be in a position to do anything regarding the making of a will.

Immediately after leaving the doctor's office Hinkson went to a stationer's store and purchased a will form. He then proceeded to the hospital and was admitted to Harmes' ward at 5.20 p.m. About 7.00 p.m. Hinkson left the hospital, the will having been signed in the presence of two nurses who were the witnesses.

By the terms of the will, there are specific bequests to relatives of the deceased, including a nephew, Paul Harmes,

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who is one of the respondents, and to a number of charitable organizations and to the University of Saskatchewan. The specific bequests aggregate $14,000. The residue of about $52,000 was bequeathed to the appellant, Hinkson.

The will was drawn by Hinkson in the room with Harmes and no one else knew its contents until after Harmes' death. Two nurses came in to witness the execution but the will was not read over in their presence. The only evidence as to the instructions for and preparation of the will is that of Hinkson, the residuary beneficiary.

The specific bequests to relatives and institutions were of the kind one might expect a man in Harmes' circumstances to make.

According to Hinkson, over an hour was spent in discussing these various bequests, and then Harmes asked him: "Well now, how much does that total up to?", and having been told, he replied: "Well, that is enough." Hinkson then said: "Well, what about the balance of your estate? You have got your hotel down here and you have got the Diana, and you have got this other place out here on Fifth Avenue, the block out there, what about them?" Mr. Harmes said: "I am going to leave those intact." "Now to this day I have been trying to figure out what he meant by 'intact' and I haven't—I haven't been able to explain that."

Then followed a lengthy discussion about the disposition of the residue. Hinkson says he made a number of suggestions which were discussed and disapproved by Harmes. Eventually, Hinkson says: "If you don't want to act on them, have you made up your mind what you want to do with the balance of your estate,"

and he thought it over for a few minutes and he said, "Well," he said, "you have been the best friend that I have got and", he said, "you can have it." And I said, "Why, George," I said, "that wouldn't be—that wouldn't be right," I said, " for me to accept it."

There was some further discussion and then Hinkson said:

Yes—and I protested and I said, "George, it wouldn't be right for me to accept that," I said, "you could still double or treble these bequests that you have already made and" I said, "you could give a good big share of it to the Dominion Government," I said, "some more to charities and", I said, "if you wanted to leave me a little bit of it," I said, "that would be in order." "But", I said, "to leave me the whole thing," I said, "it wouldn't be proper, it wouldn't be right," and we discussed the matter that way and I said, "Well now," I said, "George,

rather than complete the will to-night", I said, "we had better leave it go until to-morrow," and he said "No," he said, "we will to-night." "Well," I said, "now George, you may be too tired," I said, "to continue." "No," he said, "I am all right" he said, "go ahead."

After some further discussion,

"Now," I said, "George," I said, "have you made up your mind about the—about the balance?" "Yes," he says, "I have made up my mind." "Well," I said, "I will tell you what I will do then," I said, "George, if you feel that way about it," I said, "I will put my name in here on the will form and", I said, "if you want to change your mind over night," I said, "I will come back with another will form to-morrow," and it was either while I was saying that or right shortly afterwards that I believe the nurses came into the room to witness the—

This was evidence given by Hinkson in chief. In cross-examination it was made perfectly clear that the will was made at Hinkson's instance. He admitted that on the twelve or fifteen occasions on which he had visited at the hospital previously, no mention had been made of any will and no suggestion had ever been made by Harmes of any intention of making a will until he, Hinkson, brought in the printed will form on the afternoon of April 3rd. He admitted that Harmes was a very sick man and that he knew that he would never come out of the hospital alive. He was asked:

Q. And it was solely on account of your efforts that this will was made?

A. I expect so.

He said the will was completed at about ten minutes to seven and that the two nurses came in at about seven o'clock, or just prior thereto. He was asked:

Q. All right now, the two nurses came in about seven and then what took place?

A. Well, I would say just prior to seven o'clock, may be about five minutes to seven, and they wanted to know if we were ready to have the will signed and I said, yes, we are just ready. So the deceased had—he had slipped down from his pillow and was lying down further in the bed and one nurse got on one side of the bed and one on the other and they locked their arms around his shoulders and kind of eased him up and put a couple of pillows under him, raised him up and—

* * * *

Q. And after they had propped him up into a sitting position what—

A. I said to the deceased then in the presence of the nurses, "now" I said, "George" I said, "you had better wait until to-morrow," I said, "before you sign this will" and I couldn't think that the mental capacity that he had shown that night and the brilliance of his intellect, that he would be a dead man the next night. If anybody had told me I would never have believed it. So I couldn't see that there was any hurry about

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it and it would be far better to wait until the following day to have him sign the will—and he said "no", he says, "give me the will now," he says, "I will sign it now."

Q. Now were these two nurses in the room when he said that?

A. The two nurses were right there. Whether they recollect it or not, I don't know, that is up to them, but that is exactly what he said.

Harmes then signed the will. Further question:

Q. Well now, during the time the nurses were in the room was the will read over to the deceased?

A. No.

* * * * *

Q. Well then when you wrote in your own name as the residuary devisee, did you read that out to him?

A. Yes; I said: "I put my own name here then in the residuary clause then."

* * * * *

Q. After you put your name into the residuary clause did you read that out to him? Or in any way indicate that you were writing it in?

A. Oh, I indicated it to him: I said, "I will fill it in here now, George, and", I said, "if you want to change your mind over night I will bring back another will form to-morrow and then", I said, "we will make out an entirely new will if you have changed your mind over night."

The witnesses to the will were two nurses: a Miss Sizer and a Miss Montgomery. Miss Sizer gave evidence that she was in attendance on Harmes throughout and that after his operation he grew weaker physically and that on the evening of April 3rd she was asked to witness Harmes' will at about 6.45 p.m. and that Hinkson was there. She said that Harmes was able to talk but did not want to talk, that he dozed most of the time, that after she entered the room when the will was to be signed Hinkson was writing on the document for from five to ten minutes, that she could not see what was written there. The document was not read over while she was there. She was asked:

Q. After he signed it did he say anything to you?

A. No, nothing to us. He was rather weak and tired, and I believe I do remember at the time that he wanted to wait and finish it the next day, or something, because he was tired. This gentleman said that they would wait until morning then because he did not feel like talking any more that night, and that is when he signed it.

* * * * *

Q. You say Mr. Harmes said he was tired and wanted to leave it until morning?

A. He seemed rather irritable because he did not want to be bothered talking about it any more that night.

Q. That is correct?

A. Yes.

Q. That was before he signed it?

A. That was before, I believe. I cannot remember whether that was before or afterwards.

Q. At all events Mr. Harmes suggested leaving it till morning?

A. He said he was tired; he didn't want to talk any more about it that night, and the gentleman said "All right, we will leave it until morning", or something like that.

Q. That would be correct as far as you can recollect, Miss Sizer?

A. Yes.

Miss Montgomery, the other nurse, also gave evidence, much to the same effect as Miss Sizer. She was asked:

Q. I would like you to state again your best recollection of the conversation between Mr. Harmes and this gentleman.

A. He held up the paper and he said "Will this be all for to-day, George?" It was something like that, and he nodded and grunted assent,—"

A. Yes.

Q. —that it would be."

And then you go on: "He"—referring to Mr. Hinkson—"He gave us to understand—

Mr. BASTEDO: It doesn't refer to Mr. Hinkson.

Mr. Curtin:

Q. A. He gave us to understand that it was to be signed that day. He was restless that day. So he gave him the pen and he signed it, and he said "We will finish the rest, the other little things, to-morrow or some other day."

Q. Who was it said this?

A. This other gentleman. Mr. Harmes didn't speak any more than the odd word.

Q. This correct?

A. From what I recall—yes.

Q. Was it your impression that this document was not finished, or that there was something else?

A. My impression was that there was more property to be looked up and that there was to be another will to be drawn up.

A little lower:

Q. Did Mr. Harmes appear to want to put it off until the next day?

A. He seemed very tired and did not want to finish it.

Q. He did not want to discuss it?

A. No.

Q. You did not hear the actual discussion?

A. No.

About 8.00 p.m. the doctors came and found Harmes' condition much worse and special nurses were then put on at their orders, and one of them, a Miss Evans, gave evidence on commission, most of which refers to the following day when Harmes was sinking very rapidly. Nurse Evans said that Hinkson came in the next day, that is the 4th, and introduced himself and said he was taking care of Harmes' affairs, that he had drawn up a will for Mr. Harmes that

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afternoon (this would appear to be a mistake for the previous afternoon), and that the will was under the bed pillow. Later in the afternoon, he came in for a moment and then left. The nurse got the will and handed it to him (Hinkson). After Hinkson left with the will, some question arose in Miss Evans' mind as to whether she had done right in giving him the will:

Q. Did you say anything about it?

A. Yes, I believe it was at that time that I asked Mr. Harmes if he knew the gentleman who had just left the room and Mr. Harmes replied that he was Mr. Hinkson, his lawyer.

Q. Did he say anything else?

A. He said either "he was" or "he is drawing up my will, but he doesn't know half my affairs." So then I didn't discuss it any further with him.

Q. You didn't tell him you had given the will?

A. No, I didn't, he was very drowsy that day, didn't want to be bothered with anything.

Q. Not talking much except in things necessary?

A. No.

* * * * *

Q. And I am not sure that I got just what he wanted to see Mr. Harmes about—what he said?

A. He wanted to discuss a few details about the will, that he had drawn up the day before, that had been drawn the day before, and he asked me if I thought Mr. Harmes was in good enough condition to discuss it with him.

* * * * *

Q. Do you remember the exact words that Mr. Harmes used?

* * * * *

A. Mr. Harmes said: "That is Mr. Hinkson—he is a lawyer, he has just drawn up my will, but he doesn't know half of my affairs."

There were two doctors in attendance on Harmes: Dr. Kraminsky, from the time the former entered the hospital, and Dr. Good, a urinologist, who was engaged about two weeks later. Both of those doctors gave evidence at the trial. Neither one of them was present when the will was prepared or when it was signed. They agreed that Harmes was suffering from a severe case of uraemic poisoning and that this was progressive, particularly after the operation. On the effect of uraemic poisoning they are in substantial agreement. Dr. Kraminsky said that the disease manifests itself in a condition of fatigue in body and mind. It slows down the function of the brain without destroying intelligence. The patient can be roused for a time but soon lapses into unconsciousness. Dr. Kraminsky was asked:

Q. Could you give an illustration of how he would act when questioned? Could you give the court any idea, if you asked him a question, what might happen?

A. If you ask him the question he will answer it intelligently, but you keep on asking him questions, well his mind gets gradually tired and it interferes with the activity of the brain, the brain cannot answer the question because he is tired, he falls in a sleep, then he rouses a bit, and he rouses again and you will ask him another question and he will answer it intelligently, and before he is through with the answer he will fall off to sleep.

* * * * *

Q. Can you then, doctor, knowing the condition of the deceased on April the 3rd; can you conceive of him being able to carry on a sustained and continuous discussion of business matters for a period of half an hour? Now I say a sustained and continuous discussion.

A. No, not for half an hour.

Q. Not for half an hour?

A. I mean he will probably fall off to sleep before that.

Q. Yes—probably not for fifteen minutes?

A. No.

Q. Or not for five minutes?

A. Not more than that.

Dr. Good says that he saw Harmes every day from the 15th of March until death and is in general agreement with Dr. Kraminsky as to Harmes' condition. He says:

Q. Taking the last three days before his death; how would you describe the condition of the deceased during that time?

A. Well, at the visits that I made to him on those days, I found him in an apparent sleep, each time I went in. He could be roused to answer a question.

Q. That condition of sleep that you refer to, is that in the nature of a natural sleep or is it an unnatural sleep?

A. Oh, it is an unnatural sleep. It isn't a sleep really; it is a stupor.

* * * * *

Q. Would you express any opinion as regards his ability to concentrate his mind on a matter of business?

A. His condition at the time that I saw him was such that I would doubt his ability to concentrate satisfactorily for more than a very brief period.

Q. When you say a very brief period, doctor, can you give us any better idea as to just what the length of that period might be?

A. Well, again it would be difficult to answer it; but at my visits I could rouse him to ask him how he felt and whether he had any pain, and if I turned to speak to the nurse he would drop off again, probably a matter of two or three minutes. Most of my visits were brief and the questions I asked were not long—but after he answered me he would drop back again to his apparent sleep.

Neither of the doctors saw Harmes between 4.00 and 8.00 p.m., but at 8.00 p.m. one or both of them came in and found Harmes' condition so definitely worse that they

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ordered special nurses to be put in attendance. The next day, his condition was progressively worse although he could still be aroused for very short intervals. Eventually, in the evening, he fell into a deep coma and died at 11.30 p.m.

The onus is heavily on Hinkson.

He prepared the will and was the chief beneficiary named therein.

He was not asked to draw the will and, when learning of Harmes' condition, hastened to the hospital with a will form for the purpose of inducing Harmes to make a will.

No one was present with himself and Harmes when the will was drawn. No one else knew the contents of the will until Harmes' death. The will was not read over in the presence of the witnesses; nor is there any satisfactory evidence that it was ever read over to Harmes.

He had no claims on the bounty of Harmes. The bequest of residue was not a natural disposition of Harmes' property. Even Hinkson himself agrees with this. He said he protested:

> "George, it wouldn't be right for me to accept that," I said, * * * "if you wanted to leave me a little bit of it," I said, "that would be in order." "But", I said, "to leave me the whole thing," I said, "it wouldn't be proper, it wouldn't be right."

The deceased was so ill, according to the evidence of both doctors, that he had no interest in his surroundings. All he wanted was to be left alone and not disturbed. He did not even want to talk at all during the last few days. He just spoke the odd word when necessary to answer a question. His desire to sleep was overpowering, caused by the effect of the disease of which he was dying.

Hendricks, the banker who was familiar with Harmes' affairs and had before discussed with him the making of a will, about 2.00 p.m. found him quite unable to transact business. This was only three hours before the document here in question was drawn.

According to Hinkson's own story, Harmes did not want to make a will. It was necessary to use persuasion, what the trial Judge speaks of as "probing", to settle the comparatively simple specific bequests, and these were all to natural objects of his bounty.

This process of "probing" had continued for nearly an hour and a half before the question of residue came up for discussion.

According to Hinkson, the discussion of residue took some time and it was only a very few minutes before the will was signed that Harmes eventually said: "You can have it."

At the time when the nurses came in to witness the will, Harmes was so far exhausted that he had slumped down into the bed and had to be raised up and supported by the nurses to be able to attach his signature to the will. His enfeebled condition is shown by the signature to the will.

One of the nurses, Miss Sizer, says that after she came into the room Hinkson was writing for possibly five minutes on the document. She also says that Harmes was rather weak and tired and that she believes she remembers at the time that he wanted to wait and finish it the next day, or something, because he was tired, and that Hinkson said that they would wait until morning then, because he did not feel like talking any more that night, and that is when he signed it. That he, Harmes, was rather irritable because he did not want to be bothered talking about it any more that night, and that Hinkson said: "All right, we will leave it until morning," or something like that.

Miss Montgomery, the other nurse, said that Hinkson gave Harmes the pen and he signed the will and that Hinkson then said: "We will finish the rest, the other little things, to-morrow or some other time," and that her impression was that the document was not finished and that there was something else, that there was more property to be looked up, and that there was to be another will to be drawn up, and that Harmes was very tired and did not want to finish it and did not want to discuss it.

The next day when Harmes was aroused into consciousness for a few moments, he had some recollection of the will and he said to Miss Evans, another nurse, that he recognized Hinkson and, in answer to a question put by Miss Evans, he said that Mr. Hinkson was a lawyer. "He has drawn up my will but doesn't know half my affairs." Miss Evans also said that Hinkson had come in for the purpose of discussing a few details of the will he had drawn up the day before.

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As against all this we have Hinkson's own statement that Harmes was bright and intelligent throughout.

None of these other witnesses were interested in any way and there is no reason to think that they did not give their evidence truthfully; nor is there any suggestion on the part of the learned trial Judge that these witnesses in particular were not truthful.

I have endeavoured to arrive at a conclusion disregarding the evidence which the trial Judge treated as unreliable.

In my opinion, Hinkson has completely failed to remove the suspicion created by these various circumstances, and I think that the Court should hold that Harmes, when his signature was attached to the document, did not understand that he was bequeathing to Hinkson the whole of the residue of his estate, amounting in value to over $50,000.

I do not propose to discuss the attitude of the learned trial Judge, beyond saying that it seems to me that he failed to realize that the onus was so strongly on Hinkson.

The principles of law applicable are well settled.

Williams on Executors, 12th Edition, page 27:

> It is said by Lord Coke, in the *Marquis of Winchester's Case* (1), that it is not sufficient that the testator be of memory when he makes his Will to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his property with understanding and reason; and that is such a memory which the laws calls sane and perfect memory. In order to constitute a sound disposing mind the testator must not only be able to understand that he is by his Will giving the whole of his property to the objects of his regard, but must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from participation in that property.

In *Brown* v. *Fisher* (2):

> The Court is to approach with suspicion the consideration of a will procured and propounded by a person taking a large benefit thereunder, * * *
>
> Where a beneficiary, who had procured and subsequently propounded a will, failed, under those circumstances, to satisfy the Court, by affirmative and conclusive evidence, that the testator did, in fact, know and approve of the contents of the will which he had actually executed:—

the Court, applying and acting on the principles of *Fulton* v. *Andrew* (3), refused probate.

(1) 6 Co. 23 a; 4 Burn, E.L. 49. (2) (1890) 63 L.T. 465.
(3) (1875) L.R. 7 H.L. 448.

In *Fulton* v. *Andrew* (1), Lord Hatherley held that, where a person propounded a will prepared by and benefiting himself, the onus is on him to prove the righteousness of the transaction and that the testator knew and approved of it.

In the Canadian case of *British and Foreign Bible Society* v. *Tupper* (2), the same principles were adopted. A promoter of and a residuary legatee under a will executed two days before the testator's death, failed to furnish evidence to corroborate his own testimony that the will was read over to the testator who seemed to understand what he was doing, and as there was a doubt under the evidence of his testamentary capacity, the will was set aside. In that case, Mr. Justice Davies dissented except as to the part of the will dealing with the residue. He thought that the will might be upheld in its main provisions, but should be disallowed in respect of the residue.

This point has given me some difficulty. At first I was inclined to think that the specific bequests might be upheld, but I have come to the conclusion that Hinkson has failed to establish that the testator fully understood what he was doing, certainly when disposing of the residue, and possibly for some time before that.

In *Donnelly* v. *Broughton* (3), Lord Watson, who delivered the judgment of their Lordships, says at pp. 52 and 53:

> The principles applied by the Probate Court in England to a will obtained in circumstances similar to those which occur in the present case were explained by Sir John Nicholl in *Paske* v. *Ollat* (4). After stating that, when the person who prepares the instrument and conducts the execution of it is himself an interested person, his conduct must be watched as that of an interested person, the learned Judge goes on to say: "The presumption and *onus probandi* are against the instrument; but as the law does not render such an act invalid, the Court has only to require strict proof, and the onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances, which may increase the presumption even so much as to be conclusive against the instrument".

In *Harwood* v. *Baker* (5), Mr. Justice Erskine says at p. 120:

> Both these gentlemen, therefore, seem to think that the deceased might have been sufficiently aroused from the state of torpor to which he had

(1) (1875) L.R. 7 H.L. 448.
(2) (1905) 37 Can. S.C.R. 100.
(3) [1891] A.C. 435; 60 L.J. P.C. 48.
(4) (1815) 2 Phill. 323; 161 E.R. 1158.
(5) (1840) 3 Moo. P.C. 282; 13 E.R. 117.

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been reduced by his illness, to assent to so simple a disposition of his property as that made by the Will in question; but that it would have been impossible to have made him comprehend the details of a more complex distribution.

But their Lordships are of opinion, that in order to constitute a sound disposing mind, a Testator must not only be able to understand that he is by his Will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.

Sir John Nicholl in *Marsh* v. *Tyrrell* (1), says:

It is a great but not an uncommon error to suppose, that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case. In *Combe's* case (2) the rule is laid down in these words: "It was agreed by the judges, that sane memory for the making of a Will is not at all times when the party can answer to anything with sense, but he ought to have judgment to discern and to be of perfect memory, otherwise the Will is void." It is not answering, that "she had been round Clapham Common", or "that her house was leasehold," or the like, even if the questions were answered correctly and the husband had not been present, that would be sufficient in the present case. So again, in the *Marquess of Winchester's* case (3): "By the law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his estate with understanding and reason.

For these reasons, I would dismiss the appeal with costs.

GILLANDERS, J. (*ad hoc.*)—I am in accord with the reasons and conclusion expressed by the learned Chief Justice of Saskatchewan in his exhaustive judgment in the Court of Appeal. There is little that I need add.

(1) (1828) 2 Hagg. 84, at 122; 162 E.R. 793, at 806.

(2) Moore's Rep. 759. S.C. 8 Vin. Ab. 43, No. 22.

(3) 6 Coke 23 a.

The main question in the appeal is whether or not under the circumstances of the case the evidence is sufficient to remove the suspicion attaching to the alleged will and its preparation, and to satisfy the conscience of the Court that it is in fact the will of a free and capable testator. Under such circumstances as are present here, where the appellant prepared the will, conducted its execution, and takes under it a large portion of the deceased's estate, the Court should pronounce against the alleged will unless the evidence extends to clear proof that the disposition of the property was made with understanding and reason.

The principles to be applied have been discussed in many cases. In *Riach* v. *Ferris* (1) it was stated by Duff C.J., at page 726:

> That the law is well established and well known and that, as applicable to this appeal, it is best, as well as completely, stated in this passage from the judgment of Lord Davey (then Davey, L.J.) in his judgment in *Tyrrell* v. *Painton* (2).
>
> " * * * the principle is, that wherever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the Court ought not to pronounce in favour of it unless that suspicion is removed."

In *Donnelly* v. *Broughton* (3), Lord Watson said:

> The principles applied by the Probate Court in England to a will obtained in circumstances similar to those which occur in the present case were explained by Sir John Nicholl in *Paske* v. *Ollat* (4). After stating that, when the person who prepares the instrument and conducts the execution of it is himself an interested person, his conduct must be watched as that of an interested person, the learned Judge goes on to say: "The presumption and *onus probandi* are against the instrument; but as the law does not render such an act invalid, the Court has only to require strict proof, and the onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances, which may increase the presumption even so much as to be conclusive against the instrument."

The principles so stated are not in question. The respondents here contend that the learned trial Judge improperly instructed himself in law in that he did not approach the evidence in support of the alleged will with the requisite amount of suspicion; that in any event the evidence did not extend to the clear or strict proof necessary under

(1) [1934] S.C.R. 725.
(2) L.R. [1894] P. 151, at 159-60.
(3) [1891] A.C. 435, 60 L.J.P.C. 48.
(4) (1815) 2 Phill. 323; 161 E.R. 1158.

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Gillanders J. (*ad hoc.*)

the circumstances to support the will but, on the other hand, that the circumstances disclosed by the evidence are conclusive against the instrument.

For the reasons set out by the learned Chief Justice in his dissenting judgment in the Court of Appeal, I think that the conclusion of the trial Judge upholding the will should be supported.

This conclusion should not be interpreted as approving the appellant's conduct in preparation and execution of the will. He was a solicitor of twenty years experience. When the testator proposed making him a substantial beneficiary the proper course to adopt was clearly to have called in an independent person to prepare the will and supervise its execution.

In the result the appeal should be allowed with costs as disposed of in Mr. Justice Rinfret's judgment.

Appeal allowed. Costs of all parties to the appeal to be paid out of the estate.

Solicitors for the appellant: *MacPherson, Milliken, Leslie & Tyerman.*

Solicitors for the respondent Paul Harmes: *Balfour & Balfour.*

Solicitors for the respondent The Custodian of Enemy Property: *Curtin & Grant.*

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*Oct. 27, 28, 29.

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*Feb. 2

HARRY GRAVES CURLETT (PLAINTIFF) APPELLANT;

AND

CANADIAN FIRE INSURANCE COMPANY AND OTHERS (DEFENDANTS).... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Malicious prosecution—Claim for damages for—Issue as to absence of reasonable and probable cause for prosecution—Questions relevant to that issue—Trial Judge's charge to jury.

On a claim for damages for malicious prosecution, plaintiff recovered judgment at trial, on the findings of a jury. The Supreme Court of Alberta, Appellate Division, [1942] 1 W.W.R. 646, set aside the judgment and ordered a new trial, on the ground, as stated by Ford J. A., that the

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

trial Judge's charge to the jury "may have resulted in confounding the real issue of the absence of reasonable and probable cause for the prosecution with the question of the guilt or innocence of the plaintiff, and that the learned Judge failed to keep in mind that it is the facts, honestly and reasonably believed to exist and to be true, operating upon the mind of the prosecutor, as distinct from the explanation made at the trial by the plaintiff, which alone are relevant on the issue of the absence of reasonable and probable cause."

Plaintiff appealed to this Court, asking that the judgment at trial be restored; and defendants cross-appealed, contending that, on the evidence, and in view of requirements of the law as to facts to be proved, the action should be dismissed.

Held: (1) Plaintiff's appeal should be dismissed, on the above ground stated in the Appellate Division.

(2) Defendants' cross-appeal should be dismissed (Davis J. *dubitante*).

APPEAL by the plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division (1), which, on appeal by the defendants from the judgment of Ewing J. at trial, on the findings of a jury, in favour of the plaintiff on a claim for damages for malicious prosecution, set aside the judgment at trial and ordered a new trial. The plaintiff asked that the judgment at trial be restored. The defendants cross-appealed, contending that, on the evidence, and in view of requirements of the law as to facts to be proved, the action should be dismissed.

N. D. Maclean K.C. and *Gerald O'Connor K.C.* for the appellant.

H. H. Parlee K.C. for the respondent companies.

H. W. Riley for the respondent individuals.

The judgment of Rinfret, Hudson and Taschereau JJ. was delivered by

HUDSON, J.—This action was brought by the appellant claiming damages for alleged (1) conspiracy to injure him in his business; (2) libel and slander; and (3) malicious prosecution.

The action was tried before Mr. Justice Ewing and a jury. At the opening of the trial, counsel for the respondents moved to have the issues tried separately but, as the issues of fact were closely connected, severance was refused and the trial proceeded on all three.

(1) [1942] 1 W.W.R. 646.

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At the conclusion of the evidence, questions were submitted by the Judge to the jury: four questions in respect of the conspiracy issues, and four in respect of the charge of libel and slander. These were all answered favourably to the respondents and no longer require consideration.

Eight questions were submitted in respect of the malicious prosecution. These were all answered favourably to the appellant, and on such answers the learned trial Judge directed judgment to be entered for the appellant for $16,667.90 and costs.

On appeal, this judgment was set aside and a new trial ordered on the ground of failure by the trial Judge to properly instruct the jury on questions of fact relating to reasonable and probable cause.

The appellant here asks that the judgment at the trial be restored and the respondent asks that the appeal be dismissed and, by way of cross-appeal, asks that the action be dismissed.

The actual prosecution of which the appellant complains was initiated by a police officer under direct instructions from responsible officials of the Attorney-General's Department in Alberta. The proceedings throughout were conducted solely by Crown counsel.

The appellant alleges that the respondents induced such action by false reports and fraudulent concealment of material facts and without reasonable and probable cause procured the laying of information, and that one of the defendants, Nash, had actually committed perjury in giving evidence at the trial.

On the criminal charge the appellant was committed for trial but, subsequently, before a jury was acquitted. An appeal by the Crown from this acquittal was dismissed by the Court of Appeal in Alberta, two of the Judges of that court dissenting.

On the trial of the present action, questions were submitted to the jury by the trial Judge and answers were given as follows:

(B) MALICIOUS PROSECUTION:

The CLERK (Reading):

1. Q. Did the defendants procure the plaintiff's prosecution or did the Attorney General act on his own motion in prosecuting the plaintiff? —A. The defendants procured the prosecution.

2. Q. Did the defendants place the facts fairly before the Officers of the Attorney General?—A. No.

3. Q. If the defendants did not place the facts fairly before the Officers of the Attorney General were the Officers of the Attorney General misled?—A. Yes.

4. Q. Did the defendants neglect to take reasonable care to inform themselves of the true facts before procuring the prosecution?—A. No. (Afterwards corrected to "Yes".)

5. Q. Did the defendants have an honest belief in the probable guilt of the plaintiff?—A. No.

6. Q. Upon the facts in their knowledge were the defendants justified in such belief?—A. No.

7. Q. Were the defendants, as far as the prosecution is concerned, actuated by malice as legally defined?—A. Yes.

8. Q. If you find for the plaintiff at what sum do you assess the plaintiff's damages for malicious prosecution?—A. Special damages, $6,667.90; General damages, $10,000.

The judgment of the Court of Appeal directing a new trial proceeded upon the ground as stated by Mr. Justice Ford:

> The ground upon which the verdict and judgment cannot be allowed to stand is that, with great respect, I think it may fairly be said that the learned Judge's charge to the Jury may have resulted in confounding the real issue of the absence of reasonable and probable cause for the prosecution with the question of the guilt or innocence of the plaintiff, and that the learned Judge failed to keep in mind that it is the facts, honestly and reasonably believed to exist and to be true, operating upon the mind of the prosecutor, as distinct from the explanation made at the trial by the plaintiff, which alone are relevant on the issue of the absence of reasonable and probable cause.

Careful perusal of the evidence and the charge of the learned trial Judge to the jury has convinced me that the defendants are at least entitled to a new trial on the ground thus stated by Mr. Justice Ford.

The respondents, however, go further and press strongly for a dismissal of the action, and this raises a more difficult question.

The basis of the respondents' contention is that it appears that three responsible officers of the Crown charged with the administration of criminal law in the Province of Alberta were witnesses at the trial and stated in clear and unequivocal language their justification for the prosecution of a suspected wrongdoer. It is further submitted that the Crown officers say that there was no pressure brought upon them to prosecute the appellant, nor were they misled in any way by the reports made by or on behalf of the respondents.

The appellant here answers this by referring to the answers given by the jury, that the defendants procured

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the plaintiff's prosecution, that they did not place the facts clearly before the officers of the Attorney General, that the officers of the Attorney General were misled, that the defendants neglected to take reasonable care to inform themselves of the true facts before procuring prosecution, that the defendants did not have an honest belief in the probable guilt of the plaintiff and were not justified in any such belief by the facts in their knowledge and were guided by their malice.

It is also contended that there was evidence that, in order to induce the Attorney-General's Department to prosecute, the respondents had furnished completely false statements.

These issues were all placed before the jury, perhaps not so clearly as they should have been but, undoubtedly, the learned trial Judge was of the opinion that there was evidence to justify submission of the questions. The learned Judges in appeal were also of that opinion. Mr. Justice Ford says:

> There was, in my opinion, some evidence to submit to the Jury upon whose finding thereon the trial Judge might have found an absence of reasonable and probable cause, and I think it is improper, in this appeal, to dismiss the action as asked for by the appellants, there being also some evidence to support a finding of malice.
>
> There was also evidence upon which it could be found that the defendants procured the prosecution of the plaintiff on the charge upon which he was acquitted.

If the jury had understood clearly that in making their answers they were in effect saying that they did not believe the evidence of Crown counsel, their answers might have been different. However, these are questions of fact and, on the state of the record, I am not disposed to interfere with the course directed by the Court of Appeal and should, therefore, dismiss the appeal and cross-appeal with costs.

DAVIS, J.—The only claim, amongst several in the action out of which this appeal arises, with which we are concerned is the claim for malicious prosecution, in respect of which judgment was given at the trial, upon the verdict of a jury, for the appellant (plaintiff) against all the respondents (defendants) in the sum of $16,667.90 and costs fixed at $5,000. The Court of Appeal for Alberta set aside the judgment and directed a new trial. Both parties appealed to this Court; the appellant seeking to

have the trial judgment restored and the respondents seeking by cross-appeal to have the action dismissed.

The action was brought against eleven defendants (seven fire insurance companies and four individuals who were employees of a fire insurance investigation bureau). There were two claims of conspiracy: one of an alleged conspiracy to injure the plaintiff in his trade and business, and the other an alleged conspiracy to procure him to be prosecuted for obtaining money by false pretences; three claims for slander; claims for twelve separate libels; and a claim for malicious prosecution. Some of the issues were withdrawn before trial, others were dismissed by the Court during the trial, and others dismissed on the jury's answers to questions submitted to them. The only claim that remains is the claim for malicious prosecution.

The criminal charges had been that the plaintiff in this action did, with intent to defraud by false pretences, obtain from the insurance companies certain sums of money contrary to the provisions of the *Criminal Code*. Each of the charges was laid by a Detective-Corporal of the Royal Canadian Mounted Police at Edmonton upon directions from the Department of the Attorney General of Alberta. The fire which had destroyed the plaintiff's home and its contents had occurred in November, 1933; the loss was adjusted and the companies paid in February, 1934, on the basis of the adjustment; subsequently, on investigation, the defendants or some of them desired to have the plaintiff arrested on a charge of receiving the moneys under false pretences. The matter was brought by them to the attention of the Attorney General's Department but the law officers of the Crown undertook an investigation of their own into the matter. Mr. Henwood, the Deputy Attorney General, and two counsel in the Attorney General's Department, Mr. Frawley and Mr. McClung, all experienced law officers who have been with the Department for many years, came to the conclusion that the charges should be laid and they were laid on October 2nd, 1935. Counsel from the Attorney General's Department took the preliminary inquiry and also prosecuted at the trial. When the plaintiff was acquitted at the trial, the Attorney General appealed to the Court of Appeal for Alberta and by his law officers prosecuted the appeal before that Court. The Court of Appeal dismissed the

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Davis J.

appeal but two of the Judges dissented from this judgment. The Attorney General then applied to the Court of Appeal for written reasons of judgment in order that he might consider a further appeal in the prosecution to this Court. See [1936] 2 W.W.R. 528. It does not appear that an appeal was brought to this Court.

The criminal proceedings were initiated and continued throughout by or on behalf of the Attorney General of Alberta. At the trial of this action in October, 1940, the law officers of the Crown, Mr. Henwood, Mr. Frawley and Mr. McClung, all gave evidence and it is plain from their evidence that the decision to prosecute and the prosecution itself lay entirely in the hands and under the control of the Attorney General's Department and that they thought they had had reasonable cause for their belief in the guilt of the accused and had not been misled (or "let down" as the phrase is used in the evidence) by any of the information or reports that originally had been furnished to them by the defendants or some of them.

I find it very difficult on the evidence to accept the contention that a jury might properly come to the conclusion that the defendants were the prosecutors and equally difficult on the law to conclude that a right of action for malicious prosecution lay against the defendants, but as the other members of the Court who sat upon this appeal are not prepared to go farther than the Court of Appeal did, which directed a new trial, I shall not dissent from that disposition of the appeal and cross-appeal.

KERWIN, J.—In my view, the respondents are entitled to a new trial for the reasons stated by Mr. Justice Ford. As there is to be a new trial, I refrain from discussing the evidence. The respondents are not entitled to a dismissal of the action for malicious prosecution and on this point also I agree with Mr. Justice Ford. The appeal and cross-appeal should be dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *Neil D. Maclean.*

Solicitors for the corporate respondents: *Parlee, Smith & Parlee.*

Solicitor for the individual respondents: *M. M. Porter.*

NATIONAL TRUST COMPANY LIMITED, AND NATIONAL TRUST COMPANY LIMITED AS ADMINISTRATOR *de bonis non* OF THE ESTATE OF ANTON OSADCHUK, DECEASED (DEFENDANT)..... APPELLANT;

1942
*Oct. 29, 30
1943
*Feb. 2

AND

NICHOLI OSADCHUK AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Executors and Administrators—Trusts and Trustees—Claim by defendant, administrator of an estate, that certain mortgage investments had been made for and allocated to the estate—Transaction attacked as amounting to a sale by defendant to itself as administrator—Accounting—Interest.

This Court held (affirming a holding of the Court of Appeal for Saskatchewan, [1942] 1 W.W.R. 163) that the defendant company, the administrator of an estate, had not the right, however honest were the circumstances, to allocate to the estate as investments thereof, certain mortgage securities which had been taken by defendant in its own name for moneys advanced out of its own funds; that the transaction amounted to a sale by defendant to itself as administrator, which the law does not permit. (Also this Court expressed doubt whether the allocation was sufficiently proved).

The Court declined to hold upon the evidence, as contended by defendant, that the allocation, rather than being a disposal by defendant of securities which it had taken to itself, was in fact only the concluding step in making the investments for the estate.

It was held that, in the accounting to be made by defendant in the estate, defendant must be held to have, as funds of the estate uninvested, the sums debited to the estate for such investments, and also was liable to account for and be debited with interest thereon at 5 per cent. per annum from the date when the principal sums were so debited to the estate, with half-yearly rests down to the final passing of the accounts; and defendant could not charge for any sums expended by it in connection with the mortgaged lands or in protecting the mortgages as securities, nor should it be charged with the receipts.

APPEAL by the defendant from the judgment of the Court of Appeal for Saskatchewan (1) dismissing (Gordon J.A. dissenting) its appeal from the judgment of MacDonald J. (2) holding that the defendant must be held to have, as administrator *de bonis non* of the estate of Anton

(1) [1942] 1 W.W.R. 163; [1942] 1 D.L.R. 145.

(2) [1941] 2 W.W.R. 219; [1941] 3 D.L.R. 620.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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Osadchuk, deceased, the sum of $3,000 (the amount of two mortgage securities which the defendant claimed it had allocated to the estate as investments thereof) of trust funds of the estate uninvested, that the plaintiffs (beneficiaries of the estate) were not chargeable with any sum or sums expended by the defendant in connection with the mortgaged lands or protecting the mortgages as security, that the accounts in the estate be referred back to the Surrogate Court to be dealt with, so far as the matters in question in this action were concerned, on the basis of his judgment, that there be a reference to ascertain what sum might properly be charged against the defendant in respect of interest or compound interest, and upon confirmation of the referee's report the defendant should be chargeable with the amount found in such report as confirmed, and in passing the accounts the Surrogate Court should debit the defendant therewith.

Glyn Osler K.C. and *E. L. Medcalf* for the appellant.

A. C. Stewart K.C. for the respondents.

The judgment of the Court was delivered by

HUDSON, J.—This is an appeal from the Court of Appeal of Saskatchewan, which, by a majority, affirmed a decision of Mr. Justice MacDonald at the trial in favour of the plaintiffs, respondents.

Letters of administration of the estate of Anton Osadchuk were granted to the appellant company on the 21st of July, 1919.

The sole beneficiaries of the estate were the three respondents, who at that time were infants of tender years.

The value of the estate coming into the hands of the appellant was estimated at $5,494 in July, 1919, and by December, 1919, appellant had funds in hand in excess of $3,500.

The respondents, having come of age, commenced this action on 3rd January, 1941, claiming a general accounting of the estate by the appellant, and in particular of the two sums aggregating $3,000 claimed by appellant to have been invested for the estate.

These investments consisted in, (1) a mortgage dated 31st December, 1919, from one William Mont Lock, covering a half section of land in Saskatchewan, to secure the repayment of $1,300; (2) a mortgage dated October 29th, 1919, from one Swaney John Thorarinson to the company, covering another half section of land, to secure the repayment of $1,700. These sums were advanced by the appellant company out of its own funds and the mortgages were taken in the company's own name.

Later, on the 18th of March, 1920, the appellant in its books debited the estate with these sums, respectively, and claims to have then allocated these mortgages to the estate. The investments turned out badly and involved a serious, if not total, loss of both amounts.

The allocation, if any was legally made, was of a very informal character and, at the trial, Mr. Justice MacDonald held that the evidence was insufficient to establish any such allocation.

However, in the Court of Appeal all the learned Judges were of the opinion that an allocation of each of the mortgages had been sufficiently proved.

In the second place, Mr. Justice MacDonald held that the transaction amounted to a sale by the National Trust Company, the appellant, to itself as administrator, and was void for that reason.

On this second point, the majority of the Court of Appeal, consisting of Chief Justice Martin and Mr. Justice Mackenzie, agreed with the trial Judge, Mr. Justice Gordon dissenting.

Having come to the conclusion that the trial Judge and the majority in the Court of Appeal are right on the second point, it is unnecessary for me to deal with the first, beyond saying that I am by no means prepared to say that the learned trial Judge was wrong in his conclusion.

On the second point, the law is not seriously in question. A number of the relevant authorities are referred to in the judgments in the courts below, and I will here add only some quotations from a very recent decision in the House of Lords: *Regal (Hastings), Ltd.* v. *Gulliver*

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and others (1), the statement of Lord Sankey at page 381, approving of Lord Eldon in *Ex parte James* (2):

> The doctrine as to purchase by trustees, assignees, and persons having a confidential character, stands much more upon general principle than upon the circumstances of any individual case. It rests upon this; that the purchase is not permitted in any case, however honest the circumstances; the general interests of justice requiring it to be destroyed in every instance; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases.

In *Hamilton* v. *Wright* (3) the headnote reads:

> A trustee is bound not to do anything which can place him in a position inconsistent with the interests of his trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

To the same effect are statements by other members of the House of Lords (4), particularly Lord Wright at page 393, quoting Lord Justice James in the case of *Parker* v. *McKenna* (5):

> * * * that the rule is an inflexible rule and must be applied inexorably by this Court which is not entitled, in my judgment, to receive evidence, or suggestion, or argument as to whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that.

The point most strongly pressed upon us by Mr. Osler for the appellant was that the learned Judges below failed to address themselves to the question whether the transaction was the concluding step in making the investments for the estate, or whether it was a transaction by which the trustee disposed of property which it had bought for itself and found it convenient or desirable to sell to the estate.

This really is a question of fact. I have read the evidence and I do not think that it affords any room for the inference which Mr. Osler asks us to draw. The money was loaned to the mortgagors admittedly from the funds of the appellant company itself; the mortgages were taken in the name of the company; it was, therefore, perfectly free to keep or dispose of these mortgages as it pleased. In

(1) [1942] 1 All E.R. 378.
(2) (1803) 8 Ves. p. 337, at 345.
(3) (1842) 9 Cl. & Fin. 111.
(4) In *Regal (Hastings), Ltd.* v. *Gulliver, supra.*
(5) (1874) 10 Ch. App. 96, at 124, 125.

the case of one of them at least, the mortgage was taken before the appellant company had estate funds in hand to make the advance. Moreover, I am of the opinion that where, as in this case, the beneficiaries were all very young children with no one to look after their interests, there could be no justification in drawing any inference favourable to their trustee as against them.

The accounts of the estate were referred back to the Surrogate Court, to be dealt with on the basis that the appellant company must be held to have three thousand dollars of trust funds of the estate uninvested.

There was also a reference to the Registrar, directed to ascertain whether interest may properly be charged against the National Trust Company in respect of interest or compound interest.

I think the judgment below should be amended by providing that the appellant company is liable to account in the Surrogate Court for interest upon the principal sum of three thousand dollars at the rate of five per centum per annum from March 18th, 1920, with half-yearly rests down to the final passing of the accounts in the Surrogate Court, and that the Surrogate Court shall debit the appellant therewith. In dealing with these accounts, which by the judgment are referred back to the Surrogate Court, the various items therein credited by the appellant as receipts should be deleted as well as any disbursements expended by it in connection with the mortgaged lands or protecting the mortgages as securities. With this amendment, I would dismiss the appeal with costs.

Appeal dismissed with costs, with amendment of judgment below in respect of accounting.

Solicitors for the appellant: *Smith & Matheson.*

Solicitors for the respondents: *Stewart, Brown & Wylie.*

1942
*Nov. 26

1943
*Feb. 2.

IN THE MATTER OF THE ESTATE OF JAMES D. MORICE, DECEASED

CAROLINE MORICE ..... APPELLANT;

AND

C. W. DAVIDSON, EXECUTOR OF THE SAID ESTATE, AND SAMUEL A. MOORE, ADMINISTRATOR OF THE ESTATE OF JESSIE M. GAUVREAU, DECEASED, REPRESENTING, BY DIRECTION OF THE COURT, ALL PERSONS INTERESTED IN THE SAID MORICE ESTATE EXCEPT THE APPELLANT ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Devolution of estates—Administration of estates—Testator's widow taking under The Dower Act, Man. (Cons. A. 1924, c. 53)—Her life estate in the homestead—Sale of the homestead by consent—What should go to her from the proceeds.

A testator's widow was entitled to and did elect, rather than take under his will, to take under *The Dower Act,* Man. (then Cons. A., 1924, c. 53). Under that Act she was entitled to a life estate in his homestead and also an amount equal in value to one-third of his net estate (including the value of the homestead). After she had been in possession of the homestead for a time, it was sold, with her consent, and the price received. There was a dispute as to what should go to her from the proceeds. Adamson J. (47 Man. R. 390) held that she was entitled to be paid forthwith $1,400, being one-third of said sale price, and that said $1,400 when paid should be payment *pro tanto* on the amount equal in value to one-third of the testator's net estate (to which amount she was entitled as aforesaid) and that, in addition, she was entitled to receive for her life the income of the remaining two-thirds of said sale price, which two-thirds should be kept intact in the hands of the executor of the testator's estate and not distributed until after the widow's death. The judgment of Adamson J. was affirmed (without written reasons) by the Court of Appeal for Manitoba. The widow appealed.

Held, that for said holding (appealed from) there should be substituted the following: The net proceeds of the sale of the homestead should be divided in proportion to the respective values of the life estate and of the remainder, the widow accordingly receiving out of such proceeds the share representing the value of the life estate.

APPEAL by Caroline Morice, widow of James D. Morice, late of the city of Winnipeg, in the province of Manitoba, deceased, from the judgment of the Court of

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

Appeal for Manitoba (1) dismissing (without written reasons) her appeal from the judgment of Adamson J. (2) answering certain questions raised on an application by way of originating motion by the Executor of the Will of the said deceased for the opinion, advice and direction of the Court. The questions raised required consideration of certain provisions of *The Dower Act,* Statutes of Manitoba, Consolidated Amendments, 1924, c. 53 (The Act is now R.S.M. 1940, c. 55). The questions submitted and the answers of Adamson J. (as set out in the formal judgment in the Court of King's Bench) and the material facts and circumstances of the case for the purpose of the judgment now reported, sufficiently appear in the reasons for judgment in this Court now reported.

O. M. Biggar K.C. for the appellant.

E. K. Williams K.C. for the respondents.

The judgment of the Court was delivered by

HUDSON, J.—This is an appeal from a judgment of the Court of Appeal in Manitoba dismissing appellant's appeal from a judgment of Mr. Justice Adamson in the Court of King's Bench, on an application by the respondent by way of originating summons for the opinion, advice, and direction of the Court.

The late James D. Morice died on 13th October, 1936, leaving an estate which was valued for succession duty purposes at $23,817.75. This amount included the estimated value of a homestead consisting of farm lands not far from Winnipeg, Manitoba.

Under the provisions of *The Dower Act* of Manitoba, the widow who is now the appellant became entitled to: (1) a life estate in the homestead; (2) a third of the net value of the estate including the value of the homestead.

The appellant took possession of the homestead and operated the farm for something over a year, but it was decided by her and by the respondent (the executor) that it would be advisable to sell this homestead. Discussions took place as to the proportion of the proceeds which should be received by the appellant in respect of her life

(1) Noted in [1942] 1 W.W.R. 865; [1942] 2 D.L.R. 777.

(2) 47 Man. R. 390; [1939] 3 W.W.R. 618; noted in [1939] 4 D.L.R. 819.

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In re MORICE ESTATE. MORICE *v.* DAVIDSON ET AL.

Hudson, J.

interest. The parties were unable to agree on this but, an opportunity for a favourable sale coming up, the parties agreed to the sale being made, from which sale a net sum of $4,275 was realized. The parties continued discussions as to the proportion of the sale price which should go to the appellant for her life estate. They were, however, unable to agree.

The executor made an application to the Surrogate Court of the Eastern Judicial District of the Province of Manitoba for advice as to what amount the widow is entitled to out of the purchase price, but the Judge of the Surrogate Court held that he had no jurisdiction and suggested the parties should try and settle the matter. However, no settlement was carried out and then the executor made the present application.

There were two questions submitted, as follows:

1. Is the testator's widow entitled to receive from the executor the full amount equal in value to one-third of the testator's net estate out of the first moneys from time to time coming into the executor's hands and available for distribution before any other beneficiaries are paid, or is she entitled only to receive from time to time one-third of the amounts coming into the executor's hands, leaving the remaining two-thirds of such amounts available to the other beneficiaries?

2. Is the testator's widow entitled to receive all or any portion of the sale price of the testator's homestead, whether as part of his net real and personal property or otherwise, and if so, what amount and how and when?

The application was accompanied by an affidavit of the executor by which the above facts were verified, and adding that although he had used every endeavour to complete the administration of the estate, there were certain assets still unsold, the value of which was problematical, and certain other assets which may or may not be collected, and some of which could only be collected in part.

There were also filed on behalf of the present appellant affidavits showing the earnings of the homestead during the time in which it was held by the appellant, and also setting out certain facts bearing on her life expectancy.

The application was heard before Mr. Justice Adamson who answered the questions as follows:

(1) That the said testator's widow is entitled to receive from the said executor the full amount equal in value to one-third of the testator's net estate as defined in Section 2 (*h*) of *The Dower Act* including therein the amount realized from the sale of the homestead $4,200, after the

testator's net real and personal property is ascertained in the manner provided in Section 2 (*g*) of *The Dower Act* as if the same were a debt of the testator at the time of his death, and that the same is payable forthwith to her out of the first moneys from time to time coming into the executor's hands and available for distribution, except two-thirds of the amount received from the sale of the homestead, before any other beneficiaries are paid.

(2) That in ascertaining and computing the value of the net real and personal property of the testator and making the payments to the testator's widow, the values of the unrealized assets and securities should be very conservative, no payments should be made on the basis of doubtful assets and the executor must take every precaution to guard and preserve the interests of the other beneficiaries.

(3) That the widow is entitled to be paid forthwith the sum of $1,400, being one-third of the amount of the sale price of the homestead, and the said sum of $1,400 when paid shall be payment *pro tanto* on the amount equal in value to one-third of the testator's net estate referred to in paragraph 1 hereof; and in addition the widow is entitled to receive for her life the income of the remaining two-thirds of the said sale price which two-thirds shall be kept intact in the hands of the executor and shall not be distributed until after her death.

When the appellant made her election to take the homestead and such election was approved by the Surrogate Court and she entered into possession, the homestead became her property for life. She could use it or sell or dispose of such life estate as she pleased. It was severed from the estate of the deceased. The respondent as executor was obliged to convey to her the life estate on demand. Until such conveyance he was a bare trustee for appellant of such life estate.

When the appellant and respondent agreed to sell the property, they were selling two separate estates: the life estate of the appellant and the remainder of the fee simple held by the respondent as executor of the estate. The proceeds of the sale belonged to the parties in the proportion which the life estate bore to the remainder.

The efforts of the parties to arrive at an agreement for division of the proceeds are evidence of recognition of the legal situation.

In my opinion, the value of the life estate must be ascertained on the basis of $4,275, being the value of both life estate and remainder, and when this is done the appellant will be entitled to be paid the amount fixed as value of the life estate.

It was suggested that we here should fix the amount. I do not feel that we have adequate information to enable us to do that. We have the age of the appellant and the

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Hudson J.

total value of the land. The earnings of the farm for a single year do not afford much assistance. If the parties cannot agree, no doubt the amount should be fixed on a reference with the aid of an actuary.

In regard to the answer to the first question, I agree in the main with Mr. Justice Adamson, but, in regard to the second, with respect, I approach the matter in quite a different way. The second answer given in the court below should be amended by substituting the following words:

> The net proceeds of the sale of the homestead should be divided in proportion to the respective values of the life estate and of the remainder, the widow accordingly receiving out of such proceeds the share representing the value of the life estate.

The costs of both parties should be paid out of the estate.

Judgment below amended. Costs of both parties to be paid out of the estate.

Solicitors for the appellant: *Coyne & Coyne.*

Solicitor for the respondents: *N. J. D'Arcy.*

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*Nov. 2, 3, 4, 5

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*Feb. 2

CLARENCE JOSEPH FORSYTHE.....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Conspiracy—Charge of offences under The Opium and Narcotic Drug Act, 1929 (Dom. c. 49)—Corroboration—Admission in evidence of certain written statement—Substantial wrong or miscarriage of justice (Cr. Code, s. 1014 (2))—Insufficiency of explanation to jury—Appellant convicted, while another accused, charged with him, found not guilty on subsequent separate trial—Trial Judge expressing his personal opinion to jury as to character of witnesses—Objection to count because of vagueness and generality to be taken before plea (Cr. Code, s. 898).

Appellant and B. and C. were charged on an indictment containing 16 counts: 13 for conspiracy relating to the possession, distribution and sale of drugs; two for conspiracy relating to, respectively, the signing of prescriptions and the signing of orders, in respect of a drug; and one charging them with selling a drug; all within the meaning of and contrary to the provisions of *The Opium and Narcotic Drug Act,*

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

1929 (Dom., c. 49). C. was given a separate trial, which took place subsequent to appellant's trial, and C. was found not guilty. Appellant, on trial before Major J. and a jury, was convicted on all counts. His appeal to the Court of Appeal for Manitoba was dismissed, Robson J.A. dissenting, [1942] 2 W.W.R. 580; [1942] 3 D.L.R. 500; and he appealed to this Court.

Held: A new trial should be directed because (agreeing with certain grounds of dissent in the Court of Appeal): (1) Certain evidence referred to by the trial Judge as corroboration could not be considered by the jury as such; it was merely evidence of opportunity. (2) A certain written statement obtained by the police from one E. P. (a person mentioned in the indictment in connection with certain charges) was improperly admitted in evidence; s. 10 of the *Canada Evidence Act* had no application; the fact that accused's counsel had referred to the statement in cross-examination was not sufficient to permit it to be put in evidence; the statement was made when accused was not present, and, while the majority of the Court of Appeal considered that there was nothing therein that E. P. did not say in the witness box, there were matters referred to in the statement which were clearly hearsay; it could not be confidently stated that no substantial wrong or miscarriage of justice had occurred, within the meaning of s. 1014 (2), *Cr. Code.* (3) While the trial Judge's general statement to the jury of the law of conspiracy might be unimpeachable, it was of the utmost importance in this case that the application of the law to the facts should be explained fully to the jury, particularly so far as the evidence relating to C.'s activities were concerned; the counts charging conspiracy to have C. unlawfully sign prescriptions and orders, required a much fuller explanation than was given.

In disagreeing with certain grounds of dissent in the Court of Appeal, this Court held: (1) The fact that C., on a separate trial as aforesaid, was found not guilty, was no reason in law that appellant should be acquitted. (2) On the new trial, it would be for the jury to say if the conspiracy alleged between C. and accused was proved beyond a reasonable doubt; evidence of C.'s actions on which, together with any other relevant evidence, the jury might so find, was admissible. (3) The trial Judge was within his province in expressing his personal opinion as to the character of the police witnesses, as he made it clear throughout his charge that all questions of fact were for the jury and that the jury was not bound by his opinion. (4) The objection taken to a count of the indictment because of vagueness and generality, should have been taken under s. 898, *Cr. Code,* before the accused pleaded.

APPEAL by Forsythe, one of the accused, from the judgment of the Court of Appeal for Manitoba (1) dismissing (Robson J.A. dissenting) his appeal from his conviction, on a trial before Major J. and a jury, for the offences hereinafter mentioned.

The appellant and two others, Bisson and Carson, were charged on an indictment containing 16 counts—13 for

(1) [1942] 2 W.W.R. 580; [1942] 3 D.L.R. 500.

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conspiracy relating to the possession, distribution and sale of drugs; two for conspiracy relating to, respectively, the signing of prescriptions and the signing of orders, in respect of a drug; and one, the last count, charging them with selling a drug; all within the meaning of and contrary to the provisions of *The Opium and Narcotic Drug Act, 1929* (Statutes of Canada, 1929, c. 49).

On motion on behalf of Carson, a severance of his trial from the trial of the other accused was ordered, and the trial proceeded against the other accused. On the trial of Carson, subsequently, he was found not guilty.

Forsythe was convicted on all counts. He appealed to the Court of Appeal for Manitoba. His appeal was dismissed, Robson J.A. dissenting on a number of grounds (with some of which this Court agreed, in directing a new trial); he would have allowed the appeal and quashed the conviction. Forsythe appealed to this Court.

Wray, Schaf, Lillian Young and Elizabeth Pitt, referred to in the reasons for judgment of this Court now reported, were persons mentioned in the indictment in connection with charges therein.

Counts 6 and 7 of the indictment, referred to in the reasons for judgment of this Court as requiring a much fuller explanation than was given to the jury, were charges of conspiracy to have the said Carson, alleged in the charges to be a veterinary surgeon within the meaning of said Act, unlawfully sign prescriptions and unlawfully sign orders, respectively, for the filling of which diacetylmorphine, a drug within the meaning of said Act, was required, said drug not being required for medicinal purposes in connection with his practice as a veterinary surgeon.

By the judgment of this Court now reported, the appeal was allowed and a new trial directed.

H. P. Blackwood K.C. for the appellant.

A. M. Shinbane K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—This is an appeal from an order of the Court of Appeal for Manitoba dismissing an appeal by the accused Forsythe against his conviction on thirteen counts of conspiracy relating to the possession, distribution and sale of drugs, one charge or count relating to the

signing of prescriptions in respect of a drug, one charge or count relating to the signing of orders respecting a drug and one charge or count relating to the sale of drugs, all within the meaning of and contrary to the provisions of *The Opium and Narcotic Drug Act* of Canada. Mr. Justice Robson dissented on twelve separate grounds set out in the formal order of the Court of Appeal and would not only have ordered a new trial but would have acquitted the accused. We do not agree that Forsythe should be acquitted, but, as a new trial is being directed, as little as possible will be said about the evidence.

The accused was indicted jointly with one Carson; a severance was granted with respect to Carson who, on his trial subsequent to Forsythe's conviction, was found not guilty. This circumstance is no reason in law that the appellant should be acquitted. The trial judge was within his province in expressing his personal opinion as to the character of the police witnesses, as he made it clear throughout his charge that all questions of fact were for the jury and that the latter were not bound by his opinion. On the new trial, it will be for the jury to say if the conspiracy alleged between Carson and the accused is proved beyond a reasonable doubt. Evidence of Carson's actions on which, together with any other relevant evidence, the jury might so find, is admissible. These remarks dispose of grounds of dissent 1 to 4 inclusive.

As to ground 5, we agree with Mr. Justice Robson that what was referred to by the trial Judge as corroboration could not be considered by the jury as such; that is the evidence by the stenographer in Forsythe and Bisson's office that she saw Wray and Schaf, at different times, in the office when apparently they had no business there, and the evidence of a witness who had seen Lillian Young with Bisson in an auction sales room. All this would be merely evidence of opportunity and is not corroboration. *Burbury* v. *Jackson* (1); *The King* v. *Baskerville* (2). On this ground a new trial should be directed.

A new trial should also be directed because the written statement obtained by the police from Elizabeth Pitt was improperly admitted (ground 6 of dissent). Section 10 of the *Canada Evidence Act,* referred to by the trial Judge, has no application, and counsel for the Crown

(1) [1917] 1 K.B. 16. (2) [1916] 2 K.B. 658.

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before us so admitted. It was suggested that the statement was admissible since counsel for the accused had referred to it in cross-examination. It is true that the latter did ask Mrs. Pitt if she had signed a statement for the police; that she admitted that she had done so but stated there was an error in the statement. This, however, is not sufficient to permit it to be put in evidence. The statement was made when the accused was not present and, while the majority of the Court of Appeal considered there was nothing in the statement that Elizabeth Pitt did not say in the witness box, there are two or three matters referred to in the statement which are clearly hearsay. We are unable to agree that, within the meaning of subsection 2 of section 1014 of the *Criminal Code*, it can be confidently stated that no substantial wrong or miscarriage of justice has occurred.

There is nothing in grounds 7 to 9 inclusive upon which a new trial should be directed because, subject to what is stated presently, the case for the defence was put to the jury, and the trial Judge did not exclude or qualify legitimate cross-examination by counsel for the defence of Crown witnesses. As to grounds 10 to 12, it may be stated that any objection to count 16 of the indictment because of vagueness and generality should have been taken under section 898 of the *Code* before the accused pleaded. However, while the general statement of the law of conspiracy made by the trial Judge may be unimpeachable, it was of the utmost importance in this case that the application of the law to the facts should be explained fully to the jury, particularly so far as the evidence relating to Carson's activities was concerned. Counts 6 and 7 required a much fuller explanation than was given. For this third reason a new trial is directed.

In view of the statement before us of counsel for the respondent, no doubt the Crown authorities will consider whether it is advisable that the accused should be tried on an indictment containing a less number of counts, leaving it to him, if so advised, to demand particulars.

Appeal allowed and new trial directed.

Solicitors for the appellant: *H. P. Blackwood and L. L. Broad.*

Solicitor for the respondent: *A. M. Shinbane.*

HIS MAJESTY THE KING.....APPELLANT;

AND

CHARLES T. ORFORD.....RESPONDENT.

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*Oct. 8
1943
*Feb. 2

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Perjury—Declaration made by vendor pursuant to Bulk Sales Act—Statement proved to be false—Whether offence is perjury under section 172 Cr. C.—Substitution of lesser offences under sections 175 and 176 Cr. C.—Criminal Code, sections 170, 171, 172, 173, 174, 175, 176, 951 (1), 1016 (2)—Bulks Sales Act, R.S.B.C. 1936, c. 29—British Columbia Evidence Act, R.S.B.C., 1936, c. 90.

The *Bulk Sales Act* of British Columbia provides that the vendor of any stock in bulk shall give to the purchaser a list of his creditors with the amount of all accounts owing by him in connection with his business. Such statement had to be verified by the solemn statutory declaration of the vendor. The respondent sold his café business and gave the required statement to the purchaser, declaring that he did not owe any debts. The declaration proved to be false and he was convicted on a charge of perjury. The conviction was quashed by a majority of the appellate court.

Held, affirming the judgment appealed from (58 B.C.R. 51), Kerwin and Hudson JJ. dissenting, that the respondent did not give a false statement under oath while called as a witness in a judicial proceeding (s. 170 Cr. C.) nor did he give a false oath in a judicial proceeding in the manner contemplated by section 172 Cr. C., and therefore, cannot be charged of having committed the crime of perjury under these sections.

Per Rinfret and Taschereau JJ.:—Section 170 Cr. C., defining perjury, enacts that it may be committed only "by a *witness* in a judicial proceeding"; and section 172 Cr. C. provides that "every one is guilty of perjury who * * *". So, any violation of this last section amounts to *perjury:* it must necessarily be perjury as defined in section 170 Cr. C. and, therefore, in a judicial proceeding.

Per Davis J.:—The concluding words of section 176 Cr. C.: "makes a statement which would amount to perjury if made on oath in a judicial proceeding" show that section 172 Cr. C. is limited to false statements made on oath in a judicial proceeding.

Per Kerwin J. dissenting:—Section 172 Cr. C. contains no reference to section 170 Cr. C. nor does it state that the enumerated acts must be done by a witness or in a judicial proceeding. By section 172 Cr. C., Parliament has enacted that every one who does the things specified is guilty of a crime (perjury). In view of the plain language of that section, a person falling within its terms is just as guilty of what Parliament has chosen to call perjury as one who falls within the ambit of section 170 Cr. C.—The respondent's solemn statutory declaration contains the statement that such declaration was of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act.* The declaration having been proven to be false, the respondent was guilty of perjury under section 172 Cr. C.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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Per Hudson J. dissenting:—The taking of the statutory declaration falsely by the respondent, is perjury within the meaning of section 172 Cr. C.

As to the question whether or not a conviction could or should have been made for a lesser offence under sections 175 and 176 Cr. C., pursuant to sections 951 (1) and 1016 (2) Cr. C.,

Held that the respondent could not have been found guilty under 176 Cr. C.

Per Rinfret and Taschereau JJ.:—There is no evidence that the commissioner, before whom the respondent gave the statutory declaration, was an officer authorized by law to receive a statement or a declaration of the particular character mentioned in section 176 Cr. C.—No opinion expressed as to whether that section contains the elements of a lesser offence.

Per Davis J.:—Perjury, as defined in the Criminal Code (s. 170) does not "include" the commission of the offence defined in section 176 Cr. C.; and perjury was the only offence charged in this case.

Per Kerwin J.:—The offence dealt with in section 176 Cr. C. is not a lesser offence but a different one, as the declaration mentioned therein simpliciter is not the same as the statutory declaration referred to in section 172 Cr. C.

Held, also, that it is not open to this Court to decide the question whether the respondent may have been found guilty of a lesser offence under section 175 Cr. C., as there was no dissenting opinion on that point in the appellate court.

APPEAL by the Attorney-General for British Columbia from the judgment of the Court of Appeal for British Columbia (1), which (McDonald C.J.B.C. and O'Halloran J.A. dissenting in part, but on different grounds) quashed the conviction of the respondent for perjury.

R. L. Maitland K.C. for the appellant.

John A. Sutherland for the respondent.

The judgment of Rinfret and Taschereau JJ. was delivered by

TASCHEREAU J.—The *Bulk Sales Act* of British Columbia provides that the vendor of any stock in bulk shall give to the purchaser a list of his creditors, with the amount of the indebtedness or liability due, owing, or accruing due or to become due. This statement which has to be verified by the statutory declaration of the vendor, may be in the form set forth in schedule A of the Act, or to the like effect.

(1) (1942) 58 B.C. Rep. 51; [1942] 3 W.W.R. 83; [1942] 3 D.L.R. 582.

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The respondent Charles T. Orford who was the owner of a café in British Columbia sold his business in August, 1941, and in compliance with the law, gave the required statement to the purchaser Mrs. Myra E. Ticehurst. He stated that all the accounts owing by him in connection with his business were paid, whereas in fact, he owed over $2,500. A charge was laid against him for perjury and he was convicted and sentenced to the time spent in gaol and to pay a fine of $500.

The Court of Appeal quashed the conviction on the ground that the accused could not be convicted of perjury, the Chief Justice of British Columbia and O'Halloran J.A. dissenting on questions of law. The Chief Justice thought that the taking of a statutory declaration falsely is perjury within the meaning of section 172 of the Criminal Code, and that in any event, perjury contrary to section 172 of the Criminal Code and making a false oath contrary to section 176 of the Criminal Code, are cognate offences, and that a conviction ought to be entered against Orford for taking a false oath.

Mr. Justice O'Halloran reached the conclusion that the accused should have been found guilty of the lesser offence of making a false declaration under section 176 Cr. C.

The Attorney General for British Columbia now appeals to this Court.

The respondent at the outset of the argument raised the question of jurisdiction of this Court, and cited the case of *The King* v. *Wilmot* (1). The authority of this Court to hear criminal appeals coming from the Crown is founded on section 1023, paragraph 2, of the Criminal Code. Such an appeal lies, when any court of appeal sets aside a conviction, or dismisses an appeal against a judgment or verdict of acquittal, on any question of law on which there has been dissent in the court of appeal.

In the present case, the Court of Appeal has set aside the conviction of the respondent, and there have undoubtedly been dissents on questions of law in the court below. I have no hesitation in coming to the conclusion that this court has jurisdiction to hear this appeal, and that the *Wilmot* case (1) has no application. In that case, the accused was charged with manslaughter but found

(1) [1941] S.C.R. 53.

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guilty of driving in a manner dangerous to the public under section 285(6) of the Criminal Code. The court came to the conclusion that he had not been acquitted, and that therefore it was not open to the Attorney General to appeal under section 1023(2) Cr. C. We are confronted with an entirely different matter, because the accused has been acquitted by the Court of Appeal.

The first submission of the Crown is that the Court of Appeal erred in holding that the offence in question did not constitute perjury under section 172 of the Criminal Code. With deference, I do not agree with this contention and I am of opinion that the majority of the Court of Appeal was right.

At common law, in order to amount to perjury, the offence had to be committed in a judicial proceeding. False swearing was a different offence. In Canada, after Confederation, an Act respecting perjury was introduced in Parliament in 1869 (ch. 23, 32-33 Victoria) and it is found in a modified form in the Revised Statutes of 1886, ch. 154. The reading of this Act will show that it was the clear intention of Parliament to do away with the existing law, for the word "perjury" in the new Act did not apply only to a witness giving evidence under oath in a judicial proceeding, but to any one, who having taken any oath, affirmation, declaration or affidavit, in any case in which by any Act or law in force in Canada, or in any province in Canada, it is required or authorized that facts, matters or things be verified or otherwise assured or ascertained. The wide extension given to the word perjury was a complete departure from the law of England, where the Star Chamber, in 1613, declared that perjury by a *witness* only was punishable at common law.

Kenny in his "Outlines of Criminal Law", 4th ed., says at page 295:—

> The common law offence of perjury, thus created, consists in the fact that a witness, to whom an oath has been duly administered in a judicial proceeding, gives, upon some point material to that proceeding, testimony which he does not believe to be true. It will thus be seen that false oaths do not always involve a perjury.

The Act of 1869 remained the law of the land until 1893, when our Criminal Code based on the English Draft

Code was enacted. We now find section 170 Cr. C. which defines perjury as follows:—

> Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.

It is for all practical purposes a copy of the English Draft Code, except that, in Canada, it is not necessary that the evidence given be material. But the main feature of this section is that perjury may be committed, only by a witness in a judicial proceeding, whether the witness gives his evidence orally, or by affidavit or otherwise. This is obviously a return to the former notions of perjury and a limitation of its definition to a much narrower field.

Our section 171 Cr. C., which is also found in the Draft Code, defines what is a judicial proceeding and it states that every proceeding is judicial which is held not only under the authority of a Court of Justice, but also before a grand jury, or before the Senate or House of Commons or a committee of either House, or similar bodies.

The Criminal Code deals also with false oaths which would amount to perjury if made in judicial proceedings. Section 175 Cr. C., different from 122 of the Draft Code only in its phraseology, reads as follows:—

> Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

This section covers the case of a false oath given in a non-judicial proceeding. It is not called perjury, but is merely described as being an indictable offence.

Then comes section 176 Cr. C. drafted as follows:—

> Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

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It is significant that as in the Draft Code the legislator uses the words "any statement or declaration". We do not find as in section 175 Cr. C. "statement on oath or solemn declaration". It was not sure if the giving of a false statement or declaration not on oath to a person authorized by law to permit it to be made before him, was a common law misdemeanour, but in their report the English Commissioners said:—

> False statements not on oath to which faith is given are not perjury, etc.

But they felt that it should be made indictable and proposed the enactment of section 123 which we have adopted and embodied in our Code. It is now section 176 Cr. C. It cannot be said that any untrue statement or false declaration is an offence under this section. But when the false statement is given to a person authorized by law to require it, it is an offence as it would be for instance in the case of an authorized custom or excise officer to whom a false statement is given.

It can now be seen that the law deals with three different offences: The crime of perjury, always committed by a witness in a judicial proceeding; the indictable offence of giving a false oath in a non-judicial matter; and the last, the indictable offence of giving a false statement, not under oath, to a person authorized by law to receive it. For those three offences the punishment is different. The gravest of all is obviously perjury, because made in a judicial proceeding, and which renders the offender liable to 14 years' imprisonment. The second, less serious because extra-judicial, provides for a penalty of seven years; and the third one of a minor character, where the penalty is only two years.

But the Criminal Code contains another section, which is section 172 and which is not in the English Draft Code. It is as follows:—

> Every one is guilty of perjury who,
>
> Having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath,

affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or

Knowingly, wilfully and corruptly, upon oath, affirmation or solemn declaration, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit as to any such fact, matter or thing, if such statement, affidavit, affirmation or declaration is untrue in whole or in part.

The appellant contends that the offence committed by the accused is covered by paragraph 2 of this section, a false oath being in a non-judicial matter. I do not think that section 172 Cr. C. can be interpreted in the manner suggested by the appellant.

Any violation of this section amounts to perjury. "Every one is guilty of perjury who" etc. says section 172 Cr. C. It must necessarily be perjury as defined in section 170 Cr. C. and therefore in a judicial proceeding, otherwise, we would have to reach the illogical conclusion that 172 and 175 Cr. C. both cover extra-judicial oaths, although the punishment for violating 172 Cr. C. is 14 years, and 7 years for 175 Cr. C.

The crimes described in sections 175 and 176 Cr. C. are not qualified as "perjury" but it is said in both sections, that they would amount to perjury "if made in a judicial proceeding", and these last words are omitted from 172 Cr. C., obviously because they are unnecessary. The intention of the legislator in enacting section 172 Cr. C. was not to repeat what was already enacted in section 175 Cr. C. concerning extra-judicial oaths, but to declare that it would be a crime amounting to perjury, for any person other than a witness (whose case is covered by section 170 Cr. C.), to give a false statement under oath, in a judicial proceeding. And it is very frequent that affidavits have to be given in judicial proceedings by persons who are not witnesses, as for instance affidavits by plaintiffs in civil actions, before the writ of summons may be issued.

This is, to my mind, the case which the legislator had in mind when he enacted section 172 Cr. C., and which otherwise would not amount to a crime under the Criminal Code. Indeed, it would not be an offence under 170 Cr. C. because the false oath would not have been given

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by a witness, and it cannot be said that it would be a violation of section 175 Cr. C. because the oath would be given in a judicial proceeding.

In the present case, the respondent did not give a false statement under oath while called as a witness in a judicial proceeding, nor did he give a false oath in a judicial proceeding in the manner contemplated by section 172 Cr. C., and therefore, he cannot be charged of having committed the crime of perjury.

Did the respondent commit a lesser offence, and should he have been found guilty under sections 175 or 176 Cr. C.? It seems useless to examine the question as to whether section 175 Cr. C. could apply, because there is no dissenting judgment on this point in the Court of Appeal, and our jurisdiction being limited to questions of law on which there has been a dissent, it is not open to us to deal with the matter. The contention that section 176 Cr. C. applies is found in both dissenting opinions, and it is based on section 951 of the Criminal Code which says:—

> 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.

It is most important to note in this section the words "may be convicted of any offence so included, which is proved".

It has been proved that on the 11th of August, 1941, the respondent gave a statutory declaration under oath before John P. Berry, a commissioner for taking affidavits within British Columbia. But in order to find the respondent guilty under section 176 Cr. C., it would be necessary that there should be some evidence to show that John P. Berry is an officer authorized by law to receive a statement or declaration under 176 Cr. C. John P. Berry may be a person authorized to receive a statement under oath, but there is nothing to show that he is an officer authorized by a statute to receive a statement or a declaration of the particular character mentioned in section 176 Cr. C. The falsity of the contents of such

a declaration or statement amounts to a crime only when the statement or declaration is made before such officers which are empowered, in view of the functions they occupy, to receive them. It has not been established that Berry was clothed with such authority.

This reason is, I think, sufficient to dispose of this last point raised by the appellant, and in view of my conclusion, it is unnecessary to express any opinion as to whether section 176 Cr. C. contains the elements of a lesser offence.

The appeal should be dismissed.

DAVIS J.—The respondent was charged and convicted of perjury. On appeal the Court of Appeal for British Columbia set aside the conviction, the Chief Justice and O'Halloran J., dissenting. The Attorney General of British Columbia appealed to this court.

The charge was perjury but it was not stated to have been laid under any particular section of the Criminal Code. The majority of the judges of the Court of Appeal agreed that the facts did not bring the case within the definition of perjury in the Criminal Code; the statutory declaration made by the respondent under sec. 5 of the *Bulk Sales Act* of British Columbia not being made in a judicial proceeding. See secs. 170, 171 and 172 of the Criminal Code. By sec. 174 Cr. C. everyone is guilty of an indictable offence and liable to 14 years' imprisonment who commits perjury or subornation of perjury; if the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life.

The two dissenting judges in the Court of Appeal thought that a conviction could have been made under sec. 176 Cr. C.:

> 176. Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

The concluding words,

> makes a statement which would amount to perjury if made on oath in a judicial proceeding,

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show, I think, that sec. 172 Cr. C. is limited to false statements made on oath in a judicial proceeding. I think as a matter of proper construction one is not justified in reading two different sections of the Criminal Code (secs. 172 and 176) as if they covered the same thing, but that the construction should be approached in an endeavour to give to each of the sections its own independent meaning. Here we have secs. 170, 171, 172 and 173 Cr. C. defining perjury, followed in 174 Cr. C. with a very heavy penalty. Subsequently sec. 176 Cr. C. deals with certain false statements or declarations "which would amount to perjury if made on oath in a judicial proceeding," and the penalty is two years' imprisonment. Mr. Justice Taschereau has set out in his judgment all the relevant sections of the Code and has very carefully considered their origin and scope.

In considering the question whether or not a conviction could and should have been made under sec. 176 Cr. C. (sec. 175 Cr. C. may have had some application but is not relied on in the dissents), much confusion of thought is likely to be avoided if we keep to the exact words of the statute instead of adopting other words such as "lesser offences" and "cognate offences" which have not infrequently been used in many of the decisions. Under sec. 951 Cr. C. the offence charged must "include" the commission of the "other offence." It is contended that by virtue of sec. 951 Cr. C. the Court of Appeal could and should have substituted a conviction under sec. 176 Cr. C. for making a false declaration under the *Bulk Sales Act* of British Columbia. But in my opinion perjury as defined in the statute does not "include" the commission of the offence defined in sec. 176 Cr. C. Nor could sec. 1016 (2) Cr. C. empower the Court of Appeal on the facts of this case to substitute a conviction under sec. 176 Cr. C. Sec. 1016 (2) Cr. C. applies only where an appellant has been convicted of an offence and the jury or, as the case may be, the judge or magistrate, could "on the indictment" have found him guilty of some other offence. Perjury was here the only offence charged. See *Rex* v. *Leroux* (1).

I should dismiss the appeal.

(1) (1928) 62 Ont. L.R. 336.

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KERWIN J. (dissenting).—This is an appeal by the Attorney General for British Columbia from an order of the Court of Appeal for that province quashing the conviction for perjury of the respondent Charles T. Orford. The appeal is based upon the dissents on questions of law of the Chief Justice of British Columbia and Mr. Justice O'Halloran.

The conviction was made after the trial of the respondent on a charge:—

> 1. For that he, the said Charles T. Orford, at the said City of Vancouver, on the 11th day of August, A.D. 1941, being permitted by the *Canada Evidence Act* to verify certain facts relating to his financial obligations by solemn declaration, unlawfully did commit perjury by knowingly, wilfully and corruptly by solemn declaration, declaring that he did not owe any debts, in respect of Good Eats Café and Station View Apartments such declaration being false, contrary to the form of the Statute in such case made and provided.

Orford had carried on businesses under the name of "Good Eats Café" and "Station View Apartments" and on August 11th, 1941, contracted to sell his stock of goods and chattels in bulk. The *Bulk Sales Act* of British Columbia, R.S.B.C. 1936, chapter 29, provides that in such circumstances it shall be the duty of the vendor to furnish to the purchaser a written statement verified by statutory declaration, which statement shall contain the names and addresses of all his creditors, together with the amount of the indebtedness, and that such statement and declaration may be in the form set forth in schedule A. This form concludes

> and I make this solemn declaration conscientiously believing the same to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act*.

Orford made a statement and statutory declaration substantially in the form prescribed but the declaration was false in that Orford did not disclose all his creditors and the charge for perjury followed. The majority of the Court of Appeal decided that Orford was not guilty of perjury or of any lesser offence within the meaning of section 951 of the Criminal Code or of "any other offence" within the meaning of subsection 2 of section 1016 Cr. C., and that the conviction should be quashed.

The determination of this appeal depends upon a consideration of several sections of the Criminal Code. Section 170 Cr. C. defines "perjury" and section 171 Cr. C.

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defines "witness" and "judicial proceeding" as those expressions are used in section 170 Cr. C. Then comes the section principally relied on by the appellant, section 172 Cr. C., which reads as follows:—

172. Every one is guilty of perjury who,

(*a*) having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or

(*b*) knowingly, wilfully and corruptly, upon oath, affirmation or solemn declaration, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully, and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit as to any such fact, matter or thing, if such statement, affidavit, affirmation or declaration is untrue in whole or in part.

Section 174 Cr. C. enacts that every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury, with provision for an increased penalty in certain circumstances. Sections 175 and 176 Cr. C. are as follows:—

175. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding.

176. Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.

I find it impossible to say that Orford's conviction for perjury on the charge as laid against him is bad because what he did was not done in a judicial proceeding. I agree with Chief Justice Graham of Nova Scotia when he stated in *Rex* v. *Morrison* (1) that sections 172 and 175 Cr. C. overlap and probably mean the same thing. As he points out, section 172 Cr. C. is taken from R.S.C. 1886, chapter 154, while section 175 Cr. C. is taken from the English Draft Code. In *Rex* v. *Rutherford* (2) Mr. Justice McKay of the Saskatchewan Court of Appeal,

(1) (1916) 26 C.C.C. 26, at 27. (2) (1923) 41 C.C.C. 240, at 243.

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quotes the first of these statements with approval and his judgment was concurred in by the present Chief Justice of Saskatchewan.

While sections 172 and 175 Cr. C. overlap, Parliament has seen fit to insert each in the Criminal Code and I cannot overlook the words of section 172 Cr. C.: "Every one is guilty of perjury who, etc.", and treat them as if they were not there. Section 172 Cr. C. contains no reference to section 170 Cr. C. nor does it state that the enumerated acts must be done by a witness or in a judicial proceeding. By section 172 Cr. C., Parliament has enacted that every one who does the things specified is just as guilty of a crime (perjury) as one who comes within the provisions of section 170 Cr. C. Upon conviction, each becomes liable to a penalty in accordance with section 174 Cr. C. whether or not his actions be those of a witness or in a judicial proceeding. In view of what, with respect, is to me the plain language of section 172 Cr. C., a person falling within its terms is just as guilty of what Parliament has chosen to call perjury as one who falls within the ambit of section 170 Cr. C. No doubt, in view of the overlapping of sections 172 and 175 Cr. C., the presiding judge would consider the gravity of a particular offence in imposing sentence.

The solemn declaration taken by the respondent was required by the British Columbia *Bulk Sales Act*. Section 63 of the British Columbia *Evidence Act*, R.S.B.C. 1936, chapter 90, provides that any declaration made in the form in the schedule to that Act shall be as valid and effectual as if expressed to be made by virtue of that Act, notwithstanding that the same is expressed to be made by virtue of the *Canada Evidence Act*. The conclusion in the form in the schedule is practically the same as the conclusion in the form attached as schedule A to the *Bulk Sales Act*. In the present case Orford's statutory declaration was taken before one who testified that he was a commissioner for taking affidavits in the province and it states that the declaration was of the same force and effect as if made under oath and by virtue of the *Canada Evidence Act*. In one sense, therefore, it might be said that Orford was

"permitted by the *Canada Evidence Act* to verify certain facts relating to his financial obligations"

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by solemn declaration, but, even if that be not so, the words in quotation marks may be treated as surplusage, and the charge as drawn is sufficient.

If the conviction were not sustainable under section 172 Cr. C., Orford could not legally have been convicted under section 951 of the Criminal Code as for an offence under section 176 Cr. C., nor could the Court of Appeal proceed under subsection 2 of section 1016 Cr. C. The offence dealt with in section 176 Cr. C. is not a lesser offence but a different one, as the declaration mentioned therein simpliciter is not the same as the statutory declaration referred to in section 172 Cr. C. Counsel for the appellant referred to section 175 Cr. C. but we have no jurisdiction to consider the applicability of that section as no dissent in the Court of Appeal was based upon the point.

The appeal should be allowed and the conviction restored.

HUDSON J. (dissenting).—The only ground of dissent from the judgment of the court below to which I wish to refer is the second, namely, that the taking of a statutory declaration falsely is perjury within the meaning of section 172 of the Criminal Code. There are differences of opinion in this court and in the court below on this point and, with respect, I am of the opinion that the dissent on this point is right. As has been pointed out by other members of the court, this section of the Criminal Code is of purely Canadian origin and was in force in Canada long before the Criminal Code was passed.

Looking at the statute, chapter 154, R.S.C. 1886, section 2 is as follows:

2. Every one who,—

(*a*) Having taken any oath, affirmation, declaration or affidavit in any case in which by any Act or law in force in Canada, or in any province of Canada, it is required or authorized that facts, matters or things be verified, or otherwise assured or ascertained, by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing—

(*b*) Knowingly, wilfully and corruptly, upon oath or affirmation, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes,

signs or subscribes any such affirmation, declaration or affidavit, as to any such fact, matter or thing,—such statement, affidavit, affirmation or declaration being untrue, in the whole or any part thereof, or—

(c) Knowingly, wilfully and corruptly omits from any such affidavit, affirmation, or declaration, sworn or made under the provisions of any law, any matter which, by the provisions of such law, is required to be stated in such affidavit, affirmation or declaration,—

Is guilty of wilful and corrupt perjury, and liable to be punished accordingly:

It also contains a proviso as follows:

(2) Provided, that nothing herein contained shall affect any case amounting to perjury at common law, or the case of any offence in respect of which other or special provision is made by any Act.

The language is quite plain and it seems to me that there is no justification for reading any qualification in the section as it thus stands.

When the Criminal Code was compiled this section was included in almost precisely the same language. The existence of other sections of the Criminal Code providing for punishment of other offences of the same character does not seem to be a sufficient justification for reading into section 172 Cr. C. an intention by Parliament to attach a new meaning to the language of the old provision.

The section has been so construed by the Court in Banc in Nova Scotia in *Rex* v. *Morrison* (1), and again by the same court in 1924 in *The United States* v. *Snyder* (2), and by the Court of Appeal in Saskatchewan in 1923, consisting of Justices Lamont, Mackay and Martin, in the case of *Rex* v. *Rutherford* (3). The matter had been decided in the same way by the Supreme Court of the Northwest Territories in *Regina* v. *Skelton* (4).

On the other points I agree with the other members of the court.

Appeal dismissed.

Solicitor for the appellant: *Eric Pepler.*

Solicitor for the respondent: *John A. Sutherland.*

(1) (1916) 26 C.C.C. 26, at 27.
(2) (1924) 43 C.C.C. 92.
(3) (1923) 41 C.C.C. 240, at 243.
(4) (1898) 3 Terr. L.R. 58; 4 C.C.C. 467.

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J. ALPHONSE OLIVIER (PLAINTIFF) APPELLANT;

AND

LA CORPORATION DU VILLAGE DE WOTTONVILLE (DEFENDANT) ..... RESPONDENT.

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

Municipal corporation—Contract—Construction of water-works and fire-fighting system—Agreement to pay a sum over twenty-five thousand dollars—By-law authorizing a loan not exceeding ten thousand dollars and providing for a special tax sufficient to pay costs of construction and maintenance—Reports by municipality's engineer accepted and adopted by resolutions—Claim by contractor for cost of works over ten thousand dollars—Liability of the corporation—Absolute nullity of contract if not in conformity with the "Act respecting certain works in municipalities", R.S.Q., 1941, c. 236—Quantum meruit—Whether contract valid under the "Act to grant certain powers to municipal corporations to aid the unemployed" Q., 1935, 25-26 Geo. V., c. 9—Resolutions of the municipal council also illegal.

The respondent corporation entered into a contract with the appellant for the construction of water-works and for the installation of a fire-fighting system, and agreed to pay to the appellant, as costs of the enterprise, a sum of $26,066.00. At the same time as the signing of the contract, a by-law was passed authorizing the corporation to borrow a sum not exceeding $10,000.00 and stipulating that "to provide for the payment of the costs of construction, maintenance and administration * * *, the council of the municipality was authorized to levy each year a special tax on all property", taxable or not taxable. It was stated that the by-law was passed "in order to remedy to unemployment under the authority of the Act 25-26 Geo. V., c. 9". The preambule of the by-law also declared that 70% of the costs would be paid by the provincial government "and the balance, to wit: $10,000.00, would be at the expense" of the corporation. During the period of construction and at the completion of the works, the corporation's engineer made a preliminary and a final report, estimating the value of the works at over $10,000.00, and both reports were accepted and adopted by resolution of the municipal council. The sum of $10,000.00 was paid by the Corporation. The appellant claimed by his action a further sum of $16,779.23 as balance due under the contract. The Superior Court maintained the action; but this judgment was unanimously reversed by the appellate court.

Held, affirming the judgment appealed from, that the respondent corporation was not liable for the amount claimed by the appellant. The by-law, which has authorized the contract with the appellant and has ordered the works, provided for the appropriation of the entire requisite amount only to the extent of $10,000.00, and no special tax has been imposed to provide for any amount exceeding that sum, in conformity with the *Act respecting certain works in municipalities,*

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

R.S.Q., 1941, c. 236. Any agreement with the appellant contrary to the provisions of that Act is null and does not bind the Corporation; such law, being prohibitive, imports nullity (Art. 14 C.C.); and it does not matter whether the contract is one for a fixed sum or at unit prices. Moreover, the appellant, in his evidence, has made admissions that the contract should be so construed.

Held, also, that the appellant cannot put his claim on a basis of *quantum meruit,* as the contract has been made under certain conditions clearly specified and necessarily limited by the law. *Rodovski* v. *California Associated Raisin Co.* ([1926] S.C.R. 292).

Held, also, that the appellant can neither invoke, in support of his claim, the benefit of the provisions of the *Act to grant powers to municipal corporations to aid the unemployed,* Q., 1935, 25-26 Geo. V., c. 9, which Act is referred to in the by-law. Even assuming that this Act would take away the municipal corporations from the application of the other Act (R.S.Q., 1941, c. 236), a municipal corporation can only contribute "to aid unemployed * * * either out of its general funds, or by means of loans which it may authorize by by-laws". In this case, as already stated, it was expressly specified in the by-law that the sum to be borrowed would not be in excess of $10,000.00.

Held, further, that, such contract being illegal and null, such illegality and nullity cannot be wiped away by a mere resolution of the municipal council purporting to accept and approve the execution of the works, and such resolution cannot either be taken as a ratification of a contract which the law declared to be null. *MacKay* v. *City of Toronto* ([1920] A.C. 208).

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Verret J. and dismissing the appellant's action for balance of moneys due to him as costs of the construction of water-works and fire-fighting system under contract passed with the respondent corporation.

Valmore Bienvenue K.C. and *Edouard Houde* for the appellant.

L. E. Beaulieu K.C. and *Dorais Panneton K.C.,* for the respondent.

The judgment of the Court was delivered by

RINFRET J. — L'appelant a réclamé de l'intimée la somme de $20.979.23 à titre de balance due sur un contrat pour la construction d'un système de protection contre l'incendie et pour la construction d'un aqueduc.

A l'enquête, la réclamation a été réduite à la somme de $16,779.23.

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L'appelant a obtenu un jugement favorable devant la Cour Supérieure; mais ce jugement a été unanimement infirmé, en appel, par la Cour du Banc du Roi.

Cette Cour s'est appuyée sur la *Loi concernant certains travaux publics dans les municipalités* (ch. 236, S.R.Q. 1941). Elle a décidé qu'aux termes de cette loi, la corporation intimée,

> ne pouvant ordonner de faire des travaux de construction, sans en même temps pourvoir à l'appropriation des deniers nécessaires pour en payer le coût, il en résulte qu'elle ne peut être tenue responsable de l'excédant du coût des dits travaux sur le prix stipulé au contrat originaire par les parties en cette cause, et par conséquent, ne peut être condamnée à payer la somme qui lui est présentement réclamée par l'appelant.

Le contrat entre l'appelant et la corporation intimée date du 23 septembre 1935. La Corporation s'y engage à payer à l'appelant, comme prix de l'entreprise, une somme de $26,066.00.

Concurremment avec la signature de ce contrat, la Corporation intimée adopta un règlement autorisant un emprunt de $10,000.00

> pour construire un aqueduc et des réservoirs et une station de pompage pour la protection de la municipalité contre l'incendie et pour remédier au chômage, sous l'autorité de la loi 25-26 Geo. V, chap. 9.

Le préambule du règlement mentionne que la Corporation a été autorisée par l'Honorable Ministre des travaux publics de la province de Québec à faire ces travaux, que 70% du coût sera payé par le gouvernement de la province de Québec,

> et la balance, soit dix mille piastres ($10,000.), sera à la charge de cette corporation municipale.

Le règlement statue et décrète que la Corporation de Wottonville est autorisée à effectuer un emprunt au moyen d'obligations jusqu'à concurrence de la somme de $10,000.00 et que

> pour pourvoir au paiement du coût de la construction, des frais d'entretien et d'administration du système de protection contre l'incendie, le conseil de la Municipalité est autorisé à prélever chaque année une taxe spéciale suffisante sur tous les biens imposables de la municipalité et même ceux exemptés en vertu de l'article 693 C.M.
>
> Le produit du présent emprunt par obligation devra être employé exclusivement pour la construction du dit aqueduc et du système de protection contre l'incendie et pour remédier au chômage sous l'autorité de la loi 25-26 Geo. V, chap. 9.

Avant d'avoir force de loi et effet, le règlement devait être approuvé par la Commission Municipale de Québec

et par le Lieutenant-Gouverneur en Conseil. Il reçut les deux approbations en question. Dans chaque lettre par laquelle le secrétaire de la Commission Municipale et l'officier en loi du département des affaires municipales informe la Corporation intimée que cette approbation a été donnée, le chiffre de $10,000.00 est spécifiquement mentionné.

Les parties contractantes ont parfaitement compris que la contribution de la Corporation intimée devait se limiter à la somme de $10,000.00 et que, ainsi que le spécifie le règlement d'emprunt, la balance devait être payée par le gouvernement de la province de Québec, en vertu des octrois qu'il était loisible au Lieutenant-Gouverneur en conseil d'affecter annuellement, à même le fonds consolidé de la province "aux municipalités * * * qui se protègent d'une manière efficace contre les incendies" conformément à l'article 13 du chapitre 151 des statuts refondus de Québec, 1941.

En effet, sans recourir à d'autres preuves que celle que l'on trouve dans les aveux de l'appelant lui-même, cette conclusion s'impose absolument.

Voici ce que l'appelant a admis au cours de son témoignage:

Le surplus au delà de $10,000.00, vous saviez que la Corporation avait fait un règlement pour le $10,000.00?

R. Avant, il y eut entente avant que le contrat soit signé que la Corporation devait payer $10,000.00.

Q. Et pas un sou de plus?

R. Oui, pas un sou de plus.

Q. Le reste vous vous chargiez de coopérer tous ensemble pour obtenir des octrois pour payer le surplus?

R. Oui Monsieur.

* * *

Q. Après la signature du contrat, pendant les travaux et après que les travaux ont été terminés, avez-vous mentionné au maire, au secrétaire, à monsieur Vigeant et à monsieur Gaumont que vous ne réclameriez pas un sou de plus que $10,000.00, montant prévu par un règlement de la Corporation?

R. Je l'ai dit au commencement des travaux.

Q. Avant le contrat ou après?

R. Après.

* * *

Q. Les travaux étant terminés, n'avez-vous pas déclaré devant monsieur Vigeant que vous étiez satisfait? Vous avez dit: "Je perds un peu d'argent, mais enfin c'est comme à la bourse. Je suis satisfait"?

R. Je ne me rappelle pas du tout.

Q. Et vous avez dit alors en présence de monsieur Vigeant: "Je ne réclamerai pas un sou de plus de la municipalité"?

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R. Oui, mais si je ne me rappelle pas d'avoir rencontré monsieur Vigeant?

* * *

Q. Je vous mets sur vos gardes, vous vous rappelez qu'il y avait plusieurs personnes là, — Je vous mets sur vos gardes. N'avez-vous pas déclaré cette fois-là que vous étiez satisfait des travaux, et que vous ne réclamiez pas un sou de plus de la Corporation?

R. Je l'ai dit dans certaines circonstances, je ne peux pas préciser si c'est après ou avant.

Q. Vous vous rappelez?

R. Oui, je ne m'en cache pas non plus. Vous me demandez des circonstances que je ne me rappelle pas. J'y ai été à toutes les semaines.

Q. C'est après la fin des travaux ça?

R. Je ne me rappelle pas. Je ne sais pas. Je sais que je l'ai dit avant la fin des travaux.

Q. Quand vous avez fait la dernière paie, vous avez dit: "Je ne demanderai pas un sou de plus à la corporation"?

R. Je ne peux pas jurer ça.

Q. Que vous avez fait cette déclaration — "On fait de l'argent et on en perd, c'est un peu comme à la bourse"?

R. C'est possible.

* * *

Q. Jurez-vous que dans aucune circonstance devant le maire, le secrétaire, les conseillers ou qui que ce soit vous n'avez pas dit dans le cours des travaux, alors qu'on vous représentait que ça paraissait coûter passablement cher, qu'en tout cas la municipalité ne paierait pas plus de $10,000.00 et que les suggestions qu'ils pouvaient faire, ça ne les regardait pas — d'une façon polie, — que c'était vous qui aviez le contrat, et que vous faisiez les décisions pour faire les travaux. Des paroles dans ce sens-là, que ça ne regardait pas les conseillers, le conseil?

R. Je ne peux pas voir à quel point de vue vous me demandez cette question.

Q. N'avez-vous pas déclaré?

R. Je l'ai déclaré tantôt que j'ai dit que ça ne coûterait pas plus de $10,000.00. Les travaux commençaient.

Q. Après?

R. Je ne me rappelle pas d'avoir déclaré ça après que les travaux ont été finis.

* * *

Q. N'avez-vous pas dit en présence de monsieur Boucher et monsieur Michel que c'était seulement dans le but d'avoir des octrois que vous faisiez faire des recherches à monsieur Houde, et non pas pour faire du trouble à la municipalité, parce que vous aviez fini avec la municipalité?

R. C'était pas dans ce but-là; c'était pour avoir des octrois et me faire payer la balance qui me revenait.

Q. Avez-vous dit cela?

R. Je l'ai dit le dimanche midi quand ils sont venus avec leur fameuse résolution.

* * *

Q. Vous avez demandé aussi que le Conseil passe des résolutions que vous demanderiez dans le but d'obtenir des octrois?

R. Oui monsieur.

Il n'y a donc eu, de la part de l'appelant, aucune méprise au sujet de la portée exacte, tant du point de vue des faits que du point de vue de la loi, des engagements pris par la Corporation intimée envers lui. A tout événement, en vertu de la *Loi concernant certains travaux dans la municipalité,* chap. 236 des statuts refondus de Québec, 1941, qui n'est elle-même que la reproduction du chapitre 112 des statuts refondus de 1925, tel qu'amendé par 18 Geo. V, ch. 40:

2. Nulle corporation municipale, quelle que soit la loi qui la régit, sauf les cités de Québec et de Montréal, ne peut ordonner de quelque manière que ce soit des travaux de construction ou d'amélioration ni passer un contrat à cet effet, à moins que le règlement qui autorise le contrat ou ordonne les travaux n'ait pourvu à l'appropriation des deniers nécessaires pour en payer le coût.

* * *

5. Les contrats passés contrairement aux dispositions de la présente loi sont nuls et ne lient pas la corporation et tout contribuable peut obtenir un bref d'injonction contre la corporation et l'entrepreneur pour empêcher l'exécution des travaux.

Cette loi générale s'appliquant à toutes les corporations municipales a remplacé, pour les corporations rurales comme l'intimée, l'article 627A du Code municipal, introduit en 1919.

Dans la cause de *Goulet* v. *Corporation du Village de Saint-Gervais* (1), monsieur le juge Tellier, parlant au nom de la majorité de la Cour, disait:

Sa raison d'être (de l'article 627A) se conçoit facilement. Elle a pour but de protéger le contribuable et la corporation elle-même contre les entreprises extravagantes ou inconsidérées. Le législateur a voulu que la corporation ne puisse se lier par contrat, ni engager la responsabilité du contribuable, sans avoir pourvu, de façon efficace, à ses voies et moyens. Si elle n'a pas à sa disposition les deniers requis et valablement affectés, pour ce qu'elle veut entreprendre, il lui faut, pour contracter validement, soit taxer les contribuables, soit emprunter. Qu'elle recoure à l'un ou à l'autre de ces deux moyens, les contribuables seront avertis. Une taxe ne s'impose pas, sans un règlement précédé et suivi d'un avis; et, pour emprunter, il faut, règle générale, un règlement approuvé par les contribuables.

Dans le cas qui se présentait dans l'affaire *Goulet,* (1) il n'était pas pourvu à un emprunt; et la taxe, bien qu'il fût prévu qu'elle serait imposée, ne l'avait pas encore été à la date du contrat attaqué.

(1) (1930) Q.R. 50 K.B. 513.

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L'honorable juge Tellier concluait donc (p. 521):

> Dans ces conditions, il me paraît clair que lesdits contrats étaient invalides et que, partant, le demandeur, qui est un des contribuables, avait droit à l'action en nullité qu'il a intentée. C'est ici que l'article 627*a* doit recevoir son application.

Comme on le sait, cet arrêt de la Cour du Banc du Roi fut porté devant cette Cour (1), où il fut infirmé, mais pour des raisons tout à fait étrangères à la question tranchée par la Cour du Banc du Roi. Le jugement de cette dernière cour constitue donc, jusqu'à maintenant, l'interprétation autorisée de la *Loi concernant certains travaux dans la municipalité,* (S.R.Q. 1941, c. 236).

Dans le cas actuel, ainsi que le constate la Cour du Banc du Roi, le règlement qui a autorisé le contrat avec l'appelant et qui a ordonné les travaux n'a pourvu à l'appropriation des deniers nécessaires que jusqu'à concurrence de la somme de $10,000.00. Aucune taxe spéciale n'a été imposée pour pourvoir à un montant excédant cette somme.

Il s'ensuit fatalement que toute convention avec l'appelant contraire aux dispositions de cette loi est nulle et ne lie pas la Corporation (*Mackay* v. *City of Toronto* (2); *Waterous Engine Works Co.* v. *Town of Palmerston* (3)).

Le demandeur ayant reçu la somme de $10,000.00 prévue par le règlement d'emprunt, il ne peut, en se basant sur son contrat ainsi limité par la loi, réclamer ou recevoir de l'intimée aucune somme supplémentaire; et la corporation intimée n'aurait pas, à tout événement, le droit et le pouvoir de la lui payer.

Nous avons vu d'ailleurs, par les admissions de l'appelant, que c'est ainsi qu'il a compris la situation. Cette loi comporte une prohibition absolue qui emporte nullité (art. 14 C.C.).

Dans les circonstances, il n'y a pas lieu même de se demander si le contrat passé avec l'appelant devrait être interprété comme un contrat à forfait ou comme un contrat à prix unitaires. La loi concernant certains travaux municipaux ne fait aucune distinction sous ce rapport.

Il n'y a pas lieu, non plus, d'envisager la question de savoir si l'appelant pourrait être autorisé à réclamer sur la

(1) [1931] S.C.R. 437. (2) [1920] A.C. 208.
(3) (1892) 21 Can. S.C.R. 556.

base d'un *quantum meruit*, car le contrat a été fait suivant des conditions déterminées et nécessairement limitées par la loi (*Rodovski* v. *California Associated Raisin Co.* (1)).

Enfin, même si l'appelant n'était pas lié par ses propres aveux, il ne saurait, non plus, se réclamer de la loi attribuant certains pouvoirs aux corporations municipales pour venir en aide aux chômeurs (Statuts de Québec, 25-26 Geo. V, c. 9).

Cette loi a été sanctionnée le 18 mai 1935. Elle autorise une contribution par la corporation municipale pour venir en aide aux chômeurs. Cette contribution peut se faire

> jusqu'à concurrence des montants qu'elle croit nécessaires, soit à même ses fonds généraux, soit au moyen d'emprunts qu'elle peut autoriser par règlement * * * sans autre formalité préliminaire ou subséquente que l'approbation de tel règlement par la majorité des membres de son conseil formant quorum, par la Commission municipale de Québec et par le Lieutenant-Gouverneur en conseil.

L'appelant nous a demandé de tenir compte du fait que le règlement d'emprunt dont il s'agit dans la présente cause réfère à la loi 25-26 Geo. V, c. 9.

Mais, même s'il fallait décider que cette loi a eu pour effet de soustraire les corporations municipales à l'application du chapitre 236 des statuts refondus de Québec 1941 (ou du chapitre 112 des statuts refondus de Québec 1925 — ce qui est la même chose), il n'en reste pas moins qu'en vertu du chapitre 9 de la loi 25-26 Geo. V, la contribution pour venir en aide aux chômeurs doit être faite par la corporation municipale, soit à même ses fonds généraux, soit au moyen d'emprunts qu'elle peut autoriser par règlements. Or, en l'espèce, le règlement adopté par la corporation intimée, le 24 septembre 1935, pour construire l'aqueduc et pour la protection de la municipalité contre l'incendie, a choisi d'autoriser un emprunt et a spécifié expressément que cet emprunt serait limité à la somme de $10,000.00. Cette somme a été payée à l'appelant. Il ne peut se réclamer du règlement pour exiger davantage, qu'on envisage la situation comme étant réglée par le chapitre 9 de la loi 25-26 Geo. V, ou par le chapitre 236 des statuts refondus de Québec, 1941.

(1) [1926]S.R.C. 292.

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Quant aux résolutions en date du 18 mai et du 20 juillet 1936, par lesquelles le conseil municipal de la corporation intimée aurait accepté le rapport de l'ingénieur qui a surveillé les travaux et où ce dernier approuvait une somme supérieure à celle du contrat et du règlement, il est évident qu'il ne saurait leur être donné effet.

Si un contrat pour des travaux municipaux est nul et ne lie pas la corporation lorsqu'il est fait contrairement à la loi contenue dans le chapitre 236 des statuts refondus de Québec 1941, il est clair que cette illégalité et cette nullité ne peuvent être couvertes par une simple résolution du conseil municipal prétendant accepter et approuver des travaux faits contrairement à cette loi. Les résolutions sont encore plus illégales, si possible, que le contrat lui-même.

D'ailleurs, les circonstances qui ont entouré l'adoption de ces résolutions sont expliquées par les aveux de l'appelant auxquels nous avons fait allusion au cours de ce jugement. Il n'est pas nécessaire de se demander si elles doivent être mises de côté par suite des représentations de l'appelant. La loi concernant certains travaux municipaux les rend illégales et nulles au même point et pour les mêmes raisons que le contrat lui-même.

Ces résolutions ne peuvent, non plus, valoir comme ratification du contrat — il est à peine besoin de le mentionner. L'on ne saurait admettre comme valide la ratification d'un contrat que la loi déclare absolument nul (*Mackay* vs. *City of Toronto.* (1))

Dans les circonstances, l'appel doit être rejeté avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *Edouard Houde.*

Solicitors for the respondent: *Panneton & Boisvert.*

(1) [1920] A.C. 208.

JOY OIL LIMITED (PLAINTIFF).....PLAINTIFF;

AND

McCOLL FRONTENAC OIL CO. LIMITED (DEFENDANT) ..... } RESPONDENT.

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*Nov. 23, 24.
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*Feb. 2.

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

Practice and procedure—Inscription in law—Action in damages resulting from series of offences and quasi-offences—Alleged conspiracy—Declaration containing 117 paragraphs—Inscription in law against all paragraphs but four, the latter being mere recitals—Conclusions not attacked—Offences and quasi-offences committed over two years before service of action—Prescription of damages—Some paragraphs containing libellous statements—Plaintiff alleging knowledge within a year before service of action—Such paragraphs not to be rejected on inscription-in-law—Delay of prescription under article 2262 (1) C.C. reckoning from day libel came to knowledge of party aggrieved—Conspiracy alleged to constitute continuous delict—Whether prescription runs from date of cessation of conspiracy—Damages prescribed from date of each of overt act constituting conspiracy—Libellous statements contained in legal proceedings—Whether prescription runs from date of service or from date of final judgment—Dismissal of action in toto, although conclusions not attacked—Joinder of causes of action—Articles 2232, 2261, 2262 (1), 2267 C.C.—Articles 87, 177 (6), 192 C.C.P.

The appellant company, owning and operating a number of stations for the sale of gasoline and oil in the province of Quebec, brought an action against the respondent company, a competitor in the same trade. The appellant, alleging the existence of a conspiracy, between the respondent and four other parties not before the Court, to prevent it from operating or to hinder its business, claimed damages resulting from a series of offences and quasi-offences alleged to have been committed by the respondent. The declaration, or statement of claim, contained 117 paragraphs. The respondent filed an inscription in law against all but the three opening paragraphs and the last one, the former being purely introductory recitals and the appellant merely stating in the latter its option for a jury trial. The offences and quasi-offences were alleged to have been committed in 1934, 1935, 1936 and 1937. The writ of summons was served upon the respondent on August 5th, 1940. More particularly, paragraphs 95 to 110 inclusive contained allegations of libellous statements made by the respondent against the appellant; and it was further alleged, as a fact (par. 116), that the appellant learned only in the month of December, 1939, that these statements were due to the acts and deeds of the respondent. The Superior Court maintained the inscription in law on the ground that the appellant's action was prescribed (art. 2261 C.C.) and the debt absolutely extinguished (art. 2267 C.C.), and, although not prayed for, dismissed the action *in toto*. This judgment was affirmed by the appellate court.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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Held that paragraphs 95 to 110 inclusive, part of paragraph 115 and paragraph 116 should not have been rejected by the courts below and that, otherwise, the judgment appealed from, as to the other paragraphs, should be affirmed. The appeal to this Court was allowed accordingly, with costs.

Held, also, that, the appellant alleging (par. 116) that, in fact, he acquired knowledge of his rights against the respondent (those stated in par. 95 to 110 inclusive) less than a year before he served his action upon the latter, the appellant's action as brought, and on the strength of that allegation, was well founded in law, as far as those paragraphs were concerned, by force of articles 2232 and 2262 (1) C.C., it should not have been dismissed on an inscription in law but should have been allowed to go to trial *pro tanto*. *Charpentier* v. *Craig* (Q.R. 22 K.B. 385) and *Beaubien* v. *Laframboise* (Q.R. 40 K.B. 196) foll.—There was clearly, in these paragraphs, allegations of libellous statements by the respondent, and the appellant learned only in December, 1939, that these statements were due to the acts and deeds of the respondent. On an inscription in law, all allegations of fact must be taken as proven. Therefore, as to the above paragraphs, the course of prescription was suspended, as, up to that date, it had been "absolutely impossible for" the appellant "in law or in fact" to bring its action against the respondent (art. 2232 C.C.) and such action was brought *en temps utile*, i.e. within one year from that date (art. 2262 (1) C.C.—Under this last article, an action for libel is prescribed by one year, reckoning not merely "from the day that it came to the knowledge of the party aggrieved", but from the day the party aggrieved acquires the knowledge of the identity of the person who has made the libellous statement; this is a question of fact which cannot be disposed of on an inscription in law. It is a well-known principle of the law of prescription, recognized by the Civil Code (art. 2232), that *contra non valentem agere non currit prescriptio*.

As to the appellant's ground of appeal that, its action being wholly based on a conspiracy between the respondent and other parties, it constituted therefore a continuous delict with the result that prescription would run only from the date of the cessation of the conspiracy,

Held, concurring with the opinion of the appellate court, that prescription is distinct and separate in respect of each of the overt acts alleged to have been committed by the respondent and that the damages suffered as a consequence of these overt acts are prescribed from the date on which each one of them has been committed.

As to another ground of appeal: some of the allegations in the declaration referred to certain actions, termed illegal and vexatious, brought before the courts against the appellant by different individuals at the alleged instigation of the respondent, and it was contended by the appellant that the period of prescription should not be computed from the date of the service of these actions, but from the date when they had been finally disposed of by judgment. Decisions relied on mainly in support of this ground of appeal were *Bury* v. *The Corriveau Silk Mills Co.* (M.L.R. 3 S.C. 218); *Lapierre* v. *Lessard* (Q.R. 38 K.B. 373) and *The mayor of the city of Montreal* v. *Hall* (12 Can. S.C.R. 74). The appellate court held that these cases did not apply because the appellant's action was not directed so much

towards the merits of the proceedings instituted by the individual parties, but towards the conspiracy of which these actions were alleged to have been overt acts.

Held that the appellant's declaration may be susceptible of such interpretation; but, in any event, the proceedings in question were not instituted by the respondent, and, for that reason, there is a doubt that the above decisions can find their application in an action in damages brought, not against those who instituted the proceedings, but against the respondent, which was not a party to those proceedings.

Paragraphs 1 to 3 and 117 of the declaration were not attacked by the inscription in law, nor were the conclusions thereof, and the respondent did not pray for the dismissal of the action. Nevertheless the Superior Court dismissed the action *in toto*, and that judgment was affirmed by the appellate court. The appellant contended that the court had no such authority, or that, at least, he should have had an opportunity of being heard on that point.

Held that, it being unnecessary to express any opinion on the merits of this point, it is doubtful whether the point could have been considered as a mere question of practice and procedure in which this Court should not have interfered; but that the present judgment, at all events, should not be taken as an approval of the course followed in the premises by the courts appealed from.

Quœre whether, in view of the declaration setting out several causes of action, this joinder of causes was permissible under art. 87 C.C.P. and whether such procedure should not have been inquired into by the Superior Court, had the respondent raised the point by dilatory exception under paragraph 177 (6) of that code.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Savard J., which had maintained a partial inscription in law made by the respondent and which also had dismissed *in toto* the appellant's action with costs.

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 G. Ahern K.C. for the appellant.

Hugh E. O'Donnell K.C. for the respondent.

The judgment of the Court was delivered by

RINFRET J.—The declaration which the appellant has annexed to its writ of summons against the respondent sets out, no doubt, several causes of action; and the question whether this joinder of causes was permissible under

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article 87 of the Code of Civil Procedure might have been inquired into by the Superior Court, if the respondent had raised the point by dilatory exception under paragraph 6 of article 177 of that Code.

However, the respondent elected to contest the action as it stood by means of a partial inscription in law and, so far at least as this appeal is concerned, that is the only issue at present before this Court.

The declaration contains 117 paragraphs and prays for judgment against the respondent, and other defendants not at the moment before us, for the sum of $49,932.15.

The respondent's partial inscription in law prayed that paragraphs 4 to 116 (enumerating them one by one, both in the body and in the conclusion of the inscription in law) be rejected with costs.

Thus, paragraphs 1 to 3 and 117 of the declaration were not attacked, nor were the conclusions thereof. That is to say: By its inscription in law, the defendant did not pray for the dismissal of the action, but merely for the rejection of certain enumerated paragraphs of the declaration.

Nevertheless, the Superior Court, by its judgment, dismissed the action *in toto*, and that judgment was confirmed by the Court of King's Bench.

The appellant, of course, complains that the courts below had no authority to dismiss the action completely, and that, upon the proceedings as they stood, the only power which the courts could exercise was to render a judgment in accordance with the conclusions of the partial inscription in law and, therefore, to limit their adjudication solely to the paragraphs demurred against.

It is to be noticed that article 192 of the Code of Civil Procedure prescribes that an inscription in law must " contain all the grounds relied upon" and that"no ground which is not therein alleged can be urged at the hearing". It would seem, therefore, that the action was dismissed without there having been, in the inscription in law, either allegations or conclusions to that effect, and without the appellant, at least in the Superior Court, having even had an opportunity of being heard on the point, which clearly was not raised by the pleadings then before that Court.

Under the circumstances, there is much to be said in favour of the appellant's complaint in that respect. Were

it not for the fact that, in the view I take of the case, the point becomes a matter of indifference, it is doubtful whether it could have been considered as a mere question of practice and procedure in which this Court should not have interfered.

The present judgment, at all events, should not be taken as an approval of the course followed in the premises by the courts appealed from.

The learned trial judge describes the appellant's action as constituting "toute une série de délits et de quasi-délits"; and, on the ground that they dated back to the years 1934, 1935, 1936 and 1937, while the writ of summons had been served upon the respondent only on August 5th, 1940, he declared that the action as against the respondent was prescribed by force of article 2261 of the Civil Code, that the debt was absolutely extinguished under article 2267 C.C. and that, accordingly, the action could not be maintained.

In the Court of King's Bench, Létourneau C.J., who delivered the main judgment with which the other members of the Court concurred, thought that the allegations of the declaration could be brought into six groups:

1. Plusieurs réunions tenues à Montréal pour décider de faire de l'opposition à l'appelante et organisation des moyens à prendre; ceci aurait été vers la fin de l'année 1934 (allégations 5 et 6).

2°. Demande d'un permis par la demanderesse pour poste de distribution rue Notre-Dame est; opposition suivie d'un refus des autorités municipales. Ce dernier résultat est en date du 1er février 1935. Un bref de mandamus aurait finalement eu raison de cette opposition illégale et vexatoire de la défenderesse, mais il en aurait coûté à la demanderesse une somme de $636.60. Ceci se serait passé avant le premier mai 1935 (allégations 7, 8, 9, 10, 11 et 12).

3°. La défenderesse aurait induit un nommé Edouard Forget, distributeur de Imperial Oil, à demander en justice et avec injonction, l'annulation du permis obtenu comme susdit, fournissant à cette fin tous les fonds requis. Cette demande aurait été finalement rejetée par jugement du 10 mai 1935, mais il en aurait coûté à la demanderesse pour se libérer de cette opposition illégale, une somme de $6,000.00 outre ses dommages (allégations 13, 14, 15, 16, 17, 18).

4°. Plus tard, vers juillet 1935, la demanderesse ayant pour la construction de divers postes de distribution, fait ses contrats avec Reinforced Concrete Builders Limited, la défenderesse aurait trouvé le moyen, par l'intermédiaire d'un nommé R. Benoît et du fils de celui-ci, de faire instituer contre la demanderesse sept poursuites en Cour Supérieure, toutes subséquemment rejetées, et de faire suivre cette première tentative, et toujours pour ennuyer la demanderesse et ruiner ses efforts, d'une pétition de faillite qui a été à son tour rejetée. Ceci se passait avant la fin de

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juillet 1935, selon que nous l'avons déjà signalé, et aurait occasionné à la demanderesse des frais d'avocats au montant de $6,000.00 et, en outre, des dommages au montant de $5,000.00 (allégations 19 à 29 inclusivement).

5°. Vers le 15 novembre 1935, la défenderesse aurait réussi à s'attacher un nommé Henri Joseph Bourbonnière que la demanderesse avait eu à son emploi du mois de décembre 1934 à venir au 28 octobre 1935 pour le choix et l'établissement de ses postes de distribution à Montréal, et elle l'aurait employé à précisément contrecarrer tous les plans de la demanderesse, à contester ses demandes de permis et à lui faire systématiquement échec partout où elle le pouvait. Ceci aurait réussi quant à un poste que la demanderesse a tenté d'établir en novembre 1935, coin avenue Atwater et rue Ste-Emélie. Ce dernier échec de la demanderesse aurait impliqué pour elle une perte de $15,000.00. Semblable procédé aurait été répété quant à un poste coin Sherbrooke et Amherst, faisant subir à la demanderesse un autre dommage, cette fois de $1,000.00. Ceci se serait également répété en août 1936 quant à un poste coin St-Hubert et St-Grégoire, et cette fois, on aurait eu recours à de fausses signatures. Ce dernier incident aurait donné lieu à des plaintes contre un nommé Martineau d'abord, puis contre Bourbonnière lui-même; tous deux auraient été condamnés, et à cette occasion John Pritchard, l'un des plus hauts officiers de la défenderesse, de même qu'un nommé Griffiths pour la Imperial Oil Limited, auraient assuré Bourbonnière "that they would not let him down in his criminal case" et de fait lui auraient fourni tous les fonds requis. Plus tard, on aurait chargé Bourbonnière de surveiller les requêtes que faisaient signer les représentants de la demanderesse pour l'établissement d'un poste coin Atwater et Albert, et effectivement l'employé de la défenderesse aurait à ce sujet procédé à des contre-requêtes. Ceci aurait conduit à l'arrestation pour *faux* de deux des employés de la demanderesse, presque aussitôt après acquittés, avec toutefois ce résultat que Bourbonnière aurait été, par suite de sa dénonciation, poursuivi et condamné à des dommages; un appel interjeté par lui aurait été rejeté le 15 septembre 1938. Et pendant que Bourbonnière purgeait à la prison une sentence pour *faux*, d'un mois, la défenderesse aurait versé à sa femme une allocation de $25 par semaine.

Le permis d'un poste coin Sherbrooke et Amherst qui avait été refusé à la demanderesse au mois d'août 1936, lui aurait été accordé le 7 janvier 1937, vu que dans l'intervalle, elle avait pu faire condamner pour *faux* le dénommé Martineau.

6°. En juillet 1936, les représentants de la défenderesse auraient induit Bourbonnière à susciter à la demanderesse des poursuites de la part d'un certain nombre d'employés qu'elle avait jugé bon de démettre de leurs fonctions. Ces actions ont toutes été rejetées, sans toutefois qu'il ait été possible à la demanderesse de recouvrer ses frais. Mais trois de ces actions, celle d'un nommé Channing Call, pour $78.16, celle de Joseph Trainor pour $11.50 et celle de Gérald Renaud pour $277.61, prises le 24 juillet 1937 n'auraient toutefois été renvoyées qu'en octobre 1939, soit moins de deux ans avant la poursuite en dommages que vise l'inscription en droit qui sert de base au présent appel.

Tout ceci aurait entraîné la demanderesse dans des frais et déboursés et à des dommages considérables, dont je ne crois pas nécessaire de relever les précisions, mais dont le total entre pour une large part dans la réclamation de la demanderesse-appelante.

Ce qu'il importe de retenir c'est que, sauf la décision même des trois dernières poursuites dont la demanderesse-appelante aurait eu à souffrir, tout remonte à plus de deux ans avant l'institution de sa présente action.

Nous en sommes ainsi arrivés à l'allégation 109 de la déclaration.

Notons encore que les allégations 110, 111, 112, 113 et 114, 115, 116 et 117 énoncent substantiellement:

110.—Qu'en suscitant ces poursuites, la défenderesse-intimée et ses co-défendeurs auraient agi illégalement et avec l'intention de nuire à la demanderesse et de lui causer des dommages.

111.—Que la défenderesse McColl Frontenac n'a cessé de participer et a dirigé elle-même la conspiration comme aussi toute la campagne contre la demanderesse dont parle la déclaration.

112.—Que le défendeur John Pritchard a lui-même été partie à tous ces actes et a lui-même dirigé la conspiration et cette campagne en sa qualité d'officier représentant de la défenderesse-intimée McColl Frontenac.

113.—Que la défenderesse Imperial Oil a aussi été partie, fournissant sa part des fonds requis.

114.—Que les défendeurs sont responsables pour les actes de Bourbonnière qui, dans les circonstances, agissait comme leur employé, sous leur contrôle et leur direction, et c'est dans l'exercice de ses fonctions même qu'il aurait exécuté les actes qui lui sont attribués.

115.—Que les sommes successives de $636.30, de $6,000.00, de $3,000.00, de $6,000.00, de $5,000.00, de $15,000.00, de $1,000.00, de $400.00, de $4,500.00, de $890.00, de $2,000.00, de $5,505.85 que représentent comme déboursés ou dommages les différents paragraphes de la déclaration, accusent un total de $49,932.15 pour lequel la demanderesse demande condamnation conjointe et solidaire contre les défendeurs.

116.—Que ce ne serait qu'en décembre 1939 que la demanderesse aurait appris que ses tracas et dommages en question étaient dus aux actes et manœuvres des défendeurs, bien qu'elle eut déjà soupçonné cette participation des dits défendeurs dès le moment où elle eut à en souffrir.

117.—Cette allégation se borne au choix par la demanderesse d'un procès par jury.

Jusqu'au bout, on s'est en la déclaration borné à parler d'intention de nuire, de mauvaise foi, de poursuites abusives, de conspiration enfin dont les "overt acts" ne seraient, dans le résumé que je viens de terminer, que bien succinctement rapportés.

In an elaborate judgment, the Chief Justice of the province of Quebec examines the grounds of appeal from the judgment of the Superior Court, which he sums up under four headings; the first being that the trial judge should not have dismissed the action *in toto,* in view of the fact that the respondent had filed only a partial inscription in law. This ground has already been mentioned at the beginning of this judgment and need not be again referred to.

The second ground of appeal examined in the judgment *a quo* is that some of the allegations referred to certain actions termed illegal and vexatious, and that the delay of prescription in respect of those allegations was not to be computed from the date of service of the actions, but from the date when they were finally disposed of by judgment.

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The third ground examined was that the action itself was wholly based on an alleged conspiracy between the respondent and the other defendants and that, therefore, it constituted a continuous delict, as a consequence of which prescription would have run only from the date of the cessation of the conspiracy.

The fourth ground of appeal examined was based on art. 2232 of the Civil Code, the appellant alleging that, up to the date of the service of the writ of summons, it had been absolutely impossible for it, in law or in fact, to bring the actions against the several defendants, and, in particular, against the respondent.

In the judgment appealed from, all these grounds were declared of no avail and the dismissal of the action by the learned trial judge was confirmed.

As to the third ground of appeal discussed by the Court of King's Bench, I find the disposition thereof made by that Court satisfactory; and I do not deem it necessary to deal with it.

In support of its second ground of appeal, the appellant relied mainly on three judgments upon cases instituted in the province of Quebec.

In the first one, rendered by Davidson J., in *Bury* v. *The Corriveau Silk Mills Company* (1), the opinion was expressed that

> prescription of any right of action which may arise out of a pleading does not run from its date, but from its disposal by the Court.

The second case was that of *Lapierre* v. *Lessard* (2). The holding of the Quebec Court of King's Bench was:

> La prescription d'une action en dommages à raison d'une poursuite malicieuse ne commence à courir que de la date du jugement final de cette poursuite.

The third case relied on was one which came before this Court (*The mayor of the city of Montreal* v. *Hall* (3)). It was held that the action was for a malicious prosecution by proceedings instituted in the courts maliciously and without any just cause, and prescription did not begin to run until termination of such proceedings.

Létourneau C.J. discussed these three cases and came to the conclusion that they did not apply, because the appellant's present action was not directed so much

(1) (1887) M.L.R. 3 S.C. 218.
(2) (1924) Q.R. 38 K.B. 373. (3) (1885) 12 Can. S.C.R. 74.

towards the merits of the proceedings instituted by Graham, Neil, Trainor and Renaud, but towards the conspiracy of which these actions were alleged to have been overt acts.

I would not say that the appellant's declaration is not susceptible of that interpretation. At all events, it should be pointed out that the proceedings in question were not instituted by the present respondent; and, for that reason, at least, I would doubt that the authorities referred to by the appellant can find their application in an action in damages brought not against those who instituted the proceedings, but against the respondent, which was not a party in those proceedings.

There remains, therefore, the fourth ground of appeal discussed in the judgment appealed from; and, in reviewing it, I find it necessary to point out that this ground ought really to be divided in two separate parts, one of which, I say it with due deference, is not mentioned in either of the judgments submitted to us.

This fourth ground of appeal was disposed of as a result of the conclusion reached by both courts that it did not come within the terms of article 2232 of the Civil Code. The possible bearing of article 2262-1 upon the question at issue was not considered.

In order to examine the appellant's declaration from the latter point of view, it is important to look more closely at some of the allegations of the declaration.

Beginning at allegation no. 95, the appellant states that, on July 24th, 1937, three actions were brought against it by three of its former employees.

Then comes the following paragraphs:

98. In the said three actions the declarations follow the same pattern and all contain the same false and slanderous allegations to the effect that the plaintiff in order to reduce its operating costs had illegally taken away from the managers and assistant managers of each of its eleven gasoline stations in Montreal part of the salary paid to them every two weeks and that the plaintiff was continually changing its managers and assistant managers and dismissing them without consideration for their services and their needs and without reason; that the plaintiff had dismissed at least seventy-five of its managers and assistant managers on the pretext that there were shortages in their sales; that the said managers and assistant managers had to agree to the holdback made by the plaintiff on their salaries under threats and that any ratification given by the said parties to the holdback in their salaries was obtained from them by threat, fraud and fraudulent representation.

99. The said three parties, Call, Trainor and Renaud, on whose behalf the actions were so taken, never made to defendants' attorneys

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the allegations mentioned in the foregoing paragraph, but said allegations were included in the proceedings on the instructions of defendants for the sole purpose of hurting and damaging plaintiff.

I pass over paragraphs 100 to 109, which I do not find material for the purpose of the present discussion.

But paragraph 110 is important:

110. In promoting the litigation mentioned in paragraphs 77 to 109 the defendants were acting illegally and with the intent and purpose of hurting the plaintiff and damaging it, and are responsible for the loss, expense and damages incurred and suffered by it, to wit:

A. Attorney's costs paid by plaintiff: $21.60, $176, $98.05 and $87.60, etc., $505.85.

B. Damages to plaintiff's reputation by false, trumped-up and slanderous statements contained in said proceedings, as alleged in paragraph 98, $5,000.

Total, $5,505.85.

Again, paragraphs 111 to 115 inclusive need not be reproduced here, as not being essential to the point now under examination; and we reach paragraph 116 which reads as follows:

116. Although at the time the damages claimed herein were suffered by the plaintiff it suspected that they were caused by the illegal acts of the defendants, it was only in the month of December, 1939, that it learned that the said damages were due to the acts and deeds of the defendants as alleged herein.

Whether or not the main cause of action against the respondent be conspiracy, it must not be forgotten that the present appeal comes on an inscription in law and that consequently all the facts alleged must, for the present, be held as true. Upon such a proceeding, no issue of fact can be raised; the decision must be arrived at strictly upon the question whether, the allegations of fact being taken for proven, they give rise to the right claimed.

Now, what is the cause of action alleged in the paragraphs just above quoted and irrespective of whether it was rightly or wrongly joined in the present action?

The cause of action is that in proceedings instituted by three former employees of the appellant, there was contained some "false and slanderous allegations against the appellant"; that the said allegations were included in the proceedings on the instructions of the respondent for the sole purpose of hurting and damaging the appellant; that when promoting the litigation mentioned the respondent was acting illegally and with the intent and purpose of hurting the plaintiff and damaging it and it is responsible for the damages incurred, which are so described:

110B. Damages to plaintiff's reputation by false, trumped-up and slanderous statements contained in said proceedings, as alleged in paragraph 98, $5,000.

And that (paragraph 116):

Although at the time the damages claimed herein were suffered by the plaintiff it suspected that they were caused by the illegal acts of the defendants, it was only in the month of December, 1939, that it learned that the said damages were due to the acts and deeds of the defendants as alleged herein.

Those are clearly allegations of libellous statements made by the respondent against the appellant, and it is alleged as a fact that the appellant learned only in the month of December, 1939, that the said statements were due to the acts and deeds of the respondent.

On the inscription in law, we are bound to take the allegations as they are made. It must be admitted as a fact that the appellant learned only in the month of December, 1939, that the libellous statements were, in fact, the acts and deeds of the respondent. It may be that, when the case comes to trial, the appellant will be unable to prove that it did not know or could not have found out, by proper investigation, that the respondent was really the author or the instigator of the statements complained of; but that is strictly a question of fact upon which the Court may not speculate on the issue raised by the inscription in law. The allegation is that the knowledge came to the appellant aggrieved only in the month of December, 1939; and by that allegation, for the present purposes, the Court is absolutely bound.

As a consequence, the allegation in question comes strictly under paragraph 1 of article 2262 of the Civil Code:

2262. The following actions are prescribed by one year:

1. For slander or libel reckoning from the day that it came to the knowledge of the party aggrieved.

As the writ of summons was served on the 5th of August, 1940, the action was allegedly brought "en temps utile" and that part of the declaration could not be rejected on an inscription in law.

The respondent argued before this Court that the three actions, in which the false and slanderous allegations are said to have been made, were served upon the appellant in the course of July, 1937, and that, therefore, the appel-

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lant must be taken to have had knowledge of the libels as of the date when the actions were served. It adds that the true meaning of article 2262-1 C.C. is that the action is prescribed by one year reckoning from the day that the libel itself comes to the knowledge of the aggrieved party, whether the latter knows or does not know who is the author or the instigator of the libel.

I cannot agree with that view of the law. It is a well-known principle of the law of prescription, recognized by the Civil Code of Quebec, that *contra non valentem agere non currit prescriptio.*

This maxim was not embodied in the French Civil Code and, for that reason, the Commentators on that Code may not safely be relied on, although some of them, and even the "Cour de Cassation" have, sometimes at least, treated the law of France as if the maxim had been recognized by it.

But it is not to be doubted that the maxim is reproduced in article 2238 of the Quebec Civil Code as having formed part of the old French law; the article is to the effect that

> prescription runs against all persons, unless they are included in some exception established by this code, or unless it is absolutely impossible for them in law or in fact to act by themselves or to be represented by others.

The last part of the article is not to be found in the French Civil Code. I omit, therefore, to refer to the doctrine or the jurisprudence of France on the subject, although some decisions of the "Cour de Cassation" might be mentioned admitting the doctrine, notwithstanding the fact that it has not been inserted in the Code.

Moreover, I think article 2232, C.C., for the purpose of our discussion, need be relied on only in help of the interpretation of article 2262-1, C.C. It is absolutely impossible in fact for an aggrieved party to bring an action against a person who has made a libellous statement, at least until the aggrieved party finds out who is responsible as author or instigator of the libel. And that illuminates the meaning of article 2262-1, C.C. That meaning must be that the year by which the action for libel is prescribed must be reckoned from the day when the party aggrieved acquires the knowledge of the identity of the person who

has made the libellous statement; and that is a question of fact which cannot be disposed of on an inscription in law.

As stated by Mr. Mignault, in vol. 9 of his "Droit Civil Canadien", at page 452, commenting on article 2232, C.C.:

> Du reste, l'impossibilité d'agir doit être absolue; mais elle peut exister en droit ou en fait. Comme je viens de le dire, je crois que notre code énonce tous les cas d'impossibilité d'agir en droit. L'impossibilité d'agir "en fait" échappe à toute définition.

I fail to see, therefore, how it can be decided, on an inscription in law, where the plaintiff alleges that he has acquired knowledge of the identity of the author or instigator of a libellous statement made against him only within the year, that his action is prescribed and should be dismissed on that ground. The question whether he has really acquired the knowledge only at the date alleged by him, even the further question whether, having suspicions, he did not make proper investigations to discover the author or instigator, are purely questions of fact which must be left to be gone into at the trial and which the courts are not allowed to dispose of as questions of law.

I find in an old commentator of the French law (to whom, indeed, the codifiers of the Quebec Civil Code have referred in their Report) the following excerpt, which seems to me in point:

> Il faut cependant remarquer que la prescription ne commence que du jour que le demandeur a eu connaissance de l'injure et qu'en ce cas il en est cru à son affirmation, à moins qu'on ne lui prouve le contraire, car enfin si je n'apprends qu'aujourd'hui que dans tel endroit, en mon absence, on a tenu des propos diffamants contre moi, il ne serait pas juste qu'on m'opposât un silence qui n'était fondé que sur l'ignorance où j'étais de ces mauvais propos. (2 Darreau, par Fournel, "Traité des injures" de 1785, p. 382.)

Naturally the ignorance by a plaintiff of the nature of his rights against a certain person, whom he knows and whom he has identified, is quite a different thing from the ignorance of the identity of the person herself. The mere knowledge of the existence of a libel, without knowing who is responsible for it, cannot be the knowledge referred to in article 2261-1 C.C. Until the aggrieved party knows the author, he is powerless to act.

It is absolutely impossible for him, in fact, to act by himself, or to be represented by others, within the meaning of article 2232 of the Civil Code.

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And, of course, one should not confuse the situation above mentioned with the other situation referred to in a case relied on by the respondent, in which it was held that, knowing the responsible party, a plaintiff is not warranted in invoking lack of knowledge within article 2262-1 C.C., just because he has not yet acquired sufficient evidence to warrant him in bringing his action against the known party.

The judgment of the Quebec Court of King's Bench in *Charpentier* v. *Craig* (1) seems to me a good illustration of the principles above mentioned. In that case, the headnote reads as follows:

> Le défaut de moyens de preuve d'un quasi-délit ne met pas la victime dans l'impossibilité absolue d'agir contre l'auteur, et son recours n'en est pas moins sujet à la prescription de deux ans.

In that case, Charpentier claimed from Craig certain damages on the ground that 996 cords of pulpwood had been destroyed by a fire set by the latter and his employees. The action was served only on the second day of January, 1911. The fire had taken place on the 28th September, 1908; and the Court of King's Bench found that the action was, therefore, prescribed by two years. Charpentier, however, claimed that he was within the proper delays, because it had been impossible for him before the month of October, 1910, "de se procurer les renseignements nécessaires pour intenter l'action." And the following passage, in the judgment rendered by Carroll J., for the Court, is interesting (p. 386):

> Dans l'espèce, cette impossibilité absolue en fait d'agir consiste en ce que les appelants n'auraient pu s'assurer du nom ou des noms de l'auteur du quasi-délit. Cette inscription en droit a été rejetée par la cour de première instance, dont le jugement a été confirmé par cette cour, mais je comprends que deux des juges étaient dissidents, et que le troisième a exprimé l'opinion que la preuve de l'allégation devait être faite avant de résoudre la question de droit. Le dispositif du jugement de cette cour est à l'effet que l'allégation en question est bien fondée en droit, et conséquemment il ne reste qu'à déterminer si, en fait, la preuve a établi l'impossibilité pour les demandeurs d'agir avant l'expiration des deux ans.

As will be seen by the above extract from the judgment, Charpentier, having alleged that he had been unable to obtain the necessary information to bring his action before the month of October, 1910, he was met, as here, by an inscription in law from the defendant; but that inscription in law was dismissed because the Court thought that the

(1) (1913) Q.R. 22 K.B. 385.

allegations in Charpentier's action held good in law and that the point whether he was unable to bring his action sooner was one of fact which should be left to be decided on its merits at the trial.

The judgment of the Quebec Court of King's Bench in *Beaubien* v. *Laframboise* (1) is also authority for the propositions already stated.

In that case, an action in damages resulting from an automobile accident had been brought against one Roméo Laframboise, who was then driving the automobile. Beaubien obtained a judgment for $5,000 against the driver, but he was unable to collect the amount against the latter. The automobile stood registered in the name of Roméo Laframboise; and only much later did Beaubien discover that, although so registered, the automobile really belonged to the father of Roméo. He then brought action against the latter, alleging the fact that he had only found out about the true ownership of the car within a short time before the action was served upon the father.

In the Superior Court, the action against the father was dismissed as unfounded in law, on the ground that it was prescribed, since the accident had happened more than two years before the action was served.

In the Court of King's Bench, the appeal was maintained and the record was sent back to the Superior Court, there to be proceeded upon " suivant que de droit ". Dorion J. delivered the judgment of the Court of King's Bench; and he holds that, as the father was jointly and severally responsible with his son, the action served upon the son interrupted the prescription against the father.

But the Court of King's Bench also allowed the appeal for the following reason:

> Quoiqu'il en soit de cette question, l'autre réponse donnée par l'appelant au moyen de la prescription, à savoir que la prescription était suspendue par l'impossibilité où il était d'agir contre l'intimé, me semble bonne.
>
> Dans l'ancien droit, la maxime *contra non valentem agere non currit prescriptio* était admise pour les cas d'impossibilité d'agir (Pothier, Prescriptions no. 23).
>
> Le Code Napoléon l'a rejetée, (Pandectes Françaises, prescription no. 1094). Notre Code l'a adoptée expressément dans l'article 2232. Nos codificateurs, dans leur rapport, disent qu'il s'agit d'impossibilité absolue; mais encore faut-il rester dans l'ordre des choses pratiques, et prendre le mot " impossibilité ", qui est sans équivoque, dans son sens ordinaire. Il était impossible à l'appelant de poursuivre puis qu'il lui était impossible

(1) (1925) Q.R. 40 K.B. 194.

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même d'en avoir l'idée; il ignorait l'existence de l'intimé, sa qualité de propriétaire de l'automobile, sa responsabilité; il ignorait son propre droit d'action, et cette ignorance était invincible.

Le plaidoyer de prescription est donc mal fondé.

To my mind, the situation in *Beaubien* v. *Laframboise* (1) is strikingly similar to the one alleged by the appellant in the present case; and I do not see why a similar decision should not be rendered, at least on the inscription in law.

In the *Beaubien* case (2), the plaintiff, of course, knew of the accident and indeed he had sued the driver. He discovered that the father of the driver was the true owner of the motor car only much later. He then brought action against the father, alleging his lack of knowledge as an excuse for which prescription would not apply against him. It was held that, upon this allegation, there was no legal ground for dismissing the action; and then, upon the allegations being proven whereby the claim was taken out of the rules of prescription, the action was maintained.

Whether there was impossibility to act is a question of fact in each case and cannot, therefore, be disposed of by means of an inscription in law (*Canadian National* v. *Trudel* (3); *City of Montreal* v. *Cantin* (4).

Here, the appellant alleges that, in fact, he acquired knowledge of his rights against the respondent less than a year before he served his action upon the latter; and, by force of articles 2232 and 2262-1 of the Civil Code, its action as brought, and on the strength of that allegation, is well founded in law. It should not have been dismissed on an inscription in law; but, as happened in *Charpentier* v. *Craig* (5) and in *Beaubien* v. *Laframboise* (1), it should have been allowed to go to trial.

I consider that for those reasons, at least in so far as the respondent was concerned, the allegations 95 to 110 inclusive, that part of allegation 115 as follows:

> The above mentioned sum of $5,505.85 (paragraph 110) * * * the plaintiff is entitled to have and recover from the defendant * * * who refuses to pay the same, although requested so to do.

and paragraph 116 should not have been rejected by the judgments appealed from.

(1) (1925) Q.R. 40 K.B. 194.
(2) (1926) Q.R. 42 K.B. 476.
(3) (1904) 35 Can. S.C.R. 223.
(4) (1913) Q.R. 22 K.B. 335.
(5) (1925) Q.R. 40 K.B. 194.

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As a consequence, paragraphs 1, 2, 3, and 117 and the conclusions (although for the reduced amount) of the declaration should also remain.

In my view, the appeal should be allowed accordingly, with costs here and in the Court of King's Bench; but the inscription in law was well founded with regard to the other paragraphs, and the respondent should, therefore, have its costs in the Superior Court.

Appeal allowed, with costs in this Court and the Court of King's Bench against the respondent and with costs in the Superior Court against the appellant.

Solicitors for the appellant: *Hyde, Ahern & Smith.*

Solicitors for the respondent: *Magee, Nicholson & O'Donnell.*

AMERICAN AUTOMOBILE INSURANCE CO. (DEFENDANT IN WARRANTY). APPELLANT;

AND

DAME ANNIE WALLACE DICKSON (PRINCIPAL DEFENDANT AND PLAINTIFF IN WARRANTY) ..... RESPONDENT;

AND

JAMES BUCHANAN WEIR (PRINCIPAL PLAINTIFF IN TWO ACTIONS),

AND

MARGARET C. BRUCE CAMERON (PRINCIPAL PLAINTIFF).

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*Nov. 13, 16, 17, 18, 19.

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*Feb. 23.

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

Motor vehicle—Negligence—Collision—Claims for damages to car and injury to passengers—Action in warranty by defendant against insurance company—Public liability insurance policy—Intoxication of driver—Excessive speed—Whether driver's acts amounting to criminal misconduct—Concurrent findings—Rule of public policy—Whether "intoxicated person" driving the car means owner of the car—Criminal negligence—Elements constituting it.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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An automobile, owned and driven by one Dickson while alone in the car, came into a head-on collision with another automobile belonging to one Weir and driven by one Cameron. The two drivers were killed and the occupants in the other automobile were seriously injured. As a result of the accident, three actions were instituted against the respondent, the mother and the universal residuary legatee of her son, Dickson, Weir claiming damages for his car and for bodily injuries and the widow of Cameron asking compensation for the death of her husband. The respondent, defendant, took three actions in warranty against the appellant insurance company under a public liability indemnity policy issued in favour of Dickson. The appellant denied its liability on the ground that, at the time of the collision, Dickson was driving his car in a state of intoxication and at a dangerous and illegal rate of speed, that such reckless conduct constituted an act of gross negligence as well as a crime and that, upon the rule of public policy, no indemnity can be recovered for the loss resulting therefrom. The trial judge maintained the three principal actions and the three corresponding actions in warranty; and the appellate court, dealing only with the latter, dismissed the appeals.

Held that the judgments appealed from should be affirmed. There were concurrent findings in the courts below that intoxication of the driver Dickson had not been proved, and that negligence and reckless driving on his part and excessive speed of his car have not been such that they would amount to criminal misconduct. That being so, there was no ground for the appellant company to invoke what was contended to be a rule of public policy, which under some circumstances might disentitle a plaintiff to recover on a policy of indemnity insurance.

Clause 5 of the policy stipulated that the insurance company would not be bound to indemnify the insured, if the accident occurs "while the automobile, with the knowledge and consent or connivance of the insured, is being driven * * * by an intoxicated person".

Held that the words "intoxicated person" do not mean the owner of the automobile: such clause applies and makes the policy void, when the "intoxicated person" is not the owner, but one who drives with the consent of the owner. *Home Insurance Co.* v. *Lindal and Beattie* ([1934] S.C.R. 33) foll.—Davis and Hudson JJ. expressing no opinion.

Held, also, that, in order to allow a court to see in the driver Dickson's acts the distinguishing marks of criminality, there should be proved a high degree of negligence and a "moral quality carried into the act" before it becomes culpable. *Rex* v. *Greisman* (46 C.C.C. 172, at 178) approved. Davis and Hudson JJ. expressing no opinion.

APPEALS from three similar judgments rendered by the Court of King's Bench, appeal side, province of Quebec, affirming three judgments of the Superior Court, Errol McDougall J., which judgments had maintained three actions in warranty and condemned the appellant company to pay to the plaintiffs the sum of $18,612.41, being the amounts of the condemnations upon the three principal actions.

L. E. Beaulieu K.C. and *Gérald Fauteux K.C.* for the appellant.

G. C. Papineau-Couture K.C. and *John Kerry K.C.* for the respondent.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

TASCHEREAU J.—This is an appeal (*in re* Cameron) from a judgment of the Court of King's Bench, affirming the judgment of the trial judge, Chief Justice Létourneau and Mr. Justice St-Germain dissenting. This last judgment had maintained an action in warranty and condemned the appellant to pay to the respondent the sum of $15,000, being the amount of the condemnation upon the principal action.

On the 23rd of July, 1937, on the Taschereau Boulevard, Parker Dickson was proceeding alone in his automobile from Laprairie towards Montreal. At a short distance from Montreal, his automobile came into a head-on collision with another automobile belonging to James Buchanan Weir, which was driven by Alexander Fraser Cameron. The two drivers, Parker Dickson and Cameron, were killed, and the other occupants in the other automobile were seriously injured.

As a result of this accident, three actions were instituted against Dickson's mother, Annie Dickson, who was the universal residuary legatee of her son. Weir claimed $1,037.86 for his car, and $6,778.68 for bodily injuries, and Mrs. Cameron, the wife of Alexander Fraser Cameron, claimed $50,000 for the death of her husband.

In May, 1937, the appellant, the American Automobile Insurance Company, had issued in favour of the late William Parker Dickson an insurance policy known as a combination automobile policy, where it undertook to indemnify the latter against loss or damages which the insured might become liable to pay for injury caused to any person, or destruction of property. Annie Dickson, therefore, took three actions in warranty praying that the insurance company, the appellant, be condemned to guarantee and indemnify her against any condemnation which might be rendered against her. The learned trial judge maintained the three principal actions and the three corresponding actions in warranty. The Court of

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King's Bench, which had to deal only with the appeals on the actions in warranty, dismissed the three appeals with costs, and the present appellant now appeals before this Court.

It is submitted on behalf of the appellant that, at the time of the collision, the late William Parker Dickson was driving his car in a state of intoxication and that the risk resulting from such a conduct was not covered by the terms of the policy. The appellant further submits that Dickson was driving his car at such a dangerous and illegal rate of speed and in such a reckless manner that his conduct constituted an act of gross negligence, manifestly unlawful, as well as a crime under the provisions of the Criminal Code of Canada, and that, on the ground of public policy, no indemnity could be recovered for the loss resulting therefrom.

An important feature of this case is that there has been no witness heard on the question as to how the accident happened, both drivers being killed and all the passengers in Weir's automobile being unable to remember anything that happened, having suffered, as a result of the shock, complete loss of memory. This coincidence of three persons, being similarly and simultaneously affected, was declared by the medical evidence as being unusual but not impossible. The last concrete fact prior to the accident which was revealed by the evidence was told by Bingham who was seated beside the driver of Weir's car. Shortly after they had crossed the Harbour Bridge and had turned right into Taschereau Boulevard, which is approximately six miles from where the accident occurred, Bingham observed that the speedometer of their car indicated a speed of fifty miles an hour. He believes that Cameron was driving to the right of the roadway and that the speed appeared to be the "cruising speed". There is no other direct evidence to indicate the speed of the automobiles, and nobody knows how the accident happened. It is by the damaged condition of the cars, their position on the highway, the pieces of shattered glass on the spot where they were found, the evidence of experts, that the learned trial judge made the following findings and came to the conclusion that there was contributory negligence:—

From observations made after the accident, in reconstruction of what must have occurred, it would seem that the Weir car, a Buick Sedan, had been driving slightly to the right of the centre line of the travelled roadway, and the Dickson car, a Plymouth, the lighter of the two, had been proceeding upon the highway to its left of the centre line thereof. Such fact is determined by measurements taken after the accident, showing that the left wheels of the Buick were six inches from the centre line, parallel to the side of the roadway. It is a fair assumption from the position in which the two cars were found and the physical evidence of damage to conclude that the impact had been practically head-on, which is entirely consistent with the curious phenomenon of both cars abruptly brought to a stop where they collided, without trace upon the roadway of tire marks indicating the slightest movement, forward or lateral. Given the weight of the Weir car (3,610 lbs.) plus the weight of passengers, as compared with that of Dickson's (3,145 lbs.), in which he was alone; that both cars stopped dead upon impact, and that the Weir car was travelling at 50 miles per hour, it is a simple problem in dynamics to conclude that the smaller and lighter of the two cars (Dickson's) must have been travelling at a considerably higher speed than the heavier vehicle.

So, on a clear moonlight night, upon a roadway thirty feet and more in width, these two automobiles came into head-on collision. It is obvious that such an occurrence could not take place without negligence. Upon whom is the responsibility to rest? Clearly, Dickson cannot escape. He was driving at an excessive and illegal rate of speed under the circumstances, and in disregard of the cardinal rule of safe driving that a driver must keep to the right of the roadway. His car was found to have been proceeding beyond the centre line of the roadway, i.e. to the left thereof. But Dickson's negligence does not necessarily absolve the driver of Weir's automobile from blame. He too was driving at high speed, true, to his own side of the centre line, but well in the centre. Coming up the slope to the crest of the overpass, it was negligent and careless for him to proceed in that position and at such speed when he could not see the approaching car upon the opposite side of such slope. He must be held to have contributed to the accident by his negligence. The Court is then called upon to assess the degree of responsibility attributable to each driver proportionate to the negligence of each (*Nichols Chemical Company of Canada* v. *Lefebvre* (1), and, after careful consideration of all the elements involved, determine this proportion at seventy-five per cent (75%) for Dickson and at twenty-five per cent (25%) for Weir. As to the latter, it is shown that Cameron, in charge of Weir's automobile, was driving with the consent of the latter, who must be held to answer for the acts of his préposé.

Under the terms of the policy, the appellant agreed to indemnify the insured

against all loss or damage which the insured shall become legally liable to pay for bodily injury (including death resulting therefrom) caused to any person or persons, by the ownership, maintenance or use of the automobile.

By the judgment of the trial judge, Dickson's estate became "legally liable to pay" and as there has been no appeal on the principal action, it is not open to us to

(1) (1909) 42 Can. S.C.R. 402.

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reconsider this matter. But, the appellant submits that, under the terms of clause 5 of the policy, it is not bound to indemnify the insured, if the accident occurs:—

> while the automobile, with the knowledge, consent, or connivance of the insured, is being driven by a person under the age limit fixed by law, or in any event under the age of 16 years, or by an intoxicated person.

In view of the conclusion which I have reached, it would seem unnecessary to determine whether this section has any application, but I wish nevertheless to add, that I do not think that the words "intoxicated person" mean the owner of the automobile. This section applies and makes the policy void, when the "intoxicated person" is not the owner, but one who drives with the consent of the owner. We are bound, I think, by the decision of this Court, in *Home Insurance Company* v. *Lindal and Beattie* (1), where Mr. Justice Lamont speaking for the majority of the Court said:

> The exclusion from liability, under statutory condition 5, is only "while the automobile, with the knowledge, consent or connivance of the insured, is being driven by * * * an intoxicated person". This is not apt language to describe an act by the insured himself. It is, however, just the language one would expect to be used if the intention was to exclude liability where the automobile was being driven by a third person with the permission of the insured. Apart from the inaptness of the language there is, we think, another difficulty. To exclude liability, the automobile, when driven by an intoxicated person, must be driven with the knowledge of the insured. If statutory condition 5 is construed so as to include the insured himself, we should have this remarkable result: that, if the insured were so intoxicated as not to know what he was doing, the condition would not apply owing to the insured's want of knowledge; while, if he were but slightly intoxicated, he would know that he was driving and the condition would be applicable. In our opinion condition 5 is not to be construed as applicable to the insured.

But, the appellant says alternatively that even if the clause does not apply, the policy is still void on the ground of public policy: the intoxication of the insured, while operating his car, and his reckless driving on the highway in violation of the Criminal Code, being a bar to all claims against the appellant. I do not think that this Court can interfere with the findings made on the question of intoxication by the courts below. After carefully reviewing all the evidence, the learned trial judge who saw and heard the witnesses, and who had to deal with a question of credibility, came to the conclusion that:

(1) [1934] S.C.R. 33, at 36.

To reach a finding that Dickson was, in fact, intoxicated, and had become so affected in his mental, physical and nervous process that he lacked to an appreciable degree the ability to function properly in relation to the operation of his automobile, the Court would require more convincing proof.

In the Court of King's Bench, Mr. Justice Bond said:

The burden of proof has not been discharged by the appellant in the opinion of the trial judge and a careful review of the evidence leads me to the same conclusion.

Mr. Justice Barclay also said:

I have carefully considered all the evidence as to the intoxication and I find nothing to justify any interference by this Court with the learned trial judge's decision on this point.

And Mr. Justice Salvas sitting *ad hoc* expressed his views as follows:

Après avoir étudié attentivement toute cette preuve, je ne puis arriver à la conclusion que la Cour Supérieure a erré en rejetant, comme non prouvé, le premier moyen de l'appelante qui, encore une fois, ne soulève qu'une pure question de fait.

Although I have been impressed by the able arguments of counsel for the appellant, I feel it impossible to hold that intoxication was sufficiently proven, without violating the well-known rule established before this Court by a long series of judicial pronouncement, and which is that "concurrent findings" should not be disturbed, unless they cannot be supported by the evidence.

Did the insured commit any other criminal offence that would void the insurance contract, on the ground of public policy? It has not been suggested that Dickson if living could be prosecuted for manslaughter; but it is submitted that he had the care of a thing susceptible of endangering human life, that he did not fulfil his legal duty to take reasonable precautions to avoid such danger, that by doing negligently or omitting to do any act which it was his duty to do, he caused grievous bodily injury to other persons, and that on a highway, he was driving recklessly. These three offences are embodied in sections 247, 284 and 285 of the Criminal Code.

I cannot agree with these contentions.

In my opinion, the evidence fails to reveal any characteristics of criminality in the conduct of Dickson. It is only by a process of reconstruction that the learned trial judge reached his conclusions. The evidence, although

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on the border line between conjectures and inferences drawn from proven facts, was sufficient for him to say that there was civil liability; but in my judgment, these findings are far from sufficient to lead me to the conclusion that there has been a criminal act.

We do not know what really happened, and what is the extent of Dickson's negligence, if any. Was his conduct such that it amounted to a complete disregard for the safety of others? Was he driving furiously, having regard to all the circumstances? I do not think that these questions are satisfactorily answered.

In order to allow a court to see in Dickson's acts the distinguishing marks of criminality, there should be proved a high degree of negligence, and a "moral quality carried into the act" before it becomes culpable. (*Rex.* v. *Greisman* (1).)

In this case the burden was upon the appellant. If I did come to the conclusion that the necessary ingredients of a crime are to be found in the evidence, I feel that I would rest my judgment on mere speculation and hypothesis.

This appeal, and the two others argued at the same hearing, should be dismissed with costs.

The judgment of Davis and Hudson JJ. was delivered by

DAVIS J.—The appellant company seeks to avoid payment under a public liability indemnity policy. Two motor cars met in a head-on collision at two or three o'clock in the morning on a paved highway leading out of Montreal. In one car was Dickson, alone. He was owner and driver. In the other car was Weir, who was driving, with three passengers in his car. It was a very bad accident; both the drivers were killed; none of the passengers had any recollection of the accident, all having been injured; and there were no other eye-witnesses. These suits were brought on the Dickson policy and the insurance company put its defence on three grounds:

(1) That Dickson was an intoxicated person at the time of the accident and that therefore,

(*a*) because of a special provision in the policy the company is not liable; and

(1) (1926) 46 C.C.C. 172, at 178.

(*b*) alternatively, that public policy would in any event lead the Court under the circumstances not to assist the plaintiff in recovering.

(2) That assuming intoxication is not proved, the excessive speed at which Dickson's car was being driven was wanton recklessness and manifest wrong-doing, and public policy is again relied on.

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Errol McDougall J. tried the cases; he came to the conclusion that there was not sufficient evidence to justify him in finding that Dickson was in a state of intoxication at the time of the accident. The only evidence of intoxication was the amount of liquor Dickson had taken that evening and the results of blood tests made from the body of the dead man a few hours after his death. On this branch of the cases, three of the five judges of the Court of King's Bench agreed with Mr. Justice McDougall that intoxication had not been proved.

On the question of speed the trial judge found there must have been excessive speed but that it was not such a wrong-doing as would invoke the rule of public policy. Here again the majority of the Court of King's Bench agreed with this conclusion. The actions stand dismissed. The insurance company appeals to this Court.

Notwithstanding the able and exhaustive argument addressed to us by Mr. Beaulieu, I do not think that the question of public policy so much stressed by him really arises on the evidence in the case. As might well be expected under the circumstances, if the evidence at the trial ever got beyond the region of conjecture in the efforts of the parties to determine the fault that caused the unfortunate collision, there was no proof of what might be called, for want of a better term, criminal misconduct on the part of Dickson as the cause of, or as a contributing cause to, the collision. That being so, there is no ground for invoking what was contended to be a rule of public policy which under some circumstances might disentitle a plaintiff to recover on a policy of indemnity insurance.

I should dismiss the appeals with costs.

Appeals dismissed with costs.

Solicitors for the appellant: *L. E. Beaulieu* and *Gérald Fauteux.*

Solicitors for the respondent: *Campbell, Weldon, Kerry* and *Bruneau.*

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CANADIAN NATIONAL RAILWAYS (DEFENDANT) ..... APPELLANT;

AND

ARTHUR GUÉRARD (PLAINTIFF) ..... RESPONDENT.

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

Railway—Bridge over highway—Height of—Injury to person—Standard of maintenance—Whether statutory height to be maintained as structure originally constructed, or maintained continually at such height—Bridge and land owned by railway company—Level of highway raised by works of third parties—Knowledge of railway company of possible danger and previous accident—Whether railway company had means to cope with situation—Government Railways Act, R.S.C., 1927, c. 173, s. 19.

The respondent brought an action for damages against the railway company appellant, arising out of the death of his son, whose head was struck by a beam of a railway bridge over a highway. The bridge at the point of contact was only 10 feet 4 inches above the highway, and it was contended that it should have been maintained at all times by the appellant company with a clearance of at least 12 feet. The railway company pleaded that the bridge had been constructed originally with a clearance in excess of the 12 feet required by statute, but that in subsequent years improvements made from time to time by the municipal corporation and by the provincial highway authorities resulted in raising the level of the travelled road to such an extent as to diminish the original clearance. The statutory provision under which the railway bridge had been built in 1912 was the same as the one now contained in section 19 of the *Government Railways Act,* R.S.C., 1927, c. 173, where it is provided that "the span of the arch of any bridge * * * shall be constructed and continually maintained at * * * a height * * * of not less than twelve feet * * *".

Held, Rinfret and Taschereau JJ. dissenting, that the section must be construed as compelling the railway company to maintain the structure as it was when originally constructed, provided it was constructed within the statutory requirements, and that the railway company was not required under the statutory provision to raise the bridges on their line, and with them necessarily the whole grade of the line in the neighbourhood, whenever a municipality or a provincial government should think proper to raise the surface of the highways passing under them. *Carson* v. *Village of Westen* ([1901] 1 Ont. L.R. 15) approved and applied.

Per Rinfret and Taschereau JJ. (dissenting).—Under section 19 of the *Government Railways Act,* R.S.C., 1927, c. 173, it was the duty of the appellant railway company to build the subway with a clearance of at least twelve feet; but, in this case, the railway company, being the owner of both the subway and the land over which it was built,

(1) [1901] 1 Ont. L.R. 15.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

where the public had access and to which it was invited, had the further duty to maintain this clearance continually, and, having failed to do so, must be held liable. Moreover, the argument of the appellant that the lowering of the clearance was not the result of its own acts, but of the acts of third parties, the provincial and municipal authorities, cannot be upheld: the acts of third parties may constitute an answer to a claim in damages only if it be shown that they cannot be imputed to the defendant and could not have been foreseen or prevented by him. Upon the evidence, the appellant railway not only contributed to the raising of the road, but knew it had been raised by the provincial and municipal authorities; it was aware of the danger and had been warned by the fact that another accident had happened previously at the same place and was also aware through representations made by public bodies and a petition before the Board of Transport. Moreover, the appellant railway company had at its disposal the appropriate means to cope with the situation, by applying to the courts for an injunction to prevent, on its own property, the performance of these works by third parties or by summoning the latter, if the work had been done without its knowledge and consent, to restore the premises to their original state.

Judgment of the Court of King's Bench (Q.R. [1942] K.B. 345) reversed, Rinfret and Taschereau JJ. dissenting.

APPEAL, by leave of this Court, from a judgment of the Court of King's Bench, appeal side, province of Quebec (1), which affirmed the judgment of the Superior Court, Boulanger J., in so far as it maintained the respondent's action for damages against the appellant railway company.

C. V. Darveau K.C. and *I. C. Rand K.C.* for the appellant.

S. Germain and *G. Roberge* for the respondent.

The judgment of Rinfret and Taschereau JJ. (dissenting) was delivered by

TASCHEREAU J.—This is an appeal by the Canadian National Railways, which have been condemned to pay to the plaintiff-respondent the sum of $1,212.70.

During the night of November 10th, 1938, the respondent's son, who was driving in a truck, was accidentally killed while passing through a subway at Charny, his head striking a beam about 10·4 feet above the highway. The boy, who had helped to load the truck in Quebec city, the property of one Marius Miller, took a place on the top of the load, and it is while proceeding to Sherbrooke that

(1) Q.R. [1942] K.B. 345.

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this unfortunate accident happened. He suffered a fracture of the skull from the effects of which he died shortly afterwards.

The father of the victim took action against Miller, the owner and operator of the truck, against the municipality of Charny where the subway is located, against the Government of the province of Quebec, and also against the appellant, the tracks of which pass over the subway.

Mr. Justice Boulanger of the Superior Court in Quebec dismissed the action as to Miller, but condemned the municipality of Charny, the Government of the province of Quebec, and the present appellant to pay to the plaintiff jointly and severally the sum of $1,212.70. For a reason which does not appear in the record, the respondent desisted from his judgment against the Government of the province of Quebec; the Court of King's Bench allowed the appeal of the municipality of Charny and dismissed the action. There remains before this Court only the present appellant, the appeal of which was dismissed in the court below, Chief Justice Létourneau and Mr. Justice Bernier dissenting, and to which special leave to appeal to the Supreme Court of Canada was granted.

It is submitted on behalf of the respondent that the appellant has violated section 19 of the *Act Respecting Government Railways*, chapter 173, Revised Statutes of Canada, which reads as follows:

> 19. The span of the arch of any bridge erected for carrying the railway over or across any highway, shall be constructed and continually maintained at an open and clear breadth and space, under such arch, of not less than twenty feet, and of a height from the surface of such highway to the centre of such arch of not less than twelve feet.

The contention is that under the provisions of this section there must be a clearance of not less than 12 feet between the surface of the highway and the span of the arch, and that the law creates an obligation upon the appellant to maintain it continually.

The appellant submits that such an obligation does not exist, and that, at all events, if the insufficiency of the clearance is the cause of the accident, the parties responsible are the other defendants, namely, the municipality of Charny and the province of Quebec which elevated the surface of the highway and reduced to 10·4 feet the clearance which under the provisions of the Act should be of at least 12 feet.

This subway was constructed in 1912 by the Intercolonial Railway which was owned by the Dominion Government. At the time of its construction it had a clearance of 13 feet, and the road over which it was built, and which was the property of the Railway, was not a very important commercial artery. It was a dirt road, and used mostly by pedestrians and horse-drawn vehicles. Pierre Fontaine, the mayor of Charny at that time, testifies that it was "un chemin de campagne", and another witness states that it was used also between Breakeyville and Charny "pour la malle". But although it was in a primitive state, it was nevertheless, I think, a "highway" within the meaning of the Act, for it was a public way of communication. The word "highway" in the *Railways Act* is defined as follows:

> Subsection (11) section 2: "highway" includes any public road, street, lane or other public way or communication.

And under the Government *Railways Act*, section 2, subsection (*g*), the word "highway" has the same meaning.

It seems that the word "lane" found in the definitions above cited is the appropriate word to describe this road. The words "lane or other public way or communication" do not necessarily mean that the road must be owned by the municipality, but they mean that the road must be one where the public may circulate freely, as it did in the present case. (*Vide Canadian Pacific Railway Co.* v. *City of Toronto* and *Grand Trunk Railway Co.* (1).)

It follows that "the span of the arch of the bridge erected for carrying the railway" was over a highway, and therefore the provisions of the law find their application.

Since 1912, three defendants in the action, one of which was the appellant, have at different times repaired this lane, thus inviting the people to use it "as a public communication"; and approximately at the time of the construction of the subway, the Canadian National Railways placed cinders and ashes on its surface to facilitate circulation. In 1914, the municipality of Charny macadamized it, and at a later date the Government of the province of Quebec added a layer of gravel and asphalt, and also undertook in 1924 to keep the road in a good state of repairs.

(1) [1911] A.C. 461, at 477.

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The appellant built a sidewalk for the use of pedestrians, installed electric lights and saw to the removal of snow during the winter months. All these repairs and additions to the surface of the road brought about the result that in 1938, date of the accident, the clearance between the surface of the road and the arch of the subway, was reduced from 13 to 10·4 feet which is nearly 3 feet, and it is undoubted, as found by the trial judge, that this reduction in height is one of the determining causes of the accident.

As already pointed out, the subway was built in 1912 by the Dominion Government which at that time owned and operated the Intercolonial Railway. In virtue of section 19 of chapter 172, Revised Statutes of Canada, 1927, *Canadian National Railways Act,* the Governor-in-Council passed an order entrusting to the Canadian National Railways the management and operation of the Intercolonial Railway. There is no doubt that section 19 of the *Act Respecting Government Railways* and providing for a clearance of 12 feet applied, because the *Railway Act* found its application to Government-owned railways only respecting operations. It was, therefore, the duty of the Railway to build the subway with a clearance of at lease 12 feet. This duty was fulfilled, but, the Railway being the owner of the subway and of the land beneath, where the public had access, had the duty to maintain this clearance continually.

Since 1928, 18-19 Geo. V, ch. 13, the provisions of the *Railway Act* apply not only for the operation of the railway, but also for its construction and maintenance, and it is the submission of the appellant that the matter of highway clearance is covered by section 263 and 264 of the *Railway Act,* which are as follows:

263. Unless otherwise directed or permitted by the Board, the highway at any overhead railway crossing shall not at any time be narrowed by means of any abutment or structure to a width less than twenty feet, nor shall the clear headway above the surface of the highway at the central part of any overhead structure, constructed after the first day of February, one thousand nine hundred and four, be less than fourteen feet.

264. Every structure by which any railway is carried over or under any highway or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure.

The effect of these sections would be to place within the sole jurisdiction of the Board of Transport all questions arising in respect of the protection, safety and convenience of the public. In its factum, the appellant points out that the matter has been brought before the Board of Transport, and that an order was made and complied with.

It is true that some time previous to the accident, an application was made to the Board, but, an examination of the proceedings before the Commissioners reveals that the decision arrived at does not have the bearing upon this case, that the appellant has invited us to give it. It was as the result of a resolution passed by the Chamber of Commerce of the district of Lévis, which asked that the subway be totally *reconstructed,* that the matter came before the Board; the conclusion of the resolution is as follows:

> That the Dominion Railway Board and the Canadian National Railways be requested to take immediate action to correct the error made in 1911, and *reconstruct the said subway* in order to give the proper width of road and sidewalk, which is standard throughout the province, thereby removing an existing hazard which may be responsible at any moment of causing death and injury to the citizens of Canada, and, at the same time, eliminating a serious bottle-neck to traffic.

As it will be seen, it was the reconstruction of the subway which was asked for by the Chamber of Commerce of Lévis, and obviously during the hearing the attention of the Commissioners was drawn to the fact that some oil was leaking from the subway, for we have been told at the hearing that the only order made by the Commission was that that part of the subway through which oil was leaking should be repaired; but, the question of reconstruction was kept in abeyance as it appears in the order itself:

> Que d'ici à ce que l'on dispose finalement de la requête pour la reconstruction de ladite structure, les Chemins de Fer Nationaux du Canada soient et ils sont par la présente requis de faire dans les trente jours de la date de la présente ordonnance, toutes les réparations nécessaires au toit du tunnel sur la route No. 1 entre Charny et Breakeyville, province de Québec, au mille 6·9 de la subdivision de Drummondville.

The question of reconstruction was never considered again, and the appellant complied with the order of the Commission and made the repairs which were ordered. The Canadian National Railways were not authorized to lower the clearance of the subway under section 263 of the *Railway Act,* and they never obtained such a permission,

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for the reason that they never asked for it. It might have been a good defence for the appellant, if it could have shewn that an order of the Board had been made authorizing a reduction in the statutory height of the arch, but I do not think that it is a valid defence to invoke an order of the same board, which does not deal with the question. As the matter stands, now, it is true that the reconstruction has not been ordered, but no authorization has been given to lower the clearance.

Another ground on which the appellant rests its case is that the lowering of the clearance between the surface of the highway and the arch of the subway was not the result of its own act, but of acts of third parties, namely, of the municipality of Charny, and of the Quebec Government. The subway was built by the Dominion Government, which owned the Intercolonial Railway, and by the operation of the law, the Canadian National Railways are entrusted with its care.

The appellant, with relation to the Intercolonial Railway, is answerable only for the liabilities to which the Crown would have been subject, if the railway's management and operation had not been transferred. *Canadian National Railways Company* v. *St. John Motor Line Limited* (1).

It is quite true, indeed, that, in many cases, the acts of third parties may constitute an answer to a claim in damages; but it must be shown that they cannot be imputed to the defendant, and could not have been foreseen or prevented by him.

Here we have to deal with very different conditions. The appellant not only contributed to the raising of the road, but knew that it had been raised by the municipality of Charny and by the Department of Highways of the province of Quebec many years before the accident. It was aware of the danger and of the possibility of the happening of an accident such as the one which caused the death of the defendant's son. It had been warned by the fact that another accident had happened previously at the same place, and also by the representations made by public bodies and by the petition of the Chamber of Commerce of Lévis before the Board of Transport. The answer of the appellant was that the costs to repair or

(1) [1930] S.C.R. 482.

rebuild would have been too high. We are not, I think, confronted with a case where the appellant may invoke this theory " de l'acte d'un tiers " to escape liability quoad the victim.

The appellant had at its disposal the appropriate means to cope with the situation, and it could have applied to the courts to obtain an injunction in order to prevent, on its own property, the performance of this work which offered a danger for the security of the public, and which the law forbade in unequivocal terms. It could also after the raising of the level of the road, have summoned these third parties, if the work (for instance) had been done without its knowledge and consent, to restore the premises to their original state. And in the event of a refusal, the appellant would have been entitled to have the work done at the expense of the municipality or of the highways department. It was its duty to see that the clearance was " continually maintained " at the height provided by statute, and having failed to do so, it must, as the trial judge and the Court of King's Bench have so found, be held liable.

As already pointed out, the appellant at the time of the accident was the owner of both the subway and the land over which it was built. It is on account of these special circumstances that I am of the opinion that the appellant is liable. In view of the conclusion which I have reached, it is unnecessary to determine whether the appellant would still be liable if the municipality or the provincial Government had been owner of the land under the subway, and on this point I reserve my decision.

In the appellant's petition praying for special leave to appeal before this court, it was stated that the provincial or municipal authorities had jurisdiction over the highway and it is under that assumption that leave was granted. But the evidence is that such are not the facts, and that the road is the appellant's property. It would, therefore, be useless to discuss a hypothetical case which would be of no help in determining this appeal.

I would dismiss the appeal with costs.

DAVIS J.—This action arose out of the death of the respondent's son, a boy of sixteen years of age, whose head was struck by a beam of a railway bridge over a highway.

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Davis J.

The boy was sitting on the top of some furniture that was being transported on a motor truck along the highway. The railway bridge at the point of contact was only about 10 feet 4 inches above the highway. From the effect of the injuries the boy died shortly afterwards. It is contended that the clearance should have been at least 12 feet.

The highway taken by the truck led through the subway at the village of Charny, a short distance west of Lévis, Que., under the tracks of the Canadian Government Railways. Action was brought against the owner and operator of the truck, the village of Charny within which the subway lies, the province of Quebec represented by the Attorney-General, and against the appellant railway. We are only concerned in this appeal with the judgment which has been awarded the father against the railway. What is said against the railway is that the bridge should have been maintained at all times by the railway company with a clearance of at least 12 feet, and the fact that the actual clearance at the time of the accident was only 10 feet 4 inches was the cause of the accident. The railway company's answer is, the bridge had been constructed originally with a clearance in excess of the 12 feet required by statute but that in subsequent years, owing to the increased highway traffic needs, what had been originally a dirt road had become an improved highway by improvements made from time to time by the village and by the province which had resulted in raising the level of the travelled road to such an extent as to diminish the original clearance.

The statutory provision under which the railway bridge had been built in 1912 by the Dominion Government in the course of its administration of the Government Railway then known as the Intercolonial is that now contained in section 19 of the *Government Railways Act*, R.S.C. 1927, ch. 173. The provision is as follows:

> 19. The span of the arch of any bridge erected for carrying the railway over or across any highway, shall be constructed and continually maintained at an open and clear breadth and space, under such arch, of not less than twenty feet, and of a height from the surface of such highway to the centre of such arch of not less than twelve feet; and the descent under any such bridge shall not exceed one foot in twenty feet.

Counsel for the respondent seeking to maintain the judgment against the railway naturally stresses the words

in the provision "shall be constructed and continually maintained," asserting that on a proper construction the obligation of the railway company is to maintain at all times a clearance of 12 feet.

I should have found much more difficulty in coming to a conclusion in the appeal had I not come across, since the argument, the case in the House of Lords of *Attorney-General* v. *Great Northern Railway Company* (1). That appeal had reference to the maintenance and repair of a bridge by means of which a highway was carried over a railway, and the appeal raised the question whether the railway company was liable merely to maintain the bridge in the same condition as to strength in relation to traffic as it was in when completed, or whether it was liable to improve or strengthen the bridge so as to render it sufficient to bear the ordinary traffic which might reasonably be expected to pass over the bridge according to the standard at the time of the litigation. The bridge had been constructed between 1862 and 1867 and it was admitted that the bridge as originally constructed complied with the statutory requirements in relation thereto. The bridge in question had been constructed by means of cast-iron girders which were designed to carry a road thickness of one foot. At later dates the road thickness had been considerably increased, and the weight upon the girders had been increased by the provision of larger water mains, a thick bed of concrete, and heavy cast-iron plates. In 1912 Pickfords, Limited, who were desirous of using the bridge for heavy motor traffic, having obtained the fiat of the Attorney-General, instituted proceedings asking for a mandatory injunction to compel the railway company to put the bridge into a proper state of repair and into a condition of safety for the passage of the traffic upon or to be expected upon the highway carried by the bridge.

The measure of the railway company's liability turned upon the construction of section 46 of the *Railways Clauses Consolidation Act*, 1845, which section provided as follows:

> 46. If the line of railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches, and all other necessary

(1) [1916] 2 A.C. 356.

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works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided always, that, with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level.

The emphasis in the argument was put, as in the appeal now before us, upon the words of the statute—"shall be executed and at all times thereafter maintained"—which are, it seems to me, substantially the same as in the statutory provision with which we have to deal. The House of Lords held by Lord Buckmaster L.C., Earl Loreburn, Lord Shaw of Dunfermline and Lord Sumner, Viscount Haldane dissenting, that the railway company was liable to maintain the bridge in the condition as to strength in relation to traffic in which it was at the date of completion but was not liable to improve and strengthen the bridge to make it sufficient to bear the ordinary traffic of the district which might reasonably be expected to pass over it according to the standard existing at the time of the litigation. A careful reading of the speeches of the Lords as to the proper construction of the statutory obligation "shall be executed and at all times thereafter maintained," and the principles of interpretation laid down by them has been very helpful to me in reaching a conclusion as to the proper construction of the words of the statutory obligation in this appeal now before us—"shall be constructed and continually maintained." As Lord Shaw said in the concluding words of his judgment (p. 377) (1):

> The adjustment of the responsibilities of all parties in regard to those alterations and developments which the needs of the country demand is a legislative task, but does not fall within the sphere of judicial remedy.

The judgment of Street J., in *Carson* v. *Village of Weston* (2), on a section similar to that in our present statute was to the same effect. That was section 185 of the Dominion *Railway Act,* 51 Vict., ch. 29. The words were,

> shall, at all times, be and be continued * * * of a height, from the surface of such highway to the centre of such arch, of not less than 12 feet.

Not only was Street J. a very able judge but the decision, so far as I am aware, has never been challenged since it was delivered over forty years ago. The bridge had originally been built at a height greater than that required by the

(1) [1916] 2 A.C. 356. (2) [1901] 1 Ont. L.R. 15.

statute but subsequent improvements to the highway under the bridge had resulted in a reduction in the clearance between the then travelled road and the railway bridge. Street J. held that the statutory obligation on the railway was an obligation to maintain the structure as it was when originally constructed, provided, of course, that it was constructed within the statutory requirements, and that the railway company was not required under the statutory provision to raise and lower the bridges on their line, and with them necessarily the whole grade of their line in the neighbourhood, whenever a municipality should think proper to raise the surface of the highways passing under them.

There was some evidence that the railway company in the present case had put some cinders and ashes at one time upon the road and had built sidewalks and lighted the road, but it is plain that no substantial change in the clearance was caused by anything the railway did. The highway improvements that did effect the change were made both by the village of Charny and the provincial highway authorities.

I should allow the appeal and set aside the judgment against the appellant. It is not a case for costs.

KERWIN J.—If this were the case of an ordinary highway vested in a municipal or provincial authority, I am of opinion that section 19 of the Government *Railways Act*, R.S.C. 1927, chapter 173, would not impose any liability upon the appellant where the statutory clearance between the surface of such highway and the centre of the arch of the bridge had been lessened by the action of the authority having control over the highway. I read that section as referring to the construction and maintenance of the span of the arch of a bridge and not as imposing on the railway a duty to see that such an authority does not raise the level of the surface of the highway so as to lessen the required clearance. In that respect I agree with the construction placed by Mr. Justice Street in *Carson* v. *Weston* (1), on an enactment which, for the purposes of this appeal, is the same as section 19.

In the present case the Intercolonial Railway constructed its line of railway in 1912 at the point in question. A

(1) [1901] 1 Ont. L.R. 15.

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bridge was erected for carrying the railway over a gully, the paper title to which gully was, and so far as appears, still is, either in the Intercolonial Railway or in the Crown in the right of the Dominion. This gully was a "highway" within the definition of that word in subsection 11 of section 2 of the Act. *Canadian Pacific Railway Co.* v. Toronto (1). The span of the arch of the bridge as originally constructed was "of a height from the surface of such highway to the centre of such arch" of more than twelve feet. Subsequently the appellant placed not more than three inches of cinders on the highway but this did not lessen the clearance below the statutory limit. The other work done by the appellant, such as building a sidewalk for pedestrians, installing electric lights and occasionally removing snow, had no effect at all upon the clearance. For the purposes of this action, I think it must be found on the evidence, that the municipality of Charny or the province of Quebec exercises control over the highway and that the appellant was correct in so stating in its application for leave to appeal to this Court. None of the work done by the appellant should be treated as indicating that the appellant did anything more than assist one or other of those authorities. The effective control over the highway still remained in the municipality or province and there is nothing, therefore, in my view, to take the case out of the general rule.

I would allow the appeal and set aside the judgment against the appellant. In accordance with the terms of the order granting leave to appeal, there should be no costs.

HUDSON J.—I agree with my brothers Davis and Kerwin in their interpretation of section 19 of the Government *Railways Act*. The reasons for such an interpretation are stated by Mr. Justice Street in construing a similar provision in the case of *Carson* v. *Weston* (1), and so stated seem to me most convincing.

It appears from the record that the ownership of the soil is either in the railway company or in the Crown in the right of the Dominion of Canada. Accepting this as a fact, I cannot see that taken by itself it imposes any obligation on the railway company. In my opinion the

(1) [1911] A.C. 461, at 477.

railway company is not liable for the acts of others who have jurisdiction over the highway crossing beneath its lines.

Appeal allowed, no costs.

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Solicitor for the appellant: *C. V. Darveau.*

Solicitors for the respondent: *Marquis, Lessard, Germain & Lapointe.*

LA FONCIERE COMPAGNIE D'ASSURANCE DE FRANCE (GARNISHEE) ..... APPELLANT;

AND

DAME BLANCHE PERRAS AND RENE MONGEAU (SEIZING PLAINTIFFS) ... RESPONDENTS;

AND

OCTAVE DAOUST (DEFENDANT) ..... RESPONDENT.

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*Nov. 10, 11, 12.
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*Feb. 23.

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

Negligence—Motor vehicle—Injury to passengers—Judgment against driver—Seizure by garnishment in hands of insurance company—Public liability indemnity policy—Driver convicted of criminal offence—Insurance company declining liability—Concurrent findings as to absence of criminal negligence—Rule of public policy—Applicability of rule—Whether decision of a criminal court is res judicata in subsequent civil action—Sufficiency and admissibility at the trial of document purporting to prove conviction—Art. 1241 C.C.—Art. 1351 C.N.—Sect. 284 Cr.C.

The respondents, seizing plaintiffs, were awarded $5,000 damages resulting from an automobile accident, in an action brought against the respondent Daoust, the driver of the car in which they were passengers. In execution of that judgment, the plaintiffs took a seizure by garnishment in the hands of the appellant insurance company, invoking the terms of a public liability indemnity policy issued by the appellant company in favour of the owner of the car. The chauffeur, Daoust, after the accident, was charged before a magistrate's court with the indictable offence of causing grievous bodily injury under the provisions of section 284 Cr.C. and, after trial, was found guilty and fined "$50 and costs or thirty days", although the penalty under section 284 Cr.C. is two years' imprisonment. The appellant company, in its declaration as garnishee, declined to admit liability under the policy on the ground that the driver had been found guilty, and it was contended convicted,

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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of a criminal offence due to the manner of his operation of the motor car at the time of the accident. The appellant company therefore contended that the maintenance of Daoust's claim would be against the rule of public order, that a court of justice will not allow a criminal or his representative to reap by the judgment of the court the fruits of his crime; and it further alleged that the conviction of Daoust constituted *res judicata* as to the fact that he had committed a criminal offence. A document, purporting to be the record of Daoust's conviction in the magistrate's court, was filed as an exhibit and admitted at the trial; and the appellant relied upon it as proof of the conviction.

Held that the judgment of the Superior Court, maintaining the seizure by garnishment in the hands of the appellant company by the respondent plaintiffs, which judgment was unanimously affirmed by the appellate court (Q.R. [1942] K.B. 231), should not be disturbed. There were concurrent findings in the courts below that the chauffeur Daoust, in driving the automobile the way he did and thus causing injury to the plaintiffs, was guilty of negligence, but not to the extent that it would amount to that sort of negligence which is characterized as criminal negligence. Hudson J. was of the opinion that the appeal should be dismissed with costs.

Held, also, per Rinfret, Kerwin and Taschereau JJ., that a judgment rendered by a court of criminal jurisdiction has not the effect of creating before the civil courts the presumption *juris et de jure* resulting from the authority of a final judgment (art. 1241 C.C.)—(The decision under the English law and most of the commentators of the French law (art. 1351 C.N.) are also in accord with such holding. The contrary opinion of some commentators is due to the difference between the French and the Quebec laws.) Moreover, even assuming that a decision in a criminal court could be considered as *res judicata* in a civil action, the fulfilment of the conditions required by article 1241 C.C. is lacking in the present case.

Held further, that, accordingly, this Court has not to decide the point, raised by the appellant company, as to the applicability of the rule of public policy above mentioned. *Per* Rinfret, Kerwin and Taschereau JJ.—In any event, the courts should apply such doctrine only in "clear cases" and when the offence has been "conclusively proven": *Home Insurance Co. of New York* v. *Lindal* ([1934] S.C.R. 33, at 39). —Davis J., after referring to the opinions expressed in the *Beresford* case ([1938] A.C. 586), cites with approval the dictum of Lord Esher in the *Cleaver* case ([1892] 1 Q.B. 147) that the application of that rule of public policy to the performance of a contract "ought not to be carried a step further than the protection of the public requires".

As to the sufficiency and the admissibility of the document, certified by the Clerk of the Peace, purporting to prove the conviction of the driver charged with a criminal offence:

Per Rinfret, Kerwin and Taschereau JJ.—The reception of that document at the trial (without deciding the question of its alleged irregularity), was inadmissible in an action as the present one, and such conviction, which cannot be considered as *res judicata* between the parties, has, therefore, to be established by ordinary evidence.

Per Davis J.—If the record of a conviction in a criminal court is admissible at all at the trial of a civil action, it would only be presumptive evidence of the commission of a crime.

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APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Cousineau Louis J. (2), maintaining the contestation of the respondents, seizing plaintiffs, and condemning the appellant company, garnishee, to pay the sum of $5,667.55 with interest and costs.

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

F. P. Brais K.C. and *A. J. Campbell* for the appellant.

J. P. Lanctot K.C. for the respondent, seizing plaintiffs.

A. Montpetit for the respondent, defendant.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

RINFRET J.—Les demandeurs saisissants, en cette cause, ayant obtenu contre le défendeur Daoust, en Cour Supérieure, un jugement condamnant ce dernier à leur payer la somme de $5,000.00, avec intérêts et dépens, ont fait émettre un bref de saisie-arrêt après jugement entre les mains de la compagnie appelante.

Le jugement contre Daoust, prononcé par le juge Fabre Surveyer, à Montréal, était le résultat d'un accident d'automobile, dont Daoust, qui conduisait alors la voiture, fut trouvé responsable.

La saisie-arrêt après jugement était basée sur le fait que l'appelante avait émis en faveur de Mongeau, Robert & Cie, Ltée, une police d'assurance garantissant ces derniers contre toute " responsabilité légale à l'occasion de blessures corporelles " causées à autrui par suite de l'usage de l'automobile en question, dont Mongeau, Robert & Cie Ltée étaient propriétaires.

En vertu des conventions contenues dans la police d'assurance, l'appelante s'était engagée à

garantir, de la même manière et sous les mêmes conditions que l'assuré y a droit par les présentes, toute personne transportée dans l'automobile ou la conduisant légitimement, ainsi que toute personne responsable de la conduite de cette automobile.

(1) Q.R. [1942] K.B. 231. (2) (1939) Q.R. 77 S.C. 455.

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L'appelante, dans sa déclaration comme tierce-saisie, n'a pas contesté que le cas de Daoust fût couvert par les termes de la police; non plus que toutes les formalités requises, à la suite de l'accident, eussent été remplies de manière à rendre le paiement de l'indemnité exigible en vertu de la police; mais elle a prétendu qu'il ne pouvait y avoir aucune responsabilité de sa part

> attendu que l'accident a résulté de et pendant que le dit Octave Daoust commettait une offense criminelle; et il a de fait été arrêté et condamné par le tribunal compétent du district où l'accident est survenu d'une offense en vertu de la section 284 du Code Criminel du Canada.

Les demandeurs-saisissants ont contesté cette déclaration et ils ont allégué qu'il était faux que l'accident dénoncé dans les procédures ait résulté de la commission d'une offense criminelle, mais, au contraire, qu'il s'agissait d'un cas de faute ordinaire couvert par la police invoquée dans les procédures.

Le juge de première instance a refusé d'accepter la prétention de l'appelante; il a maintenu la saisie-arrêt après jugement; et il a condamné la tierce-saisie à payer aux demandeurs saisissants la somme de $5,000 avec intérêt depuis le 22 juin 1938, ainsi qu'une somme additionnelle de $667.55, également avec intérêt depuis la même date, représentant les frais taxés des avocats des demandeurs saisissants pour lesquels ces derniers étaient autorisés à exécuter.

La Cour du Banc du Roi siégeant en appel a unanimement confirmé le dispositif de ce jugement, sans en adopter tous les motifs.

La question la plus importante qui se pose dès l'abord est de savoir si les tribunaux civils qui ont condamné l'appelante étaient liés par le jugement prononcé contre Daoust, à la suite de son arrestation au criminel, par le magistrat siégeant pour les comtés unis de Prescott et Russell, dans la province d'Ontario; (l'accident s'étant produit à Rockland, dans cette province).

L'appelante a soutenu que cette condamnation constituait chose jugée sur le fait que l'intimé Daoust, en conduisant l'automobile de la façon qui a causé l'accident, avait commis une offense criminelle à l'encontre de l'article 284 du Code Criminel et qu'il en résultait qu'il ne pouvait se réclamer de la garantie qui lui était assurée par la police, vu que le maintien de sa réclamation serait contraire à l'ordre

public. Ni l'une ni l'autre des cours qui ont eu à se prononcer sur les prétentions de l'appellante ne lui ont jusqu'ici donné raison.

L'article du code civil de la province de Québec (1241 C.C.) qui traite de l'autorité de la chose jugée (*res judicata*), et qui en fait une présomption *juris et de jure,* déclare que cette autorité

> n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement, et lorsque la demande est fondée sur la même cause, est entre les mêmes parties agissant dans les mêmes qualités, et pour la même chose que dans l'instance jugée.

Il s'agit, bien entendu, dans cet article, de la présomption qui s'attache à la chose jugée en matière civile; et si nous avions ici un jugement antérieur, même rendu par un tribunal inférieur, pourvu qu'il fût de juridiction civile et qu'il rencontrât, par ailleurs, les conditions de l'article 1241 C.C., la question ne se poserait pas. La Cour Supérieure serait liée par le jugement d'un tribunal inférieur de juridiction civile passé en force de chose jugée.

Mais l'appelante prétend que la même situation existe à l'encontre d'un tribunal civil à raison du jugement rendu par une cour de juridiction criminelle.

Nous n'avons pas à nous demander ici de quelle façon un tribunal siégeant en matière criminelle aurait à se comporter à l'égard d'un jugement passé en force de chose jugée et rendu par un tribunal de juridiction civile.

En l'espèce, la Cour a devant elle une action civile et elle doit la juger suivant les principes contenus dans le code civil de la province de Québec.

Or, il ne paraît pas possible d'arriver à la conclusion que le jugement de la cour de magistrat des comtés unis de Prescott et Russell, que l'appelante veut opposer aux intimés, rencontre les exigences de l'article 1241 du code civil pour constituer la présomption *juris et de jure* que cet article attache à l'autorité de la chose jugée.

Si même l'on peut admettre pour les besoins de la discussion que l'objet du jugement, c'est-à-dire la question de savoir si, par la manière dont Daoust a conduit l'automobile, il a commis une offense criminelle, peut, dans un certain sens, être le même; s'il peut être prétendu que la demande est fondée sur la même cause, à savoir: l'accident et la nature de la faute de Daoust; nous ne voyons pas comment l'on peut décider que la demande est

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entre les mêmes parties agissant dans les mêmes qualités, et pour la même chose que dans l'instance jugée.

Les intimés n'étaient pas parties au litige criminel. D'un certain point de vue, la Couronne peut être tenue pour représenter le public tout entier; mais, en outre que la Couronne et les intimés ne constituent pas physiquement les mêmes parties, la Couronne ne figure au procès criminel que pour les fins de faire décider s'il y a eu offense et dans quelle mesure cette offense doit entraîner la répression et la punition de l'accusé. Le droit des demandeurs-saisissants à la réparation des dommages, qu'ils ont subis par la faute de l'intimé Daoust, n'a jamais été mis en question devant le magistrat des comtés de Prescott et Russell, qui n'avait, d'ailleurs, aucune compétence pour en connaître. Pour cette même raison, l'on ne peut en venir à la conclusion que, même si les demandeurs-saisissants, en tant que membres du public, étaient en quelque sorte représentés par la Couronne pour les fins limitées de l'instance criminelle, ils pouvaient y être considérés comme " agissant dans les mêmes qualités " que celles qu'ils ont dans l'instance civile qui nous est soumise.

Enfin, de toute évidence, la demande qui fait l'objet de la présente cause n'est pas " pour la même chose que dans l'instance jugée " au criminel.

Aussi est-ce avec raison, suivant nous, que le juge de première instance a décidé

qu'un jugement rendu par une cour de juridiction criminelle n'a pas l'effet de la chose jugée devant nos tribunaux civils;

et ce motif du jugement frappé d'appel a trouvé sa confirmation de la part de la majorité des juges de la Cour du Banc du Roi.

Cette question a fait l'objet de la considération des tribunaux de la province de Québec dans certains jugements de la Cour du Banc du Roi, comme par exemple: *La Cité de Montréal* v. *Lacroix* (1); *Deslandes* v. *Compagnie d'Assurance Mutuelle du Commerce* (2); *Ménard* v. *Regem* (3). Il en fut également de même dans des jugements de la Cour Supérieure: *Bourdon* v. *Hudson Bay Insurance Company* (4); *MacDonald* v. *Bray* (5); *et tout récemment dans Bettigrew* v. *McLean* (6).

(1) (1909) Q.R. 19 K.B. 385.
(2) (1932) Q.R. 52 K.B. 235.
(3) (1933) Q.R. 55 K.B. 98.
(4) (1933) Q.R. 72 S.C. 146.
(5) (1935) 39 Q.P.R. 313.
(6) (1942) 48 R.L.n.s. 468.

L'article 1351 du Code Napoléon est rédigé dans des termes semblables à ceux de l'article 1241 de notre code; et Toullier (t. 8, nos 30 et suiv. et t. 10, nos 240 et suiv.) enseigne qu'on ne rencontre pas, en cette matière, les conditions requises par l'article 1351 du code français. Sa conclusion est que la chose jugée au criminel n'a aucune influence sur l'action au civil.

Monsieur Lacoste ("De la chose jugée", 3ème éd. par Bonnecarrière), après avoir signalé la divergence d'opinion qui existe sur ce point entre les auteurs français, conclut (page 414, n° 1063):

> Si donc, pour trancher la controverse relative à l'influence du criminel sur l'action civile, on n'avait comme élément de décision que l'article 1351 C. civ., il faudrait dire que le juge de l'action civile n'est aucunement lié par ce qui a été jugé au criminel.

Mais en France, comme on l'a signalé dans les notes des juges de la Cour du Banc du Roi, certaines dispositions telles que les articles 3 et 463 du Code d'Instruction criminelle expliquent pourquoi certains auteurs et certains arrêts ont reconnu au civil les décisions des tribunaux répressifs. Glasson et Tissier, dans leur Traité de Procédure Civile (3e éd. p. 108, n° 177), admettent que, à l'appui de la doctrine que les décisions des tribunaux criminels ont une autorité absolue pour ou contre toute personne sans exception, l'on ne saurait invoquer l'article 1351 C.N. "qui paraît bien étranger à la question"; et ils ajoutent, ainsi que M. le juge-en-chef de la province de Québec l'a d'ailleurs fait remarquer dans l'affaire *Deslandes* v. *Compagnie d'Assurance Mutuelle du Commerce* (1), en invoquant l'autorité de Planiol & Ripert, que l'article 1351 C.N., ou notre article 1241 qui y correspond, ne saurait permettre de décider que le jugement en matière criminelle doit être tenu pour chose jugée par un tribunal de juridiction civile; mais que c'est plutôt du texte formel des articles déjà cités du Code d'Instruction criminelle que s'autorisent les commentateurs pour reconnaître

> aux décisions des juridictions répressives * * * une autorité absolue qui s'impose au juge civil.

Sur ce point, nous partageons l'avis de monsieur le juge Galipeault dans ses notes sur la cause actuelle.

(1) (1932) Q.R. 52 K.B. 235.

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La loi étant entièrement différente de la nôtre, il y a donc peu à retenir de ce qu'écrivent les auteurs français, admettant comme chose jugée les décisions des cours criminelles en France.

Il ajoute, avec raison suivant nous, que les règles de la preuve ne sont pas les mêmes et que, de façon générale, les conditions devant les tribunaux criminels sont différentes de celles qui existent en juridiction civile.

On ne décide pas autrement dans la jurisprudence anglaise. Dans la cause de *Caine* v. *Palace Steam Shipping Company* (1), il fut jugé.

that the conviction of the plaintiffs at Hong-Kong did not operate as an estoppel against their claim for wages.

Dans cette cause, il fut soumis que, pour constituer chose jugée, il était nécessaire que les procédures soient entre les mêmes parties; et que, comme les procédures à Hong-Kong étaient d'une nature criminelle, soit entre la Couronne d'une part et les demandeurs d'autre part,

a judgment in a criminal matter cannot operate as an estoppel in civil proceedings.

On y cita Taylor, On Evidence, 10th ed. sec. 1693, et plusieurs arrêts, parmi lesquels *Castrique* v. *Imrie* (2). Dans cette dernière affaire, Lord Blackburn, parlant pour lui-même et pour MM. les juges Bramwell, Mellor, Brett et Cleasby, s'exprime comme suit, à la page 434:

A judgment in an English court is not conclusive as to anything but the point decided; and, therefore, a judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in an action on the bill, though the conviction must have proceeded on the ground that the bill was forged.

Le jugement de la cour d'appel d'Angleterre *re Caine* v. *Palace Steamshipping Company* (1) fut confirmé par la Chambre des Lords (3), bien que l'arrêt de cette Cour s'appuie sur un point différent.

Arrivant à la conclusion que la décision rendue par le magistrat des comtés de Prescott et de Russell ne constitue pas chose jugée entre les intimés et l'appelante dans la cause actuelle mue devant la Cour Supérieure de la province de Québec, cela enlève toute importance au point soulevé par les intimés que la preuve de la conviction prononcée au

(1) [1907] 1 K.B. 670. (2) (1870) L.R. 4, H.L. 414.
(3) [1907] A.C. 386.

criminel n'avait pas été régulièrement faite devant le tribunal de première instance et que le document certifié par le greffier de la paix était irrégulier et insuffisant pour établir le fait de la condamnation de Daoust pour offense en vertu de l'article 284 du Code criminel.

D'ailleurs, nous sommes d'avis que, indépendamment de sa régularité, la réception même de ce document était inadmissible en l'espèce. Cela nous paraît être le résultat nécessaire de la conclusion que l'arrêt du tribunal criminel ne saurait constituer chose jugée devant le tribunal civil. En effet, cela fait disparaître l'unique motif pour lequel l'appelante pouvait avoir un intérêt à offrir la preuve de la condamnation par le tribunal criminel. Dès que cette dernière ne peut pas constituer chose jugée, il est impossible de voir quel autre objet l'appelante pouvait avoir en vue en demandant de produire le certificat du jugement au criminel; et, d'autre part, il est facile de prévoir les inconvénients de la production d'un document de ce genre, par exemple dans un procès par jury, où le simple fait de la condamnation pourrait exercer sur le verdict une influence qu'il ne saurait avoir.

Il doit être bien compris cependant que, pour le moment, la remarque qui précède doit être entendue uniquement d'une cause dans le genre de celle dont il s'agit ici. On peut envisager des cas où la situation serait tout à fait différente, comme ceux que prévoit l'article 610, ou l'article 893, du Code civil, ou encore l'action en dommages à raison d'une poursuite criminelle malicieuse où la jurisprudence est bien reconnue que le demandeur est tenu d'établir qu'il en a préalablement été acquitté. Il se peut qu'il y ait d'autres cas où cette preuve doive être admise; et ce n'est pas notre intention de procéder à les énumérer ici. Nous bornons notre décision sur cette question à une cause du genre de celle qui est présentement devant nous.

Il en résulte que, en l'espèce, les tribunaux civils de la province de Québec avaient à décider, d'après la preuve faite devant eux, si Daoust, en conduisant comme il l'a fait la voiture dont il avait la charge, et en causant l'accident d'où sont résultés les dommages réclamés par les demandeurs saisissants, avait commis un crime.

Or, sur ce point essentiel, le juge de première instance et la majorité de la Cour du Banc du Roi se sont trouvés d'accord.

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Rinfret J.

La Cour Supérieure a été d'avis que l'accident survenu n'avait pas été le résultat de faits qui pouvaient permettre de conclure que l'intimé Daoust avait commis une offense criminelle; mais que, au contraire, d'après la preuve,

> l'accident s'est produit par la simple omission de prendre certaines précautions, sans qu'il y ait eu de vitesse exagérée * * *

A son tour, la majorité de la Cour du Banc du Roi est arrivée à la conclusion que le cas de Daoust ne peut être classé dans un tel degré de négligence que l'on puisse dire qu'il y eu crime de sa part. Par conséquent, la question d'ordre public ne se soulève pas.

Il est inadmissible que, chaque fois qu'un chauffeur d'automobile cause des dommages à la personne d'autrui, on doive en conclure que l'article 284 du code criminel s'applique et que l'on se trouve en présence d'un acte criminel.

Déjà cette Cour-ci, dans la cause *The Estate of Charles Millar* (1), mettait en garde contre le danger d'accepter de nouvelles théories d'ordre public qui ne seraient pas contenues dans la loi statutaire ou qui ne seraient pas reconnues par une jurisprudence bien établie. Et cette Cour référait au jugement de Lord Wright, dans la cause de *Fender* v. *Mildway* (2).

La question dans la présente cause n'est pas de décider si une infraction aux articles du code criminel canadien constitue, en elle-même, une violation de l'ordre public; mais le point sur lequel l'appelante doit faillir est que la preuve contre Daoust faite devant le tribunal civil n'a pas établi qu'il avait commis un acte criminel, ni, en particulier, une offense au sens de l'article 284 du code criminel.

Il y a déjà à ce sujet l'opinion concordante des deux cours qui ont rendu les jugements qui nous sont soumis; mais il y a également le fait que, tant en ce pays qu'en Angleterre, chaque fois que les tribunaux civils ont été appelés à se prononcer sur un cas de ce genre et à décider si l'ordre public était en jeu, ils n'ont tranché la question dans l'affirmative que lorsqu'ils se sont trouvés en présence d'un cas clair (" clear case ") et où l'offense était prouvée d'une façon concluante (" conclusively proved ").

On remarquera que, dans la cause de *Home Insurance Co. of New York* v. *Lindal* (3), et sur laquelle l'appelante a

(1) [1938] S.C.R. 1. (2) [1937] 3 All E.R. 402, at 425, 426.
(3) [1934] S.C.R. 33, at 39.

fondé son argumentation, l'honorable juge Lamont, prononçant le jugement de la majorité de la Cour, a déclaré que l'on admettait dans cette cause l'application de la doctrine d'ordre public parce que la preuve établissait que Beattie

was manifestly intoxicated while driving his automobile at the time of the accident. On this point the judgment of the learned trial judge leaves no doubt.

Et il venait de référer à ce passage du jugement de Kennedy, J., *re Burrows* v. *Rhodes* (1), où ce dernier s'exprime comme suit:

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

A quoi Scrutton, L. J., avait, dans la cause de *Haseldine* v. *Hoskins* (2) ajouté le commentaire suivant:

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

Ce qui manque à la cause de l'appelante, c'est d'avoir établi que, en l'espèce, l'intimé Daoust s'était rendu coupable de l'offense prévue au code criminel. D'après les deux cours qui ont eu à examiner la preuve, l'on se trouve ici simplement en présence d'un cas de négligence susceptible d'entraîner des conséquences civiles, ou de

la simple omission de prendre certaines précautions, sans qu'il y ait eu de vitesse exagérée;

et une lecture attentive du dossier ne nous permet pas de mettre de côté la décision des deux cours dont est appel sur cette question de fait essentielle.

Pour ces raisons, nous sommes d'avis que l'appel doit être rejeté avec dépens.

DAVIS J.—The motor car accident out of which these proceedings were taken on a policy of public liability indemnity insurance was one of those accidents which unfortunately are all too common though they often, as in this case, result in very serious physical injuries.

(1) [1899] 1 Q.B. 816, at 828. (2) (1933) 102 L.J. K.B. 441.

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Davis J.

The chauffeur was driving two of his employers and their wives from Montreal to Ottawa. At a point a few miles out from Ottawa the paved highway takes a sudden S-shaped turn, passing over railway tracks. The driver obviously did not notice this abrupt turn in the road until he was practically upon it; it had been raining for several hours and the road was wet; he applied his brakes, but the car, which was a new and heavy Cadillac car, skidded badly and he lost control of it; the result was the car finally struck a telephone pole near the side of the road with great force and the two women passengers were seriously injured. The facts were developed minutely at the trial of the action and while there can be no doubt that the chauffeur was negligent, it was not in my opinion that sort of negligence that is characterized as criminal negligence.

The appellant insurance company declined to admit liability under its public liability indemnity policy upon the ground that the driver had been guilty, and it was contended convicted, of a criminal offence due to the manner of his operation of the motor car in question at the time of the accident. As I have already said, the evidence at the trial of this action does not in my opinion establish on the facts that there was criminal negligence. But the appellant filed as an exhibit at the trial and relies upon a document as proof of a conviction, in a magistrate's court, of the driver on a charge of negligence causing grievous bodily injury, contrary to sec. 284 of the Criminal Code. On the back of a certified copy of the charge appear the words "Accused found guilty, Judgment $50 and costs or thirty days." A fine of $50 on a charge under a provision that "every one is guilty of an indictable offence and liable to two years' imprisonment who" (sec. 284 Cr.C.), suggests that the accident was regarded by the magistrate to be merely careless conduct or that the charge may have been reduced to some breach of a provincial highway traffic statute. Whatever be the facts, they are not shewn. Assuming the sufficiency of the proof of a conviction, the question of admissibility arises. A fact in issue between the parties in these civil proceedings is whether or not the driver was guilty of criminal misconduct in the operation of the motor car at the time of the accident. If the record of a conviction in the magistrate's

court was admissible at all (Roscoe's Evidence in Civil Actions, 20th ed., p. 209; *Hollington* v. *Hewthorn & Co. Ltd.* (1), it would only be presumptive evidence of the commission of a crime (*In re Crippen* (2); and *Mash* v. *Darley* (3), affirmed on different ground (4)), and the evidence before us establishes that the driver's conduct was not of a criminal nature.

The rule of public policy sought to be applied by counsel for the appellant is, when correctly stated, what Lord Atkin said it was in the *Beresford* case (5), in the House of Lords,

> I think that the principle is that a man is not to be allowed to have recourse to a court of justice to claim a benefit from his crime whether under a contract or a gift. No doubt the rule pays regard to the fact that to hold otherwise would in some cases offer an inducement to crime or remove a restraint to crime, and that its effect is to act as a deterrent to crime. But apart from these considerations the absolute rule is that the courts will not recognize a benefit accruing to a criminal from his crime.

Lord Atkin was dealing with a case of suicide and, I venture to think, is there using the word "crime" in the sense of *felo de se*.

It may be useful for me to quote some observations made by Lord Wright when he sat as Master of the Rolls in the Court of Appeal in the *Beresford* case (6). While they are *dicta*, they carry great weight. Lord Wright said:

> While the law remains unchanged the Court must, we think, apply the general principle that it will not allow a criminal or his representative to reap by the judgment of the Court the fruits of his crime.
>
> We have quoted the above authorities in support of that principle, which is of general import. The principle has been applied not only in the authorities quoted above but also in many decisions dealing with varied states of fact and applications of the same or similar principle. These are all illustrations of the maxim *ex turpi causa non oritur actio*. The maxim itself, notwithstanding the dignity of a learned language, is, like most maxims, lacking in precise definition. In these days there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems, afford no moral justification for a court to apply the maxim. There are likewise some crimes of inadvertence which, it is true, involve *mens rea* in the legal sense but are not deliberate or, as people would say, intentional. Thus in *Tinline* v.

(1) [1943] 1 K.B. 27.
(2) [1911] P. 108.
(3) [1914] 1 K.B. 1.
(4) [1914] 3 K.B. 1226.
(5) *Beresford* v. *Royal Ins. Co.* [1938] A.C. 586, at 598.
(6) [1937] 2 K.B. 197, at 219, 220.

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White Cross Insurance Association (1), and *James* v. *British General Insurance Co.* (2), both cases of motor-car manslaughter, the judges held that policies against third-party liability were enforceable. In these cases something may turn on the special legislation on the matter. The cases have been questioned in *Haseldine* v. *Hosken* (3), but need not further be considered here.

Lord Esher in the *Cleaver* case (4) said that the application of the rule of public policy to the performance of a contract

ought not to be carried a step further than the protection of the public requires.

I shall quote the passage in which those words appear:

No doubt there is a rule that, if a contract be made contrary to public policy, or if the performance of a contract would be contrary to public policy, performance cannot be enforced either at law or in equity; but when people vouch that rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires.

In my opinion the judgment in the present case rendered by the Superior Court for the district of Montreal at the trial and which was unanimously affirmed on appeal by the Court of King's Bench for the province of Quebec, should not be disturbed.

I should therefore dismiss the appeal with costs.

HUDSON J.—I agree that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Brais & Campbell.*

Solicitors for the respondents, seizing plaintiffs: *Lanctôt & Hamelin.*

Solicitors for the respondent, defendant: *Beaulieu, Gouin, Bourdon, Beaulieu & Montpetit.*

(1) [1921] 3 K.B. 327.
(2) [1927] 2 K.B. 311.
(3) [1933] 1 K.B. 822.
(4) *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q.B. 147, at 151.

PARRISH & HEIMBECKER LIMITED AND INSURANCE COMPANY OF NORTH AMERICA (PLAINTIFFS). } APPELLANTS;

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Nov. 24, 25, 26.
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Feb. 23.

AND

BURKE TOWING & SALVAGE COMPANY LIMITED (DEFENDANT).... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Bill of lading—Wheat in bulk—Foundering of ship—Loss of cargo—Unseaworthiness—Seaworthiness at beginning of voyage—Severe storm—Peril of the sea—Prima facie liability—Burden of proof—Findings of fact—The Water Carriage of Goods Act, 1936, (D), 1 Edw. VII, c. 49.

The appellants, plaintiffs, seek to recover from the respondent, defendant, the value of a cargo of wheat in bulk delivered to and received by the defendant on board its ship *Arlington* at Port Arthur, Ontario, on April 30th, 1940, for carriage to and delivery at Owen Sound, Ontario. The wheat was shipped under bills of lading issued by the respondent, by the terms of which the shipment was subject to all the terms and provisions and all the exemptions from liability contained in *The Water Carriage of Goods Act*, 1936, 1 Edw. VII, c. 49, and the Rules as provided in the schedule of the Act. The *Arlington* foundered while on Lake Superior on May 1st, 1940, and, with her cargo, became a total loss. The appellants' action for damages was dismissed by the late President of the Exchequer Court of Canada. The trial judge found that the cargo was properly loaded and stored, that the ship was not unseaworthy because she was not provided with either longitudinal bulkheads in the cargo holds or with shifting boards, that the carrier used due diligence to make seaworthy, generally, the ship and her equipment, including the tarpaulins and the equipment for securing them in place and that they were in fact seaworthy at the commencement of the voyage and that the presence of slack water in one of the tanks had no real bearing on the case.

Held, affirming the judgment of the Exchequer Court of Canada, Maclean J., ([1942] Ex. C.R. 159), Davis J. dissenting, that the findings of the trial judge were findings of fact which ought not to be disturbed by this Court and that upon them the shipowner respondent was not liable. The respondent has acquitted itself of the onus put upon it to show the cause of the loss and bring itself within the exceptions: *Gosse Millard* v. *Canadian Government Merchant Marine, Limited* ([1927] 2 K.B. 432, [1929] A.C. 223) and negligence causing the loss has been negatived. There was more than a *prima facie* case of loss by peril of the sea, the evidence disclosing that the storm was a severe one, and the mere fact that none of the other ships in the vicinity suffered in the same way as did the *Arlington* does not detract from this evidence.—The shortness of the time that elapsed between the sailing of the ship and its foundering is a circumstance to be taken into consideration

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau.

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in deciding whether the ship was unseaworthy. *Ajum Goolam Hassen and Co.* v. *Union Marine Insurance Company, Limited* ([1901] A.C. 363, at 366); *Lindsay* v. *Klein* [1911] A.C. 194, at 203).

Per Davis J. dissenting. Findings of fact by the trial judge lose much of their weight if the question of the peril of the sea was not the vital point for consideration and such test was in law not the primary test of liability in this case. *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills, Limited* ([1929] A.C. 269, at 273). The bald statement of fact that the ship sank within a few hours after leaving port raised by itself the heaviest sort of burden on the respondent to dislodge *prima facie* liability, and the foundering of the ship without any other explanation than the existence of a strong gale puts one on his enquiry as to the seaworthiness of the ship at the beginning of the voyage. There was no peril of the sea, as the weather was what might be expected in the spring on Lake Superior. Upon the evidence, the respondent has not satisfied the burden that lay upon it in the circumstances to show that the ship was seaworthy at the beginning of the voyage or that the loss was not due to its unseaworthiness.

APPEAL from the Judgment of the Exchequer Court of Canada, Maclean J. (1), dismissing the plaintiffs' action with costs.

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

Russell McKenzie K.C. for the appellants.

Frank Wilkinson K.C. and *Ross Dunn* for the respondent.

The judgment of Rinfret, Kerwin, Hudson and Taschereau JJ. was delivered by

KERWIN J.—On April 30th, 1940, Parrish and Heimbecker Limited delivered to Burke Towing & Salvage Company Limited, who received on board its ship *Arlington* at Port Arthur, Ontario, a quantity of wheat in bulk, for carriage to and delivery at Owen Sound, Ontario. Early in the morning of May 1st, 1940, the *Arlington* foundered on Lake Superior and, with her cargo, became a total loss. An action for damages for the loss of the wheat was dismissed by the late President of the Exchequer Court of Canada and the plaintiffs appeal.

The wheat was shipped under bills of lading issued by the respondent, by the terms of which the shipment was subject to all the terms and provisions and all the exemp-

(1) [1942] Ex. C.R. 159.

tions from liability contained in *The Water Carriage of Goods Act*, 1936, chapter 49. By force of section 2, the Rules relating to bills of lading, as contained in the schedule to the Act, apply to this shipment and section 3 enacts:

3. There shall not be implied in any contract for the carriage of goods by water to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

Clause 1 and 2 of article 3 of the Rules provide:

1. The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to

(*a*) make the ship seaworthy;

(*b*) properly man, equip, and supply the ship;

(*c*) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

2. Subject to the provisions of article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Clauses 1 and 3 and the relevant part of clause 2 of article 4 are as follows:

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article III.

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(*a*) act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

(*c*) perils, danger, and accidents of the sea or other navigable waters;

(*q*) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.

The corresponding British *Carriage of Goods by Sea Act*, 1924, was considered by Wright J., as he then was, in

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Kerwin J.

Gosse Millard v. *Canadian Government Merchant Marine, Limited* (1), and he pointed out at page 435 that in a bill of lading case such as this, the carrier

> has to relieve himself of the *prima facie* breach of contract in not delivering from the ship the goods in condition as received.

The judgment of Wright J. was reversed by the Court of Appeal but was restored by the House of Lords (2), where at page 236 Lord Sumner expressed the same idea in different language. The primary duty of the respondent, therefore, being to properly and carefully load, handle, stow, carry, keep, care for and discharge the wheat, the onus was upon it to show the cause of the loss and bring itself within one of the exceptions. The shortness of the time that elapsed between the sailing of the *Arlington* from Port Arthur and its foundring is a circumstance to be taken into consideration in deciding whether the ship was unseaworthy. *Ajum Goolam Hossen and Co.* v. *Union Marine Insurance Company, Limited* (3). *Lindsay* v. *Klein* (4).

Bearing in mind these considerations, I agree with the conclusions of the learned trial judge. Although two or three inaccuracies in his judgment were pointed out, they do not at all affect the result. He preferred to believe the evidence of the crew as to the loading of the cargo in preference to that of Mr. German, the naval architect. I agree with him on this point, particularly when viewed in conjunction with these facts; that the *Arlington* had, on its immediately preceding voyage, carried a cargo of approximately the same quantity; that it would appear, from the free board allowed, that the ship was practically fully loaded; and that, notwithstanding the agreement of counsel as to the "capacity plans", there is nothing to indicate, after the lapse of so many years since the ship was constructed, that alterations had not taken place by which the capacity of no. 1 hold was altered. It has not been overlooked that it was as to no. 1 hold that Mr. German testified and that the latter did not leave the matter at large as stated by the trial judge.

I also agree that the ship was not unseaworthy because she was not provided with either longitudinal bulkheads in the cargo holds or with shifting boards. The trial

(1) [1927] 2 K.B. 432.
(2) [1929] A.C. 223.
(3) [1901] A.C. 363, at 366.
(4) [1911] A.C. 194. at 203

judge's findings that the carrier used due diligence to make seaworthy the hull, decks, bilges, engines, machinery, tanks, cargo holds, bulkheads, hatch covers, and generally the ship and her equipment, including the tarpaulins and the equipment for securing them in place and that they were in fact seaworthy at the commencement of the voyage, should be sustained for the reasons given by him.

These are questions of fact. *Paterson Steamships, Limited* v. *Canadian Co-operative Wheat Producers, Limited* (1). They were there determined adversely to the carrier by the trial judge, whose judgment was affirmed by the Court of King's Bench for Quebec and upheld by the Judicial Committee of the Privy Council. In the case at bar, I find myself in entire agreement with the President of the Exchequer Court of Canada.

I further agree that water entered into the cargo holds through the tarpaulins and hatch covers of at least two of the hatches and that there was no negligence on the part of the respondent or its agents or servants. As to the time the list developed, the trial judge preferred to believe the witnesses from the *Arlington,* and not only can I not say that he was wrong in so doing but on the record I arrive at the same conclusion. The presence of slack water in one of the tanks has no real bearing on the case.

Did the loss arise or result from a peril of the sea? The manner in which the trial judge put to himself the question for decision on this point:

> was there such a peril of the sea as that against which the insured undertook to indemnify the carrier,

is explained by his reference shortly thereafter to the case of *Canada Rice Mills, Limited* v. *Union Marine and General Insurance Company, Limited* (2). That action was on an insurance policy but, as Lord Wright pointed out, the House of Lords in *The Xantho* (3) had already decided the same meaning is to be ascribed to the expression "perils of the sea" in a bill of lading as in policies of marine insurance. It was when Lord Herschell in *The Xantho* case (3) was considering marine policies that he stated at page 509:

> I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of

(1) [1934] A.C. 538, at 543.
(2) [1941] A.C. 55.
(3) (1887) 12 App. Cas. 503.

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the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding.

With respect to the interpretation of the words "perils of the sea", these remarks are just as applicable to and in fact appear in a bill of lading case. The results, of course, are not necessarily the same since negligence is immaterial in an insurance case.

In the case at bar, there was more than a *prima facie* case of loss by perils of the sea, and negligence causing the loss was negatived. The evidence discloses that the storm was a severe one and the mere fact that none of the other ships in the vicinity suffered in the same way as did the *Arlington* does not detract from this evidence. The respondent has acquitted itself

> of the onus of showing that the weather encountered was the cause of the damage and that it was of such a nature that the danger of damage to the cargo arising from it could not have been foreseen or guarded against as one of the probable incidents of the voyage.

Canadian National Steamships v. *Baylis* (1), where the carrier did not acquit itself of the onus, while in *Keystone Transports Limited* v. *Dominion Steel and Coal Corporation, Limited* (2), it did.

The appeal should be dismissed with costs.

DAVIS J. (dissenting).—The ship *Arlington,* loaded with about 98,000 bushels of grain of a value of about $87,000, the property of the appellant Parrish & Heimbecker Limited, left Port Arthur, Ont., on Lake Superior, April 30th, 1940, to deliver the grain to Owen Sound, Ont. Within a few hours and at a distance of somewhere around 100 miles from Port Arthur, the ship, having developed in the meantime a heavy list, turned over and sank, with the total loss of her cargo. There is no suggestion that she met with

(1) [1937] S.C.R., 261 at 263. (2) [1942] S.C.R. 495.

any collision or struck any obstruction. I should have thought that the bald statement of fact itself raised the heaviest sort of burden on the ship owner, the respondent, to dislodge a *prima facie* liability to the shipper and owner, who sued for the loss of the cargo. The defence was that the ship was lost due to a peril of the sea, but the weather on Lake Superior at the time was normal for the spring season of the year, when gales of greater or less intensity frequently occur. The *Arlington* had already made one return trip that spring from Port Arthur to Owen Sound, and other cargo ships on the day of the accident were plying up and down the lake with apparently little inconvenience. A strong gale did come up on the lake at the time but the foundering of the *Arlington* without any other explanation at once puts one on his inquiry as to the seaworthiness of the ship at the beginning of the voyage.

The appellant is faced in this Court at the outset with the formidable difficulty that all the findings of the trial judge are against it. But it is not only the right but the duty of an appellate court to carefully review the evidence and to come to its own conclusion, giving all due weight to the findings of the trial judge. I cannot escape from the thought that the trial judge, Maclean J., the late President of the Exchequer Court of Canada, was greatly impressed at the trial with the statement in the then very recent judgment of the Privy Council in the *Canada Rice Mills* case (1), to the effect that losses by perils of the sea were not confined to losses occasioned by extraordinary violence of the winds or waves (a statement which could not be and of course was not questioned), and failed to approach the consideration of this case as one raising at once on its simple facts the primary issue of the unseaworthiness of the ship at the beginning of the voyage.

The late President in an early part of his judgment stated that he regarded the question of the peril of the sea to be " the most vital point for consideration " in the case and later expounded the test which he directed to himself, thus:

> The question of the degree of a storm at sea is not of importance, nor does it afford ground for the inferences which the plaintiffs ask me to draw. The question is was there such a peril of the sea as that against which the insured undertook to indemnify the carrier. To say there was no peril of the sea because the weather was what might be

(1) [1941] A.C. 55.

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normally expected on such a voyage in the spring of the year on Lake Superior, or that there was no weather bad enough to bring about what happened here, appears to me to be not a true test.

The learned judge then cites and refers to the *Canada Rice Mills* case (1).

If that was not the vital point for consideration and the test was in law not the primary test of liability in this case, then the findings lose much of their weight. *Pope Appliance Corporation* case (2).

Moreover, this is a straight bill of lading case; not a marine insurance case; and the trial judge was in error in stating in the above quoted passage from his judgment that

> The question is, was there such a peril of the sea as that against which the insured undertook to indemnify the carrier.

The point in the case, as I see it, is that the weather was what might be normally expected on such a voyage in the spring of the year on Lake Superior and that the ship would not have capsized in such a gale as there was if the ship had been in a condition to encounter the gale. The test seems to me to be whether the ship failed to qualify as a seaworthy ship within the rule laid down by Lord Cairns in *Steel* v. *The State Line Steamship Company* (3):

> * * * the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter * * *

The mere sinking of a ship due to the incursion of water may or may not constitute a defence of peril of the sea and therefore calls for an investigation of the facts and surrounding circumstances in each case and the application of the appropriate principles of law to arrive at a justifiable conclusion. What was in substance the cause is the fact to be determined.

There is no doubt that water did come into the holds, but the ship was very low-set (with a freeboard of only 3 feet 5½ inches) as many of the upper lake carriers are, and if she had not developed a heavy list I do not think she would have taken in the water.

I shall not endeavour to detail the evidence but I should like to point to three witnesses who dealt with three different aspects of the case, and whose evidence was dis-

(1) [1941] A.C. 55.
(2) [1929] A.C. 269, at 273.
(3) (1877) 3 App. Cas. 72, at 77.

regarded by the trial judge. There was the evidence of Thomson, Assistant Controller of the Meteorological Service, who proved the Dominion Government Weather Records. The official records disclosed the velocity and the direction of the winds. He described the storm as typical, "such as occurs frequently along this route." He said that the weather was not abnormal at all—the winds were high, but they have high winds regularly.

> It is the type of weather which is characteristic at this time of the year, as shown by the standard practice of meteorology to anyone experienced in these records.

In the learned judge's lengthy review of the evidence he does not mention the evidence of Thomson though I should have thought the Government records were a fairly safe measure with which to test the conflicting evidence on weather conditions of other witnesses.

Then there was the evidence of Brais—he was a wheelsman on the *Collingwood,* another ship that was going down Lake Superior from Port Arthur at the same time as the *Arlington,* and at a distance of about half a mile apart. Brais went on watch on his ship around one o'clock in the morning of the day of the accident and he said that shortly after going on watch he noticed "a bad list" on the *Arlington.* He told the mate and the mate got the captain (i.e., of the *Collingwood*) and the captain told Brais not to lose sight of her (i.e., the *Arlington*). He kept the *Arlington* in sight—the list seemed to be on the port side. It was the *Collingwood* that subsequently rescued the crew of the *Arlington.* Callam, a wheelsman on the *Arlington,* had said that the *Arlington* acquired a list after midnight. Asked if he were able to fix the time of the list, he replied:

> No, I would not say exactly, because it was dark in the wheel house and I was not looking at the clock, but it was somewhere in the neighbourhood of half-past three or a quarter to four.

The time the *Arlington* capsized was fixed by the trial judge at about five-thirty o'clock in the morning. Brais on the *Collingwood* was obviously struck by the fact that the *Arlington* was listing and to such an extent that he reported it. The *Collingwood* was owned by a different shipping company; at the time of the trial the captain who had been on that ship was dead; and Brais, who was then in the Canadian Navy, was brought to the trial by

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subpoena. Yet the trial judge preferred the evidence of members of the crew of the *Arlington* as to when the listing first occurred, saying that he thought Brais was speaking without having any clear or reliable idea as to the time he observed the listing of the *Arlington*.

The third and last witness to whom I shall refer is Mr. German, a naval architect whose qualifications, both by academic training and practical experience, were of a high order. He attributed the list of the *Arlington* to two causes. One was the effect of slack water in no. 3 tank. The capacity of the tank was somewhat over 200 tons and it was only about half full at the time. He said that such tanks should be either empty or full and that a 200-ton tank half full was "decidedly to be avoided," observing that a list should not be confused with the roll of a ship. A list to one side or the other means, he said, that it submerges that side of the ship and thereby is a reduction in the safety factor. Further, Mr. German estimated that there was an empty space of at least 7,118 cubic feet which would have accommodated about 5,694 more bushels of grain, and in his opinion there was "decidedly" room to create a list. Having regard to the stowage of the grain and the slack water in no. 3 tank, the *Arlington* at the time she commenced her voyage was, in Mr. German's opinion, "definitely unseaworthy."

It cannot in my opinion be said on the evidence that the respondent satisfied the burden that lay upon it in the circumstances to show that the ship was seaworthy at the beginning of the voyage or that the loss was not due to its unseaworthiness.

I should allow the appeal, set aside the judgment below and direct judgment to be entered in favour of the appellant, Insurance Company of North America, for the amount claimed, with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellants: *Montgomery, McMichael, Connors & Howard.*

Solicitors for the respondent: *Wright & McMillan.*

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*Feb. 11, 12.
*Apr. 2.

AND

J. PAUL VERMETTE (PLAINTIFF)..... RESPONDENT.

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

Insurance (fire)—Insurable interest—Property not "owned" by insured as its real owner—Policy null and void—Meaning of "owned" in statutory condition no. 10—Salaried employee doing business on behalf of owner—Employee being the person insured in the policy—Insurer aware of nature of insured's interest—Knowledge of real situation by agents or representatives of insurance company—"Prête-nom"—Effect of declaration by person carrying on business under a firm name—Arts. 1834 and foll., 2480, 2569, 2570, 2571, C.C.—Statutory condition no. 10—Quebec Insurance Act, R.S.Q., 1925, c. 243, sections 240, 241, 242.

An insurance policy, covering against loss by fire property which is not "owned" by the insured as its real owner (statutory condition no. 10), thus lacking a material element essential to its validity, must be declared to be null and void (art. 2480 C.C.).

The word "owned", in statutory condition no. 10 (s. 240 of *Quebec Insurance Act,* R.S.Q., 1925, c. 243), must be construed as meaning "owned as owner" (propriétaire).

Therefore, where a salaried employee, being entrusted by the owner with the possession and control of a retail business which is registered in the name of such employee, with the acquiescence of the owner, has insured against fire, under his own name, the moveables and effects connected with such business, such employee cannot recover under the policy in case of loss.

The moneys payable by the insurance company through loss by fire of goods thus owned by the employer are not part of the insolvent estate of the employee, and the trustee in bankruptcy, now respondent, was not entitled to claim these moneys under the policy.

Such policy must be declared to be contrary to law, even if the evidence discloses that agents or representatives of the insurance company not only knew of the real ownership of the goods, but had advised or suggested themselves that the policy should be so issued in the name of the employee as insured; representations of any kind must be "contained in the policy or made part of it". (Art. 2570 C.C.).

Moreover, it is extremely doubtful that the courts would consider as valid an insurance policy issued in contravention with the imperative provisions of the law (arts. 2480 and 2570 C.C.; statutory condition no. 10), even if it was established that the insurer had been acquainted with the real situation and was aware of the exact nature and character of the insured's interest.

A person acting as figure-head for another (*prête-nom*) is essentially a mandatory; his interest can only be that of a mandatory and can never

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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acquire that of the mandator, the owner. Assuming that his title may confer on him an "interest appreciable in money in the thing insured" (art. 2571 C.C.), the nature of such interest must nevertheless be specified in the policy (art. 2570 C.C.). Therefore, a *prête-nom* cannot insure as owner property owned by the person whom he represents.

The mere fact that a person fyles with the prothonotary of the Superior Court, pursuant to arts. 1834 C.C. and following, a declaration that he is carrying on business under a firm name other than his own, does not import to the public the meaning that such person is the owner of the building or of the goods or effects therein contained.

Judgment of the Court of King's Bench (Q.R. 71 K.B. 224) reversed.

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

The respondent is trustee in bankruptcy of one Desrosiers who was carrying on business as grocer at Val d'Or, in the province of Quebec. The goods and effects contained in the store were insured in favour of Desrosiers against loss by fire, under a policy issued in the appellate company. The property insured was not owned by Desrosiers, who was the salaried employee of the real owner. The respondent claimed $3,000 being the amount of the loss caused by fire.

Aimé Geoffrion K.C., De Gaspé Audette K.C., and *W. Desjardins K.C.* for the appellant.

Louis Morin K.C., for the respondent.

The judgment of the Court was delivered by

RINFRET J.—L'intimé agit en l'espèce comme syndic à la faillite de J. A. Desrosiers, épicier de Val d'Or, y faisant affaires sous le nom de "Cash and Save Reg'd".

Le failli, J. A. Desrosiers, avait assuré contre le feu le mobilier de commerce et de bureau d'un magasin situé à Val d'Or, pour un montant de $3,000.00, en vertu d'une police d'assurance émise par l'appelante.

Le feu consuma les biens assurés en vertu de cette police et pendant qu'elle était encore en vigueur.

L'intimé, réclamant les droits du failli, a conclu que la somme de $3,000.00, montant de la police, lui soit versée par l'appelante.

(1) (1941) Q.R. 71 K.B. 224.

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Mais l'appelante a plaidé que les effets détruits par le feu appartenaient en réalité à M. Rémi Taschereau, dont Desrosiers n'était que l'employé; que Desrosiers n'avait donc aucun intérêt assurable dans les effets en question; que si l'appelante avait connu ces circonstances, elle n'aurait jamais émis la police; et que cette dernière était donc nulle et illégale à toutes fins que de droit.

Le plaidoyer contient d'autres moyens qu'il n'est pas nécessaire d'énumérer dans les circonstances.

Le jugement de la Cour Supérieure a fait droit au plaidoyer de l'appelante, dont il a maintenu les conclusions.

La Cour du Banc du Roi en appel a infirmé ce jugement et a maintenu l'action.

Je crois que l'appel doit être maintenu et que le jugement de la Cour Supérieure doit être rétabli, pour les raisons suivantes:

La police d'assurance, au montant de $3,000.00, porte

sur le mobilier de commerce et de bureau, y compris garnitures (autres que celles du propriétaire), aménagements, ustensiles, de toute autre partie du contenu du dit commerce ou du bureau, à l'exception du fonds de commerce et des modèles ou patrons, le tout contenu dans (ou sur) le bâtiment * * * occupé à l'usage d'épicerie et de boucherie, situé à Val d'Or, province de Québec, et portant le n° * * * côté nord de la troisième avenue.

Il est acquis au dossier que les objets assurés étaient la propriété de Rémi Taschereau.

En vertu du Code civil de la province de Québec, l'assurance contre le feu est soumise, entre autres, aux dispositions suivantes:

2569.—La police contre le feu contient:

Le nom de celui en faveur de qui elle est faite;

Une description ou désignation suffisante de l'objet de l'assurance et de la nature de l'intérêt qu'y a l'assuré;

Une déclaration du montant couvert pas l'assurance, du montant ou du taux de la prime, et de la nature, commencement et durée du risque;

La souscription de l'assureur avec sa date;

Toutes autres énonciations et conditions dont les parties peuvent légalement convenir.

2570.—Les déclarations qui ne sont pas insérées dans la police ou qui n'en font pas partie ne sont pas reçues pour en affecter le sens ou les effets.

2571.—L'intérêt d'une personne qui assure contre le feu peut être celui de propriétaire ou de créancier, ou tout autre intérêt dans la chose assurée, appréciable en argent; mais la nature de cet intérêt doit être spécifiée.

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En outre, conformément à la loi des assurances de Québec (c. 243 des statuts refondus de 1925, art. 240), certaines conditions doivent être considérées comme partie de tout contrat d'assurance contre le feu, souscrit dans la province de Québec, au sujet de tous biens s'y trouvant, et doivent être imprimées sur chacune des polices sous l'en-tête "Conditions de la police", et aucune stipulation à ce contraire ou pourvoyant à quelque changement, addition ou omission, ne lie l'assuré à moins qu'elle ne soit prouvée de la manière prescrite par les articles 241 et 242 de la loi.

Ces articles 241 et 242 stipulent que si l'assureur désire faire des changements aux conditions de la police, en omettre quelqu'une ou en ajouter de nouvelles, ces changements ou additions doivent être énoncés et imprimés en caractères voyants et en encre d'une couleur différente.

Même dans ce cas, le tribunal ou le juge auquel est soumise une question s'y rattachant a le pouvoir de considérer s'il est juste et raisonnable, de la part de la compagnie, d'en exiger l'application; à tout événement, aucun de ces changements, additions ou omissions, à moins d'être distinctement exposé de la manière expliquée, n'est légal, ou obligatoire pour l'assuré.

Parmi les conditions de la police exigées en vertu de l'article 240, se trouve celle qui est contenue au paragraphe 10 de cet article et qui se lit comme suit:

> 10. La compagnie n'est pas responsable des pertes suivantes, savoir:
>
> (*a*) De la perte d'une propriété possédée par toute autre personne que l'assuré, à moins que l'intérêt de l'assuré ne soit mentionné dans ou sur la police.

Dans cette condition, le mot "possédée" a le sens de possédée à titre de propriétaire. Cela ressort nécessairement du texte du statut; et c'est d'ailleurs ainsi que l'établit la version anglaise: "the loss of property owned by any other person than the insured". (*Vide* [1937] S.C.R. 288, 5e alinéa).

De prime abord, par conséquent, et ainsi que l'a jugé la Cour Supérieure, du moment que les objets assurés appartenaient à M. Rémi Taschereau, que M. Desrosiers n'était que l'employé de ce dernier "et que tout le monde le savait", il est évident que c'était M. Taschereau qui subissait la perte: "M. Desrosiers ne perdait que son emploi"; et la

police d'assurance, manquant d'un élément essentiel à sa validité, devait, comme elle l'a été, être déclarée nulle et de nul effet.

L'article 2480 du Code civil, qui s'applique aux assurances contre le feu, qualifie comme "polices d'aventure ou de jeu" les polices d'assurances "sur des objets dans lesquels l'assuré n'a aucun intérêt susceptible d'assurance" et les déclare illégales.

Dans cet état de la loi, il est sûrement douteux que les tribunaux puissent considérer comme valide une police d'assurance émise à l'encontre de prescriptions aussi impératives, même s'il est établi que l'assureur était au courant du véritable état de choses et connaissait la nature et le caractère de l'intérêt de l'assuré.

Mais cette question ne se présente pas ici, car le tribunal de première instance, sur la preuve faite au procès, a décidé que

> la défenderesse * * * n'a jamais connu la situation juridique véritable de Monsieur Desrosiers et que, si elle l'avait connu, elle ne l'aurait pas assuré;

et cette Cour, en présence de la preuve, ne saurait mettre de côté cette décision sur les faits.

L'intimé a bien représenté que, si toutefois la véritable situation n'était pas connue de la compagnie d'assurance, elle était connue de M. Bouchard, agent de la compagnie à Amos, et d'un M. Corriveau, représentant de M. Bouchard à Val d'Or.

Sur ce point, les faits sont controversés; mais, avec le juge de première instance, on peut admettre, au moins pour les besoins de la discussion, que, d'après la prépondérance de la preuve, M. Bouchard et M. Corriveau connaissaient la situation.

Cela ne pourrait permettre de reconnaître comme valide une police d'assurance que la loi déclare illégale (Arts. 2480 et 2570 C. C.).—Il pourrait en résulter que M. Desrosiers, ou le syndic de sa faillite, aurait d'autres recours à exercer; mais nous n'avons pas à nous prononcer là-dessus dans l'instance telle qu'elle se présente en cette cause.

Indépendamment de l'illégalité de la police d'assurance, que les tribunaux sont obligés de reconnaître en vertu du code civil et du statut, il resterait toujours que les effets appartenaient à M. Taschereau, qu'ils ont été assurés à

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titre de propriétaire; que le produit de l'assurance représentant les effets détruits par l'incendie serait la propriété de M. Taschereau, et, comme tel, n'a pu tomber dans la faillite de M. Desrosiers, ni, par suite, justifier l'intimé, comme syndic de cette faillite, de réclamer, pour les créanciers de M. Desrosiers, le montant de la police en question.

Le motif adopté par la Cour du Banc du Roi en appel a été que Desrosiers était, en réalité, le prête-nom de Taschereau.

Il est basé sur un contrat d'engagement entre Taschereau et Desrosiers, en date du 27 juillet 1938.

Ce contrat établit bien que Taschereau est le propriétaire; et c'est, d'ailleurs, le titre qu'il prend dans le document lui-même.

Par contre, Desrosiers y est désigné comme "l'employé".

Il y est dit que

> Le propriétaire engage l'employé pour administrer à titre de gérant responsable, le magasin connu sous le nom de "Cash & Save Reg'd." appartenant au propriétaire et situé à Val d'Or * * * à raison de quarante dollars par semaine;

qu'il est

> entendu que les affaires qui se transigeront au nom de l'employé le seront pour le propriétaire * * * et l'employé s'engage à remettre au propriétaire sur demande tout le commerce, camions, titres, comptes, droits, permis, licences, livres et tout ce qui peut avoir rapport avec "Cash & Save Reg'd." directement ou indirectement.

L'employé

> reconnaît n'avoir aucun droit de prétention ou autre sur ce qui est ci-dessus mentionné, même si ces choses sont à son nom.

Il n'y a qu'une restriction, c'est que

> l'employé sera responsable de tous crédits et comptes recevables qui n'auront pas été approuvés par le propriétaire par écrit.

Rien ne peut établir plus clairement que l'employé Desrosiers n'avait aucun titre de propriété dans les biens assurés.

A la suite de cet arrangement, Desrosiers a fait enregistrer au greffe une déclaration en vertu de laquelle il certifiait

> que je fais et que j'entends faire commerce comme épicier à Val d'Or, à Malartic, à Roc d'Or, à Perron, dans le canton Louvicourt et en général dans le district d'Abitibi, sous la raison sociale de "Cash & Save Reg'd." et qu'aucune personne n'est associée avec moi.

Cette déclaration est celle qui est exigée par les articles 1834 et suiv. du code civil et que toute personne mariée faisant affaires comme commerçant, seule ou en société avec d'autres personnes, doit faire enregistrer au bureau du protonotaire de la Cour Supérieure du district dans lequel ce commerce est fait. En vertu de l'article 1834 (*a*) C.C. une semblable déclaration doit être faite par une personne faisant affaires seule sous une raison sociale; et, en vertu de l'article 1834, (*b*) C.C., dans le cours des affaires, cette personne doit faire suivre la raison sociale du mot "enregistré" ou d'une "abréviation d'icelui". C'est ce qui explique, dans le cas actuel, que la raison sociale "Cash & Save" est suivie de l'abréviation "Regd.".

Cette déclaration par laquelle l'assuré Desrosiers a informé le public qu'il faisait affaires sous le nom de "Cash & Save Reg'd." ne l'a pas rendu propriétaire de l'épicerie de M. Taschereau, pas plus que le fait d'administrer cette épicerie comme gérant à salaire de M. Taschereau, ainsi que l'a décidé la Cour Supérieure.

Cette déclaration, même déposée au bureau du protonotaire, avec le consentement de M. Taschereau, a sans doute représenté au public (car c'était là son but) que c'était Desrosiers qui faisait affaires sous le nom de "Cash & Save Reg'd.". Elle n'a pas eu, et ne pouvait avoir, d'autre effet. C'est là le seul motif envisagé par le code civil dans les articles 1834, 1834 (*a*) et 1834 (*b*). Elle ne saurait représenter au public que le bâtiment dans lequel Desrosiers faisait affaires, non plus que le mobilier de commerce et de bureau, y compris les "garnitures" etc., étaient la propriété de Desrosiers.

Rien n'empêche un commerçant de faire affaires dans un magasin qu'il a loué en même temps que le mobilier et l'aménagement. Le seul fait de déclarer, en vertu des articles 1834 et suiv. C.C. qu'on fait affaires à un endroit désigné ne peut pas vouloir dire que l'on est propriétaire de l'immeuble et du mobilier.

Mais la Cour du Banc du Roi en appel a vu dans l'arrangement entre Taschereau et Desrosiers un consentement de la part du premier à ce que l'autre agisse comme son prête-nom; et elle en a conclu que, agissant comme prête-nom, Desrosiers pouvait assurer les biens mentionnés dans la police, comme s'il était propriétaire.

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Ce principe ne nous paraît pas compatible avec les exigences du code civil et les conditions de la police elle-même, dont l'article 240 des statuts refondus exige l'insertion avec tant de rigueur.

Le prête-nom est essentiellement un mandataire. Son intérêt ne peut être que celui du mandataire; il ne saurait jamais devenir celui du mandant propriétaire.

Admettant que son titre lui conférerait un "intérêt dans la chose assurée appréciable en argent", en vertu de l'article 2571 C. C., la nature de cet intérêt devait être spécifiée.

Mais bien plus; la condition même de la police, acceptée par Desrosiers, est que la compagnie n'est pas responsable des pertes

d'une propriété possédée par toute autre personne que l'assuré, à moins que l'intérêt de l'assuré ne soit mentionné dans ou sur la police.

Il ne s'agit plus, par conséquent, de se demander si l'article 2571 du code civil doit être considéré comme une disposition d'ordre public à laquelle il ne peut être permis de déroger. En l'espèce, l'obligation de mentionner dans la police l'intérêt de l'assuré était une condition du contrat lui-même entre l'appelante et l'intimé; et cette condition spécifiait que "à moins que l'intérêt de l'assuré ne soit mentionné dans ou sur la police", la compagnie n'était pas responsable de la perte de la propriété.

Nous ne voyons pas comment l'intimé pouvait réussir dans sa réclamation contre l'appelante à l'encontre d'une stipulation expresse de son contrat.

Il convient d'ajouter que, s'il était besoin de décider la cause indépendamment de la clause spécifique du contrat et de la loi telle qu'elle est contenue dans le code civil et dans les statuts refondus, nous pourrions difficilement souscrire au principe que le prête-nom pouvait assurer comme propriétaire les biens couverts par la police en question.

Dans la cause de *Gilbert* v. *Lefaivre* (1), l'honorable juge Mignault, rendant le jugement unanime de cette Cour, s'exprime comme suit:

Il y a, surtout en matière de mandat, des différences notables entre le Code Civil de la province de Québec et le Code Napoléon. Ainsi nos articles 1716 et 1727, pour ne parler que de ceux-là, n'existent pas dans le code français. En France, les tiers qui traitent avec un prête-nom, ou avec un mandataire qui parle en son propre nom, n'ont pas d'action directe contre le mandant (Planiol, 8e éd. t. 2, n° 2271; Dalloz, Répertoire pratique, vo. Mandat, n° 301). Il en est autrement sous notre

(1) [1938] S.C.R. 333, at 338, 339

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THE NORTH EMPIRE FIRE INSUR. CO. v. VERMETTE.

Rinfret J.

code (art. 1716 C. C.) qui s'inspire de la doctrine de Pothier (Mandat, n° 88). La situation apparente, en France, semble avoir une importance, en regard de la situation réelle, qu'elle n'a peut-être pas dans notre droit où nous n'avons pas la règle, si importante en matière mobilière, possession vaut titre (art. 2279 C. N. et art. 2268 Code civil, Québec). Sur tout cela je crois devoir faire des réserves, car la question peut se présenter d'une façon concrète, mais pour le moment je n'ai pas à trancher le débat.

Ainsi que nous l'avons dit, si Desrosiers doit être considéré comme le prête-nom de Taschereau: alors il n'en était que le mandataire; la police, en fait, appartenait à Taschereau; et, si ce dernier avait été partie contractante avec l'appelante, c'est ce dernier qui aurait eu le droit d'en réclamer le produit.

La connaissance qu'ont pu avoir Bouchard et Corriveau ne change rien à la situation. Elle ne saurait permettre aux tribunaux d'amender ou de modifier le contrat d'assurance, ou de le traiter comme s'il eût été rédigé différemment. (Art. 2570 C. C.).

On nous a cité l'arrêt *Re Alliance Assurance Company Limited* v. *McLean* (1), mais il est juste de faire remarquer que cette décision a été portée en appel devant cette Cour, où elle a été infirmée le 21 juin 1921.

Pour ces motifs, l'appel doit être maintenu et le jugement de première instance doit être rétabli avec dépens tant en cette Cour que dans la Cour du Banc du Roi en appel.

Appeal allowed with costs.

Solicitor for the appellant: *Audette & McEntyre.*

Solicitor for the respondent: *Christophe Taschereau.*

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*Feb. 2, 3.
*Apr. 2.

PAUL PONYICKI (PLAINTIFF)..... APPELLANT;

AND

TAKASHI T. SAWAYAMA AND CONZO SAWAYAMA (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Motor vehicle—Fatal accident—Deaths of wife and infant child—Damages—Measure of—Pecuniary loss—Loss of expectation of life—Loss of wife's services—Claims under the Administrations Act, R.S.B.C., 1936, c. 5, and the Families' Compensation Act, R.S.B.C., 1936, c. 93.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau.

(1) [1921] 27 R. L. N.S. 8.

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The appellant's wife and infant daughter, while on a public street, were struck by an automobile operated by one of the respondents and owned by his father, the other respondent, and they were so severely injured that the wife died within a few hours and the daughter within a few days thereafter. The appellant brought two actions, one as administrator of his wife's estate for damages for loss of expectation of her life under the *Administration Act* and also for damages for his benefit personally as husband and for the benefit of her daughter (represented by him as her administrator) under the *Families' Compensation Act;* and, in the second action, the appellant sued as administrator of his daughter's estate for damages for loss of expectation of her life. The two actions were consolidated; and the respondents admitted liability. The trial judge awarded damages, first, under the *Administration Act,* for loss of wife's expectation of life, $1,000, and for loss of child's expectation of life, $750, and, secondly, under the *Families' Compensation Act,* for loss of wife's services, $125; and the trial judge added that "the above amounts are without abatement". The appellant, as administrator of his wife's estate, appealed to the Court of Appeal on the ground that the damages of $1,125 were insufficient; and the respondents cross-appealed on the ground that nothing should have been awarded for loss of the wife's services. Both the appeal and the cross-appeal were dismissed.

Held, affirming the judgment of the Court of Appeal ([1942] 3 W.W.R. 719), that the appeal to this Court should be dismissed with costs. The principle of law applicable to a claim for compensation in cases as the present one has been clearly stated by the Judicial Committee in *Grand Trunk Railway Co. of Canada* v. *Jennings* (13 App. Cas. 800), where it was held that the right to recover damages is restricted to the actual pecuniary loss sustained. Under the circumstances of this case and applying such principle to the evidence, which is meagre and inconclusive, it cannot be held that the trial judge and the majority of the appellate court were clearly wrong, and this Court ought not to interfere with the assessment of damages.

Per Rinfret, Hudson and Taschereau JJ.—The point raised by the appellant, that the trial judge failed to allow to the estate of the infant, for the death of the mother, damages to which the infant was entitled under the *Families' Compensation Act,* is not well founded. The Court is entitled to inform its mind of subsequent events throwing light upon the realities of the case: *Williamson* v. *John I. Thornycroft and Co.* ([1940] 2 K.B. 658). Although the amount allowed for loss of expectation of life is not questioned, it cannot be ignored when considering the award which should be made to the appellant in respect of the loss of his wife's services: *Davies* v. *Powell Duffryn Associated Collieries Limited* ([1942] A.C. 601). The total amount awarded under either headings went to the appellant himself, so that he received in respect of the two headings an aggregate of $1,125 in respect of the wife's death, and he recovered a further sum of $750 in respect of his child's death, both these events having taken place within a few days. Therefore, when the realities of this case are taken into account, the amount of damages awarded should not be disturbed.

Per Kerwin J.—The expression used by the trial judge "The above amounts are without abatement" would be idle, unless it is construed as meaning that he had fixed the damages of the husband, under the

Families' Compensation Act, at $1,125, and deducted from it the amount allowed under the *Administration Act.* And, in this, the trial judge did exactly what the House of Lords, in *Davis* v. *Powell Duffryn Associated Collieries Limited* ([1942] A.C. 601), decided was proper. Construing the direction for judgment in that way, there is nothing to indicate that the trial judge did not take into consideration all relevant matters. On the assumption that $1,125 was fixed as the damages under the *Families' Compensation Act,* there should not be an abatement of one-half of the $1,000 awarded under the *Administration Act* because the husband would be entitled to that proportion and the child, represented by her father as administrator, to the balance. The trial judge, the child having died, undoubtedly treated the matter in a realistic manner, knowing that the full amount allowed under the *Administration Act* would go to the husband. The gain in money to the husband under that Act accrued to him by reason of the death of his wife although one-half came from another source, and the total should therefore be deducted from the award under the *Families' Compensation Act.*

APPEAL, by leave of appeal granted by the Court below, from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Sidney Smith J., and maintaining 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 judgments now reported.

Walter F. Schroeder K.C. for the appellant.

C. L. McAlpine K.C. and *John L. Farris* for the respondents.

The judgment of Rinfret, Hudson and Taschereau JJ., was delivered by

HUDSON J.—The plaintiff's wife and infant daughter, while on a public street, were struck by an automobile and so severely injured that the wife died within a few hours and the infant daughter within a few days thereafter.

Originally, there were two actions, each alleging that the accident arose through the negligence of the defendant Takasi Sawayama, for which both he and his father were responsible.

In the first of such actions, the plaintiff claims as administrator of his wife's estate (*a*) general damages for loss of income to the plaintiff as a result of the death of his wife and for loss of consortium; and (*b*) general damages for loss of expectation of life of his wife; and (*c*) special damages.

(1) [1942] 3 W.W.R. 719; [1943] 1 D.L.R. 165.

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The second action was brought by the plaintiff as administrator of the estate of his infant daughter and claimed general damages for pain and suffering of the daughter and damages for loss of expectation of life, and also special damages.

By order these two actions were consolidated.

The defendants admitted liability and the matter was heard before Mr. Justice Sydney Smith for assessment of damages. That learned judge gave judgment as follows:

> In these consolidated actions I award damages as follows:—
>
> (*a*) Under the *Administration Act*;
>
> (1) For loss of wife's expectation of life.....$1,000 00
>
> (2) For loss of child's expectation of life..... 750 00
>
> (*b*) Under the *Families' Compensation Act*;
>
> For loss of wife's services..... 125 00
>
> The above amounts are without abatement.
>
> Judgment accordingly.

An appeal and cross-appeal to the Court of Appeal were dismissed.

In respect of the items awarded by Mr. Justice Smith, no question is raised with reference to the amount allowed for the wife's expectation of life, nor for the child's expectation of life, but the plaintiff contends that the amount allowed for the loss of his wife's services is grossly inadequate.

Although the amount allowed for loss of expectation of life is not questioned, yet it cannot be ignored when considering the award which is made to the plaintiff in respect of the loss of his wife's services. This point was recently considered by the House of Lords in the case of *Davies* v. *Powell Duffryn Associated Collieries, Limited* (1). In that case the appellants, each of them suing as administratrix of her deceased husband, brought actions against the respondents for breach of statutory duty and negligence. Each claimed damages (1) under the *Fatal Accidents Acts,* 1846 to 1908, on behalf of the deceased's dependents, and (2) under the *Law Reform (Miscellaneous Provisions) Act,* 1934, in respect of the deceased's shortened expectation of life. The appellants contended that no allowance should be made in assessing damages under the *Fatal Accidents Acts* in respect of any damages awarded under the 1934 Act. It was held that in assessing damages

(1) [1942] 1 All. E. R. 657; [1942] A.C. 601.

under the *Fatal Accidents Act*, 1846, damages awarded under the *Law Reform (Miscellaneous Provisions) Act* 1934, must be taken into account in the case of dependents who will benefit under the latter Act.

There are minor differences between the English legislation and that of British Columbia, but none which would appear to be material on this point.

All of the learned judges in the Court of Appeal have agreed that the present case is governed by the *Davies* v. *Powell Duffryn Associated Collieries, Limited* case (1) and that, therefore, in considering what should be allowed the plaintiff in respect of his wife's services, the amount allowed him for loss of his wife's expectation of life must be taken into account.

In the present case the total amount awarded under either heading goes to the plaintiff himself, so that he gets in respect of the two headings an aggregate of $1,125.00.

Counsel for the plaintiff raised another question worded in this way,

> * * * that the learned judge erred in assessing damages under the *Families' Compensation Act* for the death of the said Anna Ponyicki, deceased, in that he failed to allow damages for the death of the said Anna Ponyicki, deceased, to the estate of the infant Betty Anna Ponyicki, deceased, to which damages the said infant, or her estate, is entitled under the provisions of the said *Families Compensation Act.*

Even if the appellant were able to overcome the initial objection that this point was not raised in the pleadings nor at the trial, I am of the opinion that on the facts here it is not well founded.

In *Williamson* v. *John I. Thornycroft and Co. Ltd.* (2), it was held by the Court of Appeal that while the damages had to be assessed as at the date of the husband's death, the Court was entitled to inform its mind of subsequent events throwing light upon the realities of the case, such as the fact that one defendant had only had a short tenure of life before her dependence was brought to an end, and that, therefore, in this case only a comparatively small sum ought to have been allowed to the widow under Lord Campbell's Act.

If we look at the realities, we must consider that the plaintiff recovers $1,125.00 in respect of his wife's death and $750.00 in respect of his child's death, both these events

(1) [1942] 1 All. E. R. 657; [1942] A.C. 601. (2) [1940] 2 K.B. 658.

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taking place within a few days. It is strongly argued that even on this basis the amount awarded to the plaintiff in respect of his wife's death is grossly inadequate and, in the court below, Mr. Justice O'Halloran gave a dissenting judgment on this point. He would have allowed an aggregate of $7,500.00.

The principles of law applicable to compensation in cases of this kind do not seem to be open to any amount of doubt. Damages are awarded for the loss of a reasonable expectancy of pecuniary benefit. See *Grand Trunk Railway Company of Canada* v. *Jennings* (1), *Royal Trust Company* v. *Canadian Pacific Railway Co.* (2). The appellant claimed damages for the loss of his wife's services as housekeeper. The evidence discloses merely that the wife acted as housekeeper and took care of her infant child, who was killed in the same accident as the wife. After his wife's death the appellant employed a housekeeper for one month at a cost of $25.00. No other evidence of loss was given. Services rendered gratuitously may constitute a pecuniary loss under the *Families Compensation Act,* but such services must be worth more than the cost of maintaining the wife with food, clothing, etc.

The burden is on the appellant and although the amount allowed seems small, the difficulty we are met with here is that the evidence is so meagre and inconclusive that it is difficult to say that the trial judge and the majority in the court below are clearly wrong, and, for that reason, I would dismiss the appeal with costs.

DAVIS J.—I agree that this appeal should be dismissed with costs.

The only question in the appeal is the amount of damages which should be allowed for the husband's loss of his wife by death. The right conferred by statute to recover is restricted, to use the words of Lord Watson in *Grand Trunk Railway Company* v. *Jennings* (3), "to the actual pecuniary loss sustained."

Giving effect to what the learned trial judge obviously intended by the use of the words "without abatement" in his judgment, the amount fixed by him was $1,125. The

(1) [1888] 13 App. Cas. 800.
(2) [1922] 38 T.L.R. 89 67 D.L.R. 518.
(3) (1888) 13 App. Cas. 800, at 803.

evidence of the probability of any pecuniary loss was so scanty that I do not see how the learned trial judge would have been justified in awarding any larger sum. His judgment was affirmed by the Court of Appeal and there is no ground upon which we should interfere.

KERWIN J.—Paul Ponyicki was the husband of Anna and the father of their child, Betty Anna. These two were run down by a motor vehicle owned by one of the respondents and operated by the other, as a result of which the wife died almost immediately and the daughter four days later. Ponyicki was appointed administrator of his wife's estate and he was also appointed administrator of his daughter's estate. Two actions were brought against the respondents but an order was made consolidating them and directing that the issues be tried together at the same time. The respondents admitted liability so that the only question remaining to be tried was that of damages. In the first action, damages were claimed by Ponyicki as administrator of his wife's estate for loss of expectation of her life, under the *Administration Act,* R.S.B.C. 1936, chapter 5, and also damages for his benefit personally as husband, and for the benefit of Betty Anna as daughter (represented by her administrator), under the provisions of the *Families' Compensation Act,* R.S.B.C. 1936, chapter 93. In the second action, the appellant sued as administrator of the daughter's estate for damages for loss of expectation of her life.

The trial took place before Mr. Justice Sidney Smith without the intervention of a jury. It appears that at the time of the accident the wife was twenty-seven years and eleven months old, the daughter was aged one year and three months, and the husband forty-two years. The family lived together in a two-story house, owned by the husband, in a factory section of the city of Vancouver. The husband was a carpenter and mill-wright. The wife was strong and in good health and did all the housework, including looking after six roomers who paid, in all, twenty-six dollars per month. After the wife's death another woman looked after the house for the husband, washed his clothes, etc., for one month, in return for which he did some plumbing work. After that, he rented the lower part of the house, furnished, for twenty-five dollars per month

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and he lived upstairs. No roomers have been kept since the wife's death. The above narrative relates the only evidence on the question of damages, except that of the husband and of his sister-in-law who testified that it had been arranged that he would build an addition to the house to contain a hair-dressing shop on one side and a lunch counter on the other, the former to be managed by the sister-in-law and the latter by the wife.

On this evidence the trial judge directed:—

> In these consolidated actions I award damages as follows:—
> (*a*) Under the *Administration Act*:—
> (1) For loss of wife's expectation of life.....$1,000.00
> (2) For loss of child's expectation of life..... 750.00
> (*b*) Under the *Families' Compensation Act*:—
> For loss of wife's services..... 125.00
> The above amounts are without abatement. Judgment accordingly.

Only one formal judgment was taken out in the consolidated actions and by it Paul Ponyicki as administrator of his daughter's estate was awarded $750.00, and as administrator of his wife's estate $1,125.00. In view of the daughter's death, all of the $1,125 would go to Paul Ponyicki, irrespective of what part thereof would have been allowed under the *Families' Compensation Act*. No doubt for that reason it was considered unnecessary to state in the formal judgment that he was the sole party entitled to damages under that Act.

As plaintiff in the first action, Paul Ponyicki in his capacity as administrator of his wife's estate appealed from the judgment in the consolidated actions on the ground, according to the notice of appeal, that the damages of $1,125 were insufficient. The present respondents cross-appealed on the ground that nothing should have been awarded for loss of the wife's services. The Court of Appeal, with Mr. Justice O'Halloran dissenting, dismissed the appeal and cross-appeal, subject to a variation by which the total amount was increased to $1,165 to cover a small item that had been overlooked. Upon leave granted by the Court of Appeal, the plaintiff in the first action as administrator of his wife's estate now appeals to this Court.

At bar, counsel for the appellant, quite properly I think, abandoned the claim advanced in his factum that because the daughter survived her mother four days some amount should have been awarded the former's estate under the

Families' Compensation Act. He admitted that damages could not be awarded the husband because of grief and suffering at his wife's death but argued that the sum awarded by the trial judge bore no relation to the loss in money suffered by the husband by the deprivation of his wife's services. The sum was either $125 or $1,125, depending upon the construction to be placed upon the trial judge's direction. Counsel also contended that if the trial judge had really decided to allow $1,125 under the *Families' Compensation Act* and had then deducted the $1,000 allowed under the *Administration Act,* there was no justification for so doing under the provisions of the relevant statutes.

It is advisable, therefore, to refer to the provisions of the two statutes under which the two rights of action were advanced. The *Families' Compensation Act,* R.S.B.C. 1936, chapter 93, is for all relevant purposes the same as the *Imperial Fatal Accidents Acts,* giving a right of action for damages, where wrongful act, negligence or default causes death, for the benefit of the wife, husband, parent and child of the deceased. Subsections 2 and 6 of section 71 of the *Administration Act,* R.S.B.C. 1936, chapter 5, deal with the other right of action and read as follows:—

(2) The executor or administrator of any deceased person may bring and maintain an action for all torts or injuries to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, except that recovery in the action shall not extend to damages in respect of physical disfigurement or pain or suffering caused to the deceased or to damages in respect of expectancy of earnings subsequent to the death of the deceased which might have been sustained if the deceased had not died; and the damages recovered in the action shall form part of the personal estate of the deceased.

(6) This section shall be subject to the provisions of section 12 of the *Workmen's Compensation Act,* and nothing in this section shall prejudice or affect any right of action under the provisions of section 81 of that Act or the provisions of the *Families' Compensation Act.*

In *Davies* v. *Powell Duffryn Associated Collieries Ltd.* (1), the House of Lords decided that subsection 5 of section 1 of *The Law Reform (Miscellaneous Provisions) Act,* 1934, does not alter the measure of damages recoverable for the benefit of the named persons under the *Fatal Accidents Acts* and that damages awarded under *The Law Reform Act* of 1934 must be taken into account in fixing

(1) [1942] A.C. 601; [1942] 1 All. E. R. 657.

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the amount that would otherwise be given under the former. The speeches of all the peers indicate that all that is meant by subsection 5 of section 1 of *The Law Reform Act* is that the right of action under each enactment shall co-exist. The wording of subsection 6 of section 71 of the British Columbia Act, "nothing in this section shall prejudice or affect any right of action", is even more emphatic than the corresponding Imperial statute and the decision of the House of Lords applies. On this point there appears to be no disagreement among any of the judges who have so far considered this case.

At the date of the trial judgment, the decision of the House of Lords was probably not known to the trial judge or to counsel but all were familiar with the earlier decision in *Rose* v. *Ford* (1). In view of the speeches of some of the peers in that case, the expression used by the trial judge "The above amounts are without abatement" would be idle unless it is construed as meaning that he had fixed the damages of the husband, under the *Families Compensation Act*, at $1,125, and deducted from it the amount allowed under the *Administration Act*. In this he did exactly what the House of Lords, in the later case, decided was proper. Construing the direction for judgment in that way, there is nothing to indicate that the trial judge did not take into consideration all relevant matters. The decision of this Court in *St. Lawrence and Ottawa Railway Company* v. *Lett* (2), relied upon by the appellant, contains nothing in conflict with this conclusion. The amount of damages was not there in question, the whole argument being confined to the question whether any amount could be given a husband for the death of his wife in the absence of proof that the husband had lost so many dollars and cents.

The principle to the applied was stated by the Judicial Committee in *Grand Trunk Railway Company of Canada* v. *Jennings* (3), and re-affirmed in *Royal Trust Company* v. *Canadian Pacific Railway Company* (4), where Lord Parmoor observes:—

> When a claim for compensation to families of persons killed through negligence is made, the right to recover is restricted to the amount of actual pecuniary benefit which the family might reasonably have expected to enjoy had the deceased not been killed. It is not competent for a court or a jury to make in addition a compassionate allowance. The

(1) [1937] A.C. 826.
(2) (1885) 11 Can. S.C.R. 422.
(3) (1888) 13 App. Cas. 800.
(4) (1922) 67 D.L.R. 518.

principle, as stated by Lord Watson in *Grand Trunk Railway Co.* v. *Jennings* (1), is applicable in cases where the loss, in respect of which compensation is claimed, is based on the cessation of an income derived from professional skill:—

> "It then becomes necessary to consider what, but for the accident which terminated his existence, would have been his reasonable prospects of life, work and remuneration; and also how far these, if realised, would have conduced to the benefit of the individual claiming compensation."

The difficulty arises not in the statement of the principle, but in its application to a case in which the extent of the actual pecuniary loss is largely a matter of estimate, founded on probabilities, of which no accurate forecast is possible.

Finally, in the House of Lords, Lord Wright in the *Davies* case (2) puts it thus:—

> The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value.

Applying this principle to the evidence in this case, no damages for the loss of his wife's society could be allowed the husband under the *Families' Compensation Act* but there is nothing to prevent an allowance for the reasonable expectation of pecuniary loss suffered by him in the death of a healthy, industrious and careful woman who had performed all the household duties in and about the residence of the spouses. While the evidence is meagre, it justifies a conclusion that Anna Ponyicki could be so described, and by her death the husband sustained "a substantial injury and one for which it was the intention of the legislature to indemnify the husband" (per Sir William Ritchie, C.J., in the *Lett* case, at 433) (3). The evidence does not justify an allowance of damages in connection with the proposal for the hair-dressing shop and lunch counter as there is nothing to warrant a finding that there were any reasonable prospects of the earning of profits by the services of the wife which would have conduced to the benefit of the hubsand. Under these circumstances, I am unable to say that the trial judge "has acted on a wrong principle of law or has misapprehended the facts or has for these or other reasons made a wholly erroneous estimate of the damage suffered" (4), and I would not, therefore, interfere with the assessment of damages.

(1) (1888) 13 App. Cas. 800, at 804.
(2) [1942] 1 All. E.R. 657; [1942] A.C. 601.
(3) (1885) 11 Can. S.C.R. 422.
(4) [1942] A.C. 601, at 617.

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The appellant finally contended that in any event, on the assumption that $1,125 was fixed as the damages under the *Families' Compensation Act*, there should be an abatement of only one-half of the $1,000 awarded under the *Administration Act* because the husband would be entitled to that proportion and the child, represented by her father as administrator, to the balance. However, the child having died, the trial judge undoubtedly treated the matter in a realistic manner, knowing that the full amount allowed under the *Administration Act* would go to the husband. The gain in money to the husband under that Act accrued to him by reason of the death of his wife although one-half came from another source, and the total should therefore be deducted from the award under the *Families' Compensation Act*. In the *Davies* case (1), Mrs. Williams, one of the appellants, took all the damages awarded her because her husband's estate was under £1,000 in value. Her right thereto arose under a different statute but nevertheless the £250 fixed as her damages under the *Law Reform Act* accrued to her by reason of her husband's death.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitor for the respondents: *Farris, McAlpine, Stultz, Bull and Farris.*

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*June 9, 10, 11.
1943
*April 2.

IN THE MATTER OF A REFERENCE AS TO THE POWERS OF THE CORPORATION OF THE CITY OF OTTAWA AND THE CORPORATION OF THE VILLAGE OF ROCKCLIFFE PARK TO LEVY RATES ON FOREIGN LEGATIONS AND HIGH COMMISSIONERS' RESIDENCES.

International law—Constitutional law—Assessment and taxation—Crown —Powers of municipalities in Ontario to levy rates on foreign legations and High Commissioners' residences.

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

(1) [1942] A.C. 601; [1942] 1 All E.R. 657.

The following questions were referred to this Court:

Is it within the powers of the Council of the Corporation of the City of Ottawa to levy rates on

(1) properties in Ottawa owned and occupied as Legations by the Governments of the French State, the United States of America and Brazil, respectively, or

(2) on property in Ottawa owned and occupied by His Majesty in right of the United Kingdom as the Office and Residence of the High Commissioner for the United Kingdom, or

(3) on property in Ottawa owned and occupied by His Majesty in right of Australia as the Residence of the High Commissioner for the Commonwealth of Australia, and

(4) is it within the powers of the Council of the Corporation of the Village of Rockcliffe Park to levy rates on property owned and occupied by the Government of the United States of America as the Legation of the United States in Rockcliffe Park?

The said municipalities are in the province of Ontario.

On said questions, opinions were given as follows:

Per curiam: Questions 2 and 3 should be answered in the negative, as the properties come within the exemption of Crown property in the Ontario *Assessment Act*.

As to questions 1 and 4:

Per the Chief Justice and Rinfret and Taschereau JJ. (the majority of the Court): These questions should be answered in the negative.

Per the Chief Justice: There are applicable certain general principles of international law (as applied in normal times and circumstances), accepted and adopted by the law of England (which, except as modified by statute, is the law of Ontario) as part of the law of nations. The general principle which governs the juridical position of the foreign minister is that he owes no allegiance to the state to which he is sent and that he is not subject to its laws. The inviolability of his residence, used as a legation, is one of the diplomatic immunities recognized by English law and acknowledged in all civilized nations as annexed to the ambassadorial character. The legation, for all the ordinary affairs of life, is equally, with the ambassador himself, not subjected to the authority of the territorial sovereignty. Taxes and rates imposed by statute in general terms in respect of the occupation or the ownership of real property are not recoverable from diplomatic agents in respect of real property occupied or owned by them or their states and occupied and used for diplomatic purposes. Such a statute creates no liability to pay; and it cannot, consistently with principle, create any effective charge upon the property: the property is not subject to process, or to visitation by government officers; and the foundation of this privilege is that the foreign state and its ambassador are immune from *coactio* (in the sense of Lord Campbell's judgment in *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94) direct or indirect. The contention that property of a foreign sovereignty in use for diplomatic purposes may, without infringement of the principles of international law, be subjected to such a tax as a charge upon the land, cannot be accepted. So long as the property is devoted to such use, the territorial sovereignty admittedly cannot enforce a charge;

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and if, in case of a sale, the charge is to stand as against the purchaser, the statutory proceeding is only a method of enforcing indirectly the law of the territorial jurisdiction against the public property of the foreign sovereign; it would be the assertion of a right over it adversely affecting it, because the charge would affect the price for which it could be sold; the creation of the charge would amount to the creation of a *jus in re aliena,* to a subtraction from the property of the foreign sovereign; and would be inconsistent with the principle "of absolute independence of every superior authority" which lies at the basis of the immunities conceded to a foreign sovereign and his property. The general language of the enactments imposing the taxation in question must be construed as saving the privileges of foreign states under the principles above stated. (It was pointed out that the principles governing the immunities of a foreign sovereign and his diplomatic agents and his property do not limit the legislative authority of the legislature having jurisdiction in the particular matter affected by any immunity claimed or alleged).

Per Rinfret J.: A principle of international law which has acquired validity in the domestic law of England and, therefore, in the domestic law of Canada, is that a foreign minister is not subject to the laws of the state to which he has been sent as a diplomatic representative; he enjoys an entire independence from its jurisdiction and authority; consequently, he is exempt from the jurisdiction of its courts. It is a necessary consequence of the legal impossibility of collecting the taxes against foreign states or diplomats that such taxes may not be assessed and levied on the properties owned and occupied by them and used for diplomatic purposes; nor, consistently with principle, can the municipal corporation create any effective charge upon the property, because, as this would affect the price for which the property could be sold later to an ordinary purchaser, it would only be an indirect way of coercing the foreign state.

Per Taschereau J.: It is a settled and accepted rule of international law in practically all the leading countries of the world, that property belonging to a foreign government, occupied by its accredited representative, cannot be assessed and taxed for state or municipal purposes. The immunity of the foreign minister from legal process in the country where he is sent extends to the property of his state, which is exempt from all forms of taxation. It is with this in mind that the *Assessment Act* of Ontario must be read. Concurrence expressed with the reasons of the Chief Justice.

Per Kerwin J.: On the basis that the questions submitted refer to the powers of the councils of the municipal corporations to impose assessments, taxes and charges, and not to their powers or those of the corporations acting through their officers and agents to compel payment of these taxes, questions 1 and 4 should be answered in the affirmative. As to the properties owned by the foreign states, there is nothing to prevent the ordinary procedure being taken (whatever may be the ultimate result thereof), that is, for the assessor to enter them on the assessment roll and the countries concerned as owners thereof, and for the collector's roll to be prepared and for the proper municipal authorities to enter in that roll the amount of taxes either for general or special rates or assessments; and for the tax collector to send a notice in the usual form showing the amount of taxes.

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Per Hudson J.: Questions 1 and 4 should be answered in the affirmative, meaning thereby that the council of the municipality can impose such taxes, but this is qualified by the fact that assistance of the courts would not be given to enforce payment so long as the diplomatic immunity continued. The Dominion has the right to give a status to diplomatic representatives, and the Province is bound to recognize their status, but not necessarily bound to accord them privileges in matters falling within provincial legislative jurisdiction under s. 92 of the *B.N.A. Act*; the granting of the status does not carry with it immunities from provincial laws beyond those immunities recognized by the provincial legislature. There is no legislation of Canada or of Ontario granting immunities in respect of foreign legations, so that, if any exist, it must be by virtue of general principles of international law or of imperial legislation, having the force of law in Ontario. A consideration of the extent of such immunities under such principles and legislation leads to the conclusion that a court would be bound to hold that in Ontario no action could be proceeded with against any foreign sovereign or state or its diplomatic representatives who pleaded immunity, in respect of taxes imposed by municipal corporations, and the same rule would apply to any proceedings in court calculated to disturb their occupation of the land. But such immunity or privilege is one from action or molestation; it does not destroy liability. The Ontario legislature, which is supreme in the matters of municipal institutions and property and civil rights in the province, has not seen fit to exempt the land used for legations from municipal taxes. The tax when imposed creates a lien and charge on the land; and, on severance of diplomatic relations or disposal of the land by the foreign state or its representative, the lien might well become effective. Again, a substantial part of municipal taxation is imposed to pay for the services rendered by the municipality, such as water, sewerage, etc., which it would have a right to withhold until taxes are paid.

(References were made in the opinions to distinction between taxes which constitute payment for services rendered for the beneficial enjoyment of the particular property in respect of which they are assessed (as water rates, etc.) and those which are levied for general purposes. As to the first class: *Per* the Chief Justice: There is no obligation to provide the envoy from a foreign state gratuitously with water, or electricity, and it would be generally agreed that where a tax is in the nature of the price of a commodity, the person enjoying the benefit of that commodity ought to pay the price (though, *semble,* he cannot be compelled to do so, since his person is inviolate and his house and goods are exempt from legal process). *Per* Rinfret J.: The Attorney-General of Canada admitted that the "rates" with which the Court must deal in its answers do not include the charges imposed for such services or commodities. *Per* Kerwin J.: The word "rates" as used in the questions should not be so restricted.)

REFERENCE by His Excellency the Governor General in Council, under the authority of s. 55 of the *Supreme Court Act* (R.S.C. 1927, C. 35), of the following questions to the Supreme Court of Canada for hearing and consideration, namely:—

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Is it within the powers of the Council of the Corporation of the City of Ottawa to levy rates on

(i) properties in Ottawa owned and occupied as Legations by the Governments of the French State, the United States of America and Brazil, respectively, or

(ii) on property in Ottawa owned and occupied by His Majesty in right of the United Kingdom as the Office and Residence of the High Commissioner for the United Kingdom, or

(iii) on property in Ottawa owned and occupied by His Majesty in right of Australia as the Residence of the High Commissioner for the Commonwealth of Australia,

and is it within the powers of the Council of the Corporation of the Village of Rockcliffe Park to levy rates on property owned and occupied by the Government of the United States of America as the Legation of the United States in Rockcliffe Park?

The Order in Council is set out in full in the reasons of the Chief Justice *infra.*

D. L. McCarthy K.C., J. E. Read K.C., and *W. R. Jackett,* for the Attorney General of Canada.

Hon. G. D. Conant K.C. and *C. R. Magone K.C.* for the Attorney General for Ontario.

Rosario Genest K.C. for the Attorney General for Quebec.

F. B. Proctor K.C. and *G. C. Medcalf* for the City of Ottawa.

H. A. Aylen K.C., for the Village of Rockcliffe Park.

THE CHIEF JUSTICE.—His Excellency in Council has been pleased to refer to us certain questions. The Order-in-Council of the 19th of March, 1942, is as follows:—

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL:

WHEREAS the Minister of Justice reports:—

1. That it is the practice of the Council of the Corporation of the City of Ottawa to levy rates on

(*a*) the French legation in Ottawa which is the property of the Government of the French State;

(*b*) the Office and Residence of the High Commissioner for the United Kingdom in Ottawa which is the property of His Majesty the King in right of the United Kingdom;

(*c*) the United States Legation in Ottawa which is the property of the Government of the United States of America;

(*d*) the Residence of the High Commissioner for the Commonwealth of Australia in Ottawa, which is the property of His Majesty the King in right of Australia; and

(*e*) the Brazilian Legation in Ottawa, which is the property of the Government of Brazil;

2. That it is the practice of the Council of the Corporation of the Village of Rockcliffe Park to levy rates on the United States Legation in Rockcliffe Park which is the property of the Government of the United States of America;

3. That, as a matter of international courtesy, the Government of Canada pays the said rates.

AND WHEREAS the Minister is of opinion that the question as to the validity of any tax levied by any province, municipality or other authority in Canada upon the property of a foreign state or upon the property of His Majesty the King in right of the United Kingdom or of any other part of His Majesty's dominions is an important question of law touching the relations of the Government of Canada with foreign powers and with the other Governments of the British Commonwealth as well as the constitutionality and interpretation of provincial legislation.

NOW, THEREFORE, His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and under the authority of Section 55 of the Supreme Court Act, is pleased to refer and doth hereby refer the following questions to the Supreme Court of Canada for hearing and consideration, namely:—

Is it within the powers of the Council of the Corporation of the City of Ottawa to levy rates on

(i) properties in Ottawa owned and occupied as Legations by the Governments of the French State, the United States of America and Brazil, respectively, or

(ii) on property in Ottawa owned and occupied by His Majesty in right of the United Kingdom as the Office and Residence of the High Commissioner for the United Kingdom, or

(iii) on property in Ottawa owned and occupied by His Majesty in right of Australia as the Residence of the High Commissioner for the Commonwealth of Australia,

and is it within the powers of the Council of the Corporation of the Village of Rockcliffe Park to levy rates on property owned and occupied by the Government of the United States of America as the Legation of the United States in Rockcliffe Park?

As regards the properties owned and occupied by the High Commissioner for the United Kingdom and the High Commissioner for the Commonwealth of Australia, the powers of the Council of the Corporation of the City of Ottawa do not extend to these properties since they are embraced within the expressed exemption of Crown property by enactments of the *Assessment Act.*

In *Chung Chi Cheung* v. *The King* (1), Lord Atkin, delivering the judgment of the Judicial Committee, said, at pp. 167-8:—

It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own

(1) [1939] A. C. 160.

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domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. What, then, are the immunities of public ships of other nations accepted by our Courts, and on what principle are they based?

In *Mortensen* v. *Peters* (1), Lord Dunedin, then Lord President of the Court of Session in Scotland, said:—

> It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland.

There are some general principles touching the position of the property of a foreign state and the minister of a foreign state that have been accepted and adopted by the law of England (which, except as modified by statute, is the law of Ontario) as part of the law of nations. It should, however, be observed at the outset that we are only concerned here with such rules as applied in normal times and in normal circumstances. We are not in any way concerned with the qualifications of these rules that may be necessary in order to meet special circumstances in which the interest of the state in relation to public safety, or public order, may be affected. What I have to say as to general principles must, therefore, be taken to be subject to that observation. Nor does any question arise as to the particular classes of diplomatic agents who are the subjects of immunities which indisputably are enjoyed by a foreign minister.

It is probable that the privileges attributed to foreign representatives by the law of England, as part of the law of nations, are at least as liberal as those recognized by the law of any other country. In *Heathfield* v. *Chilton* (2), Lord Mansfield said:—

> The law of nations will be carried as far in England, as anywhere.

The general principle which governs the juridical position of the foreign minister is that he owes no allegiance to the state to which he is sent and that he is not subject to the

(1) (1906) 8 F. (J. C.) 93, at 101. (2) (1767) 4 Burrow 2015.

laws of that state. It is his duty, no doubt, to respect those laws and it may be his duty to comply with them; but where that is so the duty springs from an obligation which is incumbent upon him as the representative of a foreign sovereignty to refrain from any action which may prejudice the well-being of the country in which he is dwelling. Vattel says (Law of Nations, Chitty's Edit., Book 4, Chap. 7, p. 470, para. 92):—

> The inviolability of a public minister, or the protection to which he has a more sacred and particular claim than any other person, whether native or foreigner, is not the only privilege he enjoys; the universal practice of nations allows him, moreover, an entire independence of the jurisdiction and authority of the state in which he resides.

And he adds at page 471:—

> On the whole, therefore, it is impossible to conceive that the prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power: and this consideration furnishes an additional argument which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency: and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation.

This last passage is quoted by Marshall C.J. in his judgment in the celebrated case of *The Schooner Exchange* v. *McFaddon* (1); and the principle it expresses forms in part the foundation of the decision. The Chief Justice observes at pages 138-39:—

> The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

The judgment of Marshall C.J. was pronounced in the year 1812. The position of an ambassador came to be considered fifty years later by a Court of great authority presided over by Lord Campbell, as Lord Chief Justice, and

(1) (1812) 7 Cranch 116.

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including Mr. Justice Erle, Mr. Justice Wightman and Mr. Justice Crompton, in the *Magdalena Steam Navigation Company* case (1). Lord Campbell, delivering the judgment of the Court, said, at p. 111:—

> The great principle is to be found in *Grotius de Jure Belli et Pacis*, lib. 2, c. 18, s. 9, "Omnis coactio abesse a legato debet." He is to be left at liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country. For these reasons, the rule laid down by all jurists of authority who have written upon the subject is, that an ambassador is exempt from the jurisdiction of the Courts of the country in which he resides as ambassador. Whatever exceptions there may be, they acknowledge and prove this rule.

He adds, at page 113:—

> There is great difficulty in seeing how the writ can properly be served, for the ambassador's house is sacred, and is considered part of the territory of the sovereign he represents.

In 1894 the subject was discussed by the Court of Appeal in *Musurus Bey* v. *Gadban* (2). At p. 356, A. L. Smith, L.J., referring to the judgment of Lord Campbell in the case just mentioned, said:—

> This case renders it unnecessary to resort to text-writers, and to other cases prior thereto, for it lays down in clear and unambiguous language the principles upon which an ambassador is free from being impleaded in the Courts of this country.

The next paragraph leaves no room for doubt as to what he conceived these principles to be:—

> Lord Campbell, in delivering the considered judgment of the Court of Queen's Bench, which consisted of himself, Wightman, Erle, and Crompton JJ., used this language of an ambassador: "He does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country." These being the principles upon which an ambassador is independent of the civil jurisdiction of the country to which he is sent, in my judgment it is clearly inconsistent with them to hold that an ambassador, who has at least as great privileges of exemption from suits as the Sovereign whom he represents, can, even apart from the 7 Anne, c. 12, have a writ sued out against him

(1) *Magdalena Steam Navigation Company* v. *Martin*, (1959) 2 E. & E. 94.
(2) [1894] 2 Q.B. 352.

commanding him in the name of Her Majesty to appear in her Courts to answer the claim of one of her subjects, even although such writ is not to be served.

The judgment of Davey, L. J., in the same case is equally explicit. He says, at p. 361:—

Lord Campbell, at p. 111, states the principle to be that for all juridical purposes an ambassador is supposed still to be in his own country, and he concluded his judgment in these words: "It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign State is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles." These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our Courts: see, for example, the latest case of *The Parlement Belge* (1), in the Court of Appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory.

In the treatise on constitutional law in Halsbury's Laws of England, of which the principal author is Dr. Holdsworth, Lord Campbell's phrases are repeated without alteration. Article 625 reads as follows:—

The immunities accorded to public ministers by the usages of nations, which have come to be known as international law, are expressly recognized in the law of England.

In accordance with the principle *Omnis coactio abesse a legato debet*, a public minister does not owe even a temporary allegiance to the Sovereign to whom he is accredited, and has at least as great an immunity from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the State in which he exercises his functions, and is for all juridical purposes supposed to be still in his own country.

This is the language of the first edition, which is reproduced in Lord Hailsham's edition, published in 1932.

It is proper to add here a sentence from the judgment of the Court of Appeal in *The Parlement Belge* (2):—

The real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity—that is to say, with his absolute independence of every superior authority.

(1) (1880) 5 P.D. 197. (2) (1880) 5 P.D. 197, at 207.

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One of the diplomatic immunities recognized by English law, as already intimated, is the inviolability of the ambassador's residence, that is to say, of the legation. Vattel puts it this way:—(Chap. IX, p. 494, para. 117)

> The independency of the ambassador would be very imperfect, and his security very precarious, if the house in which he lives were not to enjoy a perfect immunity, and to be inaccessible to the ordinary officers of justice. The ambassador might be molested under a thousand pretexts; his secrets might be discovered by searching his papers, and his person exposed to insults. Thus, all the reasons which establish his independence and inviolability, concur likewise in securing the freedom of his house. In all civilized nations, this right is acknowledged as annexed to the ambassadorial character; and an ambassdor's house, at least in all the ordinary affairs of life, is, equally with his person, considered as being out of the country. * * *
>
> The house of an ambassador ought to be safe from all outrage, being under the particular protection of the law of nations, and that of the country; to insult it, is a crime both against the state and against all other nations.

The qualification "at least in all the ordinary affairs of life" must be read as excluding the fiction of exterritoriality in its extreme form. This extreme doctrine, according to which a ship of war is a floating part of the territory of the sovereignty to which she belongs, is finally rejected as a doctrine of the law of nations, recognized by the law of England, in the judgment of the Judicial Committee of the Privy Council, delivered by Lord Atkin, in *Chung Chi Cheung* v. *The King* (1) *supra*. I shall revert to this point.

The current view is well expressed by Sir Cecil Hurst in a disquisition published in Académie de Droit International, Recueil des Cours, Vol. 2, 1926, p. 161, and cited in the last edition of Oppenheim's International Law at p. 629:—

> Tout le monde est d'accord pour admettre que la résidence officielle d'un agent diplomatique jouit du privilège diplomatique et qu'elle est exempte de la juridiction locale. Le privilège s'étend à tous les locaux occupés par l'agent diplomatique à titre officiel. Ces locaux sont inviolables: les autorités locales ne peuvent ni y entrer, ni y exercer les actes de leurs fonctions sans le consentement de l'agent diplomatique.
>
> L'accord sur ce point est si complet qu'il n'y a pas lieu d'entrer dans des détails. La question a été discutée, il est vrai, mais à une époque déjà éloignée; on trouvera des différends à ce sujet relatés dans des livres tels que *Les Causes célèbres du droit des gens* de Martens. Ces différends ont presque toujours été causés par une tentative faite par l'agent diplomatique en vue de mettre à l'abri de la justice quelqu'un qui s'était réfugié dans l'ambassade ou dans la légation.

(1) [1939] A.C. 160

La résidence officielle de l'agent diplomatique a un droit égal aux immunités, quel que soit son caractère et sans égard aux conditions de la tenure. Qu'elle soit une maison ou un appartement, qu'elle appartienne au gouvernement ou à l'agent diplomatique lui-même, ou qu'elle soit tenue à bail, la résidence officielle a toujours droit au bénéfice des immunités aussi longtemps qu'elle est habitée par une personne y ayant droit.

Ce n'est pas la résidence officielle seule qui est ainsi privilégiée, mais tous les biens sans lesquels l'agent diplomatique ne pourrait pas remplir sa mission. Comme le dit Vattel: "Toute les choses qui appartiennent à la personne du ministre en sa qualité de ministre public, tout ce qui sert à son usage, tout ce qui sert à son entretien et à celui de sa maison, tout cela a l'indépendance du ministre et est absolument exempt de toute juridiction dans le pays." De même qu'un agent diplomatique ne pourrait pas remplir sa mission sans des fonctionnaires pour l'assister et des domestiques pour le servir, il a besoin des archives et de la correspondance officielle dans sa chancellerie, d'ameublement pour sa maison, de voitures et d'automobiles pour se déplacer, de fonds déposés en banque pour défrayer les dépenses de son établissement.

Ces biens sont donc tous soustraits à la juridiction locale, et, puisque l'agent diplomatique seul peut décider si une chose lui est ou non nécessaire pour remplir ses devoirs, les privilèges doivent s'étendre à tous ses biens dans le pays de son poste.

Néanmoins les immunités ne sont accordées aux biens meubles que sous la présomption qu'ils sont employés aux fins de la mission. Dans le cas où un emploi abusif en est fait, l'agent diplomatique ne doit pas se plaindre si les privilèges ne sont pas respectés.

Hall's International Law, 8th edit., p. 233:

In Europe * * * it has been completely established that the house of a diplomatic agent gives no protection either to ordinary criminals, or to persons accused of crimes against the state. A minister must refuse to harbour applicants for refuge, or if he allows them to enter he must give them up on demand.

As Lord Atkin points out in the judgment mentioned, the fiction of exterritoriality, when applied in its extreme form, would deprive the local courts of jurisdiction where a burglary is committed on an embassy and, while the fiction is not a satisfactory or admissible explanation of diplomatic immunities, it does not, of course, follow that the principles laid down by Mansfield C.J., Marshall C.J., Lord Campbell, and other great Judges, as well as by Vattel and other authoritative text-writers, are not to be accepted merely because a form of expression, which experience has shown to be objectionable, is employed. The reasons given by Lord Campbell in the *Magdalena Company* case (1), explaining the basis of the diplomatic privilege, which consists in immunity from legal process, are expressly approved in the House of Lords as recently as 1928 by Lord Phillimore (*Engelke* v. *Musmann* (2)).

(1) (1859) 2 E. & E. 94.

(2) [1928] A.C. 433, at 450.

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The alternative juridical basis suggested by Marshall C.J. is that the immunity is established on the principle that the minister is considered as in the place of the sovereign he represents and on that basis it is impliedly granted by the governing power of the nation to which the minister is deputed. In the passage quoted above from Vattel, and adopted by Marshall C.J., it is said:—

> It is impossible to conceive that the prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power.

In the words of Marshall C.J. himself in the same judgment, also quoted above:—

> A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain.

This, then, is the juridical principle, upon which the immunity rests and, to quote Marshall C.J. again (1), as regards any particular exemption from territorial jurisdiction implied in favour of a foreign sovereignty:—

> Its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

An authoritative French Author, Pradier-Fodéré, Cours de Droit Diplomatique, Tome 2, p. 45, says:—

> L'indépendance [de l'agent diplomatique] consiste dans le droit et dans le fait de ne point être placé sous la juridiction et sous l'autorité de l'Etat où il réside, de n'être soumis à aucune juridiction, à aucune autorité étrangères. Que le gouvernement auprès duquel le ministre public est accrédité n'ait aucun pouvoir sur lui; que l'agent diplomatique ne puisse être distrait de ses fonctions par aucune chicane; qu'il n'ait rien à craindre du souverain à qui il est envoyé: voilà ce qui constitue l'indépendance.

As regards the immunity of the legation itself, as Vattel says in the passage quoted above, all the reasons which establish his independence and inviolability "concur likewise in securing the freedom of [the ambassador's] house." The right is acknowledged in all civilized nations as annexed to the ambassadorial character and the legation, for all the ordinary affairs of life, is equally, with the ambassador, himself, not subjected to the authority of the territorial sovereignty.

(1) *Schooner Exchange* v. *McFaddon*, (1812) 7 Cranch 116, at 143.

Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the property of a foreign state devoted to public use in the traditional sense. In *The Parlement Belge* (1) *supra,* it was held that this immunity applies to a ship used by a foreign government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship, the property of a foreign sovereignty and employed by the foreign government for trading purposes. *Berizzi Brothers Co.* v. *S.S. Pesaro* (2). It most certainly cannot be said that this is a settled doctrine, in view of the opinions expressed in the *Cristina* case (3), although Lord Atkin, who delivered the judgment of the Judical Committee in *Chung Chi Cheung* v. *The King* (4) *supra,* at p. 175 uses a general phrase:—

> The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process.

There is no controversy, however, that this immunity from legal process extends to the property of the foreign sovereign devoted to diplomatic uses. I shall return later to a consideration of the principle involved in this immunity.

Turning to the application of these general principles to the subject now before us.

The taxes in question may be broadly divided into two classes: those which constitute payment for services rendered for the beneficial enjoyment of the particular property in respect of which they are assessed, and those which are levied for general purposes. As regards the first class, water rates may perhaps be taken as typical. There is, of course, no obligation upon a state which receives an envoy from a foreign state to provide him gratuitously with water, or electricity, and it would be generally agreed that where a tax is in the nature of the price of a commodity, the person enjoying the benefit of that commodity ought to pay the price. As regards taxes (strictly so-called), they are imposed by the authority of the state, whether immediately, or mediately, through a municipality, or other agency. The imposition of a tax presupposes a person from whom, or a thing from which, it is exacted, or collected. It is so

(1) (1880) 5 P.D. 197.
(2) (1926) 271 U.S. 562.
(3) *Compania Naviera Vascongado* v. *S.S. Cristina,* [1938] A.C. 485.
(4) [1939] A.C. 160.

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exacted, or collected, in virtue of superior political authority. It does not require much argument to establish that, consistently with the general principles enunciated in the authorities already quoted, such an exaction cannot be demanded by one equal sovereignty from another, or from its diplomatic agent; and there is a general acceptance of the view that such tribute is not exigible, consistently with the principles of the law of nations. We are concerned at present with taxes demanded in respect of real property, and we need not consider how far it is consistent with general principles to exact from diplomatic agents licence fees, bridge tolls, stamp duties, and other imposts which, it may at least plausibly be argued, are taken in payment for specific services rendered directly to the particular individual who pays for them and belong to the same category as water rates and electric rates; nor need we touch on the subject of customs duties. The precise question we have to consider is whether a tax imposed by a statute in general terms in respect of the ownership and of the occupation of real property, or levied upon real property itself, extends to the case where such property is owned, and occupied, by a foreign state, or its diplomatic agent, and is employed for the public diplomatic purposes.

A series of statutes of the Imperial parliament, some of which are collected in the 18th Vol. of Hertslet's Treaties, (1893) edit., p. 462, illustrate the manner in which Parliament has for more than one hundred and fifty years viewed such questions. The subject is considered in the case of *Parkinson* v. *Potter* (1). The statute there in question was a local Act relating to the Parish of Saint Marylebone, 35 Geo. 3, chapter 73, sec. 190. The enactment provided that rates, or assessments, made in virtue of the Act in respect of any property inhabited by an "ambassador, envoy, resident, agent, or other public minister of any foreign prince or state, * * * " or "any other person not liable by law to pay such rate or assessment" should be paid by and recoverable from the landlord of such property. The question was whether an attaché of the Portugese Embassy occupying property within the description of the Act was a person "not liable by law" to pay the parochial rates assessed in respect of the property. Mr. Justice Mathew, at pp. 157-8, said:—

(1) (1885) 16 Q.B.D. 152.

It was said, and there is authority for the assertion, that there are certain charges, amongst which are rates of this description, in respect of which it is not usual to set up this privilege, but it is none the less clear that, if the privilege is claimed, the only remedy of the person against whom it is asserted is by appealing to the authorities of the country from which the ambassador is accredited.

It is important to notice that the question before the Court was whether or not the attaché was "a person not liable by law to pay" the rate in question. The decision necessarily involves the proposition that the statute making occupiers, of which the attaché fell within the statutory description, liable to pay the rate, imposed no liability upon persons enjoying diplomatic immunities. This particular enactment is one among a number of local statutes; but there is a statute of 1797 (38 Geo. III, Chap. 5) "granting an aid to His Majesty by a land tax," which is not a local Act, that is to the same effect.

In a note to Section 31 of the *Metropolitan Paving Act, 1817*, in Halsbury's Statutes of England, Vol. 11, p. 853, it is said:—

In *Macartney* v. *Garbutt* (1), it was held that a British subject accredited to this country as a member of the embassy of a foreign power is privileged against seizure of his goods for non-payment of rates on the ground that in the absence of an express condition to the contrary, he is exempt from the local jurisdiction of this country.

In the case mentioned in this note, Mr. Justice Mathew at p. 369 said:—

For the defendant it was conceded that the plaintiff, if he had been a foreigner, might be entitled to the exemption which he claimed; but it was argued that, as a British subject, he remained liable to the laws of his own country; and it was said that he was not within the description of persons exempt by the local Act, for the operation of the Act was limited by the words "or any other person not liable by law to pay such rate."

In support of this contention, reliance was placed on passages of Chapter XI of Bynkershoek "De Foro Legatorum", which, it was said, showed that the minister of a foreign state accredited to his own country remained subject to the laws of the state to which he owed allegiance. But the view of the learned author would seem to be that the envoy would be entitled to exemption from the local jurisdiction in all that related to his public functions, and this would seem to be the opinion of later writers on the subject (see Wheaton, International Law, 2nd ed., edited by Lawrence, p. 189, and the authorities there referred to). If this be the rule, the plaintiff would be protected from the seizure in question, which unquestionably interfered with the performance of his duty as a member of the embassy.

In Konstam's Modern Law of Rating (1927) at p. 84 it is said:—

(1) (1890) 24 Q.B.D. 368.

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Ambassadors and ministers of foreign States, and members of foreign embassies and legations, and their servants, are not rateable for offices or residences occupied by them.

In the treatise on constitutional law in Halsbury, already cited, at page 508, it is said:—

A public minister's immunity as regards rates and taxes, although deducible from the general principles as to his freedom from taxation which are sanctioned by international usage, is sufficiently safeguarded in English law by the fact that no action can be brought against him to enforce payment (*Parkinson* v. *Potter*) (1).

It is also said, at p. 507:—

The Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 4, provides for the punishment of all persons and their attorneys and solicitors who take any proceedings in contravention of the Act. The immunity conferred by the statute, while professing merely to secure the persons and property of public ministers against the process of the Courts, does in fact confer upon them complete freedom from interference. Thus, the exterritoriality or inviolability of a public minister's house—as to the extent of which writers on international law differ considerably—is safeguarded by the fact that the minister is not amenable to the jurisdiction of the Courts in respect of his actions.

This is perhaps a convenient place to point out that the statute of Anne, as it has been construed, specifically prohibits judicial process of every description, as well as distress, but it is merely declaratory and explanatory of the common law and is neither limitative or exhaustive. *Triquet* v. *Bath* (2); *In re Republic of Bolivia Exploration Syndicate, Limited* (3).

The United States statute was enacted in very similar terms about one hundred years after the statute of Anne. The passage already quoted from the judgment of Marshall C. J. shows that this statute, like the statute of Anne, has been regarded only as declaratory and affording a summary remedy in respect of the violation of rights established by the law of nations. Marshall C.J. says (4):—

It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

(1) (1885) 16 Q.B.D. 152; 11 Digest 538, *409*.
(2) (1764) 3 Burrow 1478 at 1481. (3) [1914] 1 Ch. 139 at 144.
(4) *Schooner Exchange* v. *McFaddon*, (1812) 7 Cranch. 116, at 138.

In the last edition of Stephen's Commentaries on the Laws of England, Vol. 1, p. 153, the law of England seems to be properly stated:—

> The ambassador's house is for many purposes treated as though it were a part of the territory of the state by which he is accredited. Accordingly it is not subject to the jurisdiction of the English courts; and the ambassador is not liable to pay rates or taxes in respect of it.

The practice of many other countries seems to accord generally with the English practice.

Mr. Hall, in the work from which I have already quoted, places non-subjection to taxation among the immunities of diplomatic agents. He says, at p. 235:—

> The person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation. Otherwise he enjoys no exemption from taxes or duties as of right. By courtesy, however, most, if not all, nations permit the entry free of duty of goods intended for his private use.

In Lawrence's Principles of International Law, at p. 316, it is said:—

> Immunities connected with property apply first and foremost to the official residence of the ambassador, usually called his *hotel*. It is generally regarded as inviolable except in cases of great extremity. The fiction of exterritoriality is sometimes applied to it, and it is held to be a portion of the state to which its occupant belongs. But the theory is a clumsy attempt to account for what is better explained without it. If it were true, the hotel could in no case be entered by the local authorities; whereas it is universally admitted that the extreme circumstances which justify the arrest of a diplomatic minister of a foreign power and the seizure of his papers, justify also forcible entry into his hotel and its search by the officers of the state to which he is sent.

And at page 318:—

> The ambassador is free from the payment of taxes levied upon it, whether for purposes of state or for the maintenance of municipal government; but if the charge for such commodities as light and water takes the form of local taxation, he would be expected to meet the demands for them, just as he is expected to pay the bills for the provisions consumed by his household, though he cannot be compelled to do so, since his person is inviolate and his house and goods are exempt from legal process.

In Pitt Cobbett's Cases on International Law, Vol. 1, p. 319, para. 3, it is said:—

> The Ambassador's Residence.—The buildings and grounds within which an ambassador resides and carries on his mission, by whomsoever owned, are also exempt from the local jurisdiction, to such an extent, at any rate, as may be necessary to secure the free exercise of his functions. The building, its appurtenances and contents, are also exempt from all forms

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of taxation, whether general or local; although service rates ought to be paid except where this obligation is waived by mutual arrangement. The ambassador's residence is also exempt from all ordinary forms of legal process; nor is there, in general, any right of entry on the part of the local authorities, without the ambassador's consent. At the same time this immunity cannot, save, perhaps, in the special cases mentioned below, be set up in derogation of the safety and public order of the territorial Power. Hence, if offenders, who would otherwise be subject to the local jurisdiction, either take refuge or are detained within the embassy, their surrender may be demanded, and, if necessary, enforced, by the local authorities; and this whether the offence was committed within the precincts of the embassy or not, and whether it is of a political or non-political character.

In the Practice of Diplomacy, by Mr. John W. Foster, who was Secretary of State under President Cleveland and had a very wide diplomatic experience, it is said, at p. 171:—

> The personal effects of a diplomatic officer, the property of the mission, and the real estate occupied by the legation residence and office, if owned by the foreign government, are exempt from taxation; but this exemption does not usually extend to water rents and lighting charges.

The rule in France is that immovables occupied by diplomatic agents accredited to the Government of France are exempt from property tax when the property is owned by the foreign state. This rule is set forth in La Revue de Droit International Privé, 1908, p. 324, in a letter from the Minister of Finance (M. Caillaux) to the Minister of Foreign Affairs, dated Paris, June 5th, 1907, in these terms:—

> Vous avez bien voulu me faire part du désir, exprimé par M. le Ministre du Portugal à Paris, de connaître "quels sont en France les lois, décrets et règlements qui ont édicté et qui régissent les franchises en matière de droits de douane, de droits d'octroi, d'impositions personnelles-mobilières, de portes et fenêtres, d'impositions ou taxes d'Etat ou de ville, concédées aux membres du Corps diplomatique étranger", et d'être renseigné exactement "sur le détail des immunités fiscales tant de taxes d'Etat que de taxes de villes qui leur sont accordées."
>
> Afin de vous mettre à même de satisfaire à cette demande, j'ai l'honneur de vous indiquer ci-après les règles suivies en la matière pour chaque nature d'impôts.
>
> 1. Contributions directes et taxes assimilées.—Pour les contributions directes et les taxes qui y sont assimilées, il n'existe pas, à proprement parler, de lois, de décrets ou de règlements relatifs aux immunités diplomatiques: ces immunités sont accordées soit pour des motifs de haute convenance internationale, soit en vertu des dispositions des traités conclus entre la France et les pays étrangers.—En fait, les immeubles occupés par les agents diplomatiques accrédités auprès du Gouvernement français sont affranchis de l'impôt foncier, et en même temps des centimes généraux, départementaux et communaux additionnels au principal dudit impôt, lorsque ces immeubles sont la propriété des Etats étrangers. La règle dont

il s'agit est basée sur le principe que les propriétés satisfaisant à cette dernière condition sont considérées comme une dépendance du territoire étranger et fictivement distraites du territoire français.

In Calvo's Le Droit International, Vol. 3, p. 325, para. 1530, the author, who represented his country, the Argentine Republic, in more than one capital of Europe and is a recognized authority upon this subject, says:—

> Quant à l'impôt foncier, les ministres publics ne peuvent s'en affranchir pour les immeubles qu'ils possèdent, alors même que ces immeubles sont affectés uniquement à leur logement personnel. Il en serait tout autrement, si l'hôtel de la légation était la propriété de leur gouvernement; car les convenances internationales ne permettent évidemment pas de traiter un gouvernement étranger comme un contribuable ordinaire et, partant, de l'assujettir à des impositions territoriales et directes.

There appears to be no known case in which a demand has been made to compel a diplomatic agent to pay a tax imposed by the territorial government. In an article by Francis Deak in Revue de Droit International (1928), Tome IX, p. 537, this appears:—

> (4) L'exemption des impôts et d'autres charges civiques n'est qu'une conséquence logique de la situation privilégiée des agents diplomatiques. Même s'ils étaient soumis aux taxes locales, il n'y aurait pas moyen de contraindre ces agents à payer ces taxes, puisque aucune procédure ne peut être entamée contre eux. Le principe est reconnu d'une manière tellement universelle, qu'on ne connaît pas d'exemple d'un agent diplomatique qui ait été contraint de payer des impôts, centraux ou locaux, du pays auprès duquel il était accrédité. Si le principe de l'immunité en général doit être maintenu, il paraît raisonnable également de maintenir l'exemption fiscale. On pourrait cependant se demander si cette exemption doit être étendue aux biens qu'un ministre public pourrait posséder personnellement dans le pays où il exerce ses fonctions.

In a circular instruction from the Secretary of State to American Diplomatic Officers, dated the 9th of November, 1928, the rule in the United States is thus expressed (Feller and Hudson, Diplomatic and Consular Laws and Regulations, Vol. 2, p. 1348):—

> Property in the District of Columbia owned by foreign governments for Embassy and Legation purposes is exempt from general and special taxes or assessments. Property owned by an Ambassador or Minister and used for Embassy or Legation purposes is exempt from general taxes but not from special assessments for improvements. The payment of water rent is required in all cases, as this is not regarded as a tax but the sale of a commodity.

Under the condition of reciprocity, in Spain property owned by a foreign state and used for diplomatic purposes appears to be exempt from land tax (pp. 1126-27); and

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the same rule appears to prevail in Turkey (p. 1187), in Russia (p. 1218), in Austria (p. 56, Vol. 1). Such property appears to be exempt in Denmark (pp. 414-15), in Germany, subject to reciprocity (pp. 568-69), and in Italy, on the same condition (pp. 710-11).

The general result appears to be that in England taxes and rates imposed by statute in general terms in respect of the occupation or the ownership of real property are not recoverable from diplomatic agents in respect of real property occupied by them or owned by them, or their states, and occupied and used for diplomatic purposes. Such a statute creates no liability to pay, as we have seen, and it cannot, I think, consistently with principle, create any effective charge upon the property. The property is not subject to process, or to visitation by government officers; and the foundation of this privilege is that the foreign state and its ambassador are immune from *coactio* direct, or indirect. Lord Campbell, in the *Magdalena Company* case (1) *supra.* says, at p. 113:—

> Mr. Bovill, being driven from his supposition that the writ in this case might be sued out only to save the Statute of Limitations, by the fact that it had been served upon the defendant, and by the allegation in the plea that it was sued out for the purpose of prosecuting this action to judgment, strenuously maintained that at all events the action could be prosecuted to that stage, with a view to ascertain the amount of the debt, and to enable the plaintiffs to have execution on the judgment when the defendant may cease to be a public minister. But although this suggestion is thrown out in the discussion which took place in the Common Pleas, in *Taylor* v. *Best* (2), it is supported by no authority; the proceeding would be wholly anomalous; it violates the principle laid down by Grotius; it would produce the most serious inconvenience to the party sued; and it could hardly be of any benefit to the plaintiffs. In the first place, there is great difficulty in seeing how the writ can properly be served, for the ambassador's house is sacred, and is considered part of the territory of the sovereign he represents; nor could the ambassador be safely stopped in the street to receive the writ, as he may be proceeding to the Court of our Queen, or to negotiate the affairs of his Sovereign with one of her ministers. It is allowed that he would not be bound to answer interrogatories, or to obey a subpoena requiring him to be examined as a witness for the plaintiffs. But he must defend the action, which may be for a debt of 100,000*l*, or for a libel, or to recover damages for some gross fraud imputed to him. He must retain an attorney and counsel, and subpoena witnesses in his defence. The trial may last many days, and his personal attendance may be necessary to instruct his legal advisers. Can all this take place without "coactio" to the ambassador?

(1) (1859) 2 E. & E. 94. (2) (1854) 14 Com. B. 487, 493.

The legal consequences on assessment of land under the assessment law of Ontario include these: Where the property and the persons assessed are not exempt from taxation, the tax levied, pursuant to the assessment, may be recovered as a debt from the owner, or tenant, originally assessed. The taxes are a lien upon the land and by statutory extra-judicial proceedings the land may be sold and a title vested in the purchaser and the proceeds of the sale applied in payment of the taxes. Moreover, generally speaking, where taxes are a lien on land, the municipality possesses a power of distress upon the goods and chattels of the owner, or tenant, whose name is on the collector's roll, found anywhere within the county. As to the personal obligation to pay and the liability of the Minister to have his goods distrained, his automobiles, for example, seized, anywhere within the county where the legation is situate, sufficient has been said.

As to the sale of the land for the recovery of the tax, it is difficult to see how the proceedings can be said not to involve *coactio* in the sense of Lord Campbell's judgment. Obviously the foreign state would be immediately concerned with the amount of the valuation and, if the valuation appears to him to be unjust, his only remedy is the statutory remedy involving ultimately, it may be, an appearance before the Court of Appeal for the province. In the last resort the taxing authority, or the purchaser of the property, must apply to the Courts, which are without jurisdiction.

As to the charge upon the land, it has been argued that a tax enforceable against its real property is not directly imposed upon the foreign sovereignty and, therefore, that property of the foreign sovereignty may be subjected to such a tax without any infringement of the principles of international law. Where the property is in use for diplomatic purposes, it is impossible to accept this view. So long as the property is devoted to such uses, the territorial sovereignty admittedly cannot enforce a charge; but, if the property is transferred, does the charge stand as against the purchaser? If so, the statutory proceeding is only a method of enforcing indirectly the law of the territorial jurisdiction against the public property of the foreign sovereign. It would be the assertion of "a right", to use the

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words of Scrutton L.J., in *The Tervaete* (1), "over the property of a foreign sovereign not arising from any voluntary action on his part, which adversely affected his property", because obviously the charge would affect the price for which the property could be sold. The creation of the charge amounts to the creation of a *jus in re aliena*, to a subtraction from the property of the foreign sovereign. Such a proceeding would seem to be inconsistent with the principle "of absolute independence of every superior authority", *per* Brett L.J., *The Parlement Belge* (2) *supra*, (*par in parem non habet imperium*), which, as we have seen, lies at the basis of the immunities conceded to a foreign sovereign and his property.

The following passage from the judgment of Lord Wright in the *Cristina* case (3) *supra*, at p. 510, is apposite:—

> But as Sir H. S. Giffard S.-G. pungently pointed out in argument in *The Parlement Belge* (2): "The privilege depends on the immunity of the sovereign, not on anything peculiar to a ship of war."

The rule followed by France in relation to the property of foreign states occupied by diplomatic agents accredited to the French government for diplomatic purposes (stated in the memorandum of M. Caillaux), that such property is exempt from land tax levied by the general government, as well as from departmental and communal taxes in respect of such property, has, as we have seen, been justified in France on the ground that such property is considered as a dependency of the foreign territory "et fictivement distraites du territoire français". This fiction of exterritoriality must be disregarded. Nevertheless, the substance of the principle adopted by France, namely, that the legislation of the French state imposing such taxes does not, out of respect for the principles of international law, embrace within its purview such property of foreign states, remains quite unaffected by the disregard of this fiction; and is solidly founded upon accepted principles.

I think, I repeat, that the proper conclusion from the legislation of the Imperial Parliament, particularly in the eighteenth century, in force, as some of the statutes were, when the common law was formally introduced into Upper Canada, from the decisions and judgments I have cited, and from the text-writers, is that this rule, recognized by France,

(1) [1922] P. 259 at 272. (2) (1880) 5 P.D. 197.
(3) [1938] A.C. 485.

is also implicit in the principles of international law recognized by the law of England; and, consequently, by the law of Ontario.

The principles governing the immunities of a foreign sovereign and his diplomatic agents and his property do not, of course, limit the legislative authority of the legislature having jurisdiction in the particular matter affected by any immunity claimed, or alleged. It is not necessary, in the view I take, to consider the respective jurisdictions of the Parliament of Canada and the local legislatures in this matter of taxation in respect of real estate owned, or occupied, by a foreign state, or a diplomatic agent in his character of representative of a foreign state. The general language of the enactments imposing the taxation in question must be construed as saving to the privileges of foreign states. The general principle is put with great clearness and force in the judgment of Marshall C.J., from which I have quoted so freely. These are his words (1):

> Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. * * * Those general statutory provisions * * * which are descriptive of the ordinary jurisdiction * * * ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

The questions referred should all be answered in the negative.

RINFRET J.—Two points were made clear in the course of the argument on this reference by His Excellency the Governor General in Council:

1. The Attorney General of Canada admitted that the "rates" with which the Court must deal in its answers do not include the charges imposed as for services rendered and commodities supplied, such as, for example, water rates or charges for electricity;

2. The Attorney General for the Province of Ontario made no submission with regard to questions numbers 2 and 3, in respect of property in Ottawa owned and occupied by His Majesty in right of the United Kingdom, as the office and residence of the High Commissioner for the

(1) *Schooner Exchange* v. *McFaddon*, (1812) 7 Cranch 116, at 146.

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United Kingdom, or in the right of Australia, as the residence of the High Commissioner of the Commonwealth of Australia.

As a matter of fact, so far as these properties are concerned and as the law now stands, they are exempt from liability to taxation under the *Assessment Act* of the Province.

One more point seemed to follow from the argument presented, and that is: that the word "rates", in the Order-in-Council, is meant to connote and include the word "taxes". For present purposes, the two words are interchangeable.

It must be held, I think, that amongst the principles of international law which have acquired validity in the domestic law of England and, therefore, in the domestic law of Canada, it is generally admitted that a foreign Minister is not subject to the laws of the State to which he has been sent; he enjoys an entire independence of the jurisdiction and authority of the latter State; and there exists towards him an implied consent that he shall possess all the privileges which his principal (his Sovereign or the State which he represents) intended that he should retain, as those privileges are essential to the dignity of his Sovereign and to the duties he is bound to perform. As a consequence, he is exempt from the jurisdiction of the courts of the country in which he resides as a diplomatic representative.

This, in my view, is demonstrated in the reasons of my Lord the Chief Justice, which I have had the privilege to read.

It being so, the questions which are submitted for the consideration of the Court deal with foreign legations in the City of Ottawa and the Village of Rockcliffe Park which are owned and occupied as legations by the governments of the French State, the United States of America and the government of Brazil. Occupation alone is not submitted in the questions. We are asked to envisage legations owned by these foreign States and occupied as legations.

This assumes a condition of things where the recourse of the municipal corporation is limited to a recourse against the foreign State itself as owner of the property, or against the foreign diplomat who occupies the legation owned by his government as diplomatic representative thereof.

The problem is not one which raises questions with regard to the respective competence of the Dominion Parliament and of the Provincial Parliament. It is limited to the ascertainment of the legislative competence of a Provincial Parliament to levy rates or taxes on property of foreign governments owned and occupied as legations.

The solution, it seems to me, must, therefore, be found in the remedies which the municipal corporations are empowered to adopt in order to collect their taxes, including, of course, the powers which the Provincial Legislature is competent to delegate, in that respect, to the municipal corporations.

A municipal corporation, through its council, must collect taxes in a sufficient amount to supply the total sum required for its expenditures under its yearly budget.

It would be an empty procedure for the municipal council to enter on its assessment roll amounts of taxes against property owned and occupied by foreign states, for, as they are uncollectable, the municipal council, at the end of the year, would find the amount in its hands available for its municipal purposes, as shown by its budget, deficient to the extent of the aggregate amount of taxes uncollectable against foreign states or diplomats. Thus it could not succeed in making both ends meet—as it must.

Indeed, the assessment roll, if it should include taxes which are admittedly uncollectable, would be misleading, as it would show assets which are not, in fact, available to the council.

It seems, therefore, a necessary consequence of the legal impossibility of collecting the taxes against foreign states or diplomats that such taxes or rates may not be assessed and levied on the properties owned and occupied by them and used for diplomatic purposes.

Nor do I think that, consistently with principle, the municipal corporation can create any effective charge upon the property under consideration, because obviously the charge would affect the price for which the property could be sold later, if a sale was effected by the foreign State to an ordinary purchaser. This would only mean an indirect way of coercing the foreign State.

For these reasons, in my view, the questions referred should all be answered in the negative.

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Kerwin J.

KERWIN J.—The questions of law submitted to us for hearing and consideration touch "the relations of the Government of Canada with foreign powers and with the other governments of the British Commonwealth, as well as the constitutionality and interpretation of provincial legislation." I propose to deal first with the foreign powers referred to, viz., the French State, the United States of America, and Brazil.

The City of Ottawa and the Village of Rockcliffe Park are situate in the Province of Ontario. Generally speaking, it could not be denied that under head 8 of sec. 92 of the *British North America Act*, the legislature of that province could legislate with reference to municipal institutions in the province, and that it had authorized these two municipal corporations to impose a tax on real property within their boundaries. This being so, Lord Atkin's statement in the *Labour Conventions* case (1) appears to be pertinent:—

> No further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions.

However, it was not suggested that by reason of the Dominion having sent and accepted diplomatic representatives, Parliament acquired any further legislative powers "to keep pace with enlarged functions of the Dominion Executive;" but it was argued that the purchase by the named countries of properties used by them as Legations or residences of Ministers prohibits the Councils of the municipalities where such properties are situate from levying rates thereon.

The importance of the matters raised by the questions and of the results flowing from the answers to be given thereto requires a precise definition of the expression "levy rates." Counsel for the Attorney-General of Canada submitted that the word "rates" should not include any charge that might be imposed under the provisions of the Ontario *Public Utilities Act*, R.S.O. 1937, c. 286,—presumably on the theory that any public utility furnished thereunder should and would be paid for as for services rendered or commodities supplied. This can hardly be so, in any event so far as the City of Ottawa is concerned, since the power to establish rates for an available supply

(1) *Attorney General for Canada* v. *Attorney General for Ontario, et al.*, [1937] A. C. 326, at 352.

of water is to be found in certain special legislation to which our attention has been drawn. Under section 11 of the parent Water Works Act of the City of Ottawa (35 Vic. c. 80 (Ont.)), the Water Commissioners have power and authority to fix the price, rate or rent

> which any owner or occupant of any house, tenement, lot, or part of a lot, or both, in, through, or past which the water pipes shall run, shall pay as water rate or rent, whether such owner or occupant shall use the water or not, having due regard to the assessment and to any special benefit and advantage derived by such owner and occupant, or conferred upon him or her or their property by the water works, and the locality in which the same is situated.

It is my understanding that by the existing legislation the powers conferred upon the Water Commissioners by section 11 of the original statute are now exercisable by the Council of the City of Ottawa. If that were not so, then we are not concerned with the powers of the Commissioners, as the questions submitted to us relate to the powers of the Council. However, it is unnecessary to refer further to this legislation or to express any opinion as to its effect except to point out that the price, rate or rent may be fixed having due regard to the assessment of any house, tenement, lot or part of a lot in, through or past which the city water pipes shall run, whether the owner or occupant uses the water or not. We were not told what the situation is as regards the Village of Rockcliffe Park, but what has been stated is sufficient to indicate that the word "rates" as used in the questions should not be restricted as suggested but must apply to all assessments, taxes and charges. In fact, in the second recital of the Order in Council the word "tax" is used and not the word "rates."

We are not called upon in this Reference to express any opinion as to what meaning the word "levy" might bear if under varying circumstances concrete questions had arisen as to whether the council of a municipal corporation in the Province of Ontario had or had not levied rates, but for the purpose of ascertaining what the Order in Council means when it uses the word, it appears to be not inappropriate to examine at least some of the numerous sections of such Acts of that province as *The Municipal Act,* R.S.O. 1937, c. 266, *The Assessment Act,* R.S.O. 1937, c. 272, and *The Local Improvement Act,* R.S.O. 1937, c. 269.

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Section 315 of *The Municipal Act* requires the Council of every municipality to levy in each year on the whole ratable property according to the last revised assessment roll a sum sufficient to pay all debts of the Corporation; but by section 318 of the same Act,

> the rates *imposed* for any year shall be deemed to have been *imposed* and to be due on and from the first day of January of such year unless otherwise expressly provided by the by-law by which they are *imposed*.

By section 2 of *The Assessment Act*, where no other express provision is made, all municipal, local or direct taxes shall be levied upon the whole of the assessment for real property, income and business or other assessments made under the Act; and by subsection 1 of section 3, yearly rates or any special rate authorized to be levied upon all the ratable property of a municipality for municipal or school purposes are to be calculated at so much in the dollar upon the total assessment, and shall be calculated and levied upon the whole of the assessment made under the Act. With these provisions should be contrasted section 103, where the word "levied" is used in conjunction with the words "assessed" and "collected":—

> 103. All moneys assessed, levied, and collected under any Act by which the same are made payable to the Treasurer of Ontario, or other public officer for the public uses of Ontario, or for any special purpose or use mentioned in the Act, shall be assessed, levied and collected in the same manner as local rates, and shall be similarly calculated upon the assessments as finally revised, and shall be entered in the collector's rolls in separate columns, in the heading whereof shall be designated the purpose of the rate.

Section 2 and subsection 1 of section 3 may also be contrasted with section 114, where the word "levy" is used, although not as empowering the Council, but the Tax Collector, to levy unpaid taxes by distress.

Subsection 1 of section 20 of *The Local Improvement Act* provides:—

> Except as in this Act is otherwise expressly provided, the entire cost of a work undertaken shall be specially assessed upon the lots abutting directly on the work, according to the extent of their respective frontages thereon, by an equal special rate per foot of such frontage sufficient to defray such cost.

By subsection 1 of section 52, the Council is to impose upon the land liable therefor the special assessment with which it is chargeable in respect of the owners' portion of the cost; and by subsection 3:—

The council may also either by general by-law or by a by-law applicable to the particular work prescribe the terms and conditions upon which persons whose lots are specially assessed may commute for a payment in cash the special rates imposed thereon.

In addition to these statutes, attention may be directed to the decision of the Court of Appeal for Ontario in *Re Therriault and Town of Cochrane* (1). Under subsection 1 of section 67 of *The Separate Schools Act*, 3 and 4 Geo. V., c. 71, a separate school board might "impose and levy school rates and collect school rates and subscriptions," and might appoint collectors for collecting the school rates or subscriptions. Under subsection 1 of section 70:—

A municipal council, if so requested by the board at or before the meeting of the council in the month of August in any year, shall, through their collectors and other municipal officers, cause to be levied in such year, upon the taxable property liable to pay the same, all sums of money for rates or taxes imposed thereon in respect of separate schools.

It was held by the Court of Appeal that the separate school board should impose the rates, and that the effect of subsection 1 of section 70 was merely to compel the municipal council, if requested, to collect those rates.

I repeat that we have not before us the concrete question as to whether a municipal council in Ontario has or has not in any particular case levied rates. From a perusal of these statutory provisions, it is apparent that in such a case it would be necessary carefully to consider the nature of the litigation and the context of the applicable legislation in which the words "levy" or "levied" appear. On this Reference, I take it that the questions submitted refer to the powers of the councils to impose assessments, taxes and charges and not to their powers, or those of the corporations acting through their officers and agents, to compel payment of these taxes; and I so treat the matter, and my answers are given upon that basis.

I see nothing to prevent the ordinary procedure being adopted with reference to these properties, that is, for the assessors to enter them on the assessment roll and the countries concerned as owners thereof; and for the collector's roll to be prepared and for the proper municipal authorities to enter in that roll the amount of taxes either for general or special rates or assessments; and for the tax collector to send a notice in the usual form showing the amount of

(1) (1914) 30 O.L.R. 367.

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taxes. The foreign states may choose to pay all or part of these sums or "as a matter of international courtesy" the Government of Canada may continue to pay them or may decide to pay part. A member of a Minister's staff may presumably enter into a lease of premises and agree to pay rent, although, if disputes arise, the landlord may find himself in difficulties as did the landlord in *Engelke* v. *Musmann* (1). This problem does not, of course, arise here, but neither, in my view, does the question as to whether the tax collector might, in the event of non-payment of any part of the taxes, seize goods under section 114 of *The Assessment Act* or as to whether the foreign states could be sued for the taxes or as to whether the lands themselves could be sold for taxes. When these questions arise they must be decided under those rules of international law that have become part of the domestic law of this country. (*Chung Chi Cheung* v. *The King* (2)).

As between the Dominion and foreign governments it is a matter of arrangement as to what assessments, taxes or charges are to be paid. At p. 1348 of Volume II of Diplomatic and Consular Laws and Regulations by Feller and Hudson (1933) is a "Circular Instruction from the Secretary of State to American Diplomatic Officers" dated November 9th, 1928. This instruction contains the following paragraph:

> Property in the District of Columbia owned by foreign governments for Embassy and Legation purposes is exempt from general and special taxes or assessments. Property owned by an Ambassador or Minister and used for Embassy or Legation purposes is exempt from general taxes but not from special assessments for improvements. The payment of water rent is required in all cases, as this is not regarded as a tax but the sale of a commodity.

It will be noticed that the reference is to the District of Columbia, which, as is well known, was originally part of the State of Maryland, but which was ceded by that State to the Congress of the United States. A reference to page 233 of Volume I of the same book indicates that a different rule may apply in the case of the Union of South Africa. Whatever may be the ultimate result of the inclusion in the assessor's rolls and collector's rolls of the properties referred to as owned by the foreign states and of the sending of the tax notices, there is nothing, in my opinion, to prevent those steps being taken.

(1) [1928] A.C. 433.

(2) [1939] A.C. 160, at 167.

The situation as to the properties of His Majesty the King in right of the United Kingdom and of His Majesty in right of Australia is entirely different. The relevant part of section 4 of *The Assessment Act* provides:

> 4. All real property in Ontario and all income derived, whether within or out of Ontario, by any corporation, or received in Ontario on behalf of any corporation, shall be liable to taxation, subject to the following exemptions:
>
> 1. The interest of the Crown in any property, including property held by any person in trust for the Crown, or in trust for any tribe or body of Indians, but, in the latter case, not if occupied by any person who is not a member of a tribe or body of Indians.

By clause (j) of section 32 of *The Interpretation Act*, R.S.O. 1937, c. 1, "The Crown" means the Sovereign of Great Britain, Ireland and the Dominions beyond the Seas for the time being. By section 23 of *The Assessment Act*, every assessor is to prepare an assessment roll in which he shall set down in separate colums:—

> Column 2. Name (surname first) and post office address and rural route mail number of taxable persons (including both the owner and tenant in regard to each parcel of land, and persons otherwise taxable) or person entitled to be entered on the roll as a farmer's son.
>
> Column 17. Total amount of taxable land.
>
> Column 19. Total value of land exempt from taxation or liable for local improvements only.

Section 4 appears to render non-assessable for general or special rates or local improvements the lands mentioned as belonging to His Majesty either in right of the United Kingdom or in the right of Australia, and in fact to prohibit the inclusion of those lands in the assessment roll as "taxable".

In my opinion, therefore, it is within the powers of the Council of the Corporation of the City of Ottawa to levy rates on properties in Ottawa owned and occupied as Legations by the Governments of the French State, the United States of America and Brazil, respectively, and it is within the powers of the Council of the Corporation of the Village of Rockcliffe Park to levy rates on property owned and occupied by the Government of the United States of America as the Legation of the United States in Rockcliffe Park; but that it is not within the powers of the Council of the Corporation of the City of Ottawa to levy rates on property in Ottawa owned and occupied by His Majesty in right of the United Kingdom as the office and residence of the High Commissioner for the United

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Kingdom, or on property in Ottawa owned and occupied by His Majesty in right of Australia as the residence of the High Commissioner for the Commonwealth of Australia.

HUDSON J.—In this reference by His Excellency the Governor General in Council, we are asked to give our opinion in respect to the right of two municipal corporations in Ontario to levy rates on several properties within those respective municipalities.

In what I have to say I shall assume that the words "levy rates" should be taken in their widest acceptation, that is, the imposition and collection of taxes for municipal purposes.

Under the *British North America Act,* section 92, paragraph 8, the province is given exclusive jurisdiction to make laws in relation to municipal institutions in the province. This carries with it the power to impose taxes for the purpose of carrying on the business of municipal institutions.

The taxation so imposed must be within the general provincial powers, that is: first, it must be direct taxation within the province as provided in section 92, paragraph 2, and secondly, it is subject to section 125 of the Act:—

> No lands or property belonging to Canada or any Province shall be liable to taxation.

Both the municipalities involved are in the Province of Ontario and their powers of taxation are defined in the *Assessment Act* of Ontario, R.S.O. 1937, chapter 272. By section 4 it is provided:—

> 4. All real property in Ontario * * * shall be liable to taxation, subject to the following exemptions:

The first exemption is:—

> (1) The interest of the Crown in any property, including property held by any person in trust for the Crown, * * *

There follow after this a very large number of exemptions, none of which has any relation to the present inquiry.

The exemption from taxation of Crown lands in subsection 1 of section 4 would apply to those of the Crown not only in the right of the Province of Ontario but also of the Dominion of Canada and all other parts of the British Dominions. Reference here might be made to *Secretary of State for War* v. *Toronto* (1), and *Secretary of State for War* v. *London* (2).

(1) (1863) 22 U.C.Q.B. 551. (2) (1864) 23 U.C.Q.B. 476.

This being so, the properties owned by and occupied for His Majesty in the right of the United Kingdom as the office and residence of the High Commissioner of the United Kingdom and the property owned and occupied by His Majesty in the right of the Commonwealth of Australia as the office and residence of the High Commissioner for Australia, are both exempt from taxation.

This position was not seriously contested on behalf of the City of Ottawa, nor on behalf of the Province of Ontario.

Questions (ii) and (iii) should, therefore, be answered in the negative.

We next come to the larger and more difficult question as to whether or not the municipalities have the power to impose taxes for municipal purposes on properties owned and occupied as legations of governments of foreign countries and, if so, whether there are any limitations thereto.

It should first be stated that there is no legislation of Canada or of Ontario granting any privileges or immunities in respect of such legations, so that, if any exist, it must be by virtue of some general principle of international law or of Imperial legislation having the force of law in Ontario.

Separate diplomatic representation for and to Canada was not contemplated when the *British North America Act* was passed and there is no provision therein which allots to the Dominion as against the provinces any special powers applicable thereto.

However, in *Attorney-General for Canada* v. *Attorney-General for Ontario* (1), it was held by the judicial Committee that although the Executive in Canada was now competent to enter into treaties with foreign countries, yet, in the words of Lord Atkin, at p. 352:—

> no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions.

And again:—

> There is no existing constitutional ground for stretching the competence of the Dominion Parliament so that it becomes enlarged to keep pace with enlarged functions of the Dominion Executive. If the new functions affect the classes of subjects enumerated in s. 92, legislation to support the new functions is in the competence of the Provincial Legislatures only. If they do not, the competence of the Dominion Legislature is declared by s. 91 and existed ab origine. In other words, the Dominion

(1) [1937] A.C. 326.

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cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

This statement is *a fortiori* applicable to the question of diplomatic immunities.

I think that the province would be bound to recognize the status of diplomats, but not necessarily bound to accord them any privileges in matters falling within provincial legislative jurisdiction under section 92 of the *British North America Act*.

We must then consider the extent of immunities to which diplomatic representatives and legations are entitled under the general principles of international law or the statute law of England and which, if any, such immunities form part of the law of the Province of Ontario.

Westlake's International Law, Part 1, at p. 277, gives a statement of the views prevalent among English lawyers in the year 1910:

> It is generally admitted that a diplomatic person is exempt from the territorial jurisdiction on engagements contracted by him either in his official capacity, or in a purely private as distinguished from a mercantile or professional capacity, and that so much of his property, movable or immovable, as is necessary to his dignity and comfort cannot be seized for any debt. But opinions and the practice of courts differ as to points beyond these, and since in such circumstances no international agreement can be asserted the question is one for national law, on which we cannot here enter into details. It is enough to say that in England the widest views as to diplomatic immunity are adopted. The st. 7 Anne, c. 12 (This act was passed in consequence of the ambassador of the Czar being arrested, and has always been considered in England as declaratory and not innovating), which is the most formal document we have on the subject, declares the goods of an ambassador or other public minister without limitation to be incapable of distraint or seizure, and makes no exception on the ground of trade to his immunity from suit, but only excludes from the benefit of the act any person "within the description of any of the statutes against bankrupts who shall put himself into the service of any such ambassador or public minister." And though in one case it seems to have been thought, somewhat doubtingly, that a foreign minister who engages in commercial transactions may be made a nominal defendant to a suit "merely for the purpose of ascertaining the liability of the other defendants," no attempt being made to enforce against him any judgment which may be obtained, a later case decides against that view. Again, although Wheaton says that "the hotel in which [a foreign minister] resides, though exempt from the quartering of troops, is subject to taxation in common with the other real property of the country, whether it belongs to him or to his government", yet it has been held in England that the payment of local rates cannot be enforced by suit or distress against a member of a mission, and the same would no doubt be held in the case of national taxes.

The exact language of the material sections of the statute of 7 Anne is as follows:

III. And to prevent the like insolences for the future, be it further declared by the Authority aforesaid, that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any Ambassador, or other public Minister of any foreign Prince or State, authorized and received as such by Her Majesty, her Heirs or Successors, or the domestic, or domestic servant of any such Ambassador, or other public Minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

IV. And be it further enacted by the Authority aforesaid, that in case any person or persons shall presume to sue forth or prosecute any such writ or process, such person and persons, and all attornies and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted, by the confession of the party, or by the oath of one or more credible witness or witnesses, before the Lord Chancellor, or Lord Keeper of the Great Seal of Great Britain, the Chief Justice of the Court of Queen's Bench, the Chief Justice of the Court of Common Pleas for the time being, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose, and shall suffer such pains, penalties and corporal punishment, as the said Lord Chancellor, Lord Keeper, and the said Chief Justices, or any two of them shall judge fit to be imposed and inflicted.

In the *Cristina* (1), it was said by Lord Wright, at p. 506, quoting with approval a decision of Brett, M.R., in 5 P.D. at 214 (2):

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement subject to its jurisdiction.

In the case of *Chung Chi Cheung* v. *The King* (3), it was said by Lord Atkin at p. 175:

The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process.

Now, how far can it be said that this forms part of the law of Ontario? In the above mentioned case of *Chung Chi Cheung* (3), it was said by Lord Atkin at p. 168:

(1) *Compania Naviera Vascongado* v. *S.S. Cristina*, [1938] A.C. 485.

(2) *The Parlement Belge*, (1880) 5 P.D. 197.

(3) [1939] A.C. 160.

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The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

It would appear that the Statute 7 Anne is in force in Ontario. The 1897 revision of Ontario Statutes was prepared by a Board of Commissioners composed of many of the most eminent judges of Ontario under the chairmanship of Chancellor Boyd. Schedule "C" showing Imperial Acts and parts of Imperial Acts relating to property and civil rights appearing to be in force in Ontario by virtue of Provincial Legislation which are not repealed, revised or consolidated, seems to have been indirectly accepted by chapter 13 of the Statutes of Ontario, 1902, sections 4 and 14.

The Statute of Anne mentions only ambassadors and domestic servants but, as it embodies what was a part of the common law, the principle has been held to extend to all other diplomatic representatives.

In 6 Halsbury's Laws of England, p. 507, the note is:

> The Diplomatic Privileges Act, 1708 (7 Ann. c. 12), s. 4, provides for the punishment of all persons and their attorneys and solicitors who take any proceedings in contravention of the Act. The immunity conferred by the statute, while professing merely to secure the persons and property of public ministers against the process of the Courts, does in fact confer upon them complete freedom from interference. Thus, the exterritoriality or inviolability of a public minister's house—as to the extent of which writers on international law differ considerably—is safeguarded by the fact that the minister is not amenable to the jurisdiction of the Courts in respect of his actions.

It is further said in the same passage of Halsbury:

> A public minister's immunity as regards rates and taxes, although deducible from the general principles as to his freedom from taxation which are sanctioned by international usage, is sufficiently safeguarded in English law by the fact that no action can be brought against him to enforce payment. (*Parkinson* v. *Potter* (1)).

In the *Parkinson* case there was an express provision in a statute imposing the liability for rates or assessments on the landlord in cases where the premises were occupied by representatives of foreign governments entitled to immunity. It should be observed that at that time aliens could not own land in England, so that premises occupied

(1) (1885) 16 Q.B.D. 152.

by foreign representatives were always rented from owners of the freehold.

It must, then, be concluded that a court would be bound to hold that in Ontario no action could be proceeded with against any foreign sovereign or state or its diplomatic representatives who pleaded immunity, in respect of taxes imposed by municipal corporations, and the same rule would apply to any proceedings in court calculated to disturb their occupation of the land.

But there is another side to the matter. The immunity or privilege is a privilege from action or molestation. It does not destroy liability. This is illustrated in the case of *Dickinson* v. *Del Solar* (1). There, a Peruvian diplomat while driving a motor car negligently injured the plaintiff. The defendant was insured against accidents of that sort and claimed indemnity from the insurance company. The insurance company denied liability on the ground that their policy only protected against liability of the defendant and, as the defendant was a member of the Peruvian legation, he was immune from legal process. The action was tried before Lord Chief Justice Hewart. He said at p. 380:

> Diplomatic agents are not, in virtue of their privileges as such, immune from legal liability for any wrongful acts. The accurate statement is that they are not liable to be sued in the English Courts unless they submit to the jurisdiction. Diplomatic privilege does not import immunity from legal liability, but only exemption from local jurisdiction.

See also *Taylor* v. *Best* (2), and *In re Suarez* (3).

A diplomatic representative often incurs liability under contracts. If he pleads immunity, these cannot be enforced as long as the privilege continues, but he still owes the debt.

The tax here in question is imposed on the land for the purpose of maintaining the community life and amenities shared by the inhabitants of the municipality, including the occupants of these particular properties, with all citizens. It is in no way a tax enuring for the benefit of Canada as a state.

The Legislature of Ontario, which is supreme in the matter of municipal institutions and property and civil rights in the province, has not seen fit to exempt the land used for legations from municipal taxes.

(1) [1930] 1 K.B. 376. (2) (1854) 14 C.B. 487.
(3) [1918] 1 Ch. 176.

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The Statute of 7 Anne had no application to the land. At the time it was passed and for long afterwards, alien ownership of land was not permitted by the law of England: see Blackstone's Commentaries, 1829, Ed., Vol. 1, p. 371.

In cases like *Parkinson* v. *Potter* (1), *supra,* the diplomatic representative held as tenant and was immune from personal action, but the owner was liable to the local authority and the taxes were collected from him.

The Dominion has the right to give a status to diplomatic representatives, but I cannot see that the granting of such status carries with it immunities from provincial laws beyond those which are recognized by the Provincial Legislature, as has been done, in my view, to the extent of immunity from personal liability.

The tax when imposed creates a lien and charge on the land. There are many difficulties in the way of enforcement as long as the privilege continues but, as we have reason to know, diplomatic relations may be severed, or the foreign state or person representing such state may desire to dispose of the land; then the lien might well become effective. Again, a substantial part of municipal taxation is imposed to pay for the services rendered by the municipality, such as water, sewerage, etc., which the municipality would have a right to withhold until taxes are paid.

If I am correct in these views, this leaves the matter in an unsatisfactory position. It arises because Canada's advance to international status was not foreseen when the *British North America Act* was passed. I take it that the purpose of this Reference is to clarify the legal situation so that the proper authorities may make the necessary adjustments between themselves in such a way as to comply with the necessities of international comity. What I have said perhaps does not clarify the situation but does show the legal difficulties involved in defining the functions of the Dominion as against the province. In conclusion, I would point out that in England

> It is usual for the Treasury to make an allowance to the rating authority of the district in which the immune premises are situate, in order to lessen the loss to the rates by reason of the immunity.

(6 Halsbury's Laws of England, p. 508).

My answers to the questions submitted are as follows:

(1) (1885) 16 Q.B.D. 152.

To question (i) my answer is "Yes", meaning thereby that the council of the municipality can impose such taxes, but this is qualified by the fact that assistance of the courts would not be given to enforce payment so long as the diplomatic immunity continued.

To question (ii) my answer is "No".

To question (iii) my answer is "No".

To the question as to the right of the Council of the Corporation of the Village of Rockcliffe, my answer is the same as to question (i).

TASCHEREAU J.—In the past, it has been the practice of the Councils of the City of Ottawa and the Corporation of the Village of Rockcliffe Park, to levy rates on property owned and occupied by His Majesty the King, in right of Governments of other parts of the Commonwealth, but as a matter of international courtesy, the taxes were paid by the Government of Canada.

His Excellency the Governor General has, therefore, referred to this Court the following questions:—

Is it within the powers of the Council of the Corporation of the City of Ottawa to levy rates on

(i) properties in Ottawa owned and occupied as Legations by the Governments of the French State, the United States of America and Brazil, respectively, or

(ii) on property in Ottawa owned and occupied by His Majesty in right of the United Kingdom as the Office and Residence of the High Commissioner for the United Kingdom, or

(iii) on property in Ottawa owned and occupied by His Majesty in right of Australia as the Residence of the High Commissioner for the Commonwealth of Australia,

and is it within the powers of the Council of the Corporation of the Village of Rockcliffe Park to levy rates on property owned and occupied by the Government of the United States of America as the Legation of the United States in Rockcliffe Park?

In the exercise of powers granted by the *British North America Act,* the Ontario Legislature has passed laws providing for the assessment and taxation of all real property.

Among the exemptions mentioned in the *Assessment Act* is the following:—

The interest of the Crown in any property, including property held by any person in trust for the Crown, * * *

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Taschereau J.

The *Interpretation Act* says:—

> "His Majesty", "Her Majesty", "The King", "The Queen", or "The Crown", shall mean the Sovereign of Great Britain, Ireland and the Dominions beyond the Seas for the time being.

These two references to the Statutes of Ontario are sufficient, without further comment, to allow me to give a negative answer to interrogatories (ii) and (iii). The Statute clearly creates an exemption in favour of any property belonging to the Crown.

The situation, however, as to properties in Ottawa owned and occupied as Legations by the Governments of the French State, the United States of America, and Brazil, for which there is no specific exemption, appears to be quite different, and the question must be approached from another angle. Its solution would offer no difficulty whatever in a unitary State where there is no duality of authority, as we have here as a result of the attribution of powers made by the *British North America Act* to the Federal Government and to the various Provinces of Canada.

Of course, the rapid expansion of international relations between Canada and the other countries of the world, could not be foreseen in 1867, but it is common ground that external affairs is a matter which is exclusively under Federal control, and it is in pursuance of these rights that the Canadian Government have exchanged ministers with foreign countries.

I quite agree, that if the Federal authorities contract obligations with foreign countries, their competence does not "become enlarged to keep pace with enlarged functions", and as Lord Atkin said in *Attorney-General for Canada* v. *Attorney-General for Ontario* (1):—

> In other words, the Dominion cannot, merely by making promises to foreign countries, clothe itself with legislative authority inconsistent with the constitution which gave it birth.

But in that case the questions referred asked whether the *Weekly Rest in Industrial Undertakings Act*, the *Minimum Wages Act*, and the *Limitation of Hours of Work Act*, were *ultra vires* of the Parliament of Canada. These laws had been enacted by the Parliament of Canada to

(1) [1937] A.C. 326, at 352.

give effect to draft conventions adopted by the International Labour Organization of the League of Nations, and were found to be *ultra vires,* in that the legislation related to matters assigned exclusively to the Legislatures of the Provinces.

It appears to me that this decision of the Judicial Committee has no application in the present case, where no legislation has been enacted by Parliament, and no acts done which can convey the idea that there is from its part any attempt to deal with municipal taxation, which is a matter exclusively for provincial concern.

The question is whether under International Law, a property belonging to a foreign State may be assessed for municipal purposes. A negative answer would in no way clothe the Dominion with any "enlarged competence", and the denial to the Provinces and the Municipal authorities of the right to levy such rates, would not extend the field of federal legislative powers.

I have come to the conclusion that practically in all the leading countries of the world, it is a settled and accepted rule of International Law, that property belonging to a foreign Government, occupied by its accredited representative, cannot be assessed and taxed for state or municipal purposes.

The Minister himself, is not, as a rule, subject to the authority of a foreign power, and cannot be impleaded in the courts of the country where he is sent. His immunity from legal process extends to the property of the State, which is exempt from all form of taxation. It is with this in mind that must be read the *Assessment Act* of Ontario.

I had the advantage of reading the reasons for judgment of the Chief Justice. He has made a thorough review of the jurisprudence and of the opinions of the text-writers on the subject, and with what he has said, I entirely concur.

I would answer interrogatory (i) in the negative. To the interrogatory relating to the Corporation of the Village of Rockcliffe Park, my answer is also in the negative.

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*March 9.
*April 2.

ALEXANDER GACH ..... APPELLANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Criminal law—Evidence—Statements by accused to police officers before charge or arrest made—Admissibility.

The appeal was from the affirmance by the Court of Appeal for Manitoba (two Judges dissenting) of appellant's conviction of having unlawfully received gasoline ration books, knowing them to have been stolen. Two police officers, bearers of a search warrant, had gone to appellant's home (before any charge or arrest was made) and talked to him, one of them, H., stating that "it would be better" for appellant to return the books. At the end of their visit they told appellant that he was to accompany them to the police barracks to talk to A., a police inspector, who, on their arrival, talked to and questioned appellant. Later some gasoline ration books were received by the police from some person through the mail. At the trial, evidence was given by the police officers of statements by appellant in the aforesaid interviews, the evidence of A. in this respect being that mainly relied on by the magistrate in convicting appellant. No ration books had been found on appellant or in his home, nor was he identified at the trial as one to whom stolen ration books had been sold or delivered.

Held: The conviction should be quashed.

Per the Chief Justice and Kerwin J.: Evidence of statements by appellant to A. (and also of statements by appellant to H., if they occurred after H.'s said statement) were inadmissible, as having been made under fear of prejudice or hope of advantage exercised or held out by a person in authority (*Ibrahim* v. *The King*, [1914] A.C. 599, at 609; *Sankey* v. *The King*, [1927] S.C.R. 436, at 440). On the record it must be held that there was no evidence that appellant ever had the books or that the books sent through the mail were some of those that had been stolen.

Per Rinfret, Hudson and Taschereau JJ.: Before being questioned by said officers, who were persons in authority, appellant should have been warned, and the burden was upon the Crown to show that the proper warning was given. Though not yet arrested, appellant was practically in custody. Physical custody was not necessary, under the circumstances, to make inadmissible the evidence of appellant's statements made under questioning without the proper caution having been given; the same rule should apply as when a person has been arrested, because the reasons that justify the rule in that case are equally applicable when the suspect is threatened with being charged with the commission of a crime. Principles stated in *Rex* v. *Knight and Thayre*, 20 Cox's Cr. C. 711, at 713; *Lewis* v. *Harris*, 24 Cox's Cr. C. 66, and *Rex* v. *Crowe and Myerscough*, 81 J.P. 288, should govern the present case. The appeal should, therefore, be allowed, and, as there was no evidence left to substantiate the charge, the conviction should be quashed and appellant acquitted.

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

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THE KING.

APPEAL from the judgment of the Court of Appeal for Manitoba (Prendergast, C.J.M., Dennistoun, Trueman, Robson and Richards, JJ.A.) dismissing (Dennistoun and Robson, JJ.A., dissenting, on grounds which are set out in the judgment of Taschereau J. *infra*) an appeal from the appellant's conviction by a police magistrate of having unlawfully received eleven gasoline ration books which had theretofore been stolen, knowing the same to have been stolen.

The reasons for judgment in this Court now reported deal mainly with the question as to admissibility in evidence of statements made by appellant in certain interviews between police officers and him. These interviews took place on August 7, 1942. The charge was laid on September 16, 1942.

A. R. Micay for the appellant.

E. J. Thomas for the respondent.

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

KERWIN J.—The appellant was tried before the Police Magistrate at Winnipeg on a charge of having "unlawfully received eleven gasoline ration books of the value of $5.50, the property of His Majesty the King, which had theretofore been stolen, he then well knowing the same to have been stolen." He was found guilty mainly on the strength of the evidence of Inspector Anthony of the Royal Canadian Mounted Police as to what occurred in an interview between Anthony and the appellant.

No reference is made in the magistrate's reasons for conviction to what had previously transpired when two other officers had visited the appellant at the latter's house. I find it impossible on the transcript of the evidence to decide whether that part of the evidence of one of these officers, Hannah:—"I then talked to him and tried to get him to return them to me voluntary, saying I thought it would be better for him to do so", refers to a time before or after, when, according to the other officer, Lyssey, the appellant said in the presence of the two officers:—"What if I have them; it is his word against mine: he brought them here anyway",—the "his" and "he" referring to one

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Nagurski who had been convicted of stealing ration books but who declined, in the witness box, to identify the appellant as the person to whom he had sold them. If Hannah's statement to the appellant, which included the phrase, "I thought it would be better for him to do so", occurred prior to the appellant's statement which included the sentence, "he brought them here anyway", it would clearly vitiate the latter as having been made under fear of prejudice or hope of advantage exercised or held out by a person in authority. *Ibrahim* v. *The King* (1), *Sankey* v. *The King* (2). If the magistrate had found that Hannah's statement had been made later and that what otherwise transpired between the appellant and the two officers had not brought the case within the rule, I would not be disposed to interfere, as Gach had not been arrested.

As I have already mentioned, the magistrate proceeded mainly on the evidence of Anthony, and this evidence was clearly inadmissible as it referred to a conversation that occurred after the appellant had been told by Hannah "it would be better for him to do so". The appeal should therefore be allowed, but in order to decide what order should be made, I have examined all the evidence in detail. It has already been noted that Nagurski did not identify the appellant. No ration books were found on the latter or in his house. Eight ration books were returned through the mail, each in a separate envelope. In the unsatisfactory state of the record, I have come to the conclusion that there was no evidence that the appellant ever had the books or that the books sent through the mail were some of those that had been stolen.

I would allow the appeal and quash the conviction.

The judgment of Rinfret, Hudson and Taschereau JJ. was delivered by

TASCHEREAU J.—On the 16th of September, 1942, in the City of Winnipeg, the appellant was charged of having "unlawfully received eleven gasoline ration books of the value of $5.50, the property of His Majesty the King, which had theretofore been stolen, he then well knowing the same to have been stolen."

(1) [1914] A. C. 599, at 609. (2) [1927] S. C. R. 436, at 440.

The appellant was convicted, sentenced to three months' imprisonment, and the Manitoba Court of Appeal confirmed this conviction, Mr. Justice Dennistoun and Mr. Justice Robson dissenting.

The dissenting Judges based their dissent on five grounds:—

1. There was no sufficient evidence that Gach was the man with whom Nagurski dealt for the purchase of the gasoline ration books.

2. Nagurski's testimony needed both support and corroboration—both of which were lacking.

3. The statements of accused to the police officers were procured
   (1) without previous warning or caution, and
   (2) by inducement that it would be better for accused, etc.

Wherefore, admission of this evidence was improper.

4. That the statements alleged by accused to the police were not admissions of crime.

5. That there was no evidence that accused had the books and the police testimony as to receipt of certain books through the post was improperly admitted.

The evidence at the trial was very short. The first witness, one Edward Nagurski, admitted having stolen ration books, which he sold for $17.00. When asked in cross-examination if he could identify the accused, his answer was: "No, I am not certain."

All the other witnesses, Nicholas Lyssey, Clarence Hannah, Melville Anthony, are members of the Royal Canadian Mounted Police. Lyssey and Hannah, bearers of a search warrant, called at the residence of the appellant. They informed him that Nagurski had made a statement to the effect that he had sold to the appellant eleven gas ration coupon books for $17.00, and proceeded to question him. They told him that he "could be prosecuted", and that "in any event it would be better for him to hand them over." At the end of the conversation they informed the accused "that he was to accompany them to the barracks" to talk to Inspector Anthony.

Inspector Anthony repeated to the appellant "that as far as he was concerned he might in any event be charged" and "that he would be charged in all probability."

In answer to these various questions, the appellant said: "What if I have them, it is his word against mine; he brought them here anyway". He added: "I have not any gasoline ration books, what is this all about?" "My

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mother just died last night, and I do not know where I am at." "You have advised me that I would be charged, so if I returned them, I would not have any chance."

Anthony also says in his evidence:—

> I agreed he was perfectly right, and he asked how the books could be returned, and I told him it was up to himself. If he had them that he could hand them into me, or I said there is a good postal service in Winnipeg, and he wanted to go. It was his mother's funeral, and I let him go. On the eighth of August I received from the Post Office eight ration books enclosed in airmail envelopes, addressed R C M P Winnipeg.

I think that this appeal should be allowed.

Before being questioned by these officers who were persons in authority, the appellant should have been warned. It is true, that at that time he was not arrested yet, but he was practically in custody.

As Darling, J. says in *Booth and Jones* (1):—

> I say "practically" because physical custody is not necessary to make such evidence inadmissible.

Moreover, the presence of these officers with a search warrant, in the house of the appellant, his transfer to the barracks to be questioned by Inspector Anthony, the suggestion that it would be "better for him to talk and give the coupons back" created an atmosphere prejudicial to the appellant.

There is no doubt that when a person has been arrested, all confessions made to a person in authority, as a result of questioning, are inadmissible in evidence, unless proper caution has been given. This rule which is found in Canadian and British Law is based on the sound principle that confessions must be free from fear, and not inspired by a hope of advantage which an accused may expect from a person in authority.

I believe that under the circumstances of this case, the same rule must apply—for the reasons that justify it in the case of an accused person, are equally applicable when the suspect is threatened of being charged with the commission of a crime.

The appellant should not have been questioned unless properly warned, and the burden was upon the Crown to show that such warning has been given. *The Queen* v. *Thompson* (2).

(1) (1910) 5 Criminal Appeal Reports 177, at 180.

(2) [1893] 2 Q.B. 12.

In *Rex* v. *Knight and Thayre* (1), Channell, J. says:—

It is, I think, clear that a police officer, or any one whose duty it is to inquire into alleged offences, as this witness here, may question persons likely to be able to give him information, and that, whether he suspects them or not, provided that he has not already made up his mind to take them into custody. When he has taken any one into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. A magistrate or judge cannot do it, and a police officer certainly has no more right to do so.

In *Lewis* v. *Harris* (2), it was held by the King's Bench Division:—

A statement made by a person to a constable in answer to an inquiry by the constable is admissible in evidence on subsequent criminal proceedings against such person although no caution was given by the constable, provided that the person was not at the time in custody on the charge, that the constable on making the inquiry had not formed the intention of instituting proceedings whatever the answer might be, and that no inducement was held out or threat made to induce such person to make the statement.

And in *Rex* v. *Crowe and Myerscough* in the Central Criminal court (3), it was held by Sankey, J.:—

If a police officer has determined to effect an arrest, or if the person is in custody, then he should ask no questions which will in any way tend to prove the guilt of such person from his own mouth.

I believe that these principles should govern this case, and I therefore come to the conclusion that the evidence of the three officers was improperly admitted.

The appeal should, therefore, be allowed, and, as there is no evidence left to substantiate the charge, the conviction should be quashed and the accused acquitted.

Appeal allowed and conviction quashed.

Solicitors for the appellant: *McMurray, Greschuk, Walsh, Micay & Molloy.*

Solicitor for the respondent: *John Allen.*

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(1) (1905) 20 Cox's Criminal Cases 711, at 713.
(2) (1913) 24 Cox's Criminal Cases 66.
(3) (1917) Vol. 81, Justice of the Peace, p. 288.

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*Mar. 2, 3.
*April 2.

ELMER MOTT (DEFENDANT)..... APPELLANT;

AND

ETHEL TROTT (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Action for damages for breach of promise of marriage—Evidence—Statute of Frauds, R.S.O. 1937, c. 146, s. 4—Limitations Act, R.S.O. 1937, c. 118, s. 48 (1) (g)—Corroboration (Evidence Act, R.S.O. 1937, c. 119, s. 10).

The action, brought in 1941, was for damages for breach of promise of marriage. Plaintiff alleged that she and defendant became engaged in 1908, to be married when defendant had improved his prospects in life, and that he broke the engagement in 1941. At trial, Makins J., on motion for non-suit, withdrew the issues from the jury and dismissed the action, holding that there was in 1919, if the engagement still existed, a breach of it; that since that time the parties had not been engaged; and the *Limitations Act* (Ont.) barred right of action; also that the *Statute of Frauds* (s. 4) applied. His judgment was set aside by the Court of Appeal for Ontario ([1942] O.W.N. 513; [1942] 4 D.L.R. 150), which held that, on plaintiff's evidence, if accepted by the jury, the jury might have found that promises were made which would not come within the *Statute of Frauds* and also might have found no breach of engagement before 1941; that there was evidence in support of plaintiff's case that should have been submitted to the jury and, therefore, there should be a new trial. Defendant appealed.

Held: The appeal should be dismissed.

Per the Chief Justice and Davis J.: There was some evidence open to the construction, if the jury so viewed it, that the promise was a continuing one up to shortly before the writ was issued and that the breach first occurred then; or the jury might have inferred from the evidence that the parties mutually abandoned the contract when neither party insisted on its performance for an inordinate length of time; or the jury might have found that a breach occurred at least as early as 1919 when, according to plaintiff's evidence, defendant was in a financial position to marry. These were all questions for the jury, and the direction for a new trial should be sustained.

Per Rinfret, Kerwin and Taschereau JJ.: (1) As to the *Statute of Frauds* (R.S.O. 1937, c. 146, s. 4): However the case might stand in respect to the promise of 1908, there was evidence (for the jury's consideration) of later promises that were not within the statute. (It was pointed out that the rule is that, even if any promise be made in the expectation that it will not be performed within the space of one year, the statute does not apply if it is possible that the promise can be performed, or is not incapable of being performed, within a year).

(2) As to the *Limitations Act* (R.S.O. 1937, c. 118): There was evidence which the jury was entitled to consider, of new promises by words or conduct, and if the jury believed that evidence and if they found that a breach of any one of such new promises occurred within six years before the action was begun, s. 48 (1) (*g*) of the Act would not apply.

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

Such a result would necessarily involve a finding that any earlier agreement to marry had been ended by mutual arrangement and therefore s. 54 (1) of the Act could not operate.

(3) As to corroboration (s. 10 of the *Evidence Act*, R.S.O. 1937, c. 119): Corroboration must be evidence of a material character supporting the case to be proved. It may be afforded by circumstances. The evidence relied on as corroborative need not go the length of establishing the promise relied on; it is sufficient if it supports the plaintiff's evidence that the promise was made; and evidence showing that an engagement existed, such evidence being not inconsistent with the precise engagement sworn to by plaintiff, may fulfil the requirement. There was material evidence, other than that of plaintiff, in support of a promise that the jury might find on the evidence was made within the period fixed by the *Limitations Act*.

(4) As to evidence of certain witnesses, it was held that their testimony as to what they observed of the relations between plaintiff and defendant was admissible, but not their statements that plaintiff and defendant were regarded in the community as an engaged couple.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which vacated and set aside the judgment of Makins J. at trial and ordered a new trial.

The action was for damages for breach of promise of marriage. The plaintiff alleged that the original proposal and acceptance of marriage was made in 1908, the marriage to take place when the defendant had succeeded in improving his prospects in life and had obtained a suitable home for himself and the plaintiff; and that the engagement and promise were broken by defendant in September, 1941. The writ was issued on December 2, 1941.

The action was tried before Makins J. and a jury. At the close of the plaintiff's case, counsel for the defendant moved for a non-suit. Makins J. withdrew the issues from the jury and dismissed the action. He held that there was in 1919, if the marriage engagement was then in existence, a breach of it; that since that time the parties had not been engaged; and that the *Limitations Act* (Ont.) barred the right of action; also that the *Statute of Frauds* (s. 4) applied.

The Court of Appeal held that, though the alleged promise made in 1908, according to plaintiff's account of it, might have been one that a jury might find was not to be performed within one year, and however the case might stand in respect to it, yet there was evidence of later promises that were not within the *Statute of Frauds;* that

(1) [1942] O.W.N. 513; [1942] 4 D.L.R. 150.

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the trial Judge, in regarding a conversation in 1919, as related by plaintiff, as evidence of a breach of promise by defendant, seemed to have misunderstood plaintiff's evidence; and that a jury might reasonably regard the conversation as a renewed promise to marry, to be performed within a reasonable time; that if plaintiff's evidence was accepted, the parties' relations continued without any breach until 1941; and she told of numerous other occasions through the long period of the engagement when defendant, by word or conduct or both, might, in the opinion of a jury, if accepting plaintiff's evidence, have renewed his promise to marry; that plaintiff's story was corroborated in a general way by other witnesses, and certain evidence by one of them was of special significance; that there was evidence in support of plaintiff's case that ought to have been submitted to the jury, and therefore there should be a new trial.

The appellant appealed to this Court, asking that the judgment at trial be restored.

H. E. Fuller, K.C. and *R. M. W. Chitty, K.C.* for the appellant.

W. A. Donohue for the respondent.

The judgment of the Chief Justice and Davis J. was delivered by

DAVIS J.—The respondent sued the appellant for damages for breach of promise to marry. By her pleading she fixed the date of the promise as having been made in 1908, and in her evidence she was explicitly asked, "That is the only time that Elmer ever asked you to marry him?" to which she answered, "You usually just ask once, don't you—yes." The writ was not issued until December 2nd, 1941. The defendant, appellant, offered no evidence and I am not surprised that Makins, J., the trial judge, took the case from the jury and dismissed it as statute-barred. I think I might probably have done the same thing. But upon reflection the proper course was, no doubt, to let the case go to the jury on the ground that there was some evidence open to the construction, if the jury thought fit to take that view, that the promise was a continuing one up until a month or two before the issue of the writ and that the breach first occurred then, or the jury might have inferred from the evidence that the parties mutually abandoned the

contract when neither party insisted on the performance of it for an inordinate length of time, although no express agreement to that effect had been made, or the jury might on the evidence have found that a breach of the contract occurred at least as early as 1919 when the appellant was in a financial position to marry, according to the respondent's evidence, the performance of the promise being said by the respondent to have been contingent on the happening of that state of affairs. The statute runs from the breach and not from the date of the making of the contract.

Those were all questions which might have gone to the jury. I should, therefore, not interfere with the order of the Court of Appeal, which directed a new trial.

See *Davis* v. *Bomford* (1), a breach of promise case, where it was held that the case was properly left to the jury. At p. 249 Pollock, C.B., referred to what Lord Mansfield had said in *Lowe* v. *Peers* (2): "These contracts are not to be extended by implication," and added: "It is clear that he [Lord Mansfield] thought that such contracts if not speedily carried into effect might be considered as abandoned."

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The defendant in an action for damages for breach of promise of marriage appeals from the order of the Court of Appeal for Ontario directing a new trial, and asks that the judgment of the trial judge dismissing the action be restored. At the conclusion of the evidence on behalf of the plaintiff, the trial Judge withdrew the case from the jury and dismissed the action without costs, on the ground that it was not maintainable in view of sec. 4 of the *Statute of Frauds*, R.S.O. 1937, c. 146, and that it was barred by *The Limitations Act*, R.S.O. 1937, c. 118.

The original promise of marriage was made in 1908. Chief Justice Robertson, speaking for the Court of Appeal, stated: "However the case may stand in respect to the promise of 1908, there was, in my opinion, evidence of later promises that were not within the Statute of Frauds." With that statement I agree and it is, therefore, unnecessary to consider the appellant's argument that the promise of 1908

(1) (1860) 6 Hurlstone & Norman (Exchequer Reports) 245.
(2) (1768) 4 Burr. 2225, 2230.

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was made in the expectation that it would not be performed within the space of one year. It cannot be successfully contended that on the evidence that consideration applied to any one of the later promises that a jury might find was made. However, in the event of a new trial being had, it should be pointed out that the rule is that, even if any promise be made in that expectation, the Statute does not apply if it is possible that the promise can be performed, or is not incapable of being performed, within a year. *Richmond Wineries Western Ltd.* v. *Simpson* (1). The same rule appears to apply in the United States. Williston on Contracts (Revised Edition), section 500.

As to section 48 (1) (*g*) of *The Limitations Act,* it is sufficient that the breach of any promise, which the jury might find existed, occurred within six years of the date of the issue of the writ. On this point also I agree with the Court of Appeal that there was evidence which the jury was entitled to consider, that on numerous occasions by words or conduct there were new promises of marriage. It was pointed out that the Chief Justice of Ontario used the word "renew", thus indicating, it was argued, that it was to the promise of 1908 or at least to some promise the breach of which occurred more than six years before the institution of the action to which he was referring. I do not so read the reasons, and in any event, in my view, there was evidence of new promises which the jury might believe, and if they found that a breach of any one of such new promises occurred within the six years, the section would not apply. Such a result would necessarily involve a finding that any earlier agreement to marry had been ended by mutual arrangement and therefore subsection 1 of section 54 of *The Limitations Act* could not operate.

Finally, it was argued that there was no corroboration as required by section 10 of *The Evidence Act,* R.S.O. 1937, c. 119, which reads as follows: "The plaintiff in an action for breach of promise of marriage shall not recover unless his or her testimony is corroborated by some other material evidence in support of the promise." It has been held by this Court in *McDonald* v. *McDonald* (2) and *Thompson* v. *Coulter* (3) that, under statutory provisions corresponding in all relevant respects with what is now section 11 of *The*

(1) [1940] S.C.R. 1 at 17. (2) (1903) 33 Can. S.C.R. 145.
(3) (1903) 34 Can. S.C.R. 261.

Evidence Act, corroboration must be evidence of a material character supporting the case to be proved but that such corroboration may be afforded by circumstances.

The same rules prevail in an action such as this. The evidence relied on as corroborative need not go the length of establishing the promise relied on; it is sufficient if it supports the plaintiff's evidence that the promise was made. *Bessela* v. *Stern* (1), *per* Cockburn, C.J., at 271, and *per* Brett, L.J., at 272. In *Smith* v. *Jamieson* (2), Street J. puts the position admirably in a single paragraph which I adopt as applicable to the present case, except that here the appellant did not admit any promise:—

> It was further urged that under sec. 6 of ch. 61 R.S.O. it was necessary that the plaintiff should furnish evidence to corroborate, not only the fact of the promise, but the date when it was made, when the date is material, as it is in the present case. That section provides "that no plaintiff in an action for a breach of promise of marriage shall recover a verdict unless his or her testimony is corroborated by some other material evidence in support of the promise." The plaintiff here swore that she and the defendant on the 20th August agreed to marry one another: she produced, in support of this, abundant evidence to corroborate her statement that an engagement to marry existed between her and the defendant, such evidence being not inconsistent with the precise engagement which she swore to. This I think is all that the statute requires, and it was not necessary that the corroborative evidence should go so far as to negative the promise which the defendant admitted he made before his majority.

The evidence of Mrs. Goodfellow relating to the appellant's apparent approval of the proprietary interest which the respondent was taking in the newly purchased house, and her evidence as to appellant's invitation to her (Mrs. Goodfellow) to "come and see us", was some other material evidence in support of a promise that the jury might find on the evidence was made within the period fixed by *The Limitations Act.* That part of the evidence of Burton J. Marriott and Flora Trott in which they testified as to what they observed of the relations between the parties was admissible, but not their statements that the plaintiff and defendant were regarded in the community as an engaged couple.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Pardee, Gurd, Fuller & Taylor.*

Solicitor for the respondent: *W. A. Donohue.*

(1) (1877) 2 C.P.D. 265. (2) (1889) 17 Ont. R. 626, at 632-3.

1942
*Oct. 27.
1943
*April 2.

FRANK ROY AND ATTORNEY-GENERAL OF THE PROVINCE OF ALBERTA (DEFENDANTS)..... } APPELLANTS;

AND

FLAVIUS PLOURDE (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Constitutional law—Order fixing period for redemption in action for specific performance of agreement for sale of land—Constitutional validity of The Judicature Act Amendment Act, 1942 (Alta., c. 37), s. 2.

There was in question the constitutional validity of s. 2 of *The Judicature Act Amendment Act, 1942* (c. 37), adding to s. 35 of *The Judicature Act,* Alberta, paragraph (*ddd*), which extended the time for redemption, under any order *nisi* or order for specific performance theretofore granted in an action for foreclosure of mortgage or in respect of an agreement for sale of land, respectively, in any case where no final vesting order or cancellation order had been granted, for one year from the coming into force of the enactment; and also specified the time to be fixed for redemption by the order *nisi* or the order for specific performance in any such action commenced before or after the passing of the enactment, at one year from the date of the order; provided however that in any action coming under above provisions the judge might on application decrease or extend said period of redemption having regard to circumstances in respect of certain matters specified; and, by clause (*iii*), provided that nothing contained in the enactment should apply to "(*a*) any action in which a permit is not or was not required pursuant to the provisions of *The Debt Adjustment Act, 1937;* or (*b*) any action authorized by a permit granted by the Debt Adjustment Board; or (*c*) any action in which the consent of the debtor has been obtained."

The objection to the enactment was that as a whole it was colourable and its real purpose was to give indirectly some effect to *The Debt Adjustment Act, 1937*, which had been held *ultra vires.*

Held (reversing the judgment of the Supreme Court of Alberta, Appellate Division, [1942] 2 W.W.R. 607): The enactment was not *ultra vires.* Standing by itself (excluding clause *iii*), it was a normal exercise of provincial legislative power; it concerned property and civil rights within the province and procedure in civil courts relating thereto. As to clause (*iii*), it gave creditors the benefit of provsions of an Act which would *shorten* the prescribed time for redemption, and, in any event, clause (*iii*) was severable and, as *The Debt Adjustment Act, 1937,* had finally been held *ultra vires,* could have no effect whatever.

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

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing (Ford and Ewing JJ.A. dissenting) an appeal from an order in which (having regard to and partly in furtherance of a previous order in the action) a certain period of redemption was fixed, a sale confirmed and delivery of possession ordered, in an action for specific performance (with other relief) of an agreement for sale of land from plaintiff to defendant. (A stay of execution of the order for possession was granted by the Appellate Division). There was raised the question as to the validity of s. 2 of *The Judicature Act Amendment Act, 1942* (Statutes of Alberta, 1942, c. 37), which section is set out in full in the judgment of this Court now reported. The majority of the Appellate Division held that the enactment was *ultra vires*. By an order in the Supreme Court of Alberta, Appellate Division, the Attorney-General of Alberta (who had previously intervened and been heard on the application for the said order appealed from and on the appeal to the Appellate Division) was added as a party defendant; and he joined in the appeal to this Court.

H. J. Wilson K.C., W. S. Gray K.C. with him, for the appellants.

S. H. McCuaig K.C. for the respondent.

The judgment of the Court was delivered by

HUDSON J.—The question which we are asked to decide here is whether or not an amendment to *The Judicature Act* of Alberta is within the powers of the Legislature. The Act in question provides:

2. *The Judicature Act,* being chapter 72 of the Revised Statutes of Alberta, 1922, is hereby amended as to section 35 by adding immediately after paragraph (*dd*) the following new paragraph:

(*ddd*) (i) Notwithstanding the terms of any order *nisi* heretofore granted in an action for foreclosure of a mortgage or of any order for specific performance heretofore granted in an action in respect of any agreement for sale of land in any case where no final vesting order or cancellation order has been granted the time for redemption under any such order shall be extended for a period of one year from the date of the coming into force of this Act;

(ii) In any action for foreclosure of a mortgage or for specific performance of an agreement for sale commenced before or after the pass-

(1) [1942] 2 W.W.R. 607; [1942] 3 D.L.R. 646.

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ROY AND ATTORNEY-GENERAL OF ALBERTA v. PLOURDE.

Hudson J.

ing of this Act, the time to be fixed for redemption by the order *nisi* in the case of a mortgage or by the order for specific performance in the case of an agreement for sale shall be one year from the date of the granting of the order;

Provided, however, that in any action coming under the provisions of clauses (i) or (ii) of this paragraph the judge may on application decrease or extend the said period of redemption having regard to the following circumstances:

(*a*) in case the action is in respect of a security on farm lands, the ability of the debtor to pay, the value of the land including the improvements made thereon, the nature, extent and value of the security held by the creditor, and whether the failure to pay was due to hail, frost, drought, agricultural pests or other conditions beyond the control of the debtor;

(*b*) in case the action is in respect of a security on urban lands, the ability of the debtor to pay, the value of the land including the improvements made thereon, the nature, extent and value of the security held by the creditor, the earning capacity of the debtor, and whether the debtor's failure to pay was due to temporary or permanent unemployment, or other conditions beyond the control of the debtor.

(iii) Nothing contained in this paragraph shall apply to,—

(*a*) any action in which a permit is not or was not required pursuant to the provisions of *The Debt Adjustment Act, 1937;* or

(*b*) any action authorized by a permit granted by the Debt Adjustment Board; or

(*c*) any action in which the consent of the debtor has been obtained.

Section 2, standing by itself (excluding clause iii), is a normal exercise of provincial legislative power. It concerns property and civil rights within the province and procedure in civil courts relating thereto.

The objection is that the Act as a whole is colourable and its real purpose is to give indirectly some effect to the *Debt Adjustment Act,* which has been held *ultra vires.* This objection was sustained by a majority of the Court of Appeal.

With respect, I cannot say that this objection can be sustained. Clause (iii), which is the objectionable clause, gives creditors the benefit of provisions of an Act which would *shorten* the prescribed time for redemption and, in any event, this clause is severable and, as the *Debt Adjustment Act* has finally been held *ultra vires,* can have no effect whatever.

Having arrived at this conclusion, the appeal must be allowed and, in order to enable the courts in Alberta to work out the consequences of this view, the order of the court below should be so amended so as to provide a new

date for performance. The time consumed in the various court proceedings might well be considered in fixing this time.

There should be no costs of the appeal.

Appeal allowed.

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

Solicitor for the respondent: *S. H. McCuaig.*

WILLIAM TEMPLE ..... APPELLANT;

AND

C. F. BULMER ..... RESPONDENT.

1943
*Feb. 23, 24
*April 2

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mandamus—Elections—Application for mandamus directing Clerk of the Crown in Chancery for Ontario to issue writ for election to Legislative Assembly to fill vacancy created by death of member—Legislative Asembly Act, R.S.O. 1937, c. 12, s. 34—Officer under control of and answerable to Legislative Assembly.

This Court affirmed the dismissal of appellant's application in the Supreme Court of Ontario for an order in the nature of a prerogative writ of mandamus directing the Clerk of the Crown in Chancery for Ontario to issue a writ for the election of a member of the Legislative Assembly of Ontario for an electoral district to fill a vacancy created by the death of the member therefor. The issue of the mandamus would constitute an intrusion upon the privileges of the Legislative Assembly. See 34 of *The Legislative Assembly Act* (R.S.O. 1937, c. 12) does not confer jurisdiction upon the courts in relation to Parliamentary elections; any duty imposed by s. 34 upon the Clerk of the Crown in Chancery is imposed upon him in his character of an officer under the control of and answerable to the Legislative Assembly.

APPEAL from the judgment of the Court of Appeal for Ontario dismissing the present appellant's appeal from the judgment of Greene J. in the Supreme Court of Ontario dismissing appellant's application (notice of which was dated May 13, 1942) for an order in the nature of a prerogative writ of mandamus directing the present respondent, Clerk of the Crown in Chancery for the Province of Ontario, to issue forthwith a writ for the election of a member of the Legislative Assembly of Ontario for the Electoral District of High Park, in the City of

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

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Toronto. The appellant was an elector of said Electoral District, and by affidavit stated (*inter alia*) that in May, 1940, a vacancy had been created in the Legislative Assembly by the death of the member who had been elected to represent the said Electoral District, and no writ had been issued and no election held to fill the said vacancy and the said Electoral District had remained unrepresented during two sessions of the Legislature of Ontario; that the appellant had, by letter of May 8, 1942, required the respondent to issue a writ for an election and the respondent had subsequently in an interview informed the appellant that he did not intend to comply therewith.

The respondent by affidavit exhibited a form of writ of election for a by-election in use in Ontario and stated (*inter alia*) that writs for the election of members to fill vacancies in the Legislature are always sealed with the Great Seal of the Province of Ontario and signed by the Lieutenant-Governor or the Administrator of the Province of Ontario; that the Great Seal was in the custody of the Provincial Secretary and not under respondent's control; that there is no statutory authority vested in respondent to name a returning officer to hold an election to fill a vacancy in the Legislative Assembly; that returning officers have always been appointed by the Lieutenant-Governor in Council; that there is no statutory authority vested in respondent to fix a date for holding the poll for the election of a member of the Legislative Assembly; that respondent was informed and believed that the authority to fix such date is vested in the Lieutenant-Governor in Council; and that respondent was informed and believed that the appointment of a returning officer and the fixing of the date for holding a poll, by the Lieutenant-Governor in Council, are conditions precedent to the issue of a valid writ of election.

Sec. 34 of *The Legislative Assembly Act*, R.S.O. 1937, c. 12, is as follows:

> Subject to the provisions of section 31, if the seat of a member of the Assembly has been vacant for three months and no writ has been issued, the Clerk of the Crown in Chancery shall issue the writ forthwith.

The judgment of the Court of Appeal for Ontario (Robertson C.J.O. and Middleton, Fisher, Henderson and Gillanders JJ.A.) was delivered orally by Robertson C.J.O. as follows:

We are all of the opinion that the applicant here has no status to require a mandamus to issue to the Clerk of the Crown in Chancery. We do not think this or any other Act confers upon him any specific legal right to ask for an election or to make a demand upon the Clerk of the Crown in Chancery for the issue of a writ.

Furthermore, we are of opinion that the issue by the Court of a mandamus would constitute an intrusion upon the functions and privileges of the Legislative Assembly itself. The Legislative Assembly has itself the right to declare when and by whom elections shall be held; it has reserved to officers designated by it certain functions in that regard but it has not handed over to the public in general or to prospective voters the right to control the acts of these various officers. On the contrary, we think it has, by quite obvious limitations in their power, reserved that right to be discharged in some other manner.

The appeal is, therefore, dismissed.

F. A. Brewin and *J. P. Erichsen Brown* for the appellant.

C. R. Magone, K.C., for the respondent and for the Attorney-General for Ontario.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—We are satisfied that the Court of Appeal was right in its view that the issue of a mandamus in this case "would constitute an intrusion upon the * * * privileges of the Legislative Assembly."

We cannot agree with the contention, ably supported by the argument of Mr. Brewin, that section 34 of *The Legislative Assembly Act* confers jurisdiction upon the Courts in relation to Parliamentary elections. Any duty imposed by that section upon the Clerk of the Crown in Chancery is imposed upon him in his character of an officer under the control of the Legislative Assembly and answerable to the Legislative Assembly.

We think it proper to add that we express no opinion upon that part of the judgment of the Court of Appeal which deals with the status of the applicant to invoke the jurisdiction of the Courts if there were such jurisdiction. That is a question which we shall be free to consider whenever it may be necessary to pass upon it.

The appeal is dismissed. There is no order as to costs.

Appeal dismissed.

Solicitor for the appellant: *J. Price Erichsen Brown.*

Solicitor for the respondent and for the Attorney-General for Ontario: *C. R. Magone.*

1943

*Feb. 24, 25.
*April 2.

JOHN DILLON ..... APPELLANT;

AND

TORONTO MILLSTOCK COMPANY LIMITED AND F. L. DOLSON..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Schools—Companies—Company designating portion of its assessment in municipality for separate school purposes—Separate Schools Act, R.S.O. 1937, c. 362, s. 66—Notice by company in form B—Complaint against assessment for separate school purposes—Onus of proof as to compliance with s. 66 (3)—Effect of absence of evidence.

Notwithstanding the filing by a corporation of a notice in form B pursuant to s. 66 (1) of the *Separate Schools Act*, R.S.O. 1937, c. 362, requiring the whole or a part of the assessments of the corporation to be entered, rated and assessed for separate school purposes, and entry accordingly by the assessor in the assessment roll, it is not necessary for a person filing a complaint against such assessment for separate school purposes to adduce any evidence to prove that the notice so filed by the corporation contravenes s. 66 (3) of said Act, but in the absence of affirmative proof that the portion of assessments required by that notice to be so rated and assessed does not bear a greater proportion to the whole of the assessments of the corporation than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares of the corporation, the whole of the assessments of the corporation should be entered, rated and assessed for public school purposes. The rule deduced from the Act in *Windsor Education Board* v. *Ford Motor Company of Canada, Ltd.*, [1941] A.C. 453, that the normal course of assessment and rating for educational purposes is that the ratepayer is rated for public school purposes, and that the right to the statutory exception in favour of separate schools must be established, is a rule of substantive law, by which the burden of proof is fixed from the beginning upon those claiming the benefit of that exception.

APPEAL from the judgment of the Court of Appeal for Ontario (1) dismissing the present appellant's appeal from the judgment of His Honour T. H. Barton, Judge of the County Court of the County of York, rendered on an appeal by the present appellant from the decision of the Court of Revision of the City of Toronto given against assessment for separate school purposes of the part of the assessments of the respondent company which had been required to be so assessed by notice given by the said company in form B pursuant to s. 66 (1) of the *Separate Schools Act*, R.S.O. 1937, c. 362.

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

(1) [1942] O.W.N. 365; [1942] 3 D.L.R. 359.

The appeal to the Court of Appeal was upon a case stated by His Honour T. H. Barton (pursuant to s. 85 of the *Assessment Act*, R.S.O. 1937, s. 272), reading as follows:

FACTS

Toronto Millstock Company Limited, hereinafter called the Corporation, is a Corporation assessed within the City of Toronto; the Corporation pursuant to Section 66 of the Separate Schools Act being Chapter 362, R.S.O. 1937, by Notice Form "B" of the said Separate Schools Act given to the Clerk of the City of Toronto on the 14th day of April, 1937, required part of the assessments of such Corporation for land, business and income liable to taxation for school purposes in respect of which the Corporation was assessed within the said City of Toronto to be entered, rated and assessed for the purposes of such Separate Schools; such notice has not been withdrawn, varied or cancelled by any notice subsequently given pursuant to any resolution of the Corporation or of its directors. In the year 1942 the assessor, in compiling his roll, followed the said notice and entered the Corporation as a Separate School supporter on the assessment roll in respect of so much of the assessments designated in the said notice, and the roll as returned conformed to the said notice. A complaint in respect of the said assessment was lodged by F. L. Dolson, a ratepayer of the City of Toronto, and the Court of Revision in the absence of any evidence being tendered on behalf of the said F. L. Dolson or the Corporation, allowed the appeal and directed all assessments of the Corporation to be entered for Public School purposes. From the decision of the Court of Revision allowing such appeal, the Appellant herein, John Dillon, appealed to me.

On the hearing of the appeal to me from the Court of Revision, the Corporation, although duly notified, did not appear and was not represented and the hearing of the appeal proceeded in its absence.

For the purpose of the appeal before me it was admitted that the Notice Form "B" was regular in form, had been properly filed and that the assessment roll as returned by the assessor was in conformity with the said notice.

The only evidence tendered before me, save the production of the said Notice Form "B", the assessment roll and the notice of complaint to the Court of Revision, was that of the Respondent, F. L. Dolson, who was called by the Appellant. The witness, F. L. Dolson, testified that he had no knowledge as to who were the shareholders of the company nor as to what was the religion of any shareholder, that he had no reason to believe that the share or portion of the assessments required by the notice to be rated and assessed for Separate School purposes bore a greater proportion to the whole of such assessments than the amount of stock or shares of the Corporation held by Roman Catholics bore to the whole amount of the stock or shares of the Corporation, and that he had made no investigation or inquiries as to any of the pertinent facts concerning the shareholders of the company or their religion: he stated that his reason for appealing was solely that it was his contention that it was the duty of the Corporation affirmatively to prove that the Notice Form "B" did not contravene the provisions of Section 66, Subsection 3 of the Separate Schools Act, if it wished to have its assessments apportioned in accordance with the said notice.

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DECISION

I held that, notwithstanding the filing of a Notice Form "B" pursuant to Section 66, Subsection 1 of the Separate Schools Act, when a notice of complaint as to the assessments for Separate School purposes of the Corporation concerned is filed, it is not necessary for the person filing the complaint to adduce any evidence to prove that the said Notice Form "B" contravenes Section 66, Subsection 3 of the Separate Schools Act, but that in the absence of affirmative proof before me that the percentage required by the said notice to be entered, rated and assessed for the purposes of Separate Schools does not bear a greater proportion to the whole of the assessments of the Corporation than the amount of stock held by Roman Catholics bears to the whole amount of stock or shares of the Corporation, the whole of the assessments of the said Corporation should be entered, rated and assessed for the purpose of Public Schools.

STATEMENT OF THE QUESTION

Upon the facts above and upon the true construction of the Statutes as applied to the facts so stated, was I right in holding,—

1. That where the assessor has entered, rated and assessed part of the assessments of the Corporation for Separate School purposes pursuant to a Notice Form "B" filed by the Corporation pursuant to Section 66 of the Separate Schools Act and a complaint to the Court of Revision has been filed in respect thereto, the person complaining is not required to adduce any evidence to prove that the said notice contravenes Section 66, Subsection 3, but that unless there be adduced before me evidence proving affirmatively that the percentage required by the Corporation's notice to be entered, rated and assessed for Separate School purposes, does not bear a greater proportion to the whole of the assessments of the Corporation than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares of the Corporation, the whole of the assessments of the Corporation must be entered, rated and assessed for Public School purposes;

2. That, notwithstanding that the Corporation has filed Notice Form "B" pursuant to Section 66 of the Separate Schools Act, the whole of the assessments of the Corporation ought to be entered, rated and assessed for the purposes of Public Schools unless it is affirmatively proven before me that the percentage required by the Corporation's notice to be entered, rated and assessed for the purposes of Separate Schools, does not bear a greater proportion to the whole of the assessments of the Corporation than the amount of the shares held by Roman Catholics bears to the whole amount of stock or shares of the Corporation;

3. That the filing of a complaint to the Court of Revision with respect to the assessment of the Corporation for Separate School purposes in accordance with the said Notice Form "B" filed without the adducing of any evidence in support of the complainant's contention casts upon those seeking to uphold the assessment made according to the said Notice Form "B" the onus of proving affirmatively that the share or portion of the assessments of the Corporation by the said notice required to be entered, rated and assessed for Separate School purposes does not

bear a greater proportion to all the assessments of the Corporation than the amount of the stock or shares held by Roman Catholics bears to the whole amount of the stock or shares of the Corporation.

The Court of Appeal answered in the affirmative the questions asked in the stated case.

Special leave to appeal to the Supreme Court of Canada was granted by the Court of Appeal for Ontario.

T. N. Phelan K.C. and *A. Kelly* for the appellant.

D. H. Osborne for the respondent Dolson.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—In *Windsor Education Board* v. *Ford Motor Co. of Canada, Ltd.* (1), the judgment of the Judicial Committee proceeds upon the principle which is stated in these words at p. 461:—

> It is common ground in all the judgments that the normal course of assessment and rating for educational purposes is that the ratepayer is rated for public school purposes. A statutory exception is made in favour of separate schools, but, to avail themselves of the statutory protection consisting of immunity from the ordinary liability and subjection to the extraordinary, the supporters of separate schools must establish their right to the statutory privilege.

The rule which their Lordships deduced from the statute is a rule of substantive law. To quote from the treatise on evidence in Halsbury's Laws of England (the author of which is Sir Adair Roche, now Lord Roche) at p. 543:—

> A distinction is to be observed between the burden of proof as a matter of substantive law or pleading, and the burden of proof as a matter of adducing evidence. The former burden is fixed at the commencement of the trial by the state of the pleadings, or their equivalent, and is one that never changes under any circumstances whatever.

The right to the statutory exception provided by section 66 of the *Separate Schools Act* (R.S.O. 1937, chap. 362, sec. 66) having been disputed by the notice of complaint, the onus is upon those claiming the benefit of that exception to "establish" the right. It does not matter whether the claim is that the corporation shall be rated as a separate school supporter in respect of the whole of the assessment, or only in respect of part of it. The onus from the begin-

(1) [1941] A.C. 453.

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DILLON v. TORONTO MILLSTOCK CO. LTD. AND DOLSON.

ning is upon those who support the "right to the statutory privilege." That, I think, is clearly the effect of the judgment.

The appeal should be dismissed.

There should be no order as to costs.

Appeal dismissed.

Solicitors for the appellant: *Day, Ferguson, Wilson & Kelly.*

Solicitor for the respondent F. L. Dolson: *D. Hillis Osborne.*

1943
*Feb. 25
*April 2

THEODORE BEACH SR. AND THEODORE BEACH JR. (DEFENDANTS)... } APPELLANTS;

AND

ROBERT J. HEALEY (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Motor vehicles—Negligence—Trial—Pedestrian struck by motor vehicle—Action for damages—Findings of jury—Evidence—Form of questions to jury as to negligence of driver of motor vehicle, where by statute onus is on him to disprove negligence causing damage.

In an action for damages by reason of the death of plaintiff's son caused by his being struck, while walking on a highway, by a motor car driven by one of the defendants, the trial Judge, on the jury's answers to questions put to them, dismissed the action. The Court of Appeal for Ontario ([1942] O.W.N. 288) set aside the verdict and judgment at trial and ordered a new trial. The Supreme Court of Canada now restored the judgment at trial, holding that there was evidence properly submitted to the jury upon which they might reasonably find, as they did, a verdict for the defendants.

It was stated in this Court, *per* the Chief Justice and Davis, Kerwin and Hudson JJ., that the proper course was not followed in respect of the form of certain questions submitted to the jury (which appear in this report *infra*); that the proper procedure was that laid down in *Newell* v. *Acme Farmers Dairy Ltd.*, [1939] O.R. 36, as expressed in the headnote in the report of that case (quoted in the reasons for judgment in this Court in the present case); and it was pointed out that some observations made in this Court in *Landreville* v. *Brown*, [1941] S.C.R. 473, were not sanctioned by the majority of the Court.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) allowing the plaintiff's

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

(1) [1942] O.W.N. 288.

appeal from the judgment of Hope J. (who dismissed the action, upon the findings of the jury) and ordering a new trial.

The action was brought under the *Fatal Accidents Act*, R.S.O. 1937, c. 210, for damages by reason of the death of the plaintiff's son, Ronald A. Healey. The deceased, while walking with others northerly on a highway into the village of Kemptville, Ontario, between 7 and 7.30 p.m. on November 17, 1940, was struck by a motor car owned by the defendant Theodore Beach Sr. and which was being driven by the defendant Theodore Beach Jr. northerly on said highway, which accident caused the deceased's death. Plaintiff alleged that the accident was due to the negligent operation of the motor car.

At the trial the questions put to the jury and their answers were as follows:

1. Was the defendant, Theodore Beach Jr., guilty of any negligence which caused or contributed to the accident? (Answer Yes or No.)

ANSWER: No.

2. If your answer to Question 1 is "Yes" then state fully the particulars of his negligence.

ANSWER: (Not answered.)

3. Was Ronald A. Healey guilty of any negligence which caused or contributed to the accident? (Answer Yes or No.)

ANSWER: Yes.

We the Jurors found Ronald A. Healey guilty of negligence by walking on the highway on a night when weather conditions were so poor for driving a car.

A good sidewalk was provided for pedestrians and was in better condition for walking on than the highway.

4. If your answer to Question 3 is "Yes" then state fully the particulars of his negligence.

ANSWER: (Not answered except as above.)

5. If you find that Theodore Beach Jr. and Ronald A. Healey were both negligent state the degree of fault or negligence of each.

ANSWER: (Not answered.)

6. Did the plaintiff suffer any pecuniary loss or damage by reason of the death of Ronald A. Healey? (Answer Yes or No.)

ANSWER: No.

7. If your answer to Question 6 is "Yes" at what amount do you assess the damages?

ANSWER: (Not answered.)

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and judgment was given dismissing the action. The Court of Appeal set aside the verdict and judgment and ordered a new trial (1). The defendants appealed.

T. N. Phelan K.C. and *B. O'Brien* for the appellants.

S. E. Stewart for the respondent.

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

THE CHIEF JUSTICE.—As we stated at the conclusion of the argument, there was, in our opinion, evidence properly submitted to the jury upon which they might reasonably find as they did a verdict for the appellants; and the appeal must accordingly be allowed and the judgment at the trial restored.

We think, however, we ought to say explicitly that the proper course was not followed in respect of the form of the questions submitted to the jury. These questions were considered by counsel and agreed to; and it appears that trial judges in Ontario have in this matter felt themselves under some constraint by reason of some observations made in this Court in *Landreville* v. *Brown* (2). These observations were not sanctioned by the majority of the Court. The proper procedure is laid down by the Court of Appeal in *Newell et al.* v. *Acme Farmers Dairy, Ltd.* (3). In the report of that case the headnote is in these words:—

> Where in an action for the recovery of damages for personal injuries alleged to have been caused by the operation of a motor vehicle by the defendant, the onus of proof is on the defendant to disprove negligence by virtue of sec. 48 (1) of *The Highway Traffic Act,* R.S.O. 1937, ch. 288, the only question the trial judge should put to the jury as to the negligence of the defendant is as follows: "Has the defendant satisfied you that the plaintiff's injuries did not arise from the negligence or improper conduct on the part of the defendant?" The trial Judge should not put to the jury a further question or direction that, if their answer to the aforesaid question is "No," they should state fully what acts or omissions constituted negligence on the part of the defendant.

With the decision as thus stated, we are in agreement.

The appeal is allowed and the judgment at the trial is restored with costs throughout.

(1) [1942] O.W.N. 288.
(2) [1941] S.C.R. 473.
(3) [1939] O.R. 36.

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RINFRET J.—The appeal should be allowed and the judgment at the trial should be restored with costs throughout.

Appeal allowed and judgment at the trial restored with costs throughout.

Solicitor for the appellants: *J. M. Hickey.*

Solicitors for the respondent: *McKimm, Dulmage & Stewart.*

1943

* Feb. 9, 10, 11.
* Apr. 2.

F. W. PIRIE COMPANY LIMITED (DEFENDANT) ..... APPELLANT;

AND

CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) AND..... LESLIE F. SIMMONS ET AL. (PLAINTIFFS) ..... RESPONDENTS.

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

Contract—Sale of goods—Date of delivery—Common carrier—Bill of lading—Goods "for export"—Place of delivery "West St. John" —Goods remaining at St. John pending instructions from consignee—Non-acceptance by consignee—Liability for damages resulting therefrom—Substantial performance of contract by common carrier—Carrier ready to deliver goods when notified by consignee as to place of delivery—Failure of consignee to give such notice—Practice or method of handling cars from one place to another by means of two railway companies—Practice forming part of contract or tacitly annexed to it—Evidence as to such practice—Admissibility—Not varying but explaining written contract.

The appellant company entered into a contract with the plaintiffs respondents, on October 2nd, 1939, to purchase 5,000 sacks of potatoes, to be delivered on or before the 18th October, 1939. They were accepted for shipment from Prince Edward Island by the Canadian National Railway Company respondent, the destination specified in the bill of lading being "West St. John, for export" with instructions to "notify Furness Withy & Co. Ltd." The Canadian National Railway Company brought the shipment to the end of their railway line in East St. John, on the 16th of October, 1939. To get the cars to West St. John, it was necessary to turn them over to the Canadian Pacific Railway Company to haul them another six miles to West St. John on that company's line. Notice of arrival of the last car was given by the railway respondent to

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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F. W. PIRIE CO. LTD. v. CANADIAN NATIONAL RAILWAY AND SIMMONS ET AL.

Furness Withy, the "notify party", on the 17th of October, 1939, which, in turn, at once notified the appellant company. There were many verbal, telephone and wire communications, relating to the delivery of the potatoes, between the appellant company and the two railway companies. Finally on the 30th of October, 1939, the potatoes were refused by the consignee, the appellant, on the ground that they had not been delivered at West St. John, as the contract called for. The evidence established that, for at least twenty years, the method of handling cars brought by the respondent railway at St. John, for export at West St. John, has been to retain them on the tracks of the respondent railway until their contents could be received at West St. John, either for loading on a vessel or for storage in a dock shed; and it was found by the trial judge that such practice was known to both the appellant company and the plaintiffs respondents. The potatoes, after they were refused by the appellant company, were transferred to refrigerator cars and eventually sold at a loss. The plaintiffs respondents brought action against the railway company for damages because of their alleged failure to deliver the potatoes in time, and they joint the appellant company as defendant, claiming, in the alternative, from it the purchase price of the potatoes. The case was tried before Richards J., who found the railway company liable to the vendors, because of its failure to deliver the potatoes in accordance with their contract and dismissed the action against the appellant company. The Appeal Division set aside the judgment against the railway company and directed that judgment be entered against the appellant company in favour of the plaintiffs respondents with costs, including the costs of the railway company. The Pirie Company appealed to this Court.

Held that the judgment appealed from (16 M.P.R. 353) should be affirmed.

Per Rinfret and Taschereau JJ.—The result of the insertion of the words "For export" on the bills of lading was that the goods to be carried and delivered were indicated as intended to be exported by water from Canada, such a purpose entitling the goods to be carried at a lower rate. The indication "West St. John" was a vague description of the territory where the potatoes were to be delivered, and the particular place where the purchaser intended to have the potatoes unloaded and to accept them was unexpressed in the bills of lading. The respondent railway company was at all times able, ready and willing to execute delivery by transferring the cars to West St. John sheds by means of the Canadian Pacific Railway Company and when it accepted to carry the potatoes to their destination, the respondent was entitled, according to usage and practice known to the appellant company, to have a shed indicated to it by the latter as soon as the potatoes had reached the place from which the cars would have to be switched to the exact destination. It was only by failure to give the proper instructions on the part of the appellant company that the respondent railway was prevented from delivering at the exact shed, in West St. John, where the appellant company wished to accept delivery. Both respondents carried out their contract towards the appellant company as far as they were able to do it; and, so far as the latter is concerned, it must be held to the contract exactly as if it had received delivery of the goods.

Per Rinfret and Taschereau JJ.—Under the circumstances, the practice or method of handling cars from St. John to West St. John must be held to have formed part of the terms of the bill of lading and do not come into conflict with any express terms of the contract; the evidence in that respect was both admissible and applicable. The exact place of delivery was unexpressed in the contract, and the practice or usage was not excluded either expressly or impliedly by the terms of the bills of lading. Such custom was not only reasonable but, in fact, necessary. A general usage of that character must be taken to be tacitly annexed to all contracts relating to business with reference to which they are made, unless the terms of such contract expressly or impliedly exclude them. *Metzner* v. *Bolton* (9 Ex. 518 at 521), *Meyer* v. *Dresser* (16 C.B. n.s. 646 at 660) and *Produce Brokers Company Ltd.* v. *Olympia Oil and Cake Ltd.* ([1916] 1 A.C. 314, at 324). In such a case the presumption is that both parties knew of the practice and usage and contracted accordingly.

Per Davis J.—The appellant company must be held liable. It knew perfectly well what it meant by stipulating for "delivery at West St. John", with instructions to notify F. W. & Co. at St. John. Moreover, the evidence as to what was so meant was admissible, not for the purpose of contradicting or varying the written contract, but to explain it: such evidence was relevant to the true meaning and effect of the contract: *Norden Steam Company* v. *Dempsey* (1 C.P.D. 654). The appellant company, at the time it made the contract, intended to sell and export the potatoes from the western harbour of St. John. The vendor substantially performed its part of the contract when the potatoes arrived at the railway terminal in St. John and the shipping agents were notified. It was for the purchaser to arrange for transportation on an outgoing boat and for a berth on the docks or to take delivery at the railway terminal. It did neither, and must take the consequences.

Per Kerwin, Hudson and Taschereau JJ.—The designation of "West St. John" as the place for delivery of the goods under the contract was incomplete. The seller was entitled to assume that it was the intention of the buyer to ship the goods by sea and, therefore, it was necessary for the buyer to specify the ship and the dock in West St. John before delivery could be completed. The buyer was notified of the arrival of the goods in St. John in ample time to have the shipment placed wherever he wished in West St. John within the time specified in the contract. He failed to designate such place and it is not now open to him to complain that delivery was not made as provided in the contract. *Sutherland* v. *Allhusen* (14 L.T. 666) ref.

APPEAL from the judgment of the Supreme Court of New Brunswick, appeal division (1), reversing the judgment of the trial judge Richards J. The trial judge found the railway company respondent liable to the plaintiffs respondents and dismissed the action against the company now appellant. The appellate court allowed the railway company's appeal and set aside the judgment against it,

(1) (1942) 16 M.P.R. 353.

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and directed that judgment be entered against the company now appellant with costs, including the costs of the railway company.

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

O. M. Biggar K.C. and *P. J. Hughes K.C.* for the appellant.

I. C. Rand K.C. for the railway company respondent.

R. L. Palmer for the plaintiffs respondents.

RINFRET J. (Taschereau J. concurring).—The appellant entered into a contract with the respondents Simmons and MacFarlane, on October 2nd, 1939, to purchase 5,000 fifty-kilo sacks of potatoes, to be delivered on or before the 18th October, 1939.

This contract was confirmed by a letter, as follows:

SIMMONS & MACFARLANE, October 2, 1939.
FREETOWN, P.E.I.

GENTLEMEN,—

This will serve to confirm the writer's phone conversation with your Mr. Simmons this morning, closing the purchase from you of 5,000 fifty-kilo bags Government certified small-size Green Mountain seed potatoes, delivered West Saint John on or before the 18th day of this month at $1.40 per fifty-kilo sack, and also 2,000 100-lb. sacks Government certified Red Bliss Triumph seed potatoes, delivered West Saint John on or before the 13th instant at the price of $1.50 per 100-lb. sack, you having the right to supply 50 per cent of this quantity in the number one small grade.

Please use the following marks on the Bliss bags:

100 lbs. nett, When packed, Government certified, "Pippin Brand" seed potatoes. F. W. Pirie Co. Ltd., Grand Falls, New Brunswick, Canada.

As for the marks on the fifty-kilo bags, we will wire these through to you promptly, as we have boats coming in on schedule which means that time is the essence of this agreement. You may bill the Bliss cars to ourselves, West Saint John, notifying H. E. Kane & Com., Saint John, sending your drafts and B/L's through to the Royal Bank, Saint John, and forwarding invoices to us here in Grand Falls.

On your cars, loaded with the certified Mountains, bill your cars to ourselves, West Saint John, notifying Furness, Withy and Company, Saint John, sending your drafts and B/L's through the same bank and address your invoices to F. W. Pirie Company, Limited, Grand Falls.

In all probability, we will be wiring you to-day regarding marks to be applied on the fifty-kilo bags and also, regarding a further quantity of Red Bliss Triumphs.

Yours very truly,
F. W. Pirie Company, Limited,
F. W. PIRIE,
President.

The material points to be noticed about this letter are that no mention was made therein of any particular territory where the potatoes were to be purchased by the vendors or from which they were to be shipped; and that the purchasers stated: "as we have boats coming in on schedule which means that time is the essence of this agreement". Moreover, the cars loaded with the certified Mountain potatoes were to be billed to the purchaser, West Saint John, notifying Furness Withy & Company, Saint John.

No difficulty arose with regard to the Red Bliss Triumph seed potatoes, the cars also to be billed to the purchaser, West Saint John, notifying H. E. Kane & Com., Saint John.

The case and the appeal concern only the Green Mountain seed potatoes. The claim on behalf of the appellant was that the latter were not brought to West Saint John until after the 18th October, 1939, and the purchaser, therefore, refused to accept them.

Simmons & MacFarlane brought action against the Canadian National Railway Company for damages because of their alleged failure to deliver the potatoes in time; and they joined the Pirie Company as defendant, claiming, in the alternative, against that company for the purchase price of the potatoes.

The case was tried before Richards J., who found the railway company liable to the vendors in $2,580.26, because of its failure to deliver the potatoes in accordance with their contract, and dismissed the action against the Pirie Company without costs.

The railway company appealed to the Appeal Division of the Supreme Court of New Brunswick. That court allowed the appeal, Baxter C.J., dissenting, set aside the judgment against the railway company and directed that judgment be entered against the Pirie Company with costs, including the costs of the railway company.

The Pirie Company now brings this appeal against that judgment.

There are two distinct claims involved in this suit; and, at the outset, a question might have been raised as to whether they could be joined together. The claim against the railway company is for failure to deliver as required by the bills of lading. The claim against the Pirie Company is for the price of 5,000 sacks of Green Mountain

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potatoes. In truth, they are two distinct actions; but, at this late stage, they must be discussed together, as they were in the two courts in New Brunswick.

The plaintiffs-respondents, when they brought this action, must have known that they could not recover against both defendants. If the goods were delivered as required by the bills of lading, the claim against the railway company had to be dismissed. If the goods were not delivered to the Pirie Company, as required by the contract of October 2nd, 1939, the claim against the Pirie Company must be dismissed.

As it turned out, the plaintiffs succeeded against the railway in the King's Bench Division, and against the Pirie Company in the Appeal Division.

This Court has to decide which of the two judgments should prevail. It might have happened that the plaintiffs-respondents could obtain judgment against neither of the defendants; but, at the argument, it was made clear that they were entitled to the amount of $2,580.26 (which amount is not in dispute); and that the real controversy was as to which of the defendants should be condemned to pay it to the plaintiffs.

The potatoes were shipped by Simmons & MacFarlane in the Canadian National Railway Company's cars from Prince Edward Island. There were eleven carloads of potatoes; and for them the railway company issued eleven bills of lading.

The following may be taken as typical of the several bills issued:

Form of straight bill of lading approved by the Board of Railway Commissioners for Canada by order No. 7562 15th July, 1909.

Form 7000 Canadian National Railways

Revised 6-23

Straight bill of lading—original—not negotiable

Shipper's No.....

Agent's No.....

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Freetown, P.E. Island, Oct. 7, 1939, from Simmons & MacFarlane the goods described below in apparent good order, except as noted (contents and condition of contents and packing unknown), marked, consigned and destined as indicated below, which said Railway agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed,

as to each carrier of all or any of said goods over all or any portion of said route to destination, and as to each party at any time interested in all or any of said goods, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The rate of freight from ..... (Sailing Oct. 18/39 to ..... is in Cents per 100 lbs.

If .. Times Lst	If .. Class	If .. Class	If .. Class	If .. Class	If .. Class	If .. Class	If special per

Consigned to (Mail address—Not for purposes of delivery)
F. W. Pirie Co. Ltd. Notify Furness Withy & Co. Ltd.
Destination West St. John Province or state of County of Saint John

Route For Export Car Initial C.P. Car No. 246803 (Sailing Oct. 18)

No. pkgs.	Description of articles and special marks	Weight (Subject to correction)	Class or rate	Check column	If charges are to be prepaid, write or stamp here
500	Sax small certified Green Mountain Seed potatoes 111 lbs.	55,500	14		"To be prepaid."
					Prepaid
			Received $70.70 to apply in prepayment of the charges on the property described hereon.		
	Shippers load and count Owner's risk deterioration		Agent of cashier Per..... (The signature here acknowledges only the amount prepaid.) Charges Advanced: $.....		

Simmons & MacFarlane, shipper. C. B. Matheson,
Per R. S. M. Agent.
Per.....

(This bill of lading is to be signed by the shipper and agent of the carrier issuing same.)

To this bill, conditions are attached containing eleven sections, of which sec. 2 only need be set out here:

Sec. 2. In the case of shipments from one point in Canada to another point in Canada, or where goods are shipped under a joint tariff, the carrier issuing this bill of lading, in addition to its other liability hereunder, shall be liable for any loss, damage or injury to such

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goods from which the other carrier is not by the terms of this bill of lading relieved, caused by or resulting from the act, neglect or default of any other carrier to which such goods may be delivered in Canada, or under such joint tariff or over whose line or lines such goods may pass in Canada or under such joint tariff, the onus of proving that such loss was not so caused or did not so result being upon the carrier issuing this bill of lading. The carrier issuing this bill of lading shall be entitled to recover from the other carrier on whose line or lines the loss, damage, or injury to the said goods shall have been sustained, the amount of such loss, damage or injury as it may be required to pay hereunder, as may be evidenced by any receipt, judgment, or transcript thereof. Nothing in this section shall deprive the holder of this bill of lading or party entitled to the goods of any remedy or right of action which he may have against the carrier issuing this bill of lading or any other carrier.

All the bills of lading were similar, except that in two of them the words "For export" appear under the description of the goods, while in all the others they appear above it.

These words "For export" were material. The appellant intimated that they should not have been inserted in the bills of lading; and, as they were not parties to the bills, they were not bound by the terms thereof.

We think, however, that Simmons & MacFarlane were justified in having them inserted in the bills of lading, in view of the statement made by the Pirie Company, in the confirmation letter of October 2nd, 1939, "as we have boats coming in on schedule which means that time is the essence of this agreement".

The result is that, by the terms of the bills of lading, the goods to be carried and delivered were indicated as intended to be exported by water from Canada to one or more countries specified in the tariffs. Such a purpose entitled the goods to be carried at a lower rate than if they had not been so destined.

The delivery as provided by the tariffs was to be made by placing the goods in a shed on the docks on the west side of the harbour of Saint John. There are twenty such sheds; and, by the regulations of the National Harbours Boards, no unloading of goods into the sheds is permitted, except for the purpose of transferring them into a vessel then, or about to be, ready for loading or for storage; permission in either case must be obtained from the Harbour's Board.

Delivery "For export" meant delivery at one of the sheds on the dock; and, moreover, it meant delivery to

the appellant, or someone acting on its behalf (in the present case, presumably, Furness Withy Company), who would accept the goods and take charge thereof.

The appellant has been in the business for a long time and was well aware of the practice and of the conditions implied in the bills of lading.

As it was, the evidence showed that the intention of the appellant was to export the Green Mountains to Argentine, on the ss. *Northern Prince,* the agents for which were Furness Withy & Company. That vessel arrived at Saint John about October 16th and sailed on the 21st. The Green Mountains arrived at Saint John (Union Station) on or before the 16th of October and notices of arrival at that point were immediately given by the railway company to Furness Withy & Company which, in turn, at once notified the appellant. The latter informed the local manager, at Saint John, of Furness Withy & Company, Mr. D. W. Leddingham, that it had not sold the potatoes and could not forward them on the ss. *Northern Prince.*

From the 16th to the 21st October, Mr. Leddingham kept in close touch with the appellant, as he was anxious to put the potatoes on his vessel; but, for the reason mentioned, his endeavours were unsuccessful and the vessel sailed without them.

About three days later, on October 24th, the local agent of the railway company at Saint John wired the appellant that arrangements would have to be made at once to give the Green Mountains protection from frost. Mr. Pirie, on the same day, called the agent on the telephone, was told where the potatoes were and what was needed. He replied that he would get in touch with a Mr. Elliot, representative of the Canadian Pacific Railway. On October 25th, H. E. Kane, a witness at the trial and an officer of the H. E. Kane Company Ltd., on instructions from Mr. Pirie, communicated with the Canadian Pacific Railway, with a view to having it accept the cars from the respondent railway company and switch them to West Saint John, and with the National Harbours Board to obtain space in the potato warehouse on the dock for storing the Green Mountains until they could be disposed of. The Canadian Pacific Railway replied that it could not accept the cars until arrangements had been made to receive the potatoes at Saint John, either for export or

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for storage; and the National Board answered that, until the previous year's account of some ninety dollars odd was paid, it would not allow Mr. Pirie's potatoes to be stored at the potato shed at West Saint John. All this information was conveyed to Mr. Pirie by telegram on October 25th; but it was only on October 30th that, in reply to a telegram of the same date from the respondent railway agent at Saint John, Mr. Pirie, for the first time, took the position that, as the potatoes had not been delivered at West Saint John as the contract called for, he had no further interest in them.

By arrangement between the respondent railway and Simmons & MacFarlane, the potatoes were transferred to refrigerator cars, and, about November 6th, sent over to the potato shed at West Saint John, where, under agreement with the National Harbours Board, they were stored until sold. The sale resulted in a loss in relation to the original contract of sale, for the amount of which the action was brought.

"West Saint John" is a descriptive term applied to that portion of the city, in New Brunswick, which lies on the western side of the harbour of Saint John. There are extensive docks along the waterfront and much the greater portion of the export from the port is carried on there. These docks and warehouses are under the control and administration of the National Harbours Board. The respondent railway does not extend much beyond the joint passenger station (Union Station) on the western side of the harbour. The Canadian Pacific Railway connects with the respondent railway near the joint station, passes over the Saint John River and, through the suburb of Fairville, reaches the docks on the west side of the harbour. As already stated, before goods can be unloaded into any shed on the docks, either the vessel on which they are to be exported must then be, or about to be, moored at that shed, or permission to store the goods to await export must be obtained by the owner from the Harbour Commission. In other words, delivery by unloading is to be made immediately to the owner wherever he may be on the docks, and without instructions from the owner as to the particular dock and shed to be used delivery cannot be made.

The evidence has shewn that, for at least twenty years, the method of handling cars brought by the respondent railway at Saint John, for export at West Saint John, has been to retain them on the tracks of the respondent railway until their contents could be received at West Saint John, either for loading on a vessel or for storage in a dock shed. It was found by the trial judge that such practice was known to both the appellant and the respondents Simmons & MacFarlane.

The respondent railway was at all times able, ready and willing to transfer the cars of Green Mountains to West Saint John docks or sheds by means of the Canadian Pacific Railway; and the latter was at all times able, ready and willing, on behalf of the respondent railway, to accept, to place and to unload the cars whenever the appellant, itself or through its agent, had signified that it was ready to accept them, either for export at once or for storage pending export.

The trial judge held that there was no question as to the existence of the practice and that it had been in effect for many years, and also, as already stated, that both the appellant and Simmons & MacFarlane had knowledge of the practice.

Under the circumstances, such a practice must be held to have formed part of the terms of the bills of lading. The evidence in that respect was both admissible and applicable. That point has now been settled by a long line of cases.

The learned trial judge, referring to 10 Halsbury, pp. 39 and 42, stated that the essential characteristics of a usage or practice were notoriety, certainty, reasonableness and validity. He added that the first two features seemed to be established; and he proceeded to consider the other two.

He said:

> The strongest point against the Pirie Company seems to be that, knowing the practice, having accepted and acted in accordance with the practice for several years; in fact, having accepted one shipment of potatoes part of the same contract, moved in accordance with the practice, it neglected or refused to accept the practice in respect of this particular shipment. The evidence does not disclose any real explanation. But whatever may be the explanation of this attitude or the view respecting it, it cannot affect the legal position. The practice has now been challenged and it must be considered upon its merits. In my opinion it cannot be justified; it cannot be regarded as necessary, reasonable or legally valid.

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The apparent reason of the learned trial judge for reaching that conclusion seems to have been that under the *Sales of Goods Act*, s. 24:

> It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract.

He said the destination indicated in the bills of lading was "West Saint John"; and it was the duty of Simmons & MacFarlane to deliver the potatoes in question at West Saint John.

"Usage may explain", said the learned trial judge, "may introduce what is unexpressed; it may not violate established rules of law". In the present case, in the view of the learned trial judge, "the practice seems to be in direct violation of an established principle of common law". For that reason, the learned judge refused to admit the practice as forming part of the contract.

I regret to have to disagree with those views, and more particularly, in the premises, with the assertion that the practice, in the present case, came into conflict with some express terms of the contract.

In my view, the exact place of delivery, in this case, was unexpressed in the contract, as has been shown by the evidence. The practice or usage was not excluded either expressly or impliedly by the terms of the bill of lading.

On the evidence, "West Saint John" was only a vague indication of the territory where the potatoes were to be delivered. "The usual place of delivery at said destination", as stipulated in the bills of lading, and as further indicated by the addition of the words "For export", meant that the responsibility of the respondent railway was to deliver the goods at the particular berth or shed on the docks which would be designated by the consignee as the place where he intended to have them unloaded and to accept them. That particular place was unexpressed in the bills of lading. The respondent railway, when it accepted to carry the potatoes to their destination, was entitled, according to usage and practice, to have that berth or shed indicated to it by the consignee as soon as the potatoes had reached the place from which the cars would have to be switched to the exact destination. The respondent railway was justified by the practice and usage or by the local custom regulating delivery, which formed

part of the contract of shipment, to let the goods at Saint John until instructions were obtained, so that the goods could at once be switched to the designated berth.

Not only, in my view, was the custom reasonable, but it was, in fact, necessary. And there was nothing illegal about it, because the railway company was entitled to assume that the contract of carriage had been entered into with the understanding that the acknowledged practice and usage was to supplement the terms, otherwise incomplete, of the contract.

The learned trial judge said:

> I recognize that, according to the practice, the term "For export" has been regarded as information and authority to the Canadian National Railway to deal with the goods according to that practice. But I see no reason why it should be so.

With due respect, a general usage of that character must be taken to be tacitly annexed to all contracts relating to business with reference to which they are made, unless the terms of such contract expressly or impliedly exclude them (*Metzner* v. *Bolton* (1), by Parke B.).

Earle C.J., in *Meyer* v. *Dresser* (2), says:

> In the case where such usages are imported into a contract, it is because they tacitly form part of it, like those contracts where we find the words "and other usual terms". They then form part of the contract itself. The contract expresses what is peculiar to the contract between the parties and usage supplies the rest.

These passages of Parke B. and Earle C.J. were quoted with approval in *Produce Brokers Company Limited* v. *Olympia Oil and Cake Co. Ltd.* (3).

In such a case, the presumption is that both parties knew of the practice and usage and contracted accordingly.

For all intents and purposes, therefore, the arrival of the cars at Saint John's Terminal Station of the respondent railway, on the 16th of October, and the immediate notice to Furness Withy & Company, in accordance with the terms of the bills of lading, that they had arrived at that station, together with a request for instructions as to the particular shed at the dock, at West Saint John, where the cars were to be switched, was, according to the local usage and practice, an effective carrying out of the railway's obligations under the contract. It was only by failure to give the proper instructions on the part of the appellant

(1) (1854) 9 Ex. 518, at 521. (2) (1864) 16 C.B. n.s. 646, at 660.
(3) [1916] 1 A.C. 314, at 324.

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that the railway was prevented from delivering at the exact berth or shed, in West Saint John, where the appellant wished to accept delivery—without which instructions it was impossible for the respondent railway to do anything further. The appellant must bear the consequences of the conduct which it elected to adopt in the circumstances.

It follows that both respondents carried out their contract towards the appellant so far as they were able to do it and that they were prevented from doing any more on account of the strange decision of the appellant to withhold the instructions which it was bound to give under the well-established practice, of which it had full knowledge.

So far as the appellant is concerned, it must be held to the contract exactly as if it had received delivery of the goods.

I think, therefore, that the judgment of the Appeal Division ought to be confirmed in this Court.

The respondent railway company is entitled to its costs of the trial and of both appeals against the respondents Simmons & MacFarlane.

In the Appeal Division, the formal judgment ordered the appellant to pay the costs of the respondents Simmons & MacFarlane, the latter to be entitled " to add the plaintiffs' costs of trial and appeal as against the defendant Railway Company ". This was objected to by the appellant at the hearing before this Court; but no sufficient reason was brought to show that such an order was contrary to ordinary practice in the New Brunswick courts. I do not think the order on this point should be disturbed here; and, following such a practice, I think a similar order should be made in this Court, to the effect that, after the respondents Simmons & MacFarlane have paid the respondent railway's costs in this Court, it should be entitled to recover them from the appellant.

At the close of the hearing in this Court, application was made by the appellant to file a time-table and a certain classification.

This was strenuously objected to by the respondents. It was pointed out that the railway time-table, as such, could never be accepted in the record and that the certificate of classification tendered was not admissible and, at

all events, without any further explanation, would undoubtedly be misleading. We do not think, in any aspect of the case, that either document, without more, could be held to be admissible in evidence; but, under section 68 of the *Supreme Court Act,* as amended by the statute 18-19 Geo. V, c. 9, s. 3, the Court may, in its discretion, on special grounds and by special leave, receive further evidence upon any question of fact; and we can see here no special grounds upon which the Court may exercise its discretion in giving special leave to allow the evidence tendered in the circumstances.

The application is, therefore, refused.

DAVIS J.—In a written contract for the purchase of large quantities of potatoes from Prince Edward Island, the purchaser, an exporter in New Brunswick, stipulated for delivery at "West Saint John" (New Brunswick), with instructions to "bill your cars to ourselves, West Saint John, notifying Furness, Withy & Company, Saint John". Some of the potatoes arrived in due course and were accepted and paid for by the purchaser. Subsequently the balance of the contract, eleven carloads, arrived over the Canadian National Railway at its terminal in the city of Saint John well within the time limited for delivery, and the railway at once notified Furness, Withy & Company. It was the intention of the purchaser to export the potatoes to Argentina on the ss. *Northern Prince,* the agents for which were Furness, Withy & Company. But something appears to have happened in the meantime and it is perfectly plain that the purchaser did not want to accept delivery of this large shipment when it arrived at Saint John. There is no difficulty on the evidence in finding that the place of delivery named in the contract, "West Saint John", is the western docks of the Saint John Harbour, some distance outside the municipal boundaries of the city. On the docks are berths for goods ready for shipment when the boats come in. An export shipper arranges for transportation on a particular outward-bound boat and for a particular berth on the docks. The Canadian National Railway terminal is in the centre of the city proper—the Canadian Pacific Railway alone has a line out to the western docks of the harbour, and the purchaser's stipulation to notify Furness, Withy & Company

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(as was done) ordinarily results in the giving to the railway company of instructions for delivery at a particular pre-arranged berth on the docks. The Canadian National Railway then, as part of its carriage contract, gets the Canadian Pacific Railway to switch the cars down to the docks to the berth arranged for. The distance of the switching operation is some six miles.

Mr. Pirie, the president of the appellant company, who in all matters relating to this controversy represented the appellant company, plainly decided to find some means to refuse to accept delivery, so he sat down and did nothing —that is, when the shipping agents, Furness, Withy & Company, advised him that the eleven cars of potatoes had arrived at the Saint John terminal of the Canadian National Railway—he deliberately refrained from giving to the railway company any instructions to put the shipment down on the docks. His idea was that he then could refuse to accept the shipment on the ground that delivery had not been made at "West Saint John" as stipulated for in the contract. One need not attempt to characterize commercial conduct of that sort. The potatoes being refused, the vendor resold at a loss and sued the purchaser for the loss.

I do not see how the purchaser (appellant) can escape liability. The evidence as to what was meant by delivery at "West Saint John" and notifying Furness, Withy & Company at "Saint John" was admissible, not for the purpose of contradicting or varying the written contract, but to explain the contract. This evidence was relevant to the true meaning and effect of the contract. In *Norden Steam Company* v. *Dempsey* (1), the contract was to carry the cargo to "Liverpool". That was the place of discharge, but the question was, What was the meaning of "Liverpool"? Lush J., the trial judge, refused to admit evidence as to that on the ground that it tended to contradict or vary the contract, but an order *nisi* for a new trial was made absolute by a Common Pleas Divisional Court composed of Lord Coleridge C.J., Brett and Lindley JJ., in order to allow in the rejected evidence as to what under the circumstances was meant by discharge of the cargo at "Liverpool".

(1) (1876) 1 C.P.D. 654.

In the case before us the purchaser knew perfectly well what it meant by stipulating for "delivery at West Saint John", with instructions to notify Furness, Withy & Company at Saint John. At the time it made the contract it intended to sell and ship these potatoes to the Argentine from the western harbour at Saint John. The vendor substantially performed its part of the contract when the potatoes arrived at the railway terminal in Saint John and the shipping agents were notified. It was for the purchaser to arrange for transportation on an outgoing boat and for a berth on the docks or to take delivery at the railway terminal. It did neither, and must take the consequences.

The appeal should be dismissed with costs.

The case was complicated by the fact that the vendor as plaintiff in the action not only sued the railway company for damages for failure to deliver but in the same action joined the purchaser, as a party defendant, claiming in the alternative against it the same amount of damages for non-acceptance of the goods. The consequence of this joinder of parties was that a mass of evidence was given at the trial, some of it only relevant to one issue and some of it only relevant to the other issue. Two separate and distinct causes of action against two different defendants went down to trial together. Each of the causes of action rested on a separate contract. It is quite a different thing from a joinder of parties in an action for tort where not infrequently until all the evidence is in it is difficult if not impossible to say which of two or more defendants was responsible for the wrongful act. No objection however seems to have been taken to the joinder in this case. The court of appeal of New Brunswick, while holding the present appellant (purchaser) liable and dismissing the action against the railway company with costs, directed that the plaintiff in turn could add the costs it had to pay to the railway company to its own costs against the purchaser. While I cannot appreciate the justification for such an order in a case such as this where the joinder is of different parties on claims under separate and distinct contracts, we should not interfere with an order as to costs in the Court below if we are otherwise affirming the judgment.

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When the purchaser appealed to this Court the respondent (plaintiff) served a notice on the railway company that in the event of the appeal being allowed it would then appeal from the judgment of the Court below in so far as it had dismissed the action against the railway company. That notice of appeal was contingent upon the appellant succeeding in this Court, which it has not done. The plaintiff ought therefore to pay the costs in this Court of the railway company.

HUDSON J.—Kerwin and Taschereau JJ. concurring).—The judgment prepared by my brother Rinfret which I have had an opportunity of reading has a full statement of the facts in this case.

Upon these facts it seems to me that the designation of "West Saint John" as the place for delivery of the goods under the contract was incomplete.

The seller was entitled to assume that it was the intention of the buyer to ship the goods by sea. The statement in the appellant's letter that

> we will wire these through to you promptly as we have boats coming in on schedule which means that time is the essence of this agreement

is sufficient to indicate this. If it was the intention to ship by sea, then it was necessary for the buyer to specify the ship and the dock in West Saint John before delivery could be completed.

If, on the other hand, the plaintiff desired instead of shipping by sea to ship by rail, then it seems to me that it was his duty to so advise the seller.

The buyer was notified of the arrival of the goods in Saint John in ample time to have the shipment placed wheresoever he wished in West Saint John within the time specified in the contract. He failed to designate such place and I do not think it is now open to him to complain that delivery was not made as provided in the contract.

The facts resemble the circumstances in the case of *Sutherland* v. *Allhusen* (1), the head-note of which is:

> Assumpsit on a contract for the sale of fifty tons of bicarbonate of soda * * * ; free on board, to be delivered in equal monthly quantities during April, May and June, 1865. Averment, that defendants

(1) (1866) 14 L.T. 666.

duly delivered divers portions of the goods according to agreement, and that plaintiffff was not required by defendants to accept delivery of the residue. Plea, that defendants were ready and willing to deliver the said residue according to the agreement, whereof plaintiff had notice, and that plaintiff was not ready and willing to accept, and would not accept, and did not require delivery of the same:

Held (on the authority of *Armitage* v. *Insole* (1), that before the defendants were bound to deliver the goods, the plaintiff was bound to name the ship or the place where he desired the goods to be delivered, and that a tender of the goods by the defendants was not a condition precedent to their delivery, or to the ship or place being named by the plaintiff.

The statement of Chief Baron Pollock at page 667 seems to me to be applicable to the facts here. It is as follows:

The action is upon a contract and the expression "free on board" does not necessarily import that the goods should be put on board ship; it would be competent to the parties to prove that the goods were to be delivered somewhere else. The buyer may have them on board a ship or may have them at a railway station, or may have them at any other place pointed out by him. The only question here is, was it incumbent upon the defendants to tender the goods, or was it incumbent on the plaintiff to tender the ship or point out the place where they were to be delivered, and, if on board ship, to specify the ship by description and name? It has been decided, in a case where the expression "free on board" was used, that it is the duty of the person who seeks to have the goods to point out the ship, or specify the place where they are to be delivered, before he can complain that the goods are not on board the ship. I think the spirit of that decision clearly applies in omnibus to the present case, and that the plaintiff was bound, if he meant these goods to be delivered on ship board, to name the ship, and, if elsewhere, he was bound to name the place where he desired them to be delivered, and that it was not necessary for the defendants to tender the goods, as a sort of condition precedent to their delivery or to the ship being named, or the place being designated by the plaintiff.

To the like effect are the statements of Baron Martin and Baron Bramwell.

Baron Martin:

Therefore, what the vendee, that is the plaintiff, contracted for was, that there was to be delivered to him fifty tons of bicarbonate of soda * * * "free on board in the Tyne", at a certain price. One's common sense, therefore, would point out that before the party can complain of the non-delivery of those goods the vendor ought to be told where on the Tyne, or on what ship on the Tyne side, they were to be put. The case cited seems to me directly in point.

Baron Bramwell:

I am of opinion that this rule should be made absolute. The contract being to do a certain thing, the defendants were not bound to

(1) (1850) 14 Q.B. 728.

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deliver till the plaintiff told them where they were to deliver. The plaintiff did not tell them where they were to deliver before the day of delivery arrived, and consequently the defendants never were bound.

Although the contract in the present case was not stated to be an f.o.b. contract, it is substantially the same. The reasoning of these very learned Barons of the Exchequer seems to me directly applicable in the present case.

I agree with Mr. Justice Rinfret that the plaintiff is entitled to succeed.

As the plaintiff succeeds against the defendant, F. W. Pirie Co. Ltd., he is entitled to his costs against such defendant throughout. The Canadian National Railway Company, having succeeded, is also entitled to its costs throughout. The only question is by whom and how these costs should be paid.

The general principle of costs in a case of this kind is stated in the Annual Practice 1941, page 1415, as follows:

> In a proper case, however, there is jurisdiction to order the plaintiff to pay the costs of a defendant against whom the action has failed and recoupment of such costs to the plaintiff by a defendant against whom the action has succeeded.

This jurisdiction extends to contracts as well as to tort. The costs are normally paid to the plaintiff as trustee for the successful defendant. It is said, however, that such an order is not proper where the plaintiff's doubt is as to law and not as to facts but, in general where the plaintiff sues two defendants, each of whom throws the blame on the other, the unsuccessful defendant should pay the costs incurred by the plaintiff and by the successful defendant to them direct (see *The Esrom* (1)).

In view of the fact that the plaintiff succeeded in the first instance against the Canadian National Railway, I do not think that it can be said that its action in joining that company was unreasonable. In fact, as remarked by Mr. Justice Fairweather in the court of appeal:

> There is no question at that stage but that the plaintiffs were entitled to the payment of the damages as assessed by the trial judge, and the only question to be determined was which of the two defendants were responsible at law for the payment of the amount.

(1) [1914] W.N. 81.

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Under these circumstances, I do not think that this court should interfere with the order made in the court below. For these reasons, I would dismiss the appeal with the same order as to costs as was made in the court below.

Appeal dismissed with order as to costs as made in the court below.

Solicitor for the appellant: *Peter J. Hughes.*

Solicitor for the respondent, Canadian National Railway Company: *T. J. Allen.*

Solicitors for the plaintiffs respondents: *Robinson & Palmer.*

IN THE MATTER OF A REFERENCE AS TO THE VALIDITY OF SECTION 31 OF THE MUNICIPAL DISTRICT ACT AMENDMENT ACT, 1941, BEING CHAPTER 53 OF THE STATUTES OF ALBERTA, 1941, AND AS TO THE OPERATION THEREOF.

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*Oct. 9, 12, 13.

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*Apr. 2.

Constitutional law—Provincial legislation—Taxes on land declared to be special lien or charge upon crops until paid—Priority over all other claims, liens, privileges or encumbrances on crops—Whether intra vires the legislature—Direct or indirect taxation—Municipal taxation—Conflict with Dominion legislation—Adjustment of priorities—Preferential lien granted to a bank for seed grain advances—Whether persons or corporations outside province affected—The Municipal District Act, Alta., 1926, c. 41—The Municipal District Act Amendment Act, Alta., 1941, c. 53, s. 31—The Bank Act, R.S.C. 1927, c. 12, s. 88 (10)—Sections 91 and 92 B.N.A. Act.

Section 31 of the Alberta *Municipal District Act Amendment Act, 1941,* amending the *Municipal District Act* by adding new sections 354a and 354b, enacts, *inter alia,* that "all arrears of taxes outstanding as at the date of the coming into force of the Act" (and also the taxes in any year thereafter) "in respect of land in any municipality, shall be a special lien or charge upon all crops grown or to be grown on the said land until the said taxes are paid, and such lien or charge shall have priority over all other claims, liens, privileges or encumbrances on such crops except as set out in *The Crop Liens Priorities Act.*"

Held that section 31 is *intra vires* the legislature of the province of Alberta: the enactment making the land tax a first lien upon the crops until paid is an enactment strictly within the ambit of section 92 (2) B.N.A. Act.

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

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Per the Chief Justice and Davis, Kerwin and Hudson JJ.—The legislation enacted by section 31 is a legitimate exercise of the power of the legislature in relation to direct taxation and matters merely local and private, the matter of the legislation being strictly provincial and the aim of the legislation obviously being to place obstacles in the way of persons seeking to avoid payment of the land tax. Under the system of municipal assessment and taxation provided by the *Municipal District Act*, the tax is a land tax, and the means authorized for enforcing payment are generally of the same type as those which have been employed by the provinces for that purpose for over fifty years. The liability of the owner, or of a purchaser or a mortgagor with even an economic interest of the slightest, to pay taxes on the assessed value of the land is a liability which has in a pecuniary sense no necessary relation to the value or nature of the taxpayer's interest in the land. Furthermore, the special lien which is created by section 354 is enforceable by the statutory proceedings under which the interest of everybody in the land, excepting the interests specified in the enactment, is extinguished by the sale; subject to a recognition of these interests, the land, irrespective of the persons who may have legal interests in it, is treated as an economic thing upon which a contribution by way of a tax is levied and which may, if necessary, be sold for the purpose of obtaining payment of that contribution. A provincial legislature cannot delegate to a municipality authority to levy a tax which it cannot levy directly: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* ([1896] A.C. 348, per Lord Watson at 364). But there is no ground upon which it can be affirmed that a direct tax upon land, or in relation to land, loses its character as a direct tax by reason of the fact that moneys due in respect of it are declared to be a lien upon the crops grown upon the land both before and after severance, as provided by section 31. As to the point raised that the personal liability to pay imposed by section 354 (*a*) (4) is in effect an indirect tax because the taxpayer will seek to recoup himself from the persons directly liable to pay the tax, it must be observed that the tax is a single tax which when once paid is extinguished and until paid is a lien on the crop. A purchaser of the crop takes it *cum onere*. Furthermore, the persons affected are prohibited from receiving, or accepting any such crop or any part of the proceeds of the sale of such crop, until the tax has been paid. Also, if certain provisions of the *Bank Act* and other Dominion statutes conflict with section 31, it may be that, to that extent, this section will be overborne by such Dominion legislation in particular cases in which a conflict arises. Assuming the primacy of the first-mentioned legislation, and that the provincial legislation would be displaced in case of such a conflict, it does not follow that the provincial legislation is *ultra vires;* the provisions of the *Tax Act* have full effect in all cases in which the facts do not bring the Dominion legislation into play. *Attorney-General for Ontario* v. *Reciprocal Insurers* ([1924] A.C. 328, at 345, 346); *McColl* v. *Canadian Pacific Railway Co.* ([1923] A.C. 126, at 135). As to section 88 of the *Bank Act* and especially subsections dealing with seed grain, fertilizer and binder twine, it must be observed that, while the Dominion Parliament has exclusive jurisdiction in relation to banks and banking, it does not follow that banks are taken out of the province. They remain within the province and subject to validly enacted provincial laws: they and their property are subject to taxes imposed by a province in the lawful

exercise of its authority in relation to direct taxation. *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* ([1889] A.C. 367). But the question whether a lien arising under these provisions of the *Bank Act* possesses priority over a tax lien as the one in this case, ought to be reserved for decision in a concrete case between a bank and the taxing authority. The effect of the provisions of section 31 is not to impose a liability upon persons and corporations outside the province. *Attorney-General for Ontario* v. *Reciprocal Insurers* ([1924] A.C. 328, at 345).

Per Rinfret and Taschereau JJ.—The legislation enacted by section 31 is nothing else than legislation in municipal matters imposing a municipal tax and providing security to assist in the collection of that tax. Such legislation was meant to be confined to local transactions, and it must be so construed; it is legitimate taxation within the province in the exercise of the powers devolved upon provincial legislation in relation to municipal institutions in the province, within the provisions of section 92 B.N.A. Act. If, in a sense, such legislation affects subject-matters reserved to the Dominion Parliament, it does so only collaterally and in no wise so as to entail unconstitutionality or, as a consequence, invalidity. Charges or imposts, authorized by provincial legislation, acting within its sphere, ought not to be declared unconstitutional upon the ground of an apparent conflict or a dispute, as to the priority, between a lien, such as the one enacted in section 31, and liens created by Dominion legislation. In such case, it would be purely a matter for the courts to decide and to adjudge the respective priorities enacted by Dominion and provincial legislation: *Silver Brothers Ltd.* v. *Hart* ([1932] A.C. 514; [1929] S.C.R. 557). Also, section 31 is not directed to trade and commerce as understood under the decided cases, not to any of the specific heads of section 91 B.N.A. Act; and if it affects any of the matters under that section, it is only "as a necesary incident to the lawful powers of good government within the province." *Ladore* v. *Bennett* ([1939] A.C. 468, at 482). The tax imposed by section 31 (if it is a tax, as, in reality, it is the same tax enacted in the main Act, for which a new debtor is made liable) is not an indirect tax or an indirect method of recovering the tax on the ground that the general tendency would be for the purchaser to pass the tax on to the owner of the land. Such tax is a tax on land, a municipal tax and is not, as to its incidence, to be regarded in the same aspect as taxes upon commodities to which Mill's formula concerning taxation is generally applied. *City of Halifax* v. *Fairbanks Estate* ([1928] A.C. 117, per Viscount Cave, L.C. at 125).

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (*R.S.C.* 1927, c. 35) of the following question: Is section 31 of *The Municipal District Act Amendment Act,* 1941, *ultra vires* the legislature of Alberta, either in whole or in part, and if so, in what particular or particulars, or to what extent?

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

Whereas section 31 of *The Municipal District Act Amendment Act, 1941,* being chapter 53 of the statutes of Alberta, 1941, amends *The Municipal District Act,* being chapter 41 of the statutes of Alberta, 1936, by adding immediately after section 354 thereof new sections numbered sections 354*a* and 354*b*;

And whereas the Minister of Justice submits that, inasmuch as those sections provide for a first and preferential lien on crops and affect the proceeds of the sale thereof, apparently they are in conflict with subsection 10 of section 88 of the *Bank Act* which provides for a first and preferential lien on crops in connection with seed grain advances and moreover will injuriously affect trade and commerce inasmuch as the proceeds aforesaid, whether in the form of Canadian currency or otherwise, can no longer be freely exchanged or circulated; and

That he is of opinion that the questions as to the validity and operation of the said provisions are important questions of law touching upon the constitutionality and interpretation of this provincial legislation.

Therefore, His Excellency the Governor General in Council on the recommendation of the Minister of Justice, and pursuant to the authority of section 55 of the *Supreme Court Act,* is pleased to refer and doth hereby refer the following questions to the Supreme Court of Canada for hearing and consideration, namely,—

> Is section 31 of *The Municipal District Act Amendment Act,* 1941, *ultra vires* the legislature of Alberta, either in whole or in part, and if so, in what particular or particulars or to what extent?

(Sgd.) A. D. P. Heeney,
Clerk of the Privy Council.

The respective Attorneys General of the provinces of Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan, and the Canadian Bankers' Association and the Dominion Mortgage and Investments Association were, pursuant to order of the Chief Justice of Canada, notified of the hearing of the Reference.

F. P. Varcoe K.C., and *D. W. Mundell* for the Attorney-General of Canada.

Thomas Vien K.C., for the Attorney-General of Quebec.

R. L. Maitland K.C., for the Attorney-General of British Columbia.

W. S. Gray K.C., and *H. J. Wilson K.C.,* for the Attorney-General of Alberta.

J. W. Estey K.C., and *R. S. Meldrum* for the Attorney-General of Saskatchewan.

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Aimé Geoffrion K.C., and *L. G. Goodenough* for the Dominion Mortgage and Investments Association.

Aimé Geoffrion K.C., *R. C. McMichael K.C.*, and *E. Coté* for the Canadian Bankers' Association.

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

THE CHIEF JUSTICE.—The enactments under consideration are found in section 31 of *The Municipal District Act Amendment Act, 1941*, of Alberta. That section amends Part VII of *The Municipal District Act* which deals with the subject of municipal assessment and taxation. Broadly, that part of *The Municipal District Act* provides for the assessment and the levying of taxes in respect of lands, mineral and timber where the mineral and timber are assessed as separate parcels. With these latter we are not concerned. The statute provides that lands shall be assessed at their fair actual value, exclusive of the value of buildings and improvements and minerals, subject to certain exemptions which are not material. The assessment roll gives the name of the owner of every parcel of land liable to assessment; and the statute requires the council to authorize, by resolution, the secretary-treasurer to levy, for ordinary municipal purposes upon the assessed value of all lands, a uniform rate on the dollar to be determined as the statute prescribes, not exceeding two per cent. There are provisions for special rates as well. The secretary-treasurer is required on or before the first of September in each year to enter in the assessment roll for the year a statement of all taxes against each parcel assessed upon the roll, and each statement must show *inter alia* the amount of taxes upon the land, exclusive of improvements, and the rate of taxation.

The Act (section 346) provides:—

> Every owner, purchaser * * * of assessed land, shall, whether his name appears on the assessment roll or not, pay taxes upon the assessed value thereof at the rates lawfully imposed thereon, irrespective of the amount or nature of his interest in such property.

"Owner" is defined in section 2 as any person who is registered under *The Land Titles Act* as the owner of a freehold estate in possession of land. "Purchaser" means any person who has purchased or otherwise acquired land

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within the district whether he has purchased or otherwise acquired the land direct from the owner thereof or from another purchaser, and has not become the owner thereof.

By chapter 82 of the statutes of 1938, provision is made for the sale of land and the application of the proceeds of the sale in payment of arrears of taxes and costs. Where such a sale has taken place and payment has been made, the municipality transfers the parcel sold to the purchaser. At the expiration of a period of thirty days, during which the interested persons have an opportunity of redeeming the land, if it is not redeemed the existing certificate of title is cancelled and a new duplicate certificate of title is issued in the name of the transferee. This duplicate certificate of title, to quote from the statute, section 22, subsection 6

> shall give to the person or municipality to whom it is issued an estate in fee simple in the parcel named therein, free from all encumbrances save those arising from claims of the Crown in the right of the Dominion of Canada, and save irrigation or drainage debentures, and registered easements.

It is obvious that the liability of the owner, or purchaser to pay taxes on the assessed value of the land is a liability which has in a pecuniary sense no necessary relation to the value or nature of the taxpayer's interest in the land. The land may be subject to mortgage and the mortgagor's interest derisory. He is, nevertheless, personally liable to pay at the uniform rate upon the assessed value of the land, not of his interest in it.

So as regards a purchaser: his economic interest may be of the slightest, he is nevertheless bound to pay the whole of the taxes due in respect of the land; and by section 354 the taxes may be recovered from him as a debt due to the Municipal District.

Furthermore, the special lien which is created by section 354 is enforceable by the statutory proceedings under which, as we have seen, the interest of everybody in the land, excepting the interests specified in the enactment quoted above, is extinguished by the sale; subject to a recognition of these interests, the land, irrespective of the persons who may have legal interests in it, is treated as an economic thing upon which a contribution by way of a tax is levied and which may, if necessary, be sold for the purpose of obtaining payment of that contribution.

There are supplementary provisions relating to the recovery of taxes which ought to be mentioned. If there is a lease, the secretary-treasurer may require the lessee to pay the rent to him up to the amount of any unpaid taxes, and he is invested with the same authority as that of a landlord to collect such rent by distress or "otherwise". If the tenant, under the constraint of such proceedings, or the threat of them, pays the taxes, he is given the right to deduct them from the rent. The purchaser who is also called upon to pay the taxes may deduct them from any money due to his vendor. Again, the secretary-treasurer is given a right to levy unpaid taxes with costs by distress upon *inter alia* goods or chattels wherever found within the province belonging to the owner, purchaser, or to any occupier of the land. This right of distres is apparently extended to any goods, or chattels, on the land where title to them is claimed by

> purchase, gift, transfer or assignment from a taxable person or occupier, whether absolute or in trust, or by way of mortgage or otherwise.

It seems indisputable under this system the tax is a land tax; and the means authorized for enforcing payment are generally of the same type as those which have been employed by the provinces for that purpose for over half a century.

To come now to the amendments of 1941. I must say that I am entirely in agreement with the argument that the legislature cannot delegate to a municipality authority to levy a tax which it cannot levy directly. There was a most elaborate argument on the scope of sub-section 8 of section 92, Municipal Institutions, in the Local Option Reference, and the principle is laid down in unmistakable terms by Lord Watson, speaking for the Judicial Committee in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1). There is nothing in the judgment delivered by Lord Atkin in *Ladore v. Bennett* (2), which detracts from the authority of these observations.

I have been unable to perceive any solid ground upon which it can be affirmed that a direct tax upon land, or in relation to land, loses its character as a direct tax by reason of the fact that moneys due in respect of it are declared to be a lien upon the crops grown upon the land both before and after severance.

(1) [1896] A.C. 348, at 364. (2) [1939] A.C. 468.

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Mr. Geoffrion's first point is that the personal liability to pay imposed by section 354 (A) (4) is in effect an indirect tax because the taxpayer will seek to recoup himself from the persons directly liable to pay the tax. We are concerned with a single tax which when once paid is extinguished and until paid is a lien on the crop. A purchaser of the crop takes it *cum onere*. Furthermore, the persons affected are prohibited from receiving, or accepting any such crop, or any part of the proceeds of the sale of such crop, until the tax has been paid.

It is reasonable to suppose that the effect anticipated by the legislature is that the statutory prohibition will be observed; the liability fastened by the statute upon persons receiving or accepting the crop when the taxes are not paid might reasonably be regarded and no doubt was regarded by the legislature as a deterrent operating on the minds of persons thinking of dealing with the owner.

The aim of the legislature obviously is to place obstacles in the way of persons seeking to avoid payment of the land tax. The legislation, in my opinion, is a legitimate exercise of the power of the legislature in relation to direct taxation and matters merely local or private. The matter of the legislation is strictly provincial.

It was contended that the effect of subsections 3, 4 and 5 is to impose a liability upon persons and corporations outside the province. The answer to that is to be found in a sentence in the judgment in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1).

The words are:—

> The terms of the statute as a whole are, in their Lordships' judgment, capable of receiving a meaning according to which its provisions * * * apply only to persons and acts within the territorial jurisdiction of the Province. In their opinion it ought to be interpreted in consonance with the presumption which imputes to the Legislature an intention of limiting the direct operation of its enactments to such persons and acts.

It is argued that certain provisions of *The Bank Act* and other Dominion statutes conflict with this legislation. If so, to that extent, it may be overborne by such Dominion legislation in particular cases in which a conflict arises. Assuming the primacy of the legislation relied upon by Mr. Geoffrion, and that the provincial legislation would be displaced in case of such a conflict, it does not follow that the provincial legislation is *ultra vires;* the provisions of the

(1) [1924] A.C. 328, at 345.

Tax Act have full effect in all cases in which the facts do not bring the Dominion legislation into play. *Attorney-General for Ontario* v. *Reciprocal Insurers* (1); *McColl* v. *Canadian Pacific Railway Co.* (2).

As regards section 88 of *The Bank Act*, and especially as regards the subsections dealing with seed grain, fertilizer and binder twine, it is advisable to make one observation. While the Dominion Parlinament has exclusive jurisdiction in relation to banks and banking, it does not follow that banks are taken out of the province. They remain, as Lord Watson pointed out in *Canadian Pacific Railway Company* v. *Corporation of The Parish of Notre Dame de Bonsecours* (3), within the province and subject to validly enacted provincial laws. They and their property are subject to taxes imposed by a province in the lawful exercise of its authority in relation to direct taxation. It was not argued that the Dominion, in exercise of its powers under section 91, could exempt a bank, or the property of a bank, from such taxes; and that is a consideration which must not be overlooked when the rights of a bank, acquired under section 88, subsection 8 *et seq*, come into competition with the rights of a province under validly enacted laws in relation to direct taxation.

The enactment making the land tax a first lien upon the crops until paid is, in my opinion, an enactment strictly within the ambit of section 92 (2). That there might be competent Dominion legislation overbearing and displacing it may be conceded: for example, a Dominion taxing statute creating a first lien on the same subjects in respect of a Dominion tax. *Attorney-General for Quebec* v. *Attorney-General for Canada* (4). But whether a lien arising under these provisions of *The Bank Act* possesses priority over the tax lien under consideration is a question which I think ought to be reserved for decision in a concrete case between a bank and the taxing authority.

Mr. Geoffrion contended also that the amendments of 1941 are repugnant in their operation to certain other Dominion statutes. As regards this, it appears to me sufficient to say that these enactments of the amendments of 1941 are not "legislation strictly so-called", to use the phrase of Lord Watson's judgment in the *Canadian Pacific*

(1) [1924] A.C. 328, at 345, 346.
(2) [1923] A.C. 126, at 135.
(3) [1899] A.C. 367.
(4) [1932] A.C. 514.

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Railway Company v. *Corporation of The Parish of Notre Dame de Bonsecours* (1), in relation to matters falling within any of the subjects enumerated in section 91 in (1) The Regulation of Trade and Commerce, (2) Currency and Coinage, (15) Banking, (1) Savings Banks, (20) Legal Tender; nor is it "Railway Legislation strictly so-called", nor "legislation strictly so-called" in relation to Dominion elevators, or elevators falling within the exclusive jurisdiction of the Dominion Parliament under (29) of section 91; and the issue raised by the allegation of repugnancy may be left for determination in some litigation in which it arises directly between parties interested.

The question referred should be answered in the negative.

The judgment of Rinfret and Taschereau JJ. was delivered by

RINFRET J.—His Excellency the Governor General in Council, on the recommendation of the Minister of Justice and pursuant to the authority of section 55 of the *Supreme Court Act*, was pleased to refer to this Court for hearing and consideration the following question:

Is section 31 of the *Municipal District Act Amendment Act, 1941, ultra vires* the legislature of Alberta, either in whole or in part, and if so, in what particular or particulars, or to what extent?

Section 31 of the *Municipal District Act Amendment Act, 1941*, being chapter 53 of the statutes of Alberta, 1941, amends the *Municipal District Act*, being chapter 41 of the statutes of Alberta, 1936, by adding, immediately after section 354, the new sections nos 354a and 354b.

The new section 354a is as follows:

354a.—(1) Notwithstanding anything contained in any Statute or in the Common Law, all arrears of taxes outstanding as at the date of the coming into force of this Act, in respect of land in any municipality shall be a special lien or charge upon all crops grown or to be grown on the said land until the said taxes are paid, and such lien or charge shall have priority over all other claims, liens, privileges or encumbrances on such crops except as set out in *The Crop Liens Priorities Act*.

(2) Notwithstanding anything contained in any Statute or in the Common Law, the taxes levied in any year upon or in respect of land in the municipality shall be a special lien or charge upon all crops grown on the land in the year in which the taxes are levied and upon all crops grown on the land in every year thereafter, until the said taxes are paid, and such lien or charge shall have priority over all other claims, liens, privileges or encumbrances on such crops except as set out in *The Crop Liens Priorities Act*.

(1) [1899] A.C. 367.

(3) No person or corporation other than a country elevator as defined in *The Canada Grain Act* or the holder of a lien which, pursuant to the provisions of *The Crop Liens Priorities Act,* is prior to the lien created by this section, shall receive or accept any or any part or share of any crop grown on land in any municipal district or any part of the proceeds of the sale of any such crop, until all taxes owing in respect of such land have been paid.

(4) Any person or corporation other than a country elevator who takes, receives or accepts any or any part or share of any crop or any part of the proceeds of any such crop other than as permitted by this section, shall be liable to the municipal district for the payment of the taxes owing in respect of the land on which the crop was grown to the extent of the part or share of the crop or of the proceeds of the crop so taken, received or accepted.

(5) The taxes due in respect of any land from any person by reason of his taking, receiving or accepting any or any part or share of any crop or any part of the proceeds of any such crop other than in accordance with the priorities established by *The Crop Liens Priorities Act* may be recovered with interest and costs as a debt due to the municipal district from such person.

For the purposes of this reference, it is unnecessary to set out section 354b, as it is generally agreed that the section simply provides machinery for giving effect to section 354a. The sole object of the section is to enable the municipality to ascertain who has received the crop referred to in the previous section. It is merely ancillary and, standing alone, it is of no effect.

The reason for the reference is explained in the order-in-council, where it is submitted that, inasmuch as those sections provide for a first and preferential lien on crops and affect the proceeds of the sale thereof, apparently they are in conflict with subsection 10 of section 88 of the *Bank Act* which provides for a first and preferential lien on crops in connection with seed grain advances and moreover will injuriously affect trade and commerce inasmuch as the proceeds aforesaid, whether in the form of Canadian currency or otherwise, can no longer be freely exchanged or circulated.

Being an amendment of the *Municipal District Act,* section 354a must, of course, be read in connection with the main Act. The amendment finds its place in Part VIII of that Act, which is entitled "Rates and Taxes" and, in that part, comes under the heading "Collection of taxes".

A few sections of the *Municipal District Act,* as it stood before the amendment, may be usefully referred to.

Persons liable to pay taxes, under section 346, are the owner, the purchaser and the conditional owner of assessed

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land, whether their names appear on the assessment roll or not. Their liability depends upon the assessed value of the land at the rates lawfully imposed thereon

irrespective of the amount or nature of their interest in such property.

By force of section 354, the tax due in respect of any land, mineral, or timber, or business, with costs, may be recovered with interest as a debt due to the municipal district from any person who was the owner, conditional owner or purchaser of the land or the mineral or the timber licensee of the timber, at the time of its assessment, or who subsequently became the owner, conditional owner, purchaser or timber licensee of the whole or any part thereof, saving his recourse against any other person. Such tax shall be a special lien on the land, mineral or timber, if not exempt from taxation by the province, in priority to every claim, privilege, lien or encumbrance of any person except the Crown; and the lien and its priority shall not be lost or impaired by any neglect, omission or error.

Further, under section 355,

where taxes are due in respect of any land occupied by a tenant, the secretary-treasurer may give such tenant notice in writing requiring him to pay to him the rent of the premises as it becomes due from time to time to the amount of the taxes due and unpaid and costs; and the secretary-treasurer shall have the same authority as the landlord of the premises would have to collect such rent by distress or otherwise to the amount of such unpaid taxes and costs; but nothing in this section contained shall prevent or impair any other remedy for the recovery of the taxes or any portion thereof from such tenant or from any other person liable therefor.

As a consequence, under section 356,

Any tenant or purchaser may deduct from his rent or moneys payable under his contract of purchase, any taxes paid by him which as between him and his landlord or vendor (as the case may be) the latter ought to pay.

It should be added that, by the interpretation clause (section 2 (*k*) of the *Municipal District Act*), the word "land"

shall mean lands, tenements and hereditaments and any estate or interest therein, and shall, but not so as to restrict the generality of the foregoing words, include minerals and growing timber.

Such was the state of the law when section 354a was introduced.

The effect of the amendment was to make it clear that all arrears of taxes outstanding in respect of land, in addition to being a special lien on the land, mineral or timber, shall also

be a special lien or charge upon all crops grown or to be grown on the said lands until the said taxes are paid.

The special lien on the land, mineral or timber was already stated to be

in priority to every claim, privilege, lien or incumbrance of every person.

The special lien on crops grown or to be grown is expressed to

have priority over all other claims, liens, privileges or incumbrances on such crops except as set out in *The Crops Lien Prorities Act.*

Likewise, the taxes levied in any year upon or in respect of land

shall be a special lien or charge upon all crops grown on the land in the year in which the taxes are levied and upon all crops grown on the land in every year thereafter, until the said taxes are paid, and such lien or charge shall have priority

in the same manner as that prescribed in connection with arrears of taxes.

Subsection 3 of section 354a is apparently a formal prohibition to any person or corporation to

receive or accept any or any part or share of any crop grown on land in any municipal district or any part of the proceeds of the sale of any such crop, until all taxes owing in respect of such land have been paid.

The only exceptions to that prohibition are

a country elevator as defined in *The Canada Grain Act* or the holder of a lien which, pursuant to the provisions of *The Crop Liens Priorities Act,* is prior to the lien created by this section.

Should any person or corporation receive or accept any part or share of any crop, contrary to the prohibition just mentioned, he

shall be liable to the municipal district for the payment of the taxes owing in respect of the land on which the crop was grown to the extent of the part or share of the crop or of the proceeds of the crop so taken, received or accepted.

In such a case, the taxes due

may be recovered with interest and costs as a debt due to the municipal district from such person.

Under *The Crop Liens Priorities Act,* which is chapter 46 of the Statutes of Alberta 1941, the following liens and

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charges on crops shall, in the order mentioned, have priority over all other claims, liens, privileges or encumbrances on such crops:

(*a*) The threshers' lien under *The Threshers' Lien Act* for threshing the crops;

(*b*) Liens and charges under *The Harvesting Liens Act* for harvesting advances as defined in the said Act;

(*c*) Liens and charges for the amount payable to the *Alberta Hail Insurance Board* in respect of any application for insurance under *The Alberta Hail Insurance Act;*

(*d*) Liens and charges created by section 32 of *The Bills of Sales Act* for or in respect of necessaries within the meaning of the said section;

(*e*) Liens and charges for taxes created by section 354a of the *Municipal District Act* and section 40a of the *Improvement Districts Act* and for irrigation rates created by section 145a of the *Irrigation Districts Act;*

(*f*) Liens and charges for seed under section 32 of the *Bills of Sales Act* and liens and charges created by the *Seed Grain and Other Advances Security Act, 1936,* the *Agricultural Relief Advances Act, 1936,* the *Agricultural Relief Advances Act, 1938,* and section 170 of the *Municipal District Act* for or in respect of supplies, seed grain, or other commodities;

(*g*) Liens and charges created by the *Alberta Co-operative Rural Credit Act.*

It will be noticed that the liens and charges for taxes created by section 354 (*a*) come within (*e*) and, therefore, take fifth rank in the order of priorities established by the Alberta statute. Accordingly, if the statute is to be applied literally, the first and preferential lien on crops in connection with seed grain advances provided for by subsection 10 of section 88 of the *Bank Act,* a federal statute, and also, amongst others, the rights of the loan and insurance companies incorporated by the Dominion of Canada and associated under the name of the Dominion Mortgage and Investment Association are, by the Alberta amendment, made subsidiary and posterior to the lien or charge created by section 354a.

For the above reason, and because it is claimed that, under those circumstances, the Alberta amendment is in conflict with valid Dominion statutes, it was represented that section 354a is *ultra vires* the legislature of Alberta.

It was further contended that section 354a is not within the powers conferred on a province by section 92 of the *British North America Act,* but that it constitutes legislation on currency, coinage, banks and savings banks, bills of exchange and promissory notes, legal tender, bankruptcy and insolvency, all subjects reserved exclusively to the Dominion Parliament for legislation purposes; that it is

repugnant to the provisions of valid Acts of the Dominion Parliament, viz, *The Bank Act, The Canada Grain Act, The Canadian Wheat Board Act, 1935,* and *The Currency Act;* that it is also an invasion of the powers of the Dominion Parliament relating to the regulation of trade and commerce; and that, for all those reasons, the question referred to the Court should be answered in the affirmative.

In order to answer the question, it is, of course, essential to agree on the correct interpretation to be put on section 354a.

The section evidently deals with the matter of a municipal tax. It does not create a new tax, in the sense that it does not constitute a new levy of money. In that sense, the tax itself is already provided for by section 354 of the main Act. It is that same tax which heretofore affected the land, the mineral or the timber, and which will hereafter affect the crops grown, or to be grown, on the said lands.

In so far as the crops may be said to have formed part of the land, the amendment does not introduce any new feature. It does so only from the moment that crops are envisaged as property distinct and separate from the land itself. Even so envisaged, these crops are undoubtedly property in the province of Alberta, and consequently subject to the municipal taxes which the Legislature (sovereign in this respect) deems it advisable to impose upon them. And, of course, the Legislature may also provide that these taxes should be a special lien or charge upon the property in question, with such priority as the Legislature should decide to give to it.

It cannot be suggested that legislation providing security to assist in the collection of municipal taxes does not come within section 92 of the *British North America Act* and that it comes within any of the sub-heads of section 91. That is legitimate taxation within the province in the exercise of the powers devolved upon provincial legislation in relation to municipal institutions in the province. It would be difficult to find anything more local and provincial than the imposition and collection of municipal taxes and the machinery supplied for such purpose.

So far as subsections 1 and 2 of section 354a are concerned, it would appear, therefore, that, while the question of validity thereof has been referred to the Court, the real point involved is rather one of priority as between claims

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under divers sections of Dominion Acts and the claim of the municipality under the amending Alberta Act, for it would undoubtedly be a novel idea to contend that legislation providing for a municipal tax may be unconstitutional because it provides for a lien or charge allegedly in conflict with the liens or charges existing in virtue of federal legislation.

Literally interpreted, this submission may amount to a plea that any provincial legislation, acting within its constitutional authority and creating a lien that would affect, v.g. banking or trade and commerce, would, on that account, be *ultra vires*.

The right of a municipal district to create a lien to secure the payment of a municipal tax on certain personal property within the province cannot be denied, on the ground of lack of constitutional powers, merely because there may be, in terms, a conflict, or a dispute, as to the priority between such a lien and the liens created by Dominion legislation.

In my view, that would be purely a matter for the courts to decide and to adjudge the respective priorities, as was done, for example, in the case of *Silver Brothers Limited* v. *Hart* (1).

I think we can take judicial notice that there are, in the several provinces, quite a number of statutes providing for liens—liens which are declared to "have priority over all other claims, liens, privileges or encumbrances". Literally speaking, these liens would be in conflict with other liens expressed in similar terms in the Federal legislation. This would naturally call for adjustments by the courts, but it cannot mean that charges or imposts authorized by provincial legislation, acting within its sphere, are, upon the ground of apparent conflict, to be declared unconstitutional.

To the so-called conflict, we could, no doubt, apply, *mutatis mutandis*, the words of Viscount Dunedin, in the *Silver Brothers* case (2):

> The two taxations, Dominion and provincial, can stand side by side without interfering with each other, but as soon as you come to the concomitant privileges of absolute priority, they cannot stand side by side and must clash; consequently the Dominion must prevail.

(1) [1929] S.C.R. 557; [1932] A.C. 514.

(2) [1932] A.C. 514, at 521.

In the *Silver* case (1), it was held that the Dominion and the provincial claims should rank *pari passu*. In other cases where a somewhat similar situation occurs, it may be that the Dominion legislation prevails; but, under all circumstances, there can be no question of the constitutionality and the validity of the provincial enactment. It is nothing else than a matter of mere adjustment.

In particular, on the question of the priority to be established between a tax imposed under provincial legislation and the provisions of section 88 of the *Bank Act*, this Court has already passed in the case of *The Royal Bank of Canada* v. *Workmen's Compensation Board of Nova Scotia* (2).

Any question which is a pure question of priority between claims under Dominion and provincial legislation should be disposed of along the same principles.

The conflict, if any, of that character with the *Bank Act* or the *Canadian Wheat Board Act*, etc. does not raise any question of the validity and constitutionality of the provincial legislation. That point is entirely different from that which was decided in *Attorney General for Alberta and Winstanley* v. *Atlas Lumber Company Limited* (3), or in the *Reference as to the validity of The Debt Adjustment Act, 1937, Statutes of Alberta* (4). In both those cases, the provincial legislature attempted to interfere completely with the laws of the Dominion Parliament and to impede their power and normal application and working out.

Passing now to subsections 3, 4 and 5 of section 354a, counsel opposing the validity of the legislation laid great stress on the words "receive or accept", which are to be found in each of the subsections and which, taken literally, so it was contended, would have the effect of imposing liability on any person or corporation other than those expressly excepted, whether within or without the province, taking, receiving or accepting delivery of any or any part or share of any crop or any part of the proceeds of such crop.

As to this, Mr. Gray, on behalf of the Attorney General for Alberta, stated that the true interpretation of these words was to limit their meaning to the receiving or acceptance in Alberta, and that there was no intention of extending their application outside the province.

(1) [1929] S.C.R. 357; [1932] A.C. 514.
(2) [1936] S.C.R. 560.
(3) [1941] S.C.R. 87.
(4) [1942] S.C.R. 31.

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I think the statement made on behalf of the Attorney General should be accepted as correct. The legislature of Alberta cannot be assumed to have attempted to legislate upon matters and transactions occurring outside the territory of the province. Moreover, such a construction of the words is the only one consistent with validity and should accordingly be preferred to the other construction suggested by the opponents of the legislation.

It is seriously to be doubted whether, in any event, these words in subsections 3, 4 and 5 could be construed to apply to any transaction, receiving or accepting from any other than the owner of the land upon which the crops have grown. I think they are meant to cover only the receiving or acceptance immediately from the owner of the land. Section 354a must be read in connection with the whole of the *Municipal District Act* and, more particularly, with sections 346, 354, 355 and 356, to which reference has already been made. Under those sections, the persons liable to pay tax are the owner, the purchaser, the conditional owner of assessed land and the tenant. Section 354a, in my view, should be interpreted as extending the liability no further than to the person or corporation receiving or accepting the crop immediately from the owner of the land. It cannot enter into my mind that the Alberta legislature meant to follow the crops in the hands of any and all the other persons or corporations who might happen to handle the crops in the manifold transactions through which they may proceed after the initial transaction with the owner of the land.

The statute was intended only for local application; and that is indicated by the exception of the "country elevator". In its very nature, the lien can subsist only so long as the crop preserves its identity. Moreover, in view of the statutory lien on the crop for taxes, whoever purchases the crop from the owner of the land would be put upon inquiry and would be presumed to know of the possibility that the lien might exist and extend to the proceeds of the crop in the hands of the purchaser from the farmer; but these subsections cannot be construed as seeking to extend the liability to persons who receive the crops or the proceeds, without knowledge of their origin or of their connection with any land in particular, and without any normal or

ordinary means of knowing. The lien cannot subsist when the subject-matter of it has ceased to be earmarked and has lost its identity.

If for no other reason, I think that the above reasoning should dispose of the contention that the impugned legislation constitutes an invasion of the Dominion legislation fields on currency and coinage, or on bills of exchange and promissory notes, or on legal tender.

We were told at bar that the normal method of marketing wheat in Alberta is through the country elevator; that, in practice, the sales are made to the country elevator and that the other transactions of a similar nature are negligible. This would show that the legislation was meant to be confined to local transactions and should be so construed (see: Duff C.J., in *Worthington* v. *Attorney-General for Manitoba, Forbes* v. *Attorney-General for Manitoba* (1), citing *MacLeod* v. *Attorney-General for New South Wales* (2). See also: *Forbes* v. *Attorney-General for Manitoba* (3)).

Still a further attack is made upon the amending legislation on the ground that it provides for indirect taxation.

Subsection 4 of section 354a enacts that any person or corporation who receives or accepts the crops, or the proceeds thereof,

> shall be liable to the municipal district for the payment of the taxes owing in respect of the land on which the crop was grown, etc.

Then subsection 5 enacts that the tax

> may be recovered with interest and costs as a debt due to the municipal district from such person.

It is claimed that this constitutes indirect taxation and is, therefore, invalid.

Of course, counsel for Alberta contended that no tax was imposed; that the legislation in question is merely machinery to assist a municipality in collecting the tax; and that there is no connection between the amount or value of the crop and the liability imposed on the purchaser. But this answer does not appear to me either sufficient or, indeed, accurate. It seems to me that the liability imposed on any person by subsections 4 and 5 of section 354a is, in pith and substance, taxation. It is compulsorily imposed for public purposes and it is recoverable

(1) [1936] S.C.R. 40, at 48. (2) [1891] A.C. 455.
(3) [1937] A.C. 260, at 272.

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at law. (*Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (2).

No doubt, it is not a new tax. It is the same tax, for which a new debtor is made liable; but even that would probably be not sufficient to render it valid, if we are to refer to the *Cotton case* (3), or to the *Erie Beach* case (4).

And, if it is a tax, it is contended that it is an indirect tax, because the general tendency would be for the purchaser to pass that tax on to the owner of the land. There, no intention is indicated that the person paying the tax may not recoup himself. In fact, the legislature appears to have been indifferent as to who would pay the tax. A liability is placed upon persons and corporations other than those who it is intended shall ultimately bear the burden. This, it is claimed, is an indirect method of recovering the taxes. Persons are required to pay who ought to be indemnified by those primarily liable.

It is even to be expected that the purchaser would recoup himself in advance by reducing the sale price by the amount of the tax.

The Attorney-General of Alberta attempted to meet the objection by pretending that the liability imposed on the purchaser, or on the person who received or accepted the crop, was to be looked at as a penalty—a penalty, that is to say, shouldered on the purchaser, the receiver, or the acceptor, for taking any part of the crop grown on the land in disregard of subsection 3 of section 354a, which is of a prohibitory character, and might even be taken to mean that the sale from the farmer to the purchaser is void, unless all taxes owing in respect of the land have previously been paid.

I do not think, however, that such a contention can be upheld. By it, an attempt is apparently made to take advantage of the decision of the Privy Council in *Erie Beach Company Limited* v. *Attorney-General for Ontario* (4). But no comparison can be made between that case and the present one, both on account of the different nature of the tax or duty charged or imposed and also

(1) [1931] S.C.R. 357.
(2) [1933] A.C. 169, at 175.
(3) [1914] A.C. 176.
(4) [1930] A.C. 161.

because, under the Alberta amendment, once the amount of the tax is paid by the purchaser, the tax is thereby extinguished and no longer subsists against the land owner. In the *Erie Beach* case (1), a succession duty was imposed on property in Ontario passing on the death. There was a statutory prohibition against the transfer of the property before the duty was paid or secured. To enforce the prohibition, a penalty (as it was held) was imposed on any person giving assistance to any transfer that might defeat the duty. The penalty equalled the duty, but was not the duty and did not discharge it.

Lord Merrivale, delivering the judgment of the Privy Council, said, at page 169:

> It is in truth this—Is the intention of s. 10, sub-s. 2, that when a corporation allows property of deceased person to be transferred without provision previously made for succession duty, the corporation shall incur a liability beginning and ending with itself and answerable so far as liability goes out of its corporate funds alone, or does the section intend that the corporation shall pay the succession duty on behalf of the persons concerned, and by so doing become entitled to recover from such persons the amount paid?

To that question, the answer of the Privy Council was that the statute made no provision for the reimbursement from any quarter and no such provision could be implied. The breach of the statutory prohibition was *prima facie* a misdemeanour and the person convicted of the misdemeanour was penalized without being entitled to recover the penalty from the beneficiary.

No such situation exists here. Payment pursuant to subsection 4 discharges *pro tanto* the lien against the crop and the tax on the land. The taxes are discharged through the payment made by the purchaser as effectively as if the payment had been made by the owner of the land.

But if it is a tax, it is a tax on land, and not a tax on a commodity. The language of section 354a is clear: the lien or charge created upon the crops grown is to secure taxes upon or in respect of land. The lie nonly affects the crops; and that must mean: the crops after they have been separated from the land, because up to that time they form part of the land and the question does not arise.

It is not to be forgotten that under the *Municipal District Act*, as we have already seen,

> every owner, purchaser and conditional owner of assessed land

(1) [1930] A.C. 161.

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is liable to pay the taxes upon the assessed value thereof. The purchaser of the crops as forming part of the land was, therefore, already liable to the extent mentioned. But, further, at the same time as it is a land tax, it is a municipal tax; and a tax such as this, as to its incidence, is not to be regarded in the same aspect as taxes upon commodities, to which Mill's formula concerning taxation is generally applied

as affording a guide to the application of section 92, head 2.

In *City of Halifax* v. *Fairbanks' Estate* (1), Viscount Cave, L.C., asked the question (p. 125): "What then is the effect to be given to Mill's formula above quoted?" The noble Lord went on:

> 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. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation.
>
> If this be the true view, then the reasoning of the Supreme Court of Canada requires reconsideration. It may be true to say of a particular tax on property, such as that imposed on owners by s. 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.

And further, on page 126:

> The authorities cited by Newcombe J. show the use made by this Board of Mill's definition in determining whether a new or special tax, such as a stamp duty, a licence duty or a percentage on turnover, should be classed as direct or indirect; but, with the possible exception of *Cotton* v. *The King* (2), which seems to have turned on its own facts, they do not afford any instance in which a tax otherwise recognized as direct has been held to be indirect for the purposes of the *British North America Act* by reason of any theory as to its ultimate incidence.

(1) [1928] A.C. 117. (2) [1914] A.C. 176.

And the case of *City of Montreal* v. *Attorney-General of Canada* (1), was referred to as being directly in point and supporting the above contention.

It will be noticed that, in the enumeration made by Viscount Cave of taxes which, according to the common understanding of the term, constitute direct taxation, taxes on property and municipal and local rates are specifically mentioned.

In truth, in the present instance, the Alberta legislation is nothing else than legislation in municipal matters imposing a municipal tax and the sections impugned are really no more than collection processes. It is legislation relating to municipal taxation and municipal matters; and if, in a sense, it affects subject-matters reserved to the Dominion Parliament, it does so only collaterally and in nowise so as to entail unconstitutionality or, as a consequence, invalidity. The statute is not directed to trade and commerce as understood under the decided cases, nor to any of the specific heads of sec. 91 of the *British North America Act*. To use the language of Lord Atkin, in *Ladore* v. *Bennett* (2), if they affect any of the matters under section 91, it is only "as a necessary incident to the lawful powers of good government within the province."

For the above reasons, I would answer the question referred to the Court in the negative and would say that section 31 of the *Municipal District Act Amendment Act, 1941*, is not *ultra vires* the legislature of Alberta either in whole or in part.

Question answered in the negative.

HIS MAJESTY THE KING..... APPELLANT;

AND

ANDREW BALCIUNAS ..... RESPONDENT.

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*Feb. 23.
*April 2.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Speedy trial before County Court Judge—Criminal Code, Part XVIII—One trial on three charges set forth on single charge sheet—Improper proceeding—New trial.

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

(1) [1923] A.C. 136.

(2) [1939] A.C. 468, at 482.

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Three separate informations were laid against respondent. He was committed for trial on all three. A single charge sheet setting forth three charges was prepared by the Crown Prosecutor, and on this the respondent was arraigned and elected to be tried speedily under Part XVIII of the *Criminal Code*. There was one trial on all three charges before the County Court Judge and respondent was convicted on each charge.

Held (affirming judgment of the Court of Appeal for Ontario, [1942] O.W.N. 503; [1942] 4 D.L.R. 511): The conviction should be set aside and a new trial held; it was improper to try the three charges together. Sec. 856 of the *Criminal Code* (allowing joinder of counts in the same indictment) cannot be read into Part XVIII.

APPEAL by the Attorney-General for the Province of Ontario, pursuant to s. 1025 of the *Criminal Code* and by leave granted by a Judge of this Court, from the judgment of the Court of Appeal for Ontario (1), allowing the appeal of the present respondent from his conviction by His Honour Judge Parker in the County Court Judges' Criminal Court of the County of York, exercising jurisdiction under Part XVIII of the *Criminal Code,* on each of three charges as follows: (1) of receiving certain wrist-watches and wrist-watch bands, theretofore stolen, knowing the same to have been stolen; (2) of retaining in his possession the aforesaid property, theretofore stolen, knowing the same to have been stolen; and (3) of retaining in his possession a certain other wrist-watch, theretofore stolen, knowing the same to have been stolen. All three charges were tried together. The Court of Appeal for Ontario quashed the conviction and ordered a new trial.

W. B. Common K.C. for the appellant.

W. J. P. Jenner for the respondent.

(At the conclusion of the argument for the appellant, counsel for the respondent was not called upon; judgment was reserved, and was delivered later.)

THE COURT.—This is an appeal by the Attorney-General from a judgment of the Court of Appeal of Ontario setting aside a conviction of Balciunas and directing a new trial.

(1) [1942] O.W.N. 503; [1942] 4 D.L.R. 511.

The point involved is a short one and, at the conclusion of a very complete argument by Mr. Common on behalf of the Attorney-General, the Court intimated that it was unnecessary to hear counsel for the accused.

Three separate informations were laid against Balciunas. He was committed for trial on all three. A single charge sheet setting forth the three charges was prepared by the Crown Prosecutor and on this the accused was arraigned and elected to be tried speedily under Part XVIII of the *Criminal Code.*

There was one trial on all three charges before the County Court Judge and Balciunas was convicted on each charge.

On appeal to the Court of Appeal, this conviction was set aside and a new trial directed on the ground that it was improper to try the three separate charges together, the point being that, although there was authority in the *Criminal Code* to include in an indictment a number of separate charges, this was not the case under the provisions of Part XVIII.

Under section 856 of the *Criminal Code:*

> 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.

The trial judge has a discretion to direct a trial upon any one or more of these counts separately.

There is no special provision in Part XVIII and a careful reading of the provisions of this Part as they now stand does not, in our opinion, justify the contention of the Crown that section 856 can be read into it.

We think that the Court of Appeal was right and that each charge should be tried separately. This may incur what may seem to be unnecessary expense in many cases, but the only remedy, in our opinion, is by way of amendment to the *Criminal Code.*

Appeal dismissed.

Solicitor for the appellant: *C. L. Snyder.*

Solicitors for the respondent: *Jenner & Brunt.*

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*Feb. 3, 4, 5.
*May 4.

MARK ANTHONY AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

THE ATTORNEY-GENERAL OF THE PROVINCE OF ALBERTA AND THE MINISTER OF LANDS AND MINES OF THE PROVINCE OF ALBERTA (DEFENDANTS) ..... RESPONDENTS.

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

Constitutional law—Natural Resources Agreement of 1929, section 2—Timber leases issued by Dominion—Increase of dues by province on renewals—Whether ultra vires the province—Right of province to alter dues at discretion—"Terms" of licenses—Dues alleged to be prohibitive—Acceptance by licensee of licenses issued by province—The Dominion Lands Act (D), 1908, c. 20—The Provincial Lands Act (Alta.), 1931, c. 48, and 1939, c. 10

The plaintiffs, appellants, for many years prior to 1930, were holders of licenses to cut timber. These licenses, issued for one year but renewable, had been granted by Dominion officials under the authority of the *Dominion Lands Act*. The ground rentals and annual dues were increased by regulations from 1886 until 1930, when the rates payable were $10 per square mile for ground rental and $1 for dues per 1,000 feet board measure. In 1929, an arrangement, the Natural Resources Agreement, was made between the Dominion of Canada and the province of Alberta, under which all Crown lands were to be transferred by the Dominion to the province, subject to outstanding obligations which the province undertook to implement; and on the 1st of October, 1930, the provincial officials took over the administration of these lands. In 1931, the *Provincial Lands Act* was enacted and the *Dominion Lands Act* ceased to have force of law in the province. Under the authority of the *Provincial Lands Act*, the province, for each of the years 1931 to 1939, issued licenses to the appellants or their predecessors in title in practically the same form as theretofore issued by the Dominion. These licenses were formally accepted, signed and sealed by the appellants; and similar renewals were issued in each year until 1939. These licenses contained a clause that the licensee should be entitled to renewal of his license from year to year, provided that such renewal should be subject to the payment of such rental and dues and to such terms and conditions fixed by the regulations in force at the time the renewal was made. In 1940, by order in council passed under the authority of a new *Provincial Lands Act* enacted in 1939, new regulations were made for the disposition of timber lands belonging to the province and the fixing of dues thereon. On the 25th of July, 1940, it was provided that the licensee of timber berths acquired pursuant to regulations theretofore established under the *Dominion Lands Act* should pay dues at the rate of $2.50 per 1,000 feet board measure, and on the 28th of May, 1941, the rate was increased to $3.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

On May 30th, 1941, by order in council, it was also provided that the Minister of Lands and Mines was authorized to grant licenses for the fiscal year ending March 31st, 1942, for the operation of these same berths, subject to the payment of dues on all timber cut under such licenses, the rate being made $1.75 per 1,000 feet. The appellants brought an action to have it declared that the province had no power to increase the dues payable by them as licensees beyond the sum of $1 per 1,000 feet, being the sum payable at the date of the transfer by the Dominion to the province; and it was contended that, if it has such power, it has not effectively exercised it. The trial judge held that the order in council of the 30th of May, 1941, fixing the rate of dues at $1.75 per 1,000 feet, was *intra vires* of the province; but he declared that the regulations passed by orders in council of the 25th of July, 1940, and of the 28th of May, 1941, in so far as they fixed the rate of dues at $2.50 and $3 per 1,000 feet were *ultra vires*. The appellants appealed to the Appellate Division from the first part of the judgment of the trial judge; and the respondents cross-appealed from the second part of that judgment. The Appellate Division dismissed the appellants' appeal and allowed the respondents' cross-appeal.

Held, affirming the judgment of the Appellate Division ([1942] 2 W.W.R. 554), that the provincial regulations at present being enforced were not *ultra vires* and that the appeal should be dismissed with cost.

Held.—The provincial government had the right to increase the rates of dues payable by the appellants over the amount of $1 per 1,000 feet named in the Dominion Government regulations at the time of the transfer. The Dominion licenses then in force were not conditional on the observance by the province of the regulations passed by Federal orders in council under the *Dominion Lands Act*. The terms of the transfer agreement from the Dominion to the province amount to a statutory novation, as held by the Judicial Committee in *In re Timber Regulations for Manitoba* ([1935] A.C. 184). Moreover, upon the facts in the present case, it must be held that the power possessed by the Dominion to vary the dues became vested in the province. The appellants, after the transfer, each year for nine successive years, applied for, received and accepted licenses from the Provincial Government, thus formally and definitely accepted its jurisdiction and agreed to abide by its regulations and paid the fees imposed by the Provincial Government.

Held, also, that the authority so transferred has not been limited or fettered by the "terms" of the Natural Resources Agreement (approved and confirmed by statute), and specially by clause 2 under which the province had agreed to carry out the terms of every subsisting lease or arrangement and not to alter or affect any of these terms. In construing the terms of that agreement, sanctioned by legislation which in effect amounts to a constitutional limitation, it must be held that the provincial authorities have the right to alter the dues in their discretion, provided that the alteration is not done with the purpose, or with the effect, of nullifying the agreement. The question, as to whether such point has been reached, must be determined according to the facts in each particular case. In the present case, there is no adequate evidence on which to decide such question, as held by the appellate court. At the argument, it was submitted on behalf of the respondents that the orders

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in council when properly interpreted do not impose any rate after March 1st, 1942; and, accordingly, the appellants will still be entitled to apply again to the courts in the event of any attempt being made to enforce, in the future, rates which they may deem prohibitive.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing an appeal by the plaintiffs from the first part of the judgment of the trial judge, O'Connor J. (2) and allowing a cross-appeal by the respondents from the second part of the same judgment.

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

S. Bruce Smith K.C. for the appellants.

S. W. Field K.C. for the respondents.

The judgment of the Court was delivered by

HUDSON J.—This is an appeal from a unanimous decision of the Appellate Division of the Supreme Court of Alberta.

The question involved is whether or not the Government of Alberta has the right to increase dues payable on licenses to cut timber on Crown lands, when such licenses were originally granted by the Dominion Government prior to the transfer of the lands to the province in 1930.

For many years prior to 1930 the plaintiffs were holders of licenses to cut timber. These licenses were granted by Dominion officials under the authority of the *Dominion Lands Act* and regulations made thereunder from time to time.

The licenses were secured at a sale by auction and very substantial sums were paid therefor by the successful bidders. They were issued for a term not exceeding one year but were renewable.

The form of renewal license issued by the Dominion Government in 1930 read in part as follows:

Know all men by these presents, that by virtue of the authority vested in me by the *Dominion Lands Act* and by an order of His Excellency the Governor General in Council of the first day of July, 1898, as amended by subsequent Orders in Council, I, the Honourable Frank Oliver, the Minister of the Interior of Canada, do hereby, in consideration of two dollars and fifty cents ($2.50) ground rent now paid to me

(1) (1942) 2 W.W.R. 554. (2) (1942) 1 W.W.R. 833.

for the use of His Majesty King Edward the Seventh, and in consideration of the royalty hereinafter mentioned, give unto R. Ritchie, of the town of Strathcona, in the province of Alberta, hereinafter called the licensee, his executors and administrators, full right, power and license, subject to the conditions and restrictions hereinafter mentioned and contained, and such other conditions and restrictions as are in that behalf contained in the *Dominion Lands Act*, and the amendments thereto, and in the regulations respecting timber passed by the Governor General in Council, to cut timber on the following tract of land (hereinafter called the "berth" or "berths"), that is to say:

* * *

This license is subject to the following conditions and restrictions in addition to such of the conditions and restrictions as are in that behalf contained in the *Dominion Lands Act* and the amendments thereto and in the regulations respecting timber passed by order of the Governor General in Council:

* * *

2. So long as the licensee complies with the conditions of this license and of the regulations he shall be entitled to a renewal of his license from year to year while merchantable timber remains upon the area licensed, provided, however, that such renewal shall be granted subject to any change which may have been made in the Regulations increasing or altering the rental or dues to be paid, or otherwise varying the terms or conditions under which the licenses are granted, etc.

The relevant provisions of the *Dominion Lands Act* then in force were as follows:

49. The Governor in Council may make regulations for the disposal by public competition of the right to cut timber on berths to be defined in the public notice of such competition: Provided that

(*a*) no berth shall exceed an area of twenty-five square miles, excepting a timber berth granted for the cutting thereon of pulpwood, which pulpwood berth shall be of such area as may be determined by the Governor in Council.

(*b*) no berth shall be awarded except to the person who offers the highest bonus or bid therefor; and

(*c*) no offer by tender shall be accepted unless accompanied by the full amount of the bonus.

50. The person to whom a timber berth is awarded under the last preceding section shall be granted a license therefor, which license shall describe the land upon which the timber may be cut, the kind, etc.

51. The license shall be for a term not exceeding one year, but shall be renewable from year to year while there is on the berth timber of the kind and dimension described in the license, in sufficient quantity to make it commercially valuable, such renewal being subject to the payment of such dues and to such terms and conditions as are fixed by the regulations in force at the time the renewal is made.

2. The Minister shall be the judge as to whether the terms and conditions of the license and the provisions of this Act and of the regulations made hereunder respecting timber berths have been fulfilled.

The ground rentals and annual dues were increased from time to time by regulation; for example, from 1886

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to 1898 the ground rentals were $5 per square mile and the dues 5 per cent on the amount of the sales of all products from the berth. From 1898 to 1920 the ground rental was still $5 per square mile but dues were 50 cents per thousand feet board measure. From 1920 to 1921 the ground rental was $10 per square mile and the dues 75 cents per thousand feet board measure. From 1921 onwards the ground rental was $10 per square mile and the dues $1 per thousand feet board measure, which were the rates payable in 1930. The right of the Dominion to increase these rates is not questioned. In 1929, an arrangement was made between the Dominion of Canada and the province of Alberta, by which all Crown lands, with some exceptions not here material, were to be transferred by the Dominion to the province, subject to outstanding obligations which the province undertook to implement. This arrangement was thereafter incorporated in a formal written agreement which was subsequently ratified by Acts of the legislature of Alberta, chapter 21 of the statutes of Alberta 1920, the Parliament of Canada, chapter 3 of the statutes of Canada 1930, and the United Kingdom, chapter 26 of the statutes of 1930, being the *British North America Act,* 1930.

The material provisions of this agreement are as follows:

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of Section 109 of the *British North America Act,* 1867, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due or payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this Agreement and subject as therein otherwise provided, belong to the Province, subject to any trust existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this Agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals, or royalties before the coming into force of this Agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.

2. The Province will carry out in accordance with the terms thereof every contract to purchase or lease any Crown lands, mines or minerals

and every other arrangement whereby any person has become entitled to any interest therein as against the Crown, and further agrees not to affect or alter any terms of any such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to interests therein, irrespective of who may be the parties thereto.

3. Any power or right, which, by any such contract, lease or other arrangements, or by any Act of the Parliament of Canada relating to any of the lands, mines, minerals or royalties hereby transferred or by any regulation made under such Act, is reserved to the Governor in Council or to the Minister of the Interior or any other officer of the Government of Canada, may be exercised by such officer of the Government of the Province as may be specified by the Legislature thereof from time to time, and until otherwise directed, may be exercised by the Provincial Secretary of the Province.

Under this legislation the agreement took effect on the 1st of October, 1930, and thereupon the provincial officials took over the administration of the lands in question. Meanwhile, the legislature of Alberta, in anticipation of the transfer of these lands, had passed an Act to provide for the *Administration of the Provincial Natural Resources,* being chapter 22 of the statutes of Alberta, 1930, and it was there provided by section 2 that a number of Acts, including the *Dominion Lands Act,*

shall, in so far as the terms thereof are within the legislative capacity of the Province and in so far as they apply to the transferred property, have force in the Province as if they had been originally passed by the Legislature of the same, subject, however, to the conditions, restrictions and limitations hereinafter contained.

In 1931, the legislature of Alberta passed a *Provincial Lands Act,* chapter 43, making provisions for the administration of the public lands which had been acquired by the province, and providing that the *Dominion Lands Act* which had been in force in the province pursuant to the *Administration of the Provincial Natural Resources Act* should cease to be in force. Under section 46 of this Act

the Lieutenant-Governor in Council was authorized to make regulations for the disposal by public competition of the right to cut timber and to issue licenses therefor.

Section 48 was a repetition of section 51 of the *Dominion Lands Act,* and the other sections of the Act corresponded very closely with those of the Dominion Act in all relevant matters, substituting, of course, the Lieutenant-Governor in Council for the Governor General in Council, and the provincial officials for Dominion officials.

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Under the authority of this last-mentioned statute, the province issued licenses to the plaintiffs or their predecessors in title in practically the same form as had theretofore been issued by the Dominion, substituting, however, reference to the *Provincial Lands Act* in place of the *Dominion Lands Act,* the Lieutenant-Governor in Council for the Governor General in Council, and corresponding changes in regard to the Minister and other provincial authorities. They provided:

> This license is subject to the following conditions and restrictions in addition to such of the conditions and restrictions respecting timber as are contained in the *Provincial Lands Act* and the amendments thereto, and in the regulations respecting timber passed by order of His Honour the Lieutenant-Governor in Council.
>
> * * *
>
> (*b*) The licensee shall be entitled to a renewal of his license from year to year while there is on the berth timber of the kind and dimensions described in the license in sufficient quantity to make it commercially valuable, if the terms and conditions of the license and the provisions of the *Provincial Lands Act* and of the regulations affecting the same have been fulfilled, as to which the Minister shall be the judge:
>
> Provided that each such renewal shall be subject to the payment of such ground rental and royalty dues and to such terms and conditions as are fixed by the regulations in force at the time the renewal is made.

These licenses when issued were formally accepted, signed and sealed by the plaintiffs.

Similar renewals were issued in each year until 1939.

Between 1931 and 1939 the dues payable in respect of these licenses were reduced substantially below the $1 per thousand payable under the last Dominion license.

In 1939 another Act was passed respecting provincial lands, being chapter 10 of the statutes of that year. In section 75 (*m*) it was provided that the Lieutenant-Governor in Council may,—

> (*m*) from time to time make such regulations and orders, not inconsistent with this Act, as are necessary to carry out the provisions of this Act according to their true intent, or to carry out the Agreement of Transfer, or to meet cases which may arise and for which no provision is made by this Act.

Subsection 2:

> (2) For the purpose of implementing any obligation affecting any lands vested in His Majesty in the right of the Province by virtue of the Agreement of Transfer, which, by the terms of the said agreement, the Province is bound to perform, the Lieutenant-Governor in Council is empowered to do or cause to be done all or any acts and things, and to

make any disposition of the said lands for the purpose aforesaid, and, to the extent only that it may be necessary for effecting such purpose, to depart from or vary any other provision of this Act.

On the 25th of July, 1940, the Lieutenant-Governor in Council passed new regulations which provided:

(*a*) Timber license is defined as meaning "any license granted under these or any former regulations for the cutting and removal of Crown timber for any purpose".

(*b*) No license for a timber berth shall be renewable after the tenth year from the date of sale.

(*c*) The licensee of a timber berth acquired pursuant to regulations heretofore established under the *Dominion Lands Act* shall pay dues as set out in Form E.

(*d*) Form E provided for a rate of dues on sawn lumber of other timber than poplar of $2.50 per M. feet B.M.

(*e*) The rate of dues payable by holders of timber permits was decreased from $3 per thousand to $2.50 per thousand.

On the 30th of July, 1940, the Lieutenant-Governor in Council authorized the issue of licenses for the fiscal year ending the 31st of March, 1941, for the operation

of timber berths acquired pursuant to regulations heretofore established under the *Dominion Lands Act,* subject to the payment of dues in accordance with the attached schedule;

the attached schedule provided for a rate of dues of $1 per thousand feet board measure on sawn lumber of other timber than poplar.

On the 28th of May, 1941, the Lieutenant-Governor in Council increased the rate of dues provided by schedule E of the regulations of the 25th of July, 1940, to $3 per thousand feet on sawn lumber of other timber than poplar.

On the 30th of May, 1941, the Lieutenant-Governor in Council authorized the issue of licenses for the fiscal year ending the 31st day of May, 1942, for the operation

of timber berths acquired pursuant to regulations heretofore established under the *Dominion Lands Act* subject to the payment of dues as set out in the attached schedule

and that schedule provided a rate of $1.75 per thousand feet on sawn lumber of other timber than poplar.

On May 30th, 1941, an order in council was passed reciting that section 23 of the said Regulations established by order in council should become effective on April 1st, 1941, and that it was proper and convenient to postpone the operation of section 23 to a later date. The order in council then provided that the Minister of Lands and

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Mines was authorized to grant licenses for the fiscal year ending March 31st, 1942, for the operation of timber berths acquired pursuant to Regulations heretofore established under the *Dominion Lands Act*, subject to the payment of dues on all timber cut under such licenses in accordance with the attached schedule, which rate should come into force on April 1st, 1941. By the attached schedule the rate was made $1.75 per thousand feet.

After the action was commenced an agreement was made between the parties whereby licenses for the years 1941 and 1942 were granted in consideration of $1 per thousand feet being paid to the Government and 75 cents per thousand feet being paid into court to abide the result of the action.

The appellants in this action claim:

(*a*) A declaration that certain regulations made by the Lieutenant-Governor in Council of Alberta purporting to increase the rates of dues payable by the appellants were *ultra vires*.

(*b*) A declaration that a provision in such regulations to the effect that no license should be renewable after the tenth year from the date of sale was *ultra vires*.

(*c*) An interlocutory injunction and an injunction restraining the respondents from exacting dues from them in excess of 50 cents or $1 per thousand feet board measure.

(*d*) Interim orders directing that the appellants might execute their licenses for the current period and deposit such licenses in court without prejudice to their rights and might during the course of the litigation pay the Crown $1 per thousand feet and into court 75 cents per thousand feet in respect of all spruce lumber cut by them after the 31st day of March, 1941.

The action was tried before Mr. Justice O'Connor who held,—

(*a*) That the regulations passed on the 25th day of July, 1940, as amended by the order in council passed on the 28th of May, 1941, were *ultra vires* against the appellants (1) in so far as they provided that no license for a timber berth should be renewable after the tenth year from the date of sale, and (2) in so far as they fixed a rate

of dues on license timber berths in respect of sawn lumber of other timber than poplar at $2.50 and subsequently at $3 per thousand feet.

The learned judge so decided the second point because he concluded that dues of $2.50 or $3 per thousand were so high as to be prohibitive and were adopted improperly with the purpose of causing a forfeiture of the appellants' licenses and constituted a violation of the provisions of the Natural Resources Agreement and legislation.

(*b*) That Order in Council passed on the 30th day of May, 1941, which fixed a rate of dues for the year from the 1st of April, 1941, to the 31st day of March, 1942, at $1.75 per thousand feet, was *intra vires* of the province of Alberta.

The appellants appealed to the Appellate Division of the Supreme Court of Alberta, and the respondents cross-appealed with respect to such regulations as were found to be *ultra vires* excepting the regulation providing that no license for a timber berth should be renewable after the tenth year from the date of sale. The trial judge's finding that the last-mentioned regulation was *ultra vires* therefore stands.

The Appellate Division held:

(*a*) That all of the increase in dues to $1.75 per thousand feet effected by regulation passed by the Lieutenant-Governor in Council was *intra vires*.

(*b*) That the finding of the trial judge that the rates of dues of $2.50 and $3 per thousand feet board measure were prohibitive and were adopted improperly did not arise on the pleadings, that if it did arise the evidence fell short of justifying the finding and that it was not convenient to make a declaration that rates which had not yet been imposed would have been prohibitive, having regard to the course of trial.

On the appeal before this Court the first point raised by counsel for the appellant is—

(1) that the provincial regulations in question were *ultra vires* in so far as they purported to increase the rates of dues payable by appellants over $1 per thousand for sawn lumber, being the amount named in the Dominion Government regulations at the time of the transfer. He

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argued that inasmuch as the Dominion licenses then in force were conditional on the observance of regulations passed by the Governor General in Council under the *Dominion Lands Act,* the appellants were under no obligation to pay to the province on any other basis, and that the contract was analogous to a contract for personal services because here a discretion was vested in the other party whom the plaintiff knew and trusted to exercise the reserved discretion reasonably.

The terms of the transfer agreement from the Dominion to the province came up for consideration before the Judicial Committee in a reference *In re Timber Regulations for Manitoba* (1), and it was there held that the transfer amounted to a statutory novation. It was said by Lord Wright at p. 198:

> But their Lordships agree with the Supreme Court that in the special circumstances of this case the statute of 1930 did effect such a novation. Under clase 2 it is the Province, to which the lands have been transferred, that can alone as a matter of law thereafter grant the patent to an entrant; the agreement, made law by the Act of 1930, requires the Province to carry out the various specified obligations in respect of the lands transferred; these obligations are now imposed on the Province by law; by the same reasoning they do not any longer attach to the Dominion; that implies that by law the entrant must go to the Province to obtain the carrying out of the various obligations which the statute of 1930 by confirming the agreement requires the province to fulfil.

In the present case, in addition to the statutory novation, the facts are important. The appellants after the transfer each year for nine successive years applied for, received and accepted licenses from the Provincial Government and thus formally and definitely accepted its jurisdiction and agreed to abide by its regulations and paid the fees imposed by the Provincial Government. The fact that these fees were lower than those imposed by the Dominion Government does not alter the position in consideration of this particular point.

The formal acceptance of the licenses by the appellants distinguishes the case from that of *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.* (2). In that case the employee was not aware of the transfer of employers and there was nothing in the nature of formal novation or acquiescence to bind him.

(1) [1935] A.C. 184. (2) [1940] A.C. 1014.

Upon these facts, it should be held that the power possessed by the Dominion to vary the dues became vested in the province. This is substantially the view of Mr. Justice O'Connor and the members of the Appellate Division.

Having arrived at this opinion, it must next be considered whether or not the authority so transferred is limited or fettered by the terms of the Natural Resources Agreement. The appellants claim that it is. They contend that the increases in dues payable by the appellants provided by the provincial regulations were steps in a colourable attempt by the province to forfeit the appellants' licenses and, accordingly, that such increases were *ultra vires* of the province, that the rate of $1.75 per thousand was prohibitive and invalid as well as the rates of $2.50 and $3. On this point, the appellants were partially successful. As has been stated, at the trial Mr. Justice O'Connor held that although the province had the right to fix dues, there was a limit to such power; that the dues so fixed must not be prohibitive because, if prohibitive, they would affect or alter the plaintiffs' lease or arrangements contrary to clause 2 of the Natural Resources Agreement. He then went on to find on the facts that $1.75 per thousand was excessive but was not prohibitive, but that $2.50 or $3 was prohibitive.

Clause 2 of the Natural Resources Agreement provides firstly, that the province will carry out the terms of every subsisting lease or arrangement, and secondly that it will not affect or alter any terms of such contract except with the consent of the parties or in so far as legislation may apply generally to similar agreements.

I do not think that the plaintiffs' acceptance of the licenses can be taken as a consent to any alteration in the agreement which would vest in the province a right to destroy or nullify indirectly the contract which he had with the Dominion Government.

The language of subsection 2 was the subject of much discussion in the *Spooner* case (1). It was there said by the Chief Justice of this Court at p. 645:

but if the enforcement of a tax, imposed by provincial legislation, would involve a nullification in whole or in part of competent Dominion legis-

(1) *Spooner Oils Ltd.* v. *The Turner Valley Gas Condensation Board* [1933] S.C.R. 629.

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Hudson J.

lation under which the right is constituted, then it is, to say the least, doubtful whether such provisions could take effect.

The matters for discussion in the *Spooner* case (1) were very different from those here, but the remarks of the Chief Justice have some relevance. It must be kept in mind that we are here construing the terms of an agreement sanctioned by legislation which in effect amounts to a constitutional limitation.

In my view, the provincial authorities have the right to alter the dues in their discretion, provided that the alteration is not done with the purpose or with the effect of nullifying the agreement. It is difficult to ascertain in particular cases where such point will be reached. In the present case, I agree with the court of appeal that there is no adequate evidence on which to decide the question, although there is sufficient evidence to excite suspicion as to the motives for increasing the dues to the higher figures. In argument, counsel for the Attorney-General submitted that the orders in council when properly interpreted do not impose any rate after 1st March, 1942, and I think we are entitled to accept this as the attitude of the Provincial Government.

I agree that the course adopted by the court of appeal should be followed with, of course, a right to the appellants to again apply in the event of any attempt being made to enforce the rates in excess of $1.75 per thousand, or any other rates which they may deem prohibitive.

There were two other minor points put forward by counsel for the appellants. The first is regarding saw-mills, but it does not seem to me that this materially affects the situation. A provision as to saw-mills existed in Dominion legislation from the year 1885 onwards, and the second point is that there was no power to substitute the Lieutenant-Governor in Council for the Provincial Secretary, as mentioned in the agreement. This is a matter of governmental procedure and not a matter of substance affecting the appellants.

I would dismiss the appeal. There should be no costs of this appeal.

Appeal dismissed, no costs.

Solicitors for the appellants: *Parlee, Smith, Clement & Parlee.*

Solicitor for respondents: *J. J. Frawley.*

REFERENCE BY THE BOARD OF TRANSPORT COMMISSIONERS FOR CANADA FOR THE OPINION OF THE SUPREME COURT OF CANADA.

IN THE MATTER OF THE TRANSPORT ACT, 1938 (2 GEO. VI, C. 53).

1942
*Dec. 7, 8.
1943
*May 4.

Carriers—The Transport Act, 1938 (Dom., 2 Geo. VI, c. 53), ss. 35, 36, 3 (2) —Application to Board of Transport Commissioners for approval of agreed charge between shipper and competing carriers by rail—Relevant considerations for the Board—Effects of agreed charge on business and revenues of other carriers.

On an application to the Board of Transport Commissioners under s. 35 of *The Transport Act, 1938* (Dom., 2 Geo. VI, c. 53), for approval of an agreed charge between a shipper and competing carriers by rail, the Board is not precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers, such as competing carriers by water. (*Contra, per* the Chief Justice and Rinfret J., dissenting).

Secs. 35 (1) (5) (13), 36 (1), 3 (2) of said Act particularly considered.

REFERENCE by the Board of Transport Commissioners for Canada, in pursuance of the powers conferred upon it by s. 43 of the *Railway Act* (R.S.C. 1927, c. 170) and s. 4 of *The Transport Act, 1938* (Dom., 2 Geo. VI, c. 53), for the opinion of the Supreme Court of Canada, of the following question, which, in the opinion of the Board, was a question of law:

On an application to the Board under section 35 of The Transport Act, 1938, for the approval of an agreed charge between a shipper and competing carriers by rail, is the Board precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers?

The question arose in certain cases where applications were made to the Board for the approval of agreed charges. The applications were made by carriers by rail, and were opposed by competing carriers by water, who objected on the ground that the making of the agreed charge would prejudicially affect their business and revenues. The applicants contended that the Board was precluded from regarding such objection as relevant.

In two cases (heard together) the traffic covered by the agreed charge had been carried in part by rail only, in part by water and rail, and in part by rail, water and rail. Under the terms of the agreed charge the shippers undertook to

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

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ship by rail 100 per cent. of the aggregate volume forwarded by them of certain specified carload traffic. The Board refused to approve the agreed charge, Garceau, D.C.C., dissenting (1). The carriers by rail applied to the Board in each case under s. 51 of the *Railway Act* and s. 4 of *The Transport Act, 1938,* for a review of the Board's order dismissing the application, and for a rehearing of the application, contending, *inter alia,* that the Board's judgment was wrong in holding as a matter of law that approval of the agreed charge might properly be withheld on the ground that the agreed charge might be unduly prejudicial to competing water carriers. The Board reserved its decision on said application. Because of the difference of opinion among members of the Board on the question of law and in view of the number of applications to the Board in which the same question was likely to be raised, the Board considered it desirable to obtain the opinion of the Supreme Court of Canada.

I. C. Rand K.C. for Canadian National Railways.

G. A. Walker K.C. for Canadian Pacific Railway Company.

Hazen Hansard for Canada Steamship Lines Ltd., Northern Navigation Co. and Northwest Steamships Ltd.

H. E. B. Coyne for The Board of Transport Commissioners for Canada.

THE CHIEF JUSTICE (dissenting).—This appeal arises upon a case stated by the Board of Transport Commissioners for the opinion of this Court upon the following question which the Board declares is in its opinion a question of law:

> On an application to the Board under section 35 of The Transport Act, 1938, for the approval of an agreed charge between a shipper and competing carriers by rail, is the Board precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers?

The Canadian National and the Canadian Pacific Railway Companies, together with other competing rail carriers, applied to the Board under section 35 of *The Transport Act* (Part V) for approval of agreed charges made by the rail carriers of certain specific carload traffic of two shippers whose goods had been, up to that time, carried partly

(1) 54 Canadian Railway and Transport Cases 1.

by water and rail routes in which the Canada Steamship Lines participated. The applications were opposed by the Steamship Lines on the sole ground that the effect of the agreed charges would be to deprive them of revenue from the carriage of this traffic. It is not contended that the other statutory requirements of section 35 had not been complied with.

The majority of the Board held that the probable loss of revenue by the Steamship Lines was a relevant consideration to which the Board might properly have regard in dealing with the application. The question raised by the stated case is whether or not that decision was wrong.

It is convenient to reproduce in full section 35, subsections 1, 5 and 13, as well as section 36 (1):

35. (1) Notwithstanding anything in the *Railway Act,* or in this Act, a carrier may make such charge or charges for the transport of the goods of any shipper or for the transport of any part of his goods as may be agreed between the carrier and that shipper: Provided that any such agreed charge shall require the approval of the Board, and the Board shall not approve such charge if, in its opinion, the object to be secured by the making of the agreement can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the *Railway Act* or this Act: and provided further that when the transport is by rail from or to a competitive point or between competitive points on the lines of two or more carriers by rail the Board shall not approve an agreed charge unless the competing carriers by rail join in making the agreed charge.

(5) On an application to the Board for the approval of an agreed charge:—

(*a*) any shipper who considers that his business will be unjustly discriminated against if the agreed charge is approved and is made by the carrier, or that his business has been unjustly discriminated against as a result of the making of the charge by virtue of a previous approval;

(*b*) any representative body of shippers; and

(*c*) any carrier,

shall, after giving such notice of objection as may be prescribed by the Board, be entitled to be heard in opposition to the application.

(13) On any application under this section, the Board shall have regard to all considerations which appear to it to be relevant and, in particular, to the effect which the making of the agreed charge or the fixing of a charge is likely to have, or has had, on

(*a*) the net revenue of the carrier; and

(*b*) the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn.

36. (1) Upon complaint to the Minister by any representative body of carriers which, in the opinion of the Minister, is properly representative of the interests of persons engaged in the kind of business (transport by

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water, rail or air, as the case may be) represented by such body that any existing agreed charge places such kind of business at an undue or unfair disadvantage, the Minister may, if satisfied that in the national interest the complaint should be investigated, refer such complaint to the Board for investigation and if the Board after hearing finds that the effect of such agreed charge upon such kind of business is undesirable in the national interest the Board may make an order varying or cancelling the agreed charge complained of or may make such other order as in the circumstances it deems proper.

We have had the advantage of a very able judgment by the Chief Commissioner, as well as a full discussion of all the points by counsel.

The language of subsection 13 is very comprehensive. "All considerations which appear to be relevant" would *prima facie* embrace everything which the Board may reasonably think has a bearing upon the issue before it. Generally speaking, that question will be a question of fact only. But the appellants contend that these words must be read as subject to some limitation arising out of the nature of the subject matter and the enactments of Part V. Section 36 is particularly emphasized and relied upon.

The controversy does not lend itself to extended discussion. After fully considering the very able judgment of the Chief Commissioner and, I may add, the able argument of Mr. Hazen Hansard, my conclusion is that this section points unmistakably to the conclusion that the statute does not contemplate the rejection of an application for the approval of an agreed charge on the ground that the establishment of such a charge will prejudicially affect the business and revenues of competing carriers. The proper inference, I think, from that section is that the effect of the agreed charge upon competing carriers is not a relevant consideration within the meaning of section 35, subsection 13.

The question submitted ought, therefore, to be answered in the affirmative. There should be no order as to costs.

RINFRET J. (dissenting).—In pursuance of the powers conferred by sec. 43 of the *Railway Act* and sec. 4 of *The Transport Act, 1938,* The Board of Transport Commissioners for Canada submits for the opinion of this Court the following question:

On an application to the Board under sec. 35 of *The Transport Act, 1938,* for the approval of an agreed charge between a shipper and com-

peting carriers by rail, is the Board precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers?

The circumstances which led the Board to submit the question are clearly and completely stated in the reference and need not, therefore, be recited here.

It is, however, essential to the proper understanding of the answer about to be given that some subsections of section 35 be set out:

35. (1) Notwithstanding anything in the *Railway Act*, or in this Act, a carrier may make such charge or charges for the transport of the goods of any shipper or for the transport of any part of his goods as may be agreed between the carrier and that shipper: Provided that any such agreed charge shall require the approval of the Board, and the Board shall not approve such charge if, in its opinion, the object to be secured by the making of the agreement can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the *Railway Act* or this Act: and provided further that when the transport is by rail from or to a competitive point or between competitive points on the lines of two or more carriers by rail the Board shall not approve an agreed charge unless the competing carriers by rail join in making the agreed charge.

* * *

(5) On an application to the Board for the approval of an agreed charge:—

(*a*) any shipper who considers that his business will be unjustly discriminated against if the agreed charge is approved and is made by the carrier, or that his business has been unjustly discriminated against as a result of the making of the charge by virtue of a previous approval;

(*b*) any representative body of shippers; and

(*c*) any carrier,

shall, after giving such notice of objection as may be prescribed by the Board, be entitled to be heard in opposition to the application.

* * *

(13) On any application under this section, the Board shall have regard to all considerations which appear to it to be relevant and, in particular, to the effect which the making of the agreed charge or the fixing of a charge is likely to have, or has had, on,—

(*a*) the net revenue of the carrier; and

(*b*) the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn.

Under the interpretation clause of *The Transport Act* (sec. 2), an "agreed charge" means a charge agreed upon between a carrier and a shipper as in this Act provided and includes the conditions attached thereto;

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"carrier" means any person engaged in the transport of goods or passengers for hire or reward to whom the Act applies, and shall include any company which is subject to the *Railway Act;* "shipper" means a person sending or receiving or desiring to send or receive goods by means of any carrier to whom the Act applies; "transport" means the transport of goods or passengers, whether by air, by water or by rail, for hire or reward, to which the provisions of the Act apply; and "transported" and "transporting" shall have corresponding meanings.

It is common ground that, prior to the enactment of *The Transport Act,* in 1938, the "agreed charge" was unknown as an instrument of rate making under the law; also that the rates charged by water carriers were not subject to regulation by the Board, nor were the rates charged by highway trucking concerns.

The Transport Act introduced, *inter alia,* control of rates to be charged (*a*) for water transport within a certain area and (*b*) with respect to air transport.

Up to the enactment of sec. 35, the object of the regulation of rates by the Board was to avoid monopoly; and there seems to be no doubt that the relief given, or intended to be given, to the railways by sec. 35 was in the way of restoring in part their original freedom of action, but, at the same time, preserving the condition of equality of treatment to all members of the public.

The whole policy of the transport control in Canada had always been to look after the interest of the shipper, but not after the interest of shippers *inter se,* or of carriers *inter se.* The idea of regulation was intended to control monopoly, but not competition.

Bearing in mind this historical background, we may now turn to an analysis of section 35.

The first point to be noted in that section is that it shall be applied "notwithstanding anything in the *Railway Act* or in the *Transport Act";* and, therefore, the interpretation of the section is not to be controlled by the enactments in the other sections of those two Acts.

Subsection 1 authorizes a carrier and a shipper to agree upon the charge, or charges, for the transport of the shipper's goods. That is the general purport of the section.

The proviso to such an agreement is that the agreed charge shall require the approval of the Board. And the

Board is directed not to approve the charge if, in its opinion, the object to be secured by the agreement can, "having regard to all the circumstances", adequately be secured by means of a special or competitive tariff of tolls under the *Railway Act* or the *Transport Act;* or, when the transport is by rail from or to a competitive point, or competitive points on the lines of two or more carriers by rail, the Board shall not approve an agreed charge, unless the competing carriers by rail join in making the agreed charge.

Under subsection 5, on an application for an approval of an agreed charge, any representative body of shippers, any carrier and any shipper alleging that his business has been, or will be, unjustly discriminated against as a result of the agreement, is entitled to be heard in opposition to the application.

Under subsection 13,

> the Board shall have regard to all considerations which appear to it to be relevant and, in particular, to the effect which the making of the agreed charge or the fixing of a charge is likely to have, or has had, on the net revenue of the carrier; and the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn.

The Chief Commissioner of the Board of Transport ordered that copies of the Case be served upon boards of trade, traffic leagues, chambers of commerce, railway companies and steamship lines, and several other associations and companies likely to be interested in the matter.

The Court heard argument on behalf of the Canadian National Railways, the Canadian Pacific Railway, the Canada Steamship Lines Ltd., the Northern Navigation Company, and the Northwest Steamships Limited.

The two railway companies submitted that the answer to the question should be in the affirmative; while the steamship companies submitted that the question ought to be answered in the negative.

The steamship companies argued that no wider language could conceivably have been employed in conferring discretion to the Board than that by which the Board is directed to have regard to all circumstances which appear to it to be relevant. It was pointed out that the Board is not only directed to have regard to all relevant considerations; but it is even given the power to decide what is and what is not relevant.

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Moreover, so it was contended, Parliament, while not restricting the Board's discretion, saw fit to indicate two specific considerations to which the Board must have regard: the net revenue of the carrier; and the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn.

On behalf of the railway companies, it was argued that so to interpret section 35 would be to render it practically ineffective and to defeat the object of the section, which was intended to give relief in the way of restoring in part freedom of action in relation to competition.

In my view, section 35 must be construed as a code dealing with the whole matter of agreed charges, irrespective of the other sections of the *Railway Act* or of the *Transport Act,* except so far as the other sections are necessary to supply machinery for its carrying out.

The initial words of the section show that Parliament intended that the section should be so construed.

Moreover, the subject-matter of the section, the " agreed charges ", is a new policy introduced in Canadian transport legislation; it is entirely distinct from the rate structure envisaged by the legislation up to the introduction of section 35; and the language used by Parliament indicates an intention that the section should be understood and applied independently of the remainder of the legislation, except in so far as the machinery already referred to.

Undoubtedly, the agreed charge is subject to the approval of the Board; but the proviso, wherein the approval is stated to be required, at the same time indicates for what purpose such approval is deemed necessary; the Board is to decide whether the object to be secured by the making of the agreement could adequately be secured by means of a special or competitive tariff of tolls, or the Board is to ascertain as a fact whether the agreed transport is by rail from or to a competitive point, or between competitive points on the lines of two or more carriers by rail; and, in case such should be the fact, it is to refuse the approval of the agreed charge " unless the competing carriers by rail join in making the agreed charge."

Subsection 1 does not enact, in the main provision thereof, that the agreed charge must be approved by the Board, the requirement for the approval is to be found only

in the proviso; and the proviso whereby the approval of the Board is required also specifies the particular cases in which the Board is to withhold or refuse its approval.

When, therefore, subsection 13 enacts that the Board "shall have regard to all considerations which appear to it to be relevant", it cannot mean that the Board is directed to have regard to all possible considerations which it might, in its discretion, deem advisable to take into account.

The considerations to which the Board is directed to have regard are the considerations which appear to it to be relevant, that is to say: relevant under the provisions of section 35. The Board is to decide whether the agreed charge should be approved in view of the two considerations which are mentioned in the proviso contained in subsection 1 of section 35. Those are the considerations which are relevant under the section. The Board is not permitted to have regard to all considerations whatsoever. It is, however, directed to consider also the effect which the making of the agreed charge, or the fixing of a charge, is likely to have on "the net revenue of the carrier" and "the business of any shipper by whom, or in whose interests, objection is made to approval being given to an agreed charge, or application is made for approval to be withdrawn."

Notice must be taken of the very special wording of these two "particular" considerations.

The enactment is not that the Board is to take into consideration the net revenue of any carrier. Subsection 13 (*a*) is limited to the consideration of the net revenue of "the" carrier, which means the carrier who has entered into the agreement with the shipper. This mention specifying "the" carrier necessarily excludes a consideration of the revenue of any other carrier.

Further, "the business of any shipper" which is to be particularly considered is the business of a shipper "by whom, or in whose interests, objection is made to approval being given to an agreed charge," etc. And if we turn to subsection 5 of section 35, we find there which "shipper" may make an objection to the approval. It is a shipper who considers that his business will be unjustly discriminated against if the agreed charge is approved and is made by the carrier, or that his business has been unjustly discriminated against as a result of the making of the charge by virtue of a previous approval.

It means, therefore, that the application of section 35, so far as shippers are concerned, remains subject to the con-

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dition that there should result no unjust discrimination. I mention that only in passing, because no individual shipper or no representative body of shippers has come forward before the Court to submit any argument.

But when it comes to an individual carrier, such as the Canada Steamship Lines, Ltd., the Northern Navigation Company, or the Northwest Steamships Ltd., who have submitted arguments to this Court, it seems quite clear that the Board is not authorized by subsection 13 to take into consideration the effect the making of the agreed charge will have on their revenues. By subsection (*a*), that consideration is limited to the carrier who has entered into the agreement with the shipper.

The right of "any carrier" to be heard in opposition to an application for the approval of an agreed charge, which is given by subs. 5, must be limited to the consideration of one of the two circumstances included in the proviso of subs. 1 of section 35.

The steamship companies invoked subs. 2 of section 3 of *The Transport Act,* which is to the effect that it shall be the Board's duty to perform its function "with the object of co-ordinating and harmonizing the operations of all carriers engaged in transport by railways, ships and aircraft", and the Board is directed to give to the *Transport Act* and to the *Railway Act* "such fair interpretation as will best attain the object aforesaid."

A sufficient answer to this argument is to be found in the opening words of section 35, by which the right to make agreed charges is to be exercised "notwithstanding anything in the *Railway Act,* or in this Act."

Subsection 2 of section 3 cannot prevail against the express language of section 35 and cannot be interpreted as giving to the Board an unlimited scope to the field of considerations which the Board may take into account as relevant to the decision to approve or decline to approve an agreed charge.

As to section 36 of the *Transport Act,* to which our attention has been drawn by the steamship companies, it may first be said that, for the same reason which should exclude a reference to subs. 2 of section 3, anything found in section 36 cannot help in interpreting section 35. But it may be further added that section 36 deals with a different matter. It gives "any representative body of carriers"

the right to complain to the Minister of Transport "that any existing agreed charge places such kind of business at an undue or unfair disadvantage". In such a case, the Minister, "if satisfied that in the national interest the complaint should be investigated", may refer such complaint to the Board for investigation. And the section states what should then take place and how the Board should act in those circumstances.

The words of the section are that the Minister should be satisfied that the particular kind of business is placed at an undue or unfair disadvantage and that he should also be satisfied that, "in the national interest", the complaint should be investigated. That is an entirely different matter from the unjust discrimination which an individual shipper is allowed to oppose on application for the approval of an agreed charge under subs. 5 (*a*) of section 35 or from the objection which an individual carrier may put forward. The latter subsection deals with individual interests; the application of section 36 is limited to a matter of "national interest".

I would, therefore, answer in the affirmative the question submitted by the Board.

In my opinion, this is not a case where costs should be allowed to either of the parties who were heard before this Court.

DAVIS J.—Section 35 of *The Transport Act, 1938,* is essentially an administrative provision. On an application to the Board under the section for the approval of an agreed charge, "any carrier" (which includes a carrier by water) shall be entitled to be heard in opposition to the application. Subs. 5 (*c*). It is to be observed that the grounds of opposition available to "any carrier" are not specified or otherwise indicated; the right to be heard in opposition envisages, I should think, the protection of the opposing carrier's business interests. Then by subs. 13, on any application under the section the Board shall have regard to "all considerations which appear to it to be relevant", and, in particular, to the effect of two specified conditions.

I do not think this Court has any power to lay down any rule restricting the administrative function and duty vested in the Board by section 35 or precluding the Board from having regard under that section to any consideration which may appear to it to be relevant.

I should answer the question in the negative.

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Kerwin J.

The judgment of Kerwin and Hudson JJ. was delivered by

KERWIN J.—The Board of Transport Commissioners for Canada has stated a case for the opinion of this Court upon a question which in the Board's opinion is a question of law. The question is:

> On an application to the Board under section 35 of *The Transport Act, 1938,* for the approval of an agreed charge between a shipper and competing carriers by rail, is the Board precluded from regarding as relevant considerations the effects which the making of the agreed charge is likely to have on the business and revenues of other carriers?

Before the coming into force of *The Transport Act, 1938,* referred to in this question, there was in existence The Board of Railway Commissioners for Canada. By subsection 1 of section 3 of that Act, the Board of Railway Commissioners was to be known thereafter as The Board of Transport Commissioners for Canada. By subsection 2 of section 3:

> (2) It shall be the duty of the Board to perform the functions vested in the Board by this Act and by the *Railway Act* with the object of co-ordinating and harmonizing the operations of all carriers engaged in transport by railways, ships and aircraft and the Board shall give to this Act and to the *Railway Act* such fair interpretation as will best attain the object aforesaid.

By virtue of section 4, the provisions of section 43 of the *Railway Act* are made applicable to the new Board and it is under the powers conferred upon it thereby that the case is submitted for our opinion.

At the outset it should be emphasized that the Board does not now exercise jurisdiction only over railways. It possesses also a certain jurisdiction over transport by air and transport by water but none over highway transport. We need not concern ourselves with transport by air, which is dealt with in Part III. It may be noted, however, that Part II, "Transport by Water", "shall not apply to the transport of goods in bulk" (subsection 3 of section 12), and that section 35, mentioned in the question, is one of the sections, 35 to 39 inclusive, which appear in Part V under the heading "Agreed Charges". Section 38 provides that the provisions of that Part shall not apply to the transport by water of goods in bulk. The expressions "agreed charge", "carrier", and "goods in bulk" are defined in the interpretation sections as follows:

(*a*) "agreed charge" means a charge agreed upon between a carrier and a shipper as in this Act provided and includes the conditions attached thereto;

(*d*) "carrier" means any person engaged in the transport of goods or passengers for hire or reward to whom this Act applies, and shall include any company which is subject to the *Railway Act;*

(*e*) "goods in bulk" means the following goods laden or freighted in ships, and except as herein otherwise provided, not bundled or enclosed in bags, bales, boxes, cases, casks, crates or any other container;
grain and grain products, including flour and mill feeds in bulk or in sacks,
ores and minerals (crude, screened, sized, refined or concentrated, but not otherwise processed), including ore concentrates in sacks,
sand, stone and gravel,
coal and coke,
liquids,
pulpwood, woodpulp, poles and logs, including pulpwood and woodpulp in bales,
waste paper loaded as full ship's cargo,
iron and steel scrap and pig iron.

Turning now to section 35, a carrier may by virtue of its provisions make such charge or charges for the transport of goods of any shipper, or for the transport of any part of his goods, as may be agreed between the carrier and that shipper. Such agreed charge requires the approval of the Board, which shall not be given if in the opinion of the Board the object to be secured by the making of the agreement can, having regard to all the circumstances, adequately be secured by means of a special or competitive tariff of tolls under the *Railway Act* or *The Transport Act*. There is another proviso, which, however, was complied with in this case, since the railways concerned joined in making the agreed charge, and it need not be considered.

It will be observed that subsection 1 of section 35 commences with the words, "Notwithstanding anything in the *Railway Act,* or in this Act". These words, however, do not have the effect contended for by the Railways, of making entirely inapplicable the provisions of subsection 2 of section 3 quoted above. In my view, they were inserted because, for the first time, Parliament has authorized the making of an agreed charge. The functions of the Transport Board, applying as they do to transport by air and transport by water, are much wider than were those of the Board of Railway Commissioners. While this would be apparent from a reading of the Act as a whole, even if sub-

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section 2 of section 3 had not been included, its insertion, in my view, takes on particular significance when an application for approval of an agreed charge is made to the Board.

Two such applications were made by carriers by rail and were opposed by competing water carriers. The Board refused the applications and in written reasons indicated that the majority of the members of the Board regarded as relevant considerations the effects which the making of the agreed charge was likely to have on the business and revenues of the opposing water carriers.

Subsection 5 of section 35 states:

> (5) On an application to the Board for the approval of an agreed charge:—
>
> (*a*) any shipper who considers that his business will be unjustly discriminated against if the agreed charge is approved and is made by the carrier, or that his business has been unjustly discriminated against as a result of the making of the charge by virtue of a previous approval;
>
> (*b*) any representative body of shippers; and
>
> (*c*) any carrier,
>
> shall, after giving such notice of objection as may be prescribed by the Board, be entitled to be heard in opposition to the application.

By virtue of this clause and clause (*d*) of the interpretation section, any carrier by air or any carrier by water may be heard in opposition to an application for an agreed charge to which carriers by rail are parties. Similarly, under subsection 9 of section 35, where the Board has approved an agreed charge without restriction of time, "any carrier" may apply for withdrawal of the Board's approval. Subsection 13 is important and when it states that the Board shall have regard to all considerations "which appear to it to be relevant", it appears to me that Parliament intended to leave to that body, which is a court of record, and not to any other court, the determination of what is and what is not relevant. The concluding part of the subsection merely indicates two considerations to which the Board must have regard. These considerations do not fall within any definable class so as to exclude others of a different class and, what is more important, they are stated to be relevant only "in particular" and not to the exclusion of other considerations.

It is urged that in view of the provisions of section 36, the Board, on an application under section 35 by carriers

by rail, is precluded from regarding as a revelant consideration the effect which the making of the agreed charge is likely to have on the business and revenues of carriers by water. In the first place, it is to be noted that after an approval has been given under section 35, the complaint to the Minister under section 36 must be by a representative body of carriers, which is a very different thing from the legislative permission to "any" carrier to object in the first instance to the granting of an approval. Furthermore, under section 36, it is only if the Minister is satisfied that a complaint should be investigated in the national interest that he may refer the matter to the Board, and it is only on the same ground that the Board may make an order varying or cancelling the agreed charge complained of, or make such other order as in the circumstances it deems proper.

It is said that the decision in *Great Western Railway Company* v. *Chamber of Shipping of the United Kingdom* (1) is in the opposite sense. There the Railway Rates Tribunal had refused to hear the objectors (the Chamber of Shipping) upon an application by the Railway Company for the consent of the Tribunal to set exceptional rates more than forty per cent. below the standard rates. The objectors appealed to the Court of Appeal. As Lord Justice Romer puts it at page 234:

> The only question to be determined upon this appeal is whether the Rates Tribunal when hearing an application by a railway company for granting an exceptional rate under section 37 (1) of the Railways Act, 1921, are bound to consider the question whether the exceptional rate will prejudice coastal carriers in the sense of placing them under a disadvantage, and will, therefore, be undesirable in the national interest. In my opinion, the Rates Tribunal are not bound to consider that matter when granting an exceptional rate.

That is, the Tribunal had declined to consider the question as relevant and the Court of Appeal decided that it was justified in so doing. Furthermore, what was there in question was a section of the *Railways Act, 1921,* that is an Act dealing with railways alone.

In view of these facts, I fail to see how the decision can be of any assistance to this Court in the present instance. The question should be answered in the negative. There should be no order as to costs.

Question submitted answered in the negative.

(1) (1937) 25 Railway, Canal & Road Traffic Cases 223.

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*Dec. 2, 3.
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*May 4.

RAYMOND VIGNEUX, ARTHUR P. VIGNEUX AND MARIA ANNA CHAUVIN, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF VIGNEUX BROTHERS, AND THE SAID VIGNEUX BROTHERS, AND RAE RESTAURANTS, LIMITED (DEFENDANTS) ..... } APPELLANTS;

AND

CANADIAN PERFORMING RIGHT SOCIETY, LIMITED (PLAINTIFF).. } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Musical work performed on coin-operated gramophone placed in restaurant under arrangement between owner of gramophone and owner of restaurant—Injunction asked by owner of public performing right in the musical work—Copyright Amendment Act, 1931 (Dom., 1931, c. 8) and amendments—Effect or application of subs. 6 (a) of s. 10 B—Copyright Act (1921, c. 24; R.S.C. 1927, c. 32).

Defendants V. Bros. carried on the business of installing in restaurants, etc., and looking after, electrically operated phonographs, with disc records, so arranged that a musical work could be performed by depositing a coin in the machine. They installed such a machine (with records, which were changed from time to time) in the restaurant of defendant R. Co., under arrangement that V. Bros. received $10 per week and, subject to that, the receipts from performances went to R. Co. Plaintiff society owned the public performing right in a musical work "Star Dust", which was performed by said machine in said restaurant, and sought to restrain defendants from public performance thereof.

Under *The Copyright Amendment Act, 1931* (Dom., 1931, c. 8) as amended, a society, etc., carrying on a business such as plaintiff's (dealing in performing rights) must file at the copyright office lists of musical works in current use in respect of which it has the right to grant performing licenses, and file statements of all fees, charges or royalties which it proposes during the next ensuing year to collect, in respect of performance of its works in Canada; and in case of neglect to file such statements, action to enforce any remedy for infringement is forbidden, without written consent of the Minister. After certain proceedings, such statements are considered by the Copyright Appeal Board and, with any alterations made therein by the Board, are certified by it as approved. The statements so approved are to be the fees which the society may sue for or collect in respect of the issue or grant by it of licenses for performance during the ensuing year, and it shall have no right of action for infringement against any person who has tendered or paid the approved fees. By subs. 6 (*a*) of s. 10 B, in respect of public performance by gramophone (in any place other than a theatre which

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

is ordinarily and regularly used for entertainments to which an admission charge is made), no fees, etc., are collectable from the owner or user of the gramophone, but the Board shall, "so far as possible", provide for the collection in advance from gramophone manufacturers of appropriate fees, etc., and shall fix the amount of the same.

Plaintiff had filed a statement of fees, etc., which it proposed to collect for grant of licenses, including license for public performance of "Star Dust", and by the kind of machine in question; but the Board had not, under said subs. 6 (*a*), provided for the collection in advance from gramophone manufacturers of fees, etc., covering such a performance; and defendants had paid no fee, charge or royalty.

Held, per Rinfret, Kerwin and Taschereau JJ. (the majority of the Court): Plaintiff was entitled to an injunction. The absence of provision by the Board for collection from the gramophone manufacturers under said subs. 6 (*a*) did not justify defendants in giving the public performance complained of. Subs. 6 (*a*) forms part of the *Copyright Act* (R.S.C. 1927, c. 32) and stands to be construed in the light of all the provisions of that Act. As no fee, charge or royalty had been paid by or for defendants, they had acquired no right to such performance. It was to no purpose to argue that, though plaintiff had complied with the Act, the Board had not, so far, provided for collection from the gramophone manufacturers. In the circumstances, plaintiff's rights, and remedy by injunction against infringement thereof, under general provisions of the *Copyright Act,* remained unaffected.

A license from a copyright owner permitting the manufacture of phonograph records does not by itself entitle the purchaser of a record from the licensee to use it for the giving of public performances.

Per the Chief Justice and Davis J.: As to public performances coming under said subs. 6 (*a*), it is clear from the statutory provisions that owners or users of gramophones have a statutory license for which no fees, charges or royalties are to be exacted from them; their statutory license is not in any way conditional upon the actual payment of fees prescribed by the Board and payable by gramophone manufacturers. Further, a supposed statutory intention that such owners or users, who are relieved from payment of charges, should be exposed to proceedings by owners of performing rights, and might be obliged, for permission to perform, to pay any charge demanded, would be a result quite incompatible with the policy of the legislation. (It was pointed out that a public performing right is a statutory right resting upon the enactments of the *Copyright Act, 1921,* which in effect came into force in 1924, and with which, and as part of which, are to be read and construed the provisions of *The Copyright Amendment Act, 1931,* and its amendments; and that the legislative adoption of the plan embodied in the latter Act and its amendments is a recognition of the fact that dealers in performing rights, which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, be properly subjected to public regulation). But said subs. 6 (*a*) has no application to performances by means of the instruments supplied by V. Bros. and operated under the terms of the mutual arrangements

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between them and the restaurant keepers. Subs. 6 (*a*) should be construed and applied in the light of the objects which Parliament had in view, which, as disclosed by the legislation itself, do not embrace the protection of those engaged in such a business as that of V. Bros.; and the restaurant keepers stood in the same case with V. Bros. from this point of view. Therefore defendants are liable to pay the statutory charges determined under the Act, independently of subs. 6 (*a*); and cannot be enjoined in respect of such performances if such charges are paid or tendered.

APPEAL by the defendants from the judgment of Maclean J., late President of the Exchequer Court of Canada (1). The defendants Vigneux Brothers carried on the business of installing in restaurants, etc., and looking after, electrically operated phonographs, with disc records, so arranged that one, two or five musical compositions could be performed by deposit of a coin (five cents, ten cents, or twenty-five cents) in the machine. They installed such a machine (with disc records, which were changed from time to time) in the restaurant of the defendant Rae Restaurants, Ltd., under the arrangement that Vigneux Brothers received $10 per week and, subject to that, the receipts from performances went to Rae Restaurants, Ltd. The Plaintiff owned the public performing right in a musical work "Star Dust", which was performed by said machine in said restaurant, and claimed an injunction restraining the defenants from public performance thereof. Maclean J. held that the plaintiff was entitled to the injunction claimed. The formal judgment in the Exchequer Court (which followed the wording of the claim in the statement of claim) ordered and adjudged

that the defendants and each of them, their and each of their servants and agents, are hereby restrained from publicly performing or authorizing the public performance of the musical composition known as "Star Dust" * * * and from installing or permitting the installation at any place of a device adapted publicly to perform such composition.

Leave to appeal to the Supreme Court of Canada was granted to the defendants by a Judge of this Court.

Samuel Rogers K.C. and *Walter M. Roland* for the appellants.

O. M. Biggar K.C. and *Christopher Robinson* for the respondent.

(1) [1942] Ex. C.R. 129; 2 Fox Pat. C. 179; [1942] 3 D.L.R. 449.

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The judgment of the Chief Justice and Davis J. was delivered by

THE CHIEF JUSTICE.—The *Copyright Act* was enacted in the year 1921 and it may almost be described as having given legal effect to a code of copyright law. The Act provides that rights existing on the 1st of July, 1924, of the kinds specified in the first column of the first Schedule of the Act, shall be converted into the rights defined oppositely in the second column of the Schedule. The Schedule is in these words:—

FIRST SCHEDULE

Existing Rights

Existing Right	Substituted Right
(*a*) *In the case of Works other than Dramatic and Musical Works.*	
Copyright.	Copyright as defined by this Act.
(*b*) *In the case of Musical and Dramatic Works.*	
Both copyright and performing right..	Copyright as defined by this Act.
Copyright, but not performing right...	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right, but not copyright....	The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act.

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings:—

"Copyright" in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work;

"Performing right" in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

I have reproduced the Schedule because I think it is important to realize that the rights included in copyright are rights dependent upon statutory enactments which in effect came into force in the year 1924. The right with which we are more particularly concerned is that which is given by section 3, "the sole right * * * to perform * * * the work or any substantial part thereof in public." At common law the author of a musical or dramatic work had the right to prevent its performance

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in public so long as it remained unpublished, but the right disappeared upon publication. This, of course, was unfair, but the Statute of Anne did not help the author and it was not until about one hundred years ago that the authors of musical works obtained some statutory relief. By the English *Copyright Act* of 1911 the law was put upon its present footing and the sole right of public performance was vested in copyright owners generally. The right is not limited to the cases of musical and dramatic works; in this respect the Canadian Act of 1921 follows the English Act. The right is a statutory right resting upon the enactments of the statute of 1921, which in effect came into force in 1924 and, as we shall see, the statutory provisions, which it is our duty now to consider, are provisions which must be read and construed as part of the enactments of the *Copyright Act* of 1921.

Seven years after the Act of 1921 came into force the legislature realized that in respect of performing rights a radical change in the statute was necessary. Societies, associations and companies had become active in the business of acquiring such rights, and the respondents in this case admittedly have more or less successfully endeavoured to get control of the public performing rights in the vast majority of popular musical and dramatico-musical compositions which are commonly performed in public. The legislature evidently became aware of the necessity of regulating the exercise of the power acquired by such societies (I shall refer to them as dealers in performing rights) to control the public performance of such musical and dramatico-musical works. Legislation was enacted first in 1931, which was subsequently amended in 1936 and in 1938. It is necessary to call attention to section 3 of the statute of 1938:—

> *The Copyright Amendment Act, 1931,* as amended by chapter twenty-eight of the statutes of 1936 and by this Act, shall be read and construed with, and as part of, the *Copyright Act.*

The plan which the legislature adopted was this: Associations (dealers in performing rights, that is to say) are to file at the copyright office lists of all dramatico-musical and musical works in current use in respect of which the dealer has the right to grant licenses or to charge fees for performances, and to file statements on or before the first of November in each year of all charges or royalties which

such dealer proposed during the next ensuing calendar year to collect in compensation for the issue or grant of licenses in respect of the performance of such works.

There was set up a Copyright Appeal Board whose duty it is to consider these proposed charges and to make such alterations in the statements as may seem just and transmit the statements so altered or revised, or unaltered, as the case may be, to the Minister certified as approved statements. The statements so certified are published in the *Canada Gazette;* and the fees, charges or royalties so certified are the fees, charges or royalties which the performing rights dealer may collect in respect of the issue of licenses during the ensuing calendar year. The Act provides that no dealer shall have any right of action or have any right to enforce any civil or summary remedy for the infringement of the performing rights in any of its works against any person who has tendered or paid to such dealer the fees, charges or royalties that have been approved.

Under this plan the dealer in performing rights has his sole right to perform any particular musical composition in public qualified by a statutory license vested in everybody who pays or tenders to the dealer a fee, charge or royalty which has been fixed by the Copyright Appeal Board and notified in the *Canada Gazette.* That seems like a revolutionary change, but it is evident that the legislature realized in 1931 that this business in which the dealers were engaged is a business affected with a public interest; and it was felt to be unfair and unjust that these dealers should possess the power so to control such performing rights as to enable them to exact from people purchasing gramophone records and sheets of music and radio receiving sets such tolls as it might please them to exact. It is of the first importance, in my opinion, to take notice of this recognition by the legislature of the fact that these dealers in performing rights, which rights are the creature of statute, are engaged in a trade which is affected with a public interest and may, therefore, conformably to a universally accepted canon, be properly subjected to public regulation. It is not out of place here to call attention to an observation of Lord Justice Lindley in *Hanfstaengl* v. *Empire Palace* (1):—

(1) [1894] 3 Ch. 109, at 128.

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> Copyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is itself right and just, and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic. The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion.

This passage expresses the *raison d'être* of the enactments under consideration.

It was considered, however, that under the plan as originally devised, the purchasers of gramophone records and the possessors of wireless receiving sets were still placed in a position in which they ought not to be placed. The decisions as to the meaning of "public performance" had made it unsafe for the owner of a gramophone or of gramophone records who carried on, for example, a tea shop, to use the gramophone for playing the records in her shop, or to permit her customers to use it. She might be entitled to do so, or she might not. The answer to the question would depend upon a variety of considerations, whether, for example, the gramophone manufacturer possessed authority to authorize the public performance of the records, whether she had derived such authority through the purchase of records, and so on; and these considerations, of course, she would be quite incapable herself of passing upon. The legislature, no doubt, thought that a law which made it necessary for the purchasers of gramophone records to consult a lawyer to ascertain whether or not they could safely play their records in such circumstances, was not satisfactory and was not in harmony with the general spirit of the copyright law, as explained by Lindley L.J.; and, accordingly, special provision was made dealing with the owners of gramophones and wireless receiving sets and the use of these instruments in places "other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made". It was declared (subsection 6 (*a*)) explicitly that such persons should not be called upon to pay any fee, charge or royalty in such circumstances and the duty was imposed upon the Copyright Appeal Board to make provision for fees, charges

and royalties appropriate to this situation. I confess I find no difficulty whatever in reading the language of this enactment. It declares in unqualified terms that no fee, charge or royalty is to be exacted from the owner of a gramophone record or radio receiving set in the circumstances specified, and compensation is provided in the duty imposed upon the Board to make such provision as appears to be appropriate and possible in the circumstances.

It is plain that neither subsection 3 of section 10 nor subsection 9 of section 10B has any application to the owners of receiving sets, or the owners of gramophone records, making use of them in the conditions contemplated by subsection 6 (*a*). As no fee, charge or royalty is to be collectable from them, it follows by necessary implication that they are excluded from the lists required by subsection 2 of section 10 and that generally the provisions of sections 10 and 10B (except subsection 6 (*a*) itself) have no application to them. The Copyright Appeal Board has no authority to approve any fees, charges or royalties to be exacted from them in cases where the rule of the subsection prevails.

The result is that in respect of such fees, charges and royalties which, apart from subsection 6 (*a*), would be exigible from the owners of records and receiving sets, the dealer gets the benefit of the provisions of subsection 6 (*a*) which invests the Copyright Appeal Board with the authority and the duty to make provision, so far as may be possible, for substituted charges which are to be collected from the radio broadcasting stations or gramophone manufacturers and which are to be appropriate to the conditions created by the enactments of subsection 6 (*a*); these conditions are, it is perhaps needless to repeat, that in respect of the places defined no fees, charges or royalties shall be collectable from the owner or user of a radio receiving set or gramophone in respect of a public performance by means of such an instrument.

A clear duty is imposed upon the Copyright Appeal Board. It is discretionary in the sense that the Board must determine how far it is possible to make provision for the collection in advance from broadcasting stations and gramophone manufacturers of charges which ought to be paid in respect of such public performances. If it is not possible to make such provision, that is the end of the matter. But there is no discretion vested in the Board

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in respect of the exaction of fees, charges or royalties from the owners of gramophones or receiving sets; that is settled by the statute which in the plainest terms forbids it. There is no discretion vested in the Board as to the obligations of the broadcasting stations and the gramophone manufacturers. Their obligation is to pay the fees, charges and royalties for which the Board finds it possible to make provision. As regards the owners of the performing rights, the benefit they receive from the statute is their right to receive and to be paid by the broadcasting stations and gramophone manufacturers such fees, charges and royalties as the Board finds it possible to provide for. This right is given to them in consideration of the statutory license for public performance by these instruments to the owners and users of gramophones and radio receiving sets in the conditions defined by subsection 6 (*a*) which is implicit in these provisions.

Subsection 6 (*a*) imposes no obligation, either expressly or by implication, upon these licensees in respect of compensation to the owners of the performing rights, and I think it is not contemplated by these enactments that their statutory licenses shall in any way be conditional upon the actual payment of fees prescribed by the Board and payable by gramophone manufacturers or broadcasting stations.

In the judgment appealed from, the view is expressed that the statutory rights of the owner of the performing rights can only be taken away by expressed words; but the legislation of 1931, 1936 and 1938 must be read as part of the *Copyright Act*, as we have seen. The public performing rights of the copyright owner are, again as we have seen, the creature of statute and his rights are such as appear from an examination of the legislation as a whole, of the years 1921, 1931, 1936 and 1938, all of which must be read and construed as the enactment of a single statute.

It is impossible, I think, to suppose an intention on the part of the legislature that these two classes of persons, who are relieved from the payment of charges, should be exposed to the unrestrained mercies of the dealers in the circumstances specified. It was to protect people from these mercies that the plan was originally conceived and designed. Consider their position under the judgment

appealed from. The owner of a receiving set may use his receiving set for broadcasting music in a public hall, or theatre, where a charge for admission is usually made and the fee he is obliged to pay is fixed under the statute; but if he attempts to use it in the circumstances specified in subsection 6 (*a*), if he attempts to use it in a small tea room, he is exposed to proceedings and may be obliged to pay any charge the dealers may demand. This is a result quite incompatible with the policy of the legislation.

I am, therefore, quite unable to agree with the learned President of the Exchequer Court in respect of one of the grounds of his judgment. There remains, however, another and distinct ground upon which he gave judgment for the respondents, which has to be considered: that is, whether or not these appellants, carrying on, as the learned President has said, a business of publicly performing musical compositions and dramatico-musical compositions by means of gramophones and under arrangements in the nature of a partnership with restaurant keepers, are within the protection of subsection 6 (*a*). This is a point which, after the most careful consideration, I have come to the conclusion must be decided in the sense in which the learned President has passed upon it. Subsection 6 (*a*) ought to be construed and applied in the light of the object the legislature had in view. I do not think the objects of the legislation, as disclosed by the legislation itself, embrace the protection of people engaged in the business in which the appellants are engaged. The restaurant keepers stand, I think, in the same case with Vigneux Brothers from this point of view. This is what the learned President says:—

> The question then arises, and Mr. Biggar raised and discussed it, does s.s. 6 (*a*) apply to the facts developed in this case and was it intended that it should? Was s.s. 6 (*a*) designed to protect persons, such as the defendants in this case, from an action for an injunction restraining them from the public performance of the plaintiff's musical works, in the manner and by the means I have described without being duly licensed therefor? That is all the plaintiff seeks by this action. This is not an action for compensation or damages for infringement of copyright, or for the collection of fees or royalties, for the use of the plaintiff's copyright in musical works; it is simply a question as to whether or not the plaintiff in the facts in this case, and the statute, is entitled to an injunction restraining the defendants from infringing its copyright in a certain musical work for profit, without license or authorization. That seems to me to be the neat point for decision, and when it is stated it does not seem to be one that permits of any extended discussion. The conclusion which I have reached is that the defendants do not fall

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within the class protected by s.s. 6 (*a*) of s. 10B. They are not I think the "owner or user" of a gramophone giving public performances in the sense contemplated by that statutory provision. They are virtually partners in a distinct class of business, in a venture of publicly performing musical works purely for profit, for a fee in the form of a coin or coins deposited in the gramophone by the person desiring the performance of certain musical works, and presumably for the gratification of that person. The whole scheme is entirely one for profit making, something apart from the restaurant business itself, or the ownership of the gramophone, one contributes the gramophone and the records and services the same, and the other contributes the premises, and they invite such of the public as desire the performance of musical works to deposit a certain coin in the gramophone, and this automatically causes the gramophone to perform musical works for the person who has paid a fee in the form of coins of a certain denomination.

I agree, I repeat, with this conclusion of the learned President in which he accepted the argument advanced by counsel for the respondents. Subsection 6 (*a*) having no application to these performances by the instruments supplied by the appellants, Vigneux Brothers, under their arrangements with the restaurant keepers, the appellants are under an obligation to pay the fees fixed in accordance with the provisions of the statute other than subsection 6 (*a*); and, so long as such fees are paid or tendered, the appellants are not liable to be enjoined. The precise form of the order should be settled after counsel have spoken to the point.

The respondents should have the costs of the appeal.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

RINFRET J.—Under the firm name of Vigneux Brothers, the appellants Raymond Vigneux, Arthur P. Vigneux and Maria Anna Chauvin carry on the business of distributing and servicing electrically operated phonographs of the kind popularly known as "juke-boxes". These juke-boxes are installed in restaurants and like places of popular resort. They contain phonograph disc records so arranged that one or more musical compositions, up to five, can be selected for performance by anyone who deposits a coin in the machine, one record being performed on the deposit of five cents, and two or five on the deposit of ten cents or twenty-five cents.

Different arrangements are made by Vigneux Brothers with the restaurant keepers, or with operators of places

of public resort, in which these juke-boxes are installed. In some cases, Vigneux Brothers and the operator each receive a pre-determined share of the amount of money found from time to time in the box as a result of the deposit of the money made in it. In others, the operator agrees to pay a fixed sum to Vigneux Brothers, irrespective of the amount found deposited; subject to Vigneux Brothers' claim, the operator takes the whole of the amount found in the box.

The latter was the form of arrangement in effect during 1941 between Vigneux Brothers and their co-appellant, Rae Restaurants Limited, which operated a restaurant known as Rae's Wonder Bar on Lakeside Boulevard, in the city of Toronto.

Whichever of the two alternative arrangements may be in force, Vigneux Brothers supplied, not only the box, but the records required for its use. The boxes are locked, and only Vigneux Brothers' employees have keys to them. The employees are sent around weekly from box to box; they open the box; they reverse some of the records in it; they substitute new ones for others, no doubt using their discretion as to this, but deferring probably to suggestions of the operator of the place where the box is installed. The money found in the box is counted and a settlement is then and there made with the operator of the place.

In the case of the box operated at Rae's Wonder Bar, the weekly receipts from the box varied between $36 and $50. Of this, Rae's restaurants have agreed to pay $10 to Vigneux Brothers; and they were entitled to retain the balance, which was immediately handed to them by Vigneux Brothers' employees.

For the purpose of the present appeal, it is understood that we may assume that the respondent Canadian Performing Right Society Limited is the assignee of the copyright in a musical composition known as "Star Dust". There was some question raised before us, as well as before the Exchequer Court, as to whether the respondent had established title to the performing right and the copyright in the selection "Star Dust"; but, at bar, counsel for the appellants stated that they wanted the present case to be treated as a test case and that the question of title should be disregarded.

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Rinfret J.

Evidence was given that, between eleven o'clock p.m. and midnight, on May 29th, 1941, an employee of the respondent, accompanied by his brother, went to Rae's Wonder Bar, that the restaurant had accommodation for about 120 persons, that it was a place of public resort, that about 25 patrons were present at the time; and that, as a result of the deposit of a coin in the juke-box by one of these patrons, the composition "Star Dust" was performed, the performance lasting for about 2½ minutes. It was upon this performance that the action was founded.

There is no contest either as to the fact of this performance, and we are to assume that the respondent had, in general, an exclusive right to permit the public performance of the composition.

The respondent claimed an injunction restraining the defendants and each of them, their servants and agents, from publicly performing or authorizing the public performance of the musical composition aforesaid, and from installing or permitting the installation in any place of a device for performing such composition.

The two defences relied upon are: (*a*) that by means of these machines, the appellants are free to perform copyright compositions as they please, by virtue of a provision inserted by sec. 4, ch. 27, of the Statutes of Canada, 1938, in sec. 10B of *The Copyright Amendment Act, 1931,* as amended by section 2 of ch. 28 of the Statutes of Canada of 1936; and (*b*) that a license granted by Mills Music Inc. to the Victor Talking Machine Company to make records such as that which was used for the performance in question conferred upon all purchasers of these records a right to give such public performance of the record compositions as they saw fit.

The learned President of the Exchequer Court arrived at the conclusion that the venture in which the appellants were engaged was something entirely contrary to the whole purpose and spirit of the *Copyright Act;* that section 10B of the Act does not purport to take from the owner of a musical work the right to restrain infringement of his copyright where no license has been granted, or where no definite provision has been made for compensation to the owner; and that consequently the appellants should be restrained, as prayed for.

There are, therefore, two questions for the decision of this Court:—

(*a*) Whether a license from the copyright owner permitting the manufacture of phonograph records entitles the purchaser of a record from a licensee to use it for the giving of public performances;

(*b*) Whether section 10B of *The Copyright Amendment Act 1931,* as amended, justifies the appellants, under the circumstances, in giving such public performances as that in question.

Dealing first with question (*a*), section 19 (1) of the *Copyright Act* makes special provision for the making of " records, perforated rolls, or other contrivances, by means of which sounds may be reproduced and by means of which the work may be mechanically performed ".

Under subsection 2 of section 19, the royalty to be paid is 2 cents for each playing surface of each such record and 2 cents for each such perforated roll or other contrivance.

The authors and composers of the selection " Star Dust " assigned the copyright thereof to Mills Music Inc., which is registered as the first owner of the copyright under the provisions of the *Copyright Act*. Mills Music Inc. granted to Victor Talking Machine Company of Canada the right and license to mechanically reproduce the said copyrighted musical work and manufacture and sell talking machine records derived therefrom. It was under this license that the record in question was made as one of the 100,000 a year in respect of which royalty at the rate of 2 cents was paid. The legend on the record in question indicated that it was " not licensed for radio broadcast ". There was nothing on the record purporting to confer any right to give public performances by means of it, and even if there had been, this would not bind the copyright owner.

Nothing in section 19 of the Act (which deals specifically with these records) or, indeed, in any other part of the Act, can be invoked by the appellants to justify their contention that the license granted the Victor Talking Machine Company to make the record " Star Dust " conferred upon them, as purchasers thereof, a right to give a public performance of the recorded composition, except if such right can be found in section 10B of the Act as it stood after the amendments of 1938.

The decision of the case, therefore, resolves itself into an interpretation of section 10B.

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By that section, the Copyright Appeal Board is constituted. The Board is given the power to make certain rules and provisions. The Minister of the Crown named by the Governor in Council to administer the Act refers to the Board the statements of proposed fees, charges or royalties which each society, association or company carrying on, in Canada, the business of acquiring copyright of musical works or performing rights therein must file with the Minister at the Copyright Office.

The Board is to consider these statements and the objections, if any, received in respect thereto; and, upon the conclusion of its consideration, it is to make such alteration in the statements as it may think fit, and then transmit the statements, revised or unchanged, to the Minister, certified as the approved statements. The latter are then published in the *Canada Gazette;* and the fees, charges or royalties which the society, association or company concerned may lawfully sue for or collect in respect of the issue or grant by it of licenses for the performance of its works in Canada during the ensuing calendar year are the fees, charges or royalties which have thus been approved and certified. Subsection 9 of section 10B enacts that no such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been approved as aforesaid.

But special consideration must be given to the effect of subsection 6 (*a*) of section 10B, upon which the appellants rely.

It reads thus:—

6. (*a*) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same. In so doing the Board shall take into account all expenses of collection and other outlays, if any, saved or

saveable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.

It appears that the respondent has complied with the requirement of filing with the Minister, at the Copyright Office, a statement of the fees, charges or royalties which it proposed to collect in compensation for the issue or grant of a license in respect particularly of the performance of "Star Dust" in Canada and of the juke-box in question; but that, so far, the Copyright Appeal Board has not exercised its power, given to it by subsection 6 (*a*), of providing for the collection in advance, from the gramophone manufacturers, of fees, charges and royalties covering the public performance of that composition in the appellants' juke-box.

Accordingly, the appellants could pay, and have paid, no such fee, charge or royalty.

In my opinion, the absence of the Board's ruling and approval in the premises cannot be invoked by the appellants as a justification for giving such public performance as that in question.

Under the *Copyright Act*, "musical work" means any combination of melody and harmony or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced; "performance" means any acoustic representation of a work or any visual representation of any dramatic action in a work, including a representation made by means of any mechanical instrument or by radio communication; and "plate" includes, amongst other things, any matrix or other appliance by which records, perforated rolls, or other contrivances for the acoustic representation of the work are or are intended to be made (section 2).

For the purpose of the Act (section 3), "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform * * * the work or any substantial part thereof in public. In particular, in the case of a musical work, "copyright" includes the right to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered; to communicate such work by radio communication; "and to authorize any such acts as aforesaid".

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Under section 17 of the Act, copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by the Act conferred on the owner of the copyright.

There are exceptions to that general rule, but they are not material in the premises.

Section 20 of the Act expressly defines the remedies for infringement of the copyright, as the grant of an injunction, damages, accounts, etc.

Subsection 6 (*a*) of section 10B forms part of the *Copyright Act* and stands to be construed in the light of all the provisions of the Act.

The copyright holder is under no obligation to allow the public performance of any work or to grant a license for that purpose. He has all the rights of the ordinary owner; and, subject to any special provision of the *Copyright Act* expressly stating otherwise, he may protect his ownership, or any infringement thereof, by means of an injunction.

This being the case, the meaning of the sections of the *Copyright Act* to which reference has already been made is that, so as to prevent the owner of the copyright of a work to withhold the performance in public of that work, a society, association or company carrying on in Canada the business of acquiring copyright of musical works or performing rights therein is compelled to file at the Copyright Office a statement of the fees, charges or royalties which it proposes to ask in compensation for the issue or grant of licenses in respect of the performance of its work.

When once these fees, charges or royalties have been approved and certified by the Copyright Appeal Board, any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been aproved is entitled publicly to perform the musical work thus made the subject of the fee, charge or royalty; and the society, association or company holding the copyright is deprived of any right of action or any right to enforce any civil or summary remedy on the ground of infringement of the performing right. This is equivalent to saying that whoever pays the approved fee, charge or royalty acquires the right to perform and, thereby, makes no infringement of the copyright or the performing right.

In the case, as here, of the public performance by means of a gramophone in a restaurant, subsection 6 (*a*) enacts that the fees, charges or royalties to which the society, association or company holding the copyright is entitled shall not be collectable from the owner or user of the gramophone (or, in the present instance, from Vigneux Brothers, the owners of the gramophone or juke-box, and from Rae Restaurants Ltd., the user thereof); but such fees, charges or royalties are collectable in advance from the gramophone manufacturers. When once those fees, charges or royalties have been paid by the gramophone manufacturers, the owner or user of the gramophone may publicly perform the musical work; and no fees, charges or royalties shall be collectable from such owner or user of the gramophone.

The rights, however, of the copyright holder remain unaffected in so far as they are sought to be enforced against a person who has not paid the appropriate fee (or, in this case, where the appropriate fee has not been paid by the gramophone manufacturer), provided, at least, that the conditions imposed by section 10 (2 and 3) have been complied with; and that is to say: that the society has filed at the Copyright Office its statement of fees. In the circumstances, the respondent has filed such statement; and it is to no purpose to argue that, although the respondent has complied with the necessary requirements of the Act, the Copyright Appeal Board has not, so far, provided for the collection in advance from the gramophone manufacturers.

The fact is that the respondent has complied with the Act; that no fee, charge or royalty has been paid by the appellants or for them; that the appellants, therefore, have not acquired the performing right of which the respondent is the sole owner; and there is no reason why he should not, in the present case, have asked for an injunction against infringement. Such a right could not have been taken away except by express language, which is not to be found in the legislation invoked by the appellants, and which, on the contrary, in my view, is really implied in the sections of the *Copyright Act* which have been referred to.

I think, however, that the formal order of the learned President should be modified by limiting the injunction

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to the public performance, or the authorization of the public performance of the musical composition known as "Star Dust" in the statement of claim referred to, copyright of which was registered on the 12th November, 1934, as Number 6/32087; and there should be no injunction restraining the installation itself of the gramophones of Vigneux Brothers, which, of course, may be used for the performance of other musical works in respect of which can be raised no such objections as exist here.

Subject to the above modification, the appeal should be dismissed with costs.

Appeal dismissed with costs, subject to modification of the formal order in the Court below.

Solicitors for the appellants: *Rogers & Rowland.*

Solicitors for the respondent: *Smart & Biggar.*

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*Feb. 26.
*Mar. 1.
*May 4.

W. G. DEUTCH AND SARAH DEUTCH (DEFENDANTS) ..... } APPELLANTS;

AND

JOHN ALEXANDER MARTIN (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Damages—Amount—Personal injuries—Jury's award—Unreasonable amount—Mistaken view of the case—Case as put to the jury—Consideration of verdict by appellate court—New trial directed as to amount.

The action was for damages for injuries to plaintiff caused by his being struck by an automobile owned by one defendant and driven by the other defendant. At trial, upon findings of a special jury, judgment was given for plaintiff for $165,000; which was affirmed by the Court of Appeal for Ontario. Defendants appealed.

Held: There should be a new trial, directed only to the amount of damages.

Per Rinfret, Kerwin and Taschereau JJ.: Plaintiff occupied a unique position in his business and was particularly helpful in dealing with workmen. He suffered greatly from his injuries and will have a permanent disability. But he was not totally incapacitated from exercising his calling, including the use of those special qualities that made him so valuable in a factory. A jury appreciating the evidence could not reasonably have awarded him $165,000, or, to use the words in *Tolley* v. *J. S. Fry & Sons Ltd.*, [1931] A.C. 333, at 341, "the jury took a biased or mistaken view of the whole case".

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

When an appellate court is considering whether a verdict should be set aside on the ground that the damages are excessive (there being no error in law), it is not sufficient, for setting it aside, that the appellate court would not have arrived at the same amount; its rule of conduct is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence; this is the rule in contract cases (*Mechanical and General Inventions Co., Ltd.* v. *Austin*, [1935] A.C. 346, at 378), and the same rule applies in cases of tort.

Per Davis J.: There must be a very plain case of error to induce an appellate court to interfere with the amount of compensation awarded by a jury in a case of personal injuries, and particularly so when a first appellate court has declined to interfere. But in the present case, though plaintiff's injuries were very serious and he was entitled to substantial damages, the amount awarded was so unusually large that one would naturally examine the record with great care, not only to see if there was some justification for it, but to see if the case was put fairly to the jury on the whole of the evidence. Two errors stood out very strikingly: (1) The case was in effect put to the jury as if plaintiff were such a complete physical wreck as a result of the accident that his earning capacity had gone forever, and, on the evidence taken as a whole, the case should not have so gone to the jury. (2) The case went to the jury on the basis (and on which it was plain that they arrived at so large an amount) that the amount of the financial success of a particular business venture of plaintiff, which extended over a period of only a few years, might properly be treated as a measure for estimating the annual amount which might reasonably be contemplated, but for his injuries, to be his future earnings; and this method of calculating loss of probable future earnings was not, on the evidence, justified.

APPEAL by the defendants from the judgment of the Court of Appeal for Ontario (1) which (Henderson J.A. dissenting in part) dismissed the defendants' appeal from the judgment of Chevrier J., who, upon the findings of a special jury, gave judgment for the plaintiff for $165,000 damages by reason of personal injuries to the plaintiff caused by his being struck by an automobile owned by one defendant and driven by the other defendant. The question on which Henderson J.A. dissented in the Court of Appeal was as to the amount of damages awarded; and it is also with that question that this Court is mainly concerned in the present judgment.

D. L. McCarthy K.C. and *P. E. F. Smily K.C.* for the appellants.

T. N. Phelan K.C. and *B. O'Brien* for the respondent.

THE CHIEF JUSTICE.—I concur in the judgment granting a new trial.

(1) [1942] O.W.N. 583; [1942] 4 D.L.R. 529.

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DEUTCH v. MARTIN.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

KERWIN J.—The respondent was struck by a motor car owned by the appellant W. G. Deutch and driven by the appellant Sarah Deutch, on a highway in the Province of Ontario. In an action brought to recover damages for the injuries sustained thereby, the appellants did not satisfy the jury that the driver of the motor car was not guilty of any negligence which caused or contributed to the accident, and the respondent's damages were assessed at $165,000. The Court of Appeal declined to interfere, with Mr. Justice Henderson dissenting in part, as he was of opinion that there should be a new assessment of damages.

There can be no real dispute as to the responsibility of the appellants and I can find no substance in the objections suggested, rather than argued, to the charge of the trial judge, even if such objections were open to the appellants in this Court. The only question is whether, the charge being unimpeachable, the finding of the jury as to the amount of damages can stand. It is not, of course, sufficient that an appellate court would not have arrived at the same amount. In contract cases, where there is no error in law, the rule of conduct for the appellate court, when considering whether a verdict should be set aside on the ground that the damages are excessive, is as nearly as possible the same as where the court is asked to set aside a verdict on the ground that it is against the weight of evidence (*per* Lord Wright in *Mechanical and General Inventions Co. Ltd. and Lehwess* v. *Austin et al.* (1), referring to *Praed* v. *Graham* (2). The same rule applies in cases of tort.

The respondent occupies a unique position in his business and is particularly helpful in dealing with workmen. He undoubtedly suffered greatly from the injuries he sustained and will have a permanent disability; but he is not totally incapacitated from exercising his calling, including the use of those special qualities that make him so valuable in a factory. However, I have come to the conclusion that a jury appreciating the evidence could not reasonably have awarded him the sum of $165,000, or, to use the words of Viscount Hailsham in *Tolley* v. *J. S. Fry*

(1) [1935] A.C. 346, at 378. (2) (1889) 24 Q.B.D. 53, at 55.

and Sons Ltd. (1), "that the jury took a biased or mistaken view of the whole case".

There should be a new trial directed only to the amount of damages. As liability was disputed at the outset, the respondent should have his costs of the action down to and including the trial. The appellants are entitled to tax their costs of the appeals to the Court of Appeal and to this Court and to deduct the same from whatever sum may ultimately be awarded the respondent. The costs of the new assessment of damages should be in the discretion of the presiding judge.

DAVIS J.—There must be a very plain case of error to induce an appellate court to interfere with the amount of compensation awarded by a jury in a case of personal injuries, and particularly so when a first appellate court has declined to interfere. But the amount awarded in this case, $165,000, is such an unusually large amount that one naturally examines the record with great care, not only to see if there was some justification for such an amount, but to see if the case was put fairly to the jury on the whole of the evidence. Two errors stand out very strikingly to my mind in this case. In the first place, the case was in effect put to the jury as if the injured man, the plaintiff, were such a complete physical wreck as a result of the accident that his earning capacity was entirely cut off for the rest of his life. He was a man of about fifty-one years of age at the time of the accident. No one denies that the injuries to his legs are very serious and that he is entitled to substantial damages. But on the evidence taken as a whole the case should not have gone to the jury as if on account of the injuries to his legs he had become a physical wreck, with any earning capacity gone forever. The second error as I see it was that the case went to the jury —and I think it is plain that it was on this basis that the jury arrived at the large amount they did—on the basis that the amount of the financial success of a particular business venture of the plaintiff which extended over a period of only a few years might properly be treated as a measure for estimating the annual amount which might reasonably be contemplated, but for his injuries, to be his future earnings. The evidence does not justify this method of calculating loss of probable future earnings.

(1) [1931] A.C. 333, at 341.

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I should allow the appeal and direct a new trial limited to the issue of damages. The respondent is entitled to his costs of the action down to and including the first trial. The costs of the appellants in the Court of Appeal and in this Court should be deducted from the amount of damages ultimately awarded the respondent. The costs of the new trial should be in the discretion of the trial judge.

Appeal allowed and new trial ordered, but limited to the issue of damages.

Solicitors for the appellants: *Smily, Shaver, Adams, DeRoche & Fraser.*

Solicitors for the respondent: *Phelan, Richardson, O'Brien & Phelan.*

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*Feb. 8, 9.
*May 17.

THE PROVINCIAL TREASURER FOR THE PROVINCE OF MANITOBA (PETITIONER) ..... APPELLANT;

AND

THE MINISTER OF FINANCE FOR CANADA (RESPONDENT) ..... RESPONDENT.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF MANITOBA (PETITIONER) ..... APPELLANT;

AND

THE MINISTER OF FINANCE FOR CANADA AND THE IMPERIAL CANADIAN TRUST COMPANY (RESPONDENTS) ..... RESPONDENTS.

AND

THE ATTORNEY-GENERAL OF CANADA (INTERVENANT) .....

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Companies—Bankruptcy—Constitutional law—Conflict between federal and provincial statutes—Trust agreement between trust company and loan company—Undertaking by the former to pay claims of the latter's depositors—Moneys left unclaimed in hands of trust company

PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

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PROVINCIAL TREASURER OF MANITOBA v. MINISTER OF FINANCE FOR CANADA. ATTORNEY-GENERAL OF MANITOBA. v. MINISTER OF FINANCE FOR CANADA AND ATTORNEY-GENERAL OF CANADA.

—Winding-up of trust company—Whether moneys are property of Dominion as unclaimed dividends, or of the province as bona vacantia or under Vacant Property Act—Moneys held by liquidator as trustee for depositors—Winding-up Act R.S.C. 1927, c. 213, sections 139 and 140—Vacant Property Act, Man. 1940, c. 57.

The Imperial Canadian Trust Company and the Great West Permanent Loan Company, both having charter power to receive moneys on deposit, were closely associated in management. In 1924, the Loan Company, having decided to discontinue its deposit business, entered into an agreement with the Trust Company whereby the latter took over the deposits of the former on terms set out in the agreement. The amount of deposits so turned over was $124,249.16, and the Loan Company delivered to the Trust Company securities aggregating that amount in estimated value. The Trust Company proceeded from time to time to dispose of these trust assets and to pay depositors and, on December 27th, 1927, had paid off $105,968.87, leaving an unpaid balance of $18,280.29. On that same date, the Trust Company was ordered to be wound up under the *Winding-up Act* and the Montreal Trust Company was appointed as liquidator. In August, 1929, an immovable property, the only remaining security still undisposed of, was sold by the liquidator for $30,336.65 and the liquidator "set aside and earmarked", in May, 1930, the above sum of $18,280.29. The liquidator paid out of that sum $8,435.89 to depositors who had filed claims pursuant to an order made by the Master in Chambers, leaving a balance of $9,844.40. The Provincial Treasurer of Manitoba, by an application filed in December, 1937, claimed that sum as *bona vacantia*, and this is the subject-matter of the first appeal. Then, in April, 1940, the Manitoba legislature passed an Act called the *Vacant Property Act*, and, in July, 1940, the Attorney-General for Manitoba claimed the same moneys under the provisions of that Act, and this is the subject-matter of the second appeal. The Minister of Finance for Canada contended in both cases that the moneys were the property of the Crown in right of the Dominion as unclaimed dividends under sections 139 and 140 of the *Winding-up Act*. The appellate court held that the Dominion had jurisdiction over these moneys as part of its jurisdiction over bankruptcy and that its legislation should prevail.

Held, reversing the judgments appealed from (48 Man. R. 45 and [1942] 1 W.W.R. 65) that the first appeal should be allowed in so far as the judgment *a quo* directed the moneys in question to be paid to the Minister of Finance under the provisions of sections 139 and 140 of the *Winding-up Act;* and that the second appeal should also be allowed and that it be directed that the moneys be paid to the Provincial Treasurer for Manitoba under the provisions of the *Vacant Property Act*.

Held that such fund was held by the liquidator in order to fulfil the trust agreement entered into in 1924 by the Trust Company and the Loan Company, and can be treated in no other way. Accordingly, sections 139 and 140 of the *Winding-up Act* can have no application These moneys were held by the liquidator as trustees for the individual depositors and not for the trust estate or anybody else.

Held that, as to the first action, the moneys in question cannot be treated as *bona vacantia:* they may have a discoverable owner, the possi-

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bility cannot be excluded that there may be many depositors still alive who have merely forgotten about their deposits, and, on the evidence, a general finding of abandonment cannot be made.

Held that, as to the second action, these moneys were held by the liquidator in trust for the depositors within the meaning of the provisions of the *Vacant Property Act* and that the claim of the Attorney-General for Manitoba made under that Act should be maintained.

APPEAL, in the first action, from a judgment of the Court of Appeal from Manitoba (1), reversing the judgment of the trial judge, McPherson C.J. K.B. (2); and

APPEAL, in the second action, from a judgment of the Court of Appeal for Manitoba (3), affirming the judgment of the trial judge, Donovan J.

Both appeals concern the disposition of a certain fund of $9,844.40, being in the hands of the liquidator of the Imperial Canadian Trust Company and claimed by the Minister of Finance of Canada and the Provincial Treasurer of Manitoba respectively. The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

H. A. Bergman K.C for the appellant in both appeals.

O. M. Biggar K.C. and *Christopher Robinson* for the respondents in both appeals.

The judgment of the Court was delivered by:

HUDSON J.—These two appeals were heard together. Both concern the disposition of a fund of $9,844.40, at present in the hands of the Montreal Trust Company, and claimed by the Minister of Finance of Canada and the Provincial Treasurer of Manitoba respectively.

In 1924, two companies closely associated in management and with head offices in Winnipeg entered into an agreement, the material provisions of which are as follows:

(1) (1941) 48 Man. R. 45; [1940] 2 W.W.R. 395; [1940] 3 D.L.R. 391; 21 C.B.R. 451.
(2) [1939] 3 W.W.R. 232; [1939] 4 D.L.R. 75; 21 C.B.R. 48.
(3) [1942] 1 W.W.R. 65; [1942] 1 D.L.R. 93; 23 C.B.R. 161.

Memorandum of Indenture made this 22nd day of April, 1924 Between:

The Imperial Canadian Trust Company (Hereinafter called the "First Party")

Of the first part

and

The Great West Permanent Loan Company (Hereinafter called the "Second Party")

Of the second part.

Whereas the Second Party has been receiving moneys on deposit at its head office in the city of Winnipeg in Manitoba and also at its branch office in the city of Calgary in Alberta.

And whereas the deposits which the Second Party has on this date in the said two places amount to about one hundred and twenty-four thousand two hundred and forty-nine 16/100 dollars ($124,249.16).

And whereas the Second Party intends almost immediately to cease taking deposits at the said two points and has made an offer to the First Party for the taking over by the First Party of the said deposits on certain terms hereinafter set out, and the First Party has agreed to take over the said deposits on the said terms and conditions.

Now therefore this indenture witnesseth that in consideration of the premises and of the agreement to assign securities herein provided for and of the sum of one dollar now paid by the second party to the first party, it is covenanted and agreed between the parties hereto as follows:—

1. The Second Party hereby assigns and turns over to the First Party all its deposits at the points above mentioned and any rights it has in connection therewith.

2. The Second Party in order to secure the First Party on account of the obligation it assumes in undertaking to take over and pay off the said deposits as and when the depositors may demand their money agrees to assign and transfer to the First Party good securities and cash which together will amount to one hundred and twenty-four thousand two hundred and forty-nine 16/100 ($124,249.16) said cash and securities to be good and sufficient to provide for the said sum of money without any deficiency or loss to the First Party.

3. It is provided that the First Party shall have the right to select and determine on the securities to be accepted by it for the above-mentioned purpose.

4. The First Party covenants and agrees to and with the Second Party to earmark and specially set aside the securities which shall be taken over in pursuance hereof and to retain them solely and only as security and provision to take care of and pay off the deposits above referred to and said securities shall not fall into or become part of the assets of the First Party but shall be held and used only as above provided, but the First Party shall nevertheless have the right to sell the said securities or any of them which shall be assigned in pursuance hereof, such sales to be made from time to time as this may become necessary in order to pay off depositors demanding their money, and the First Party for such purpose of paying off depositors shall also be entitled to and have the right to use any rents or interest that may be received from the said securities and the First Party agrees to pay the said depositors as they demand their money.

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Hudson J.

In accordance with the terms of this agreement the Imperial Canadian Trust Company selected securities aggregating in estimated value $124,249.16 and such securities were formally appropriated by the loan company to and accepted by the trust company on the 15th of January, 1925. There is no evidence of concurrence by all of the depositors in this arrangement. But, thereafter, the trust company proceeded from time to time to dispose of trust assets and to pay depositors and by the 27th of December, 1927, had paid off such deposits to an amount of $105,968.87, which left an unpaid balance of only $18,280.20. The trust company still held undisposed of one of the trust securities turned over to it by the loan company, namely, the Strathcona Block, Calgary.

On the last above-mentioned date, the 27th of December, 1927, the trust company was ordered to be wound up under the *Winding-Up Act,* chapter 144 of the statutes of Canada 1906, and on the 24th of February following, the Montreal Trust Company was appointed as permanent liquidator. The Strathcona Block came into the possession of the liquidator who disposed of same in August, 1929, realizing $30,336.65.

The liquidator, pursuant to an order of the court in March, 1928, gave notice to all creditors to file their claims. This was given by (1) advertisements published in newspapers in Winnipeg, Saskatoon, Calgary, Vancouver, Toronto and Victoria respectively; (2) copies of similar notices mailed to all creditors including depositors addressed to each at his or her address as they appeared in the books of the company. A large percentage of these notices were returned by the Post Office to the liquidator.

At least sixty per cent of the deposit accounts had been dormant and inactive for many years prior to 1924 and had remained dormant and inactive thereafter until the date of the liquidation. The liquidator's manager said that he had no way of locating the depositors or the representatives of such depositors.

On the 28th of May, 1930, an order was made by the Master in Chambers in the winding-up proceedings, dealing with the several different matters and among them

the claims and priorities of persons who were formerly depositors in the Great West Permanent Loan Company.

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It was therein provided:

It is further ordered that the liquidator be and it is hereby authorized to pay to depositors whose deposits were taken over by The Imperial Canadian Trust Company from The Great West Permanent Loan Company pursuant to the terms of a certain agreement between the said companies dated the 22nd day of April, 1924, the balance of their respective accounts which were not paid by The Imperial Canadian Trust Company prior to the date of the winding-up order herein; that is to say the minimum balances of such depositors respectively between 22nd April, 1924, and the date of liquidation. The total of such deposits (which aggregate $12,413.15), the names of the depositors and the amount of their respective deposits being shown on exhibits "D", "E" and "F" to the said affidavit of Loua Edgar Banner.

It is further ordered that the liquidator be and it is hereby authorized to defer payment on all claims under $10 and to those depositors whose claims are designated in said exhibits "D", "E" and "F" as "unclaimed balances", the aggregate of which total $5,481.06. Provided that the liquidator may pay any such depositors whose address come to its notice.

The amount of $12,413.15 referred to in this order was found to be incorrect and was subsequently admitted to be $18,280.29. The latter sum was placed in a separate bank account.

Additional depositors were thereafter paid off by the liquidator, leaving the balance of $9,844.40 which is now in dispute. This sum is made up of a very large number of very small deposits, most of them amounting to less than $2 each and all made prior to the agreement of 1924.

The winding-up proceedings having been substantially completed, these moneys were claimed by the Minister of Finance under sections 139 and 140 of the *Winding-Up Act*, and by the Provincial Treasurer of Manitoba as *bona vacantia*. The liquidator applied to the court for directions as to the disposition of the money and it was agreed between counsel for the liquidator and the Attorney-General that the court should deal with the matter on the basis that the final winding-up of the company had been completed and that the deposits and dividends in question had been left in the bank for more than three years since the final winding-up of the business of the company. The application was heard before Chief Justice McPherson of the Court of King's Bench who held: (1) that the general creditors had no claim, that the funds had been the property of the depositors only and were not payable out of the assets as dividends and did not fail to be transferred to the Minister of Finance under sections 139 and 140 of the

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Winding-Up Act; (2) that considering the small amount of each deposit and the time which had elapsed, he was of the opinion that the depositors had no intention of asserting any claims and that the amounts should be held to have been abandoned and should go to the Crown in the right of the province of Manitoba as *bona vacantia.*

On appeal, it was held by the Manitoba Court of Appeal that, as there was no evidence that the depositors were dead or, if dead, had not left heirs or next of kin, the funds could not be pronounced *bona vacantia.* Secondly, that, if as held by Chief Justice McPherson, the property had been abandoned, then it would not vest in the Crown but would become the property of the trust company in the same way as if the courts had released the company from carrying out the agreement. Thirdly, that the agreement was not a contract between the trust company and the depositors and the depositors could not obtain relief at their own instance. The court, therefore, directed the moneys to be paid to the Minister of Finance of Canada under the above sections.

Special leave to appeal from that decision to this court was granted by Mr. Justice Rinfret on the 10th of October, 1940. The security was perfected but the appeal was not proceeded with then because in the meantime the Manitoba legislature had passed an Act called the *Vacant Property Act,* which was assented to on the 5th of April, 1940, and came into force by proclamation on the 1st of June, 1940, and before the above-mentioned decision of the Court of Appeal was given. In that Act it was provided:

1. This Act may be cited as *The Vacant Property Act.*

2. All personal property, including money or securities for money deposited with or held in trust by any person in the province, which remains unclaimed by the person entitled thereto for twelve years from the time when such property, money or securities were first payable shall notwithstanding that the depositee or trustee has delivered or paid or transferred such personal property, money or securities to any other person or official within or without the province as depositee or trustee vest in and be payable to His Majesty in the right of the province of Manitoba subject only to His Majesty's pleasure with respect to any claim thereafter made by any person claiming to be entitled to such property, money or securities.

3. The property set out in section 2 of this Act shall be subject to the application of *The Escheats Act,* being chapter 64 of the Revised Statutes of Manitoba, 1940.

4. This Act shall apply only so far as the legislature of Manitoba has jurisdiction to enact.

On or about the 29th of July, 1940, the Attorney-General of Manitoba presented a petition to the Court of King's Bench in Manitoba, claiming the moneys in question under the above-mentioned statute. This petition was heard before Mr. Justice Donovan who held that the legislature had power to deal with the deposits made in Manitoba, that such deposits could not be considered as "unclaimed" within the meaning of the Act until the order of the 28th of May, 1930, had been made, which was less than twelve years prior to the presentation of the petition. He reserved to the petitioner the right, by amended or new petition, to claim as against the liquidator for the loan company or trust company or anyone who might appear to have an interest.

An appeal to the Court of Appeal was dismissed and a cross-appeal allowed striking out the above-mentioned proviso in the judgment of Mr. Justice Donovan. The learned judges in appeal were apparently unaware of the fact that the *Vacant Property Act* had come into force prior to their decision in the first case and at a time when the decision of Chief Justice McPherson was still undisturbed.

The fund here in question represents what remains of the securities transferred under the agreement of 1924. That agreement was primarily a contract between the loan company and the trust company to effect a substitution of the latter for the former in relation to the depositors. The agreement, however, incorporated a trust which upon the transfer of the securities to the trust company became an "executed" trust, the beneficiaries of which were the depositors. Although these depositors were not parties to the agreement they were interested. The assets transferred by the loan company diminished *pro tanto* the capacity of that company to pay the depositors and the provision for the trust was for their protection.

The language of clause 4 is explicit: the trust company covenants and agrees

> to earmark and specially set aside the securities which shall be taken over * * * and to retain them solely and only as security and provision to take care of and pay off the deposits above referred to and said securities shall not fall into or become part of the assets

of such party, "but shall be held and used only as above

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provided." When the securities were allocated to the trust company, the trust was irrevocable without the consent of the beneficiaries who thereupon acquired an independent right to enforce the trust.

As was said by Lord Eldon in *Ex parte Pye and Dubost* (1):

> It is clear that this court will not assist a volunteer: yet, if the act is completed, though voluntary, the court will act upon it. It has been decided, that upon an agreement to transfer stock, this court will not interpose: but if the party had declared himself to be the trustee of that stock it becomes the property of the *cestui que trust* without more: and the court will act upon it.

In Godefroi on Trusts, 5th ed. at p. 60:

> * * * there is a distinction between a voluntary covenant to create a trust and a complete voluntary trust of a covenant enforceable at law. The latter is enforceable, and the cases in which it is enforceable may be conveniently dealt with under the following two heads:—
>
> 1. Where it appears that the true intent and effect of the contract is to give a person not a party some beneficial right, as a *cestui que trust*, under it.

Similar statements are made in Underhill on Trusts, 9th ed., pp. 11 and 40.

The position is stated very clearly by Lord Justice Cotton in the case of *Gandy* v. *Gandy* (2):

> Now, of course, as a general rule, a contract cannot be enforced except by a party to the contract; and either of two persons contracting together can sue the other, if the other is guilty of a breach of or does not perform the obligations of that contract. But a third person—a person who is not a party to the contract—cannot do so. That rule, however, is subject to this exception: if the contract, although in form it is with A, is intended to secure a benefit to B, so that B is entitled to say he has a beneficial right as *cestui que trust* under that contract; then B would, in a Court of Equity, be allowed to insist upon and enforce the contract. That, in my opinion, is the way in which the law may be stated.

When the order was made for winding-up, the securities undisposed of were held by the trust company as trustee for the unpaid depositors and, as such, they did not form any part of the assets of the estate. See Palmer's Company Law (Winding-Up) 1937 ed., p. 252 and also p. 672.

It appears that when the property in the possession of the trust company was taken, the liquidator was not aware of the trust. At any rate the Strathcona Block was sold and, for a time at least, the proceeds were treated as

(1) (1811) 18 Ves. Jr. 140, at 149. (2) (1885) 30 Ch. D. 57, at 66.

estate funds. However, this situation was corrected. The order of the 28th of May, 1930, was made and the trust fund segregated in a separate bank account.

It was contended that the accounts in the winding-up proceedings disclosed that prior to the liquidation the trust company had paid out to depositors more than it could have received from trust securities sold. We have not here any full information of what took place between these two associated companies prior to the liquidation, but we do know that at the time of the winding-up order the trust company had in its possession trust property more than sufficient to pay the depositors then unpaid.

Some point was made of the consent signed on behalf of the Attorney-General and counsel for the liquidator in the first action, by which it was to be assumed that the final winding-up of the company had been completed and that the deposits and dividends in question had been left in the bank for more than three years since the final winding-up of the business of the company. It does not seem to me that there is any force to this objection. What we are concerned with now is the ownership of the money, and this consent was merely filed for the purpose of giving the court jurisdiction.

It would appear then that the fund in question is held to fulfil the trust of 1924 and can be treated in no other way.

In this view of the matter, sections 139 and 140 of the *Winding-Up Act* can have no application. The moneys were held by the liquidator as trustee for the individual depositors and not for the trust estate or for anybody else.

The claim of the Crown in the right of Manitoba is twofold: in the first action as *bona vacantia,* and in the second action under the statute, *The Vacant Property Act.*

The law regarding *bona vacantia* is summed up in 6 Halsbury's Laws of England, 2nd ed, at p. 827, as follows:

> The term *bona vacantia* is applied to things in which no one can claim a property, and includes the residuary estate of persons dying intestate and without husband or wife or near relatives, wreck, treasure trove, waifs, and estrays, and the personal property of a dissolved corporation, but not goods lost or designedly abandoned, the property in which is vested in the first finder and is good against all, except the true owner in the case of goods lost. *Bona vacantia* extends to an equity of redemption or leaseholds.
>
> The property in *bona vacantia* is vested in the Crown to prevent the strife and contention to which title by occupancy might otherwise give rise.

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In Godefroi, at p. 124, it is stated:

> As a general rule, where personalty is vested in trustees upon private trusts which have failed, it is held upon trust for the Crown.

The cases cited in support of this statement are: *Middleton* v. *Spicer* (1); *Re Higginson and Dean* (2). Both were cases of *bona vacantia.*

The nature of the right was considered by this Court in *Attorney-General for British Columbia* v. *Royal Bank of Canada* (3), and there Mr. Justice Kerwin speaking for the Court quoted with approval the remarks of Lord Justice Romer *In re Wells* (4):

> In my opinion it is established law that the Crown is entitled to all personal property that has no other owner.

and again:

> that the rule at common law is that property must belong to somebody and where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown.

The question is: have these deposits any owner, that is to say, any discoverable owner? Chief Justice McPherson thought they had not, basing this opinion on the lapse of time and the small amounts. He concluded that the depositors must be taken to have abandoned their claims. The facts give much weight to this view but, on the other hand, we cannot exclude the possibility that there may be many depositors still alive who have merely forgotten about their deposits and cannot be said to have abandoned them. On the evidence I do not think that a general finding of abandonment can be made.

In the second action, the claim is under the *Vacant Property Act* which applies to personal property including moneys or securities deposited with or held in trust by any person in the province which remains unclaimed by the person entitled thereto for twelve years from the time when such property, moneys or securities were first payable. The moneys in question are certainly held by the liquidator in trust for the depositors. The liquidator is in Manitoba.

The argument, however, is that the property has not remained "unclaimed" for twelve years. Mr. Biggar contended that the deposits could not be considered as

(1) (1783) 1 Bro. C.C. 201.
(2) [1899] 1 Q.B. 325.
(3) [1937] S.C.R. 459.
(4) [1933] Ch. D. 29, at 55, 56.

unclaimed until payment was due and that there was no evidence to show that there were not some restrictions on the withdrawal by depositors in their original agreement with the loan company. On this point there is no definite evidence but, in the agreement between the loan company and the trust company, the covenant of the trust company is to pay the depositors on demand the moneys in question and, holding the views that I do as to the agreement constituting a trust, it seems to me that the depositors had a right to their money at any time after the securities were handed over and the trust was executed.

The deposits were all made prior to the agreement of 1924. The securities representing them came into the hands of the trust company at that time and what remained came into the hands of the liquidator in 1927.

Mr. Justice Donovan thought that the moneys could not be regarded as unclaimed until the order for segregation was made in 1930. With respect, this does not seem to me to be correct. The twelve-year limitation is against the depositors, not the trust company or the liquidator. In any event, more than twelve years have now passed since the moneys were segregated in a separate bank account by the liquidator. I think that the Attorney-General is entitled to succeed in the second action.

As Mr. Bergman pointed out in argument, the provisions of the *Winding-up Act* do not deal with ownership but only with the immediate possession of the funds, leaving the matter of ownership to be established later.

Some suggestion was thrown out that claims might be made either by representatives of the loan company or of the trust company in the nature of a resulting trust. As to this, the loan company parted with its property absolutely in 1924 and there could be no reversion in so far as the trust company is concerned. It is clear that a trustee is not entitled to a reversion.

In the case of *Higginson* v. *Dean* (1), it was stated by Mr. Justice Wright at p. 329:

> From the time of Lord Thurlow's decision in *Middleton* v. *Spicer* (2), it has been an accepted proposition of law that chattels real or personal vested in a person as a mere trustee upon private trusts which have failed are as a general rule held by him as a trustee for the Crown of *bona vacantia;* and during all the period which has elapsed since that decision no exception from the rule seems to have been established. It has been

(1) [1899] 1 Q.B. 325. (2) (1783) 1 Bro. C.C. 201.

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illustrated by many cases which shew that the possession conferred on the trustees for purposes of jurisdiction or administration gives him no beneficial title, as by occupancy or otherwise, which he can conscientiously set up against the Crown.

It would appear from the evidence that representatives of neither company are pressing any claims in this matter. The liquidator, of course, does not do so. I then conclude that the Attorney-General is entitled to succeed in his petition in the second case.

In the first case, there was a small amount of $600 which, the court held in the first instance, should not be treated as *bona vacantia* but as part of the general funds in the winding-up. The Court of Appeal agreed with this view and I agree with their disposition of same.

In the first case, I would allow the appeal without costs in so far as the judgment below directed the fund in question to be paid to the Minister of Finance under the provisions of sections 139 and 140 of the *Winding-up Act*, and also in respect of the orders as to costs.

In the second case, I would allow the appeal and set aside the order of the Court of Appeal and direct that the fund held by the Montreal Trust Company be paid to the Provincial Treasurer of the province of Manitoba under the provisions of the *Vacant Property Act*, statutes of Manitoba 1940, chapter 57, and that there should be no costs to any party either here or below, except that I think that the Montreal Trust Company must be assumed to have acted in good faith and should be entitled to its costs out of the fund in respect of the applications in the court below.

Appeals allowed, no cost.

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*Dec. 8, 9, 10

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*Mar. 10, 11
*May 17.

CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

HARRICANA GOLD MINE INC. 1939 (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Railway—Expropriation—Amount of compensation—Method of valuation used by trial judge—Appellate court will interfere on question of quantum, when satisfied that amount allowed by trial judge

* PRESENT:—Rinfret, Davis Kerwin, Hudson and Taschereau JJ.

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is clearly excessive—Lands not subdivided into lots—Evidence, as to value of lands, tendered and accepted as if so subdivided—Trial judge proceeding on wrong principle in fixing value on such evidence —Present value of all advantages which lands possess, present and future, to be fixed by trial judge—Damages must be assessed once and for all—No reservation to claimant of any right to recover further amounts.

About 29 acres of the lands of the respondent company were expropriated by the appellant railway company and were taken by the deposit of three plans, on November, 1936, October, 1937, and March, 1940. The respondent company, in October, 1940, brought an action for $47,480, being $28,820 as value of the lands at $1,000 per acre, $11,416.41 as damages to the lands and $7,244.19 as an amount alleged to be payable to the province of Quebec on the basis that a plan would be prepared later by the respondent subdividing the expropriated lands and that under a clause of an agreement with the province, a sum of $30 would have to be paid for every subdivided lot having an area of 5,000 square feet or less. The appellant company calculated its total liability at $50 per acre or a total of $1,441. The trial judge, estimating the value of the lands as if they were subdivided lots, awarded the sum of $28,820, being $1,000 per acre, deducted $7,532.40 representing the amount which may be payable to the province under the above agreement and $1,000 as the estimated cost of making and registering a plan of subdivision, added $3,000 for depreciation of neighbouring lots still owned by the respondent, and, as a net result awarded the respondent the sum of $23,287.60. The trial judge reserved the mines and minerals in the lands expropriated and also reserved to the respondent the right to recover from the appellant a sum of $7,244.19 or such other sum as the respondent would have to pay to the province and also any future damages resulting from the expropriation. The railway company appealed.

Held, Rinfret and Taschereau JJ. dissenting, that the appeal should be allowed, the judgment appealed from set aside and for it substituted a judgment reciting an undertaking of the appellant (set forth in the reasons for judgment) and declaring that the lands expropriated, excepting the mines and minerals therein and thereunder, are the property of the appellant.

Held, also, Rinfret and Taschereau dissenting, that this Court ought to interfere on the question of *quantum,* as the amount allowed by the trial judge is clearly excessive. *Trudel* v. *The King* (49 Can. S.C.R. 501), and that, upon consideration of the facts and the evidence in the case, the indemnity to be granted for the lands and for all damages resulting from the expropriations should be reduced to the sum of $8,705.

Held, also, that the trial judge, in fixing the value of the lands expropriated, proceeded upon a wrong principle, and that is always a ground upon which this Court will set aside an award. The trial judge proceeded upon evidence tendered and accepted as if the lands had been subdivided and did not fix the present value of all advantages which the lands possess, present or future. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* ([1914] A.C. 569, at 576). Rinfret and Taschereau JJ. dissenting.

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Held, by the Court, that right to claim further sums from the appellant should not have been reserved to the respondent, as in expropriation cases damages must be assessed once and for all. In any event, the allowance of $7,244.19 or any part thereof, which the respondent may have to pay to the province under the agreement, could not be allowed as damages nor could it enhance the value of the lands expropriated and therefore, such allowance could not be claimed by the respondent from the appellant.

Per Rinfret and Taschereau JJ. dissenting: This Court ought not to disturb the findings of the trial judge as to the valuation of the expropriated lands. The trial judge "has acted upon proper principles, has not misdirected himself in any matter of law and the amount arrived at is supported by the evidence". *The King* v. *Elgin Realty Co.* (1943 S.C.R. 49). The trial judge has taken into account the hypothetic or speculative value of the lands for the sole purpose of enabling him to find out their actual selling value and the method used by the trial judge in fixing such value as if the lands had been subdivided, was a proper one, as subdivision of the lands was the best use the respondent could make out of its property.

APPEAL from a judgment of the Exchequer Court of Canada, Angers J., granting to the respondent, by way of indemnity in expropriation proceedings, the sum of $23,287.60 for the value of lands expropriated and for all damages caused to the residue of respondent's property, the whole with costs. The judgment reserved as against the appellant the recourse of the respondent in case it should be called upon to pay the sum of $7,244.19 or other amount to the Government of the province of Quebec under a certain agreement, and also reserved its recourse for damages to its mining enterprise resulting from the expropriations.

I. C. Rand K.C., R. E. Laidlaw K.C. and *Lionel Côté* for the appellant.

H. Gérin-Lajoie K.C. for the respondent.

Aimé Geoffrion K.C. for the Attorney-General of Quebec.

The judgment of Rinfret and Taschereau JJ. (dissenting) was delivered by

TASCHEREAU J.—Il s'agit dans la présente cause de déterminer la valeur de certains terrains que l'appelante a expropriés pour la construction d'un chemin de fer, près de Val d'Or, dans le district d'Abitibi, province de Québec.

L'appellante a offert la somme de $1,441 et l'intimée a réclamé $47,480.60 à titre d'indemnité pour la valeur du terrain, et pour dommages causés à ses propriétés avoisinantes.

L'honorable juge de première instance, en Cour d'Echiquier du Canada, en est venu à la conclusion que l'offre de la Canadian National Railway Co. était insuffisante, et a condamé l'appelante à payer la somme de $23,287.60 avec intérêt et dépens.

Dans son jugement, cependant, le juge de première instance, en outre d'accorder $23,287.60, a réservé à l'intimée son recours contre l'appelante, dans le cas où elle serait appelée à payer au gouvernement de la province de Québec une somme de $7,244.19, ou toute autre somme, en vertu d'une certaine convention en date du 29 juin 1937, et il a aussi réservé à l'intimée un autre recours qu'elle pourrait avoir pour dommages causés à son exploitation minière résultant des expropriations qui ont fait l'objet du litige entre les parties.

Depuis assez longtemps l'intimée possède certains terrains faisant partie de la ville de Val d'Or dans le district d'Abitibi, et en particulier ceux connus comme étant les blocs 13 et 14 du canton Bourlamaque, la moitié nord des lots nos. 57 et 58, ainsi que les lots nos. 59, 60, 61 et 62 dans le rang 8 du canton Dubuisson.

S'autorisant des pouvoirs que lui confèrent la *Loi des Chemins de Fer* et la *Loi de l'Expropriation*, l'appelante a déposé trois plans affectant ces terrains. Le premier qui couvrait une superficie de 21·52 acres, fut déposé le 18 novembre 1936, et les deux autres qui affectaient respectivement 0·27 acre et 7·30 acres furent déposés les 9 octobre 1937 et 13 mars 1939. C'est l'intimée qui a pris l'initiative de faire déterminer la valeur de ces terrains par la Cour d'Echiquier du Canada, vu le retard apporté par l'appelante à le faire.

Evidemment, à la date où les procédures ont été instituées, le 18 septembre 1939, l'intimée n'était au courant que du dépôt du premier plan, car elle ne réclame que pour le terrain exproprié en vertu de ce dépôt; mais elle amenda sa réclamation à deux reprises, qui fut finalement soumise ainsi au tribunal de première instance:—

Valeur du terrain 28·82 acres à $1,000 l'acre.	$28,820.00
Montant payable à la province de Québec...	7,244.19
Dommages à la propriété	11,416.41
	$47,480.60

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Depuis plusieurs années, l'intimée, comme résultat de diverses transactions immobilières, avait un bon titre à ces terrains qui lui conférait un droit exclusif aux métaux ainsi que des droits de superficie.

Le 29 juin 1937, par acte passé devant Henri Turgeon, notaire, la Harricana Amalgamated Gold Mines Inc., maintenant Harricana Gold Mine Inc., signa une convention avec le Gouvernement de la province de Québec, en vertu de laquelle la compagnie rétrocéda à la province tous ses droits de superficie sur les terrains ci-dessus décrits, et en retour, sujet à certaines conditions, obtint de nouveau tous les droits de surface qu'elle avait auparavant transportés au gouvernement.

Dans l'acte on trouve les deux clauses suivantes:—

(*c*) La compagnie versera au Ministère des Mines et des Pêcheries, avec toute demande de cadastration des nouvelles subdivisions de terrains compris dans les limites de la ville de Val d'Or, une somme de trente ($30) dollars par parcelle de terrain indiquée, sur le plan et ne dépassant pas cinq mille pieds carrés.

(*d*) La compagnie versera au Ministère des Mines et des Pêcheries une somme de trente ($30) dollars par cinq mille pieds de terrain, ou fraction de cinq mille pieds de terrain, donné ou vendu pour un ($1) dollar, ou autres considérations aux compagnies de chemin de fer, à même les terrains compris dans les limites de la ville de Val d'Or.

Le juge de première instance a accordé à l'intimée une somme de $1,000 l'acre, (soit $28,820) mais pour en arriver à cette conclusion, il attribue à ces terrains la valeur de lots subdivisés. Or, en vertu de la clause (*c*), citée plus haut, l'intimée, quand elle subdivise ses terrains et qu'elle dépose le plan au Ministère de la Colonisation, doit verser une somme de $30 par parcelle de terrain de 5,000 pieds carrés ou moins. Pour subdiviser ses lots il aurait donc fallu à l'intimée, verser au Gouvernement la somme de $7,532.40, et il lui aurait également fallu débourser, pour la préparation du plan, une somme que le juge estime à $1,000. Il enlève donc ce montant de $8,532.40 de $28,820, laissant une balance de $20,287.60 qu'il accorde à l'intimée, et qui représenterait la valeur actuelle des terrains expropriés. A cette somme, il ajoute $3,000 pour compenser l'intimée du dommage qu'elle souffre par suite de certaines excavations, pratiquées par l'appelante, et qui diminuent la valeur des lots avoisinants. C'est ce qui forme le grand total de $23,287.60.

Ces terrains sont situés dans la ville de Val d'Or qui, vers 1937, fut érigée en ville. Il y avait à cette date une population d'environ 7,000 âmes, mais au temps où la cause a été entendue elle était réduite à 5,500 âmes. La ville de Val d'Or a pratiquement débuté en 1934, et une forte population y a été attirée par l'exploitation de la mine Lamaque et de la mine Sigma, toutes deux situées à proximité. L'intimée elle-même a aussi fait des exploitations minières, mais, tel que le dit son président, elle a dû en suspendre les opérations par suite de troubles financiers.

Lorsque la population commença à affluer à Val d'Or, l'intimée, dans le cours de l'année 1934, fit une première subdivision et vendit presque tous les lots ainsi subdivisés pour une somme d'environ $25,000. D'autres subdivisions ont aussi été faites subséquemment, et la dernière l'a été en 1937. Depuis 1934 jusqu'à la date où le procès a été entendu, près de 500 lots ont été vendus pour un montant global de $190,456, ce qui fait une moyenne de $391.88 par lot de 5,500 pieds, et $2,251.28 par acre. Evidemment, les premiers lots ont été vendus en bordure du chemin qui était le chemin du gouvernement, et qui est devenu la rue "Principale" ou "Main Street". Quelques-uns ont été vendus au nord, quelques autres au sud. La demande pour des lots augmenta en 1935, et l'année 1936 fut sans contredit la meilleure année, au cours de laquelle 200 lots furent vendus. Le développement de la ville était extraordinairement rapide.

Le nord était la région commerciale, et le sud la région résidentielle. Il est facile à comprendre que les lots se soient vendus au centre de la ville au début, mais il est indéniable que la ville s'est considérablement développée dans diverses directions, et aussi vers le nord où, en 1937, le chemin de fer a été construit, et dont il était vaguement question en 1936.

Le chemin de fer traverse les terrains de la Compagnie à une distance pas très éloignée des lots vendus en 1937. La demanderesse prétend qu'elle n'avait pas encore cadastré ces lots, précisément où le chemin de fer passe, parce qu'elle préférait tout d'abord vendre les autres lots plus au sud et plus près du centre commercial, mais que c'était sa ferme intention, n'eut été l'arrivée du chemin de fer, de faire pour les lots en question ce qu'elle avait fait pour le reste de sa propriété.

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L'honorable juge de première instance a fait un examen détaillé de toute la preuve et en vient à la conclusion que la somme de $1,000 réclamée par la demanderesse ne lui paraît pas excessive. "Au contraire, (dit-il) elle est inférieure à la valeur marchande du terrain de 1936 à 1940." Il ressort du jugement du juge de première instance, qu'il détermine cette valeur de $1,000 l'acre, en se basant sur les prix obtenus par la demanderesse pour les terrains vendus, depuis 1934 jusqu'à la date du procès, dans les autres parties de la ville, et que ce n'est qu'en subdivisant le terrain où passe le chemin de fer que le prix qu'il accorde pourrait être obtenu. Il est certain qu'à cette date la valeur des terrains expropriés était inférieure à la valeur des lots vendus ailleurs dans la ville, mais le juge en tient compte, car la moyenne des autres lots est de $391.88 ou $2,351.28 par acre, tandis qu'il n'accorde pour les lots expropriés qu'une somme de $1,000 l'acre ou $166 pour 5,500 pieds carrés, déduction faite du terrain nécessaire pour y ouvrir des rues.

Ce n'est pas en attribuant une valeur possible à ces terrains que la juge détermine cette indemnité. Si, dans l'analyse de la preuve qu'il fait, il semble tenir compte de la valeur hypothétique ou spéculative, ce n'est, je crois, que pour arriver à trouver la valeur actuelle, et il reste ainsi dans les limites indiquées par le Conseil Privé, dans la cause de *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* (1). Après avoir pesé les témoignages des témoins, et comparé la valeur des terrains expropriés avec les terrains avoisinants et les prix obtenus pour ces derniers, on voit, qu'en accordant l'indemnité qu'il croit équitable, il a bien en vue la "valeur marchande" des lots en question.

C'est plutôt par l'ensemble du jugement que par les expressions particulières employées qu'on se rend compte qu'il a donné à ces terrains une valeur actuelle. Il ressort du jugement que si à la date de l'expropriation l'intimée avait désiré vendre ces terrains, elle aurait obtenu $1,000 l'acre ou $166 pour chaque lot subdivisé, ce qui était le meilleur usage qu'elle pouvait en faire.

Ces lots, il est vrai, n'étaient pas subdivisés encore, mais, la subdivision était le meilleur usage que l'intimée pouvait en faire, et c'est à cause de cette possibilité que le juge de première instance attribue une valeur de $116. C'est une

(1) [1914] A.C. 569, at 576.

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méthode qu'il emploie pour déterminer la valeur actuelle de ces terrains. D'ailleurs, l'appelante n'a pas suggéré sérieusement d'autre mode d'évaluation, qui était pratiquement le seul devant la Cour.

Comme dans la plupart des causes de ce genre, la preuve est évidemment contradictoire. Mais c'est au juge du procès qu'il appartient de peser ces témoignages, de faire la part du vrai et du faux, et je ne puis pas dire que son jugement ne peut pas être supporté par la preuve. Je ne crois pas davantage qu'il ait commis d'erreur de droit qui puisse nous justifier d'intervenir dans l'évaluation qu'il a faite.

Cette Cour, malgré qu'un montant puisse lui paraître élevé, intervient rarement dans l'appréciation faite par le juge qui a entendu la cause; c'est sa jurisprudence constante, et dernièrement encore, dans une cause de *The King* v. *Elgin Realty Company* (1), elle a tenu à réaffirmer ce principe de la façon suivante:—

> When in determining the amount to be awarded to the owner of land expropriated, a court of first instance has acted upon proper principles, has not misdirected itself on any matter of law, and the amount arrived at is supported by the evidence, a court of appeal ought not to disturb its finding.

Je suis donc d'opinion que le montant de $1,000 l'acre ne doit pas être modifié par cette Cour, et je crois aussi que le montant de $3,000 accordé à l'intimée pour dépréciation aux lots avoisinants comme résultat des excavations pratiquées par l'appelante n'est pas exagéré.

Dans son jugement, l'honorable juge de première instance réserve à la demanderesse son recours contre l'appelante pour la somme de $7,244.19 que celle-ci pourrait être appelée à payer au Gouvernement provincial en vertu de la convention du 29 juin 1937, clause D.

En vertu de cette clause, la Compagnie est tenue de verser au Gouvernement de Québec une somme de $30 par 5,000 pieds de terrain, ou fraction de 5,000 pieds, donné ou vendu pour un dollar ($1) ou autres considérations aux compagnies de chemin de fer, à même les terrains compris dans les limites de la ville de Val d'Or.

Lors de la première audition de cette cause, cette Cour a jugé bon, vu que le Gouvernement de la province de Québec n'était pas en cause, de faire notifier ce dernier du

(1) [1943] S.C.R. 49.

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présent litige afin qu'il ait l'opportunité d'être entendu s'il le désirait. Le Procureur Général a produit un factum, et lors de la réaudition, il a déclaré par son avocat, que ses droits se limitaient à une réclamation personnelle contre la Compagnie Harricana. Il ne nous appartient évidemment pas de déterminer si véritablement le Gouvernement de la province de Québec a droit à cette somme de $7,244.19 ou à une partie d'icelle, car il s'agit bien d'un litige à être réglé entre la Compagnie Harricana et le Gouvernement de Québec.

Mais je crois que l'honorable juge de première instance a fait erreur en réservant un recours à l'intimée contre l'appelante pour cette somme de $7,244.19. Si jamais l'intimée doit payer cette somme au Gouvernement de Québec, je suis d'opinion que c'est elle qui doit la payer, et non pas l'appelante. Ce montant doit être déduit et non pas ajouté à l'indemnité accordée. L'obligation contractée par la Compagnie Harricana ne peut ajouter de valeur à ses terrains, et je n'ai aucune hésitation à arriver à la conclusion que c'est à même le montant fixé par la Cour, que le Gouvernement de Québec doit être payé, s'il a une créance valide.

Je crois donc que les fins de la justice seront utilement servies, s'il est ordonné par le jugement formel, que l'intimée aura droit à une indemnité de $23,287.60 avec dépens en Cour d'Echiquier du Canada, et l'intérêt au taux de 5% par année à partir du 1er octobre 1937, jusqu'à la date du jugement de cette Cour.

Le jugement dont il y a appel devra cependant être modifié en y retranchant cette réserve faite en faveur de l'intimée. Et comme la réclamation du Gouvernement de Québec est purement personnelle contre l'intimée, je ne puis me rendre à la suggestion d'ordonner de déposer en Cour le montant de $7,244.19.

Quant à l'autre réserve faite en faveur de la demanderesse-intimée pour tout recours qu'elle pourrait avoir contre l'appelante à raison des dommages causés à son exploitation résultant des expropriations qui ont fait l'objet du litige, la clause suivante sera insérée dans le jugement formel, vu le consentement donné par les parties:—

Upon the undertaking of the appellant to abandon all mines and minerals taken under the expropriation herein and upon the consent of the appellant and respondent hereto,

It is ordered and adjudged that the provisions of ss. 196, 197 and 198 of the *Railway Act 1919* (ch. 170 R.S.C. 1927) shall be deemed to apply in respect of the lands expropriated as fully as if such lands had been taken under the provisions of the said Act.

Devant cette Cour, chaque partie paiera ses frais.

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

KERWIN J.—This is a most unsatisfactory case. Certain lands of the respondent were expropriated by the appellant under the provisions of the *Expropriation Act*, R.S.C. 1927, chapter 64, as made applicable by section 17 of the *Canadian National Railways Act*, R.S.C. 1927, chapter 172, and amendments. The lands were taken by the deposit of three plans on November 18th, 1936, October 9th, 1937, and March 13th, 1939, covering respectively 21·52 acres, 0·27 acres, and 7·03 acres.

In proceedings instituted in the Exchequer Court of Canada, the respondent claimed $47,480.60, made up as follows:—

Value of land 28·82 acres at $1,000 per acre	$28,820.00
Amount alleged to be payable to the Minister of Mines and Fisheries of the province of Quebec under clause (*d*) of an agreement hereafter referred to	7,244.19
Damage to lands of the respondent, caused by excavations carried out by the appellant and by construction of the line of railway	11,416.41
	$47,480.60

The appellant calculated its total liability at $50 per acre for the land expropriated, or a total of $1,441.

The trial judge fixed the value of the lands expropriated at $1,000 per acre, or a total of $28,820. From this he deducted an amount calculated by him to represent the sum payable by the respondent to the Minister of Mines and Fisheries of the province of Quebec under clause (*c*) of an agreement entered into on June 29th, 1937 (after the date of the first expropriation), between the respondent's predecessor and His Majesty the King in the right of the province. This calculation was made on the basis that a plan would be prepared by the respondent, subdividing

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the expropriated lands, and that under clause (*c*) of the agreement $30 would be paid the Minister for every sub-divided lot having an area of 5,000 square feet or less, and resulted in a figure of $7,532.40. He also deducted his estimate of the cost of making and registering such a plan —$1,000. He added an amount of $3,000 for depreciation to neighbouring lots still owned by the respondent because of excavation made by the appellant.

The net result is that he awarded the respondent the sum of $23,287.60, but he reserved the mines and minerals in the lands expropriated, and also reserved to the respondent its right to recover from the appellant the sum of $7,244.19, or such other sum as the respondent would have to pay to the province of Quebec by virtue of clause (*d*) of the agreement mentioned above. He declined to allow anything further for depreciation to the remainder of the respondent's property by reason of the expropriations and the construction of the railway.

Clauses (*c*) and (*d*) of the agreement referred to are as follows:—

(*c*) La Compagnie versera au Ministère des Mines et des Pêcheries, avec toute demande de cadastration des nouvelles sub-divisions de ces terrains, compris dans les limites de la ville de Val d'Or, une somme de trente ($30) dollars par parcelle de terrain indiquée sur le plan et ne dépassant pas cinq mille pieds carrés.

(*d*) La Compagnie versera ou Ministère des Mines et des Pêcheries une somme de trente ($30) dollars par cinq mille pieds de terrain, ou fraction de cinq mille pieds de terrain, donné ou vendu pour un ($1) dollar—ou autres considérations aux compagnies de chemin de fer, à même les terrains compris dans les limites de la ville de Val d'Or.

The Railway Company appealed. After the argument before this Court had proceeded for some time, we decided that we should hear what the Crown in the right of the province of Quebec had to say with regard to its rights. Accordingly, the hearing was postponed and an order made directing that the Attorney-General of Quebec, the Minister of Lands, and the Minister of Mines be notified of the existence of the case so that they might have an opportunity to be heard if so advised. Counsel for the Attorney-General of Quebec appeared on the date to which the argument was adjourned, and stated that the Crown in the right of the province does not claim any interest in the lands expropriated but asserts a personal claim against the respondent of an amount not exceeding

$7,244.19. At the same time the appellant, through its counsel, undertook to abandon all mines and minerals taken under the expropriations upon terms, and a consent was signed on behalf of both parties that the following clauses should be inserted in the judgment to be given by this Court:—

Upon the undertaking of the appellant to abandon all mines and minerals taken under the expropriation herein and upon the consent of the appellant and respondent hereto.

It is ordered and adjudged that the provisions of ss. 196, 197 and 198 of the *Railway Act* 1919 (Ch. 170, R.S.C. 1927) shall be deemed to apply in respect of the lands expropriated as fully as if such lands had been taken under the provisions of the said Act.

The evidence led by the respondent as to the value of the lands expropriated was given on an entirely erroneous basis. The lands were not subdivided but evidence was tendered and accepted as if they had been, and the testimony adduced on behalf of the appellant followed the same general pattern. It appears to me that the trial judge proceeded upon evidence of this nature and did not fix the present value of all advantages which the lands possess, present or future. *Cedars Rapids Manufacturing and Power Company* v. *Lacoste* (1).

There is no doubt that this Court will not interfere on a mere question of quantum unless it is satisfied that the amount allowed is clearly excessive or just as clearly too small. *Trudel* v. *The King* (2) (from which decision leave to appeal to the Privy Council was refused). In my opinion the allowance in the present case is clearly excessive. What is more important, however, is that in fixing the value of the lands expropriated as if they had been subdivided into lots, the trial judge proceeded upon a wrong principle and that is always a ground upon which this Court will set aside an award.

In many cases the matter would be remitted to the Exchequer Court of Canada but in order to save the parties that expense, I have examined the record and, by piecing together certain bits of evidence, I have concluded that sufficient appears to warrant an allowance of $250 per acre. Not all the lands expropriated are situate in Val d'Or; in the years 1938, 1939 and 1940, the respondent's unsubdivided lands south of the line of railway were assessed at

(1) [1914] A.C. 569, at 576. (2) (1914) 49 Can. S.C.R. 501.

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$200 per acre and its unsubdivided lands north of the line of railway at $25 per acre. These considerations and all the other evidence do not justify in my opinion an allowance higher than I have suggested.

As to the $3,000 item, the trial judge states that the excavations were made on lands of the respondent subsequently expropriated on March 13, 1939. While the respondent seeks to hold the sum granted, it alleges that only excavations C and D were so made and that excavations A and B were made on lands of the respondent which never have been expropriated. This appears to be so. Hector McNeil, in charge of the railway construction, stated that excavation A was made in the early part of September, 1937, and that the appellant paid the contractor for removing 7,129 cubic yards of earth. At excavation B, 1,788 cubic yards were removed. The appellant apparently contended at the trial that no claim for the material so taken was advanced in the statement of claim but I think the pleading is sufficient. The land upon which excavations C and D were made is included in the acreage for which I would allow $250 per acre and nothing further should be allowed because of these excavations.

The question of depreciation presents some difficulty. The trial judge in arriving at his conclusion pointed out that three witnesses on behalf of the respondent estimated the depreciation on subdivided lots at 35, 25 and 30 per cent respectively, and that the appellant's witnesses, while admitting there was depreciation, were unwilling to suggest any amount. He concluded that there had been a depreciation of at least 20 per cent on all properties, still owned by the respondent, adjoining the excavations on both sides of the railway and calculated that depreciation at $3,000. In view of the very much lower estimate of the value of the expropriated unsubdivided land at which I have arrived, any depreciation caused to unsubdivided land still owned by the respondent would not be substantial. However, as the trial judge pointed out there were some lots depreciated which had been subdivided. In view of this fact and of various imponderables, I would allow the sum of $1,500, to include not only depreciation, but an allowance for the material taken at excavations A and B.

The authorities are clear that damages must be assessed once and for all and that no right may be reserved to the respondent to claim any sum hereafter. In any event there is no basis upon which the respondent would be entitled to an allowance of $7,244.19 or any part thereof even if it were presently shown that it would have to pay any sum to the province of Quebec under the agreement referred to. Any such sum could not be allowed as damages nor could it enhance the value of the lands expropriated. I might add that I agree with the trial judge that the respondent is not entitled to any other damages caused by the construction of the railway.

In the result, the appeal should be allowed, the judgment *a quo* set aside and for it substituted a judgment reciting the undertaking of the appellant, set forth above, and declaring that the immovable properties expropriated by the appellant on November 18th, 1936, October 9th, 1937, and March 13th, 1939, excepting the mines and minerals therein and thereunder, are the property of the appellant as of the dates of the respective expropriations. The indemnity granted for these properties and for all damages resulting from the expropriations is fixed at the sum of $8,705 with interest down to the date of this judgment at five per centum per annum on $5,380 from November 18, 1936; on $1,567.50 (which includes the $1,500 item mentioned above) from October 9, 1937; and on $1,757.50 from March 13, 1939.

The respondent is entitled to its full costs of the action down to and including the trial and there should be no order as to the costs of the appeal.

Appeal allowed, judgment a quo set aside and for it substituted judgment as stated by the Court, costs of action to respondent and no order as to costs of the appeal.

Solicitors for the respondent: *Lajoie, Gélinas & Macnaughton.*

Solicitors for the Attorney-General of Quebec: *Geoffrion & Prud'homme.*

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Oct. 13, 14, 15, 16, 19, 20, 21, 22, 23.

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May 17.

PHILCO PRODUCTS LIMITED AND CUTTEN-FOSTER & SONS, LIMITED (DEFENDANTS) ..... APPELLANTS;

AND

THERMIONICS LIMITED, CANADIAN MARCONI COMPANY, THE CANADIAN GENERAL ELECTRIC COMPANY LTD., CANADIAN WESTINGHOUSE COMPANY, LTD., AND ROGERS-MAJESTIC CORPORATION, LTD. (PLAINTIFFS)..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Infringement of two patents—One held valid and to have been infringed, and one held invalid—Subject-matter—Invention—Anticipation—Alleged illegal agreement in restraint of trade as defence to action for infringement.—Patentee nevertheless entitled to enforce his rights—Combines Investigation Act, R.S.C., 1927, c. 26—Patent Act (D.) 25-26 Geo. V., c. 30—Criminal Code, s. 498.

The action, brought by the respondent Thermionics Limited, is one for the infringement of two patents, the Langmuir and the Freeman patents, acquired by it by way of assignment from the patentees, both patents relating to devices known as vacuum tubes used in radio sets. The other respondents are licensees under the patents so assigned. The appellant, Cutten-Foster & Sons Ltd., was reselling radio tubes, imported into Canada and sold to it by the appellant, Philco Products Ltd., which tubes are alleged to infringe both patents. The Langmuir patent is entitled "Electron Discharge Apparatus"; and the invention relates to electric discharge devices which are provided with three electrodes, namely, an "electron-emitting cathode", a "co-operating anode" and a "conductor constituting a grid" which regulates the flow of electrons. This "combination" was claimed to include a highly evacuated envelope and structural features which are alleged to be novel and to co-operate to increase the range and capacity of such devices. The Freeman patent had for its principal object the provision for radio service of a tube which may be used in the ordinary receiving and amplifying circuits with alternating current on the filament, thereby eliminating, it is contended, the major alternating current hums or noises which were due to three different factors, i.e., the electrostatic, thermal and magnetic effects. A complete detailed description of the patents is contained in the judgments. The appellants also contended that the assignments of the patents to the respondent, Thermionics Ld., were invalid on the ground that they had been given for an illegal consideration, having been made as a result of an agreement between the respondents whereby they could fix, control and unreasonably enhance the prices at which radio tubes were to be sold to dealers in, and users of, these tubes, thereby restricting competition and detrimentally affecting the public, contrary to the

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

relevant provisions of the *Combines Investigation* Act and of section 489 of the Criminal Code. The trial judge denied to the appellants the right to adduce evidence to establish facts and things in support of their above-mentioned contentions. The trial judge also held that both patents were valid and that they had been infringed by the appellants.

Held that, as to the Langmuir patent, the appeal of Philco Products Limited should be allowed, and, as to the Freeman patent, the appeal should be dismissed. The Chief Justice and Hudson J. would dismiss the appeal, and Rinfret J. and Taschereau J. would allow the appeal of Philco Products Limited, in connection with both patents (1).

Held that the combination of the features referred to in the Langmuir patent does not afford subject-matter, and, as between the respondents and the appellant Philco Products Limited, the patent granted on Langmuir's application is invalid. The Chief Justice and Hudson J. dissenting.

Held that the Freeman patent was a true combination patent and a novel and useful device, that there was subject matter in it and that the appellants have infringed. Rinfret J. and Taschereau J. dissenting.

Held, also, that, as to the Freeman patent, the defence of anticipation has not been established. Rinfret and Taschereau JJ. dissenting.

Held, also, that the appellant Cutten-Foster & Sons Ltd. was bound by a clause in an agreement entered into by it that it "admits the validity of the letters patent under which radio tubes are or may be licensed", and that, by reason of such admission, the Langmuir patent is valid as between it and the respondents.

Held, further, that the defence, based on an alleged offence against the relevant provisions of the *Combines Investigation Act* and of section 498 of the Criminal Code, should fail. Assuming the transactions between the respondents or some of them and Thermionics Ltd. were illegal and void, the patents were still vested in them and they were entitled to enforce those rights (Sections 54 to 57 of the *Patent Act*).

Judgment of the Exchequer Court of Canada ([1941] Exc. C.R. 209) varied.

APPEAL by the defendants from the judgment of Maclean J., late President of the Exchequer Court of Canada (1), maintaining the respondents' action and holding the appellants liable for the infringement of two patents, both relating to radio tubes, and granting relief accordingly to the respondents, of whom the first named sued as owner by assignment of the two patents and the others as licensee thereunder.

Maclean J. held that both patents were valid and that they had been infringed by the appellants.

(1) [1941] Exc. C.R. 209.

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PHILCO PRODUCTS LTD ET AL. v. THERMIONICS LTD. ET AL.

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

D. L. McCarthy K.C. and *E. G. Gowling* for the appellants.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondents, except the Canadian Marconi Company.

W. F. Chipman K.C. for the respondent, the Canadian Marconi Company.

The judgment of the Chief Justice and Hudson J. was delivered by

THE CHIEF JUSTICE.—To deal first with the Langmuir patent, it is important to notice with care what the invention is, as described in the patent. "The present invention", the patent states, "relates to electron discharge devices, for example, discharge tubes having an incandescent cathode". The general character of the devices is described in the specification in these words:—

> Devices of this nature are provided with an electron-emitting cathode, an anode, and a conducting body, commonly termed a "grid", consisting ordinarily of an electrical conductor located between cathode and anode for statically controlling the electrical discharge conditions of the tube.

It proceeds:—

> Electron discharge devices as described may be operated at exceedingly high voltages and have a high load capacity. This new apparatus is suited for use in a much wider field than former devices of this nature which were limited to low voltages and very feeble currents.

The combination includes a highly evacuated envelope and structural features which are said to be novel and to co-operate to increase the range and capacity of such devices. Evacuation, it is said, should be carried preferably to a pressure "as low as a few hundredths of a micron, or even lower". In any event, it should be so low that no appreciable gas ionization takes place during normal operation. The various parts of the apparatus are shown as mounted in a tube, or globe, upon a pedestal "similar to the mount employed for incandescent lamps". The cathode consists of a substantially straight filament of highly refractory material, preferably tungsten, mounted between two oppositely disposed supports constituting a

frame-work, and upon this frame-work is wound (transversely to the cathode) the wire which constitutes the grid. The turns of the wire are closely adjacent to each other and "very closely adjacent to", but out of contact with, the incandescent cathode. The supporting frame-work for the cathode and grid is attached to a rod, mounted upon the stem of the tube, and adjacent to this frame-work is the anode, which consists of a wire strung zig-zag over hooks attached to fork-shaped supports and attached to the same rod springing from the stem of the tube. It should be observed parenthetically that the form of neither the anode nor the cathode, as given in this description, is exclusive. Alternative forms are suggested by which the anode takes the form of a plate attached to supports similarly provided and the cathode is "V" shaped. Under these alternative forms, the operation of the apparatus, as regards the matters with which we are concerned, remain the same in principle.

Langmuir admittedly was the first to propose vacuum tubes in which the removal of gases from the envelope was carried to the degree described in this specification. The terms "highly exhausted tube" and "highly rarefied tube", which had been used by scientists and engineers for some years before 1913, the date of Langmuir's invention, conveyed no idea of such a degree of exhaustion, which, by the methods of evacuation then available, could not have been achieved. The advantages of the hard valve, or the hard tube, meaning a highly exhausted valve, are well recognized, one of the most important, perhaps the most important, being that the removal of the residual gases by the methods initiated by Langmuir got rid of a pronounced lack of uniformity in operation, which was encountered in tubes of the soft variety, and made possible the use of tubes carrying current of great magnitude, as well as of exceedingly high potential. About this there is no dispute and, simultaneously with the patent now in question, Langmuir applied for and obtained a patent for his highly exhausted tube which has expired.

The invention of the hard valve brought about a revolution in the radio art. On behalf of the appellants it is contended that the value of the apparatus now in question is almost entirely due to the fact that such a valve is employed and that beyond this Langmuir's combination

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involves no invention. On the other hand, it is contended that by this apparatus, and especially by its novel features, the advantages of the hard valve can be realized to a degree not possible through any apparatus previously known.

The features of the apparatus, which are emphasized in the argument of the respondents, are:

(1) The construction of the grid consisting of a wire, which may be very fine, wound upon a frame-work, which may be made of a non-conducting material, or of metal, in turns closely adjacent to one another.

(2) The position of the filament which is supported by the two ends of the same frame that supports the grid and is surrounded by the turns of the wire constituting the grid, but not in contact with, though closely adjacent to it.

(3) That all the electrodes, the cathode and the grid (that is to say, the frame which supports the cathode and the grid), and the anode (or the supports to which the anode is attached) are mounted upon a single pedestal in such a manner that sufficient rigidity may be secured to protect each and all of the parts of the apparatus against material shocks, or electrical stresses, having a tendency to bring the separated parts of the apparatus into contact with one another, or to alter the relative position of one part in respect to any other.

As we have seen, it is explicitly stated in the specification that the electron discharge device described may be operated at "exceedingly high voltages" and have a "high load capacity"; the evidence supports this averment.

It is also said that this new apparatus is adaptable for use in a much wider field than former devices of the same nature which were limited to low voltages and very feeble currents.

There is, moreover, a statement at the end of the specification that the apparatus may be used to transmit currents limited in potential only by the dielectric strength of the tube and the mechanical strength of the parts subjected to static forces; the evidence establishes this.

I think the evidence sufficiently supports the proposition that such a closely wound grid in close proximity to

the cathode can be employed to obtain a high magnification of the plate current; in other words, that a slight proportionate increase in the potential applied to the grid may cause a vastly greater proportional increase in the value of the plate current; and there is evidence that it may be used to obtain a high load capacity and high magnification of the plate potential.

It is indisputable that the form of grid adapted by Langmuir was entirely new and I cannot accept the proposition that the utility of a closely wound grid of this type placed in close proximity to a cathode, as Langmuir places it, must have been obvious to any radio engineer at the time; nor can I think that the idea itself of using a grid of that type can be said to have been obvious. It seems to me to be too clear for discussion that the grid was a useful improvement and that employed in the manner prescribed by the specification it would co-operate with the highly evacuated envelope to produce most important results. I cannot reach the conclusion that Langmuir's patent has no subject matter.

As to Freeman and Wade, Freeman's invention was made in August, 1921. As a rule, up to that time the heat supplied to the cathode had been derived from a direct current storage battery known as A-battery. There was a wide and insistent demand for some plan by which this battery might be dispensed with and the alternating current of the ordinary electric light circuit be utilized. Such alternating current was then, as now, supplied between 25 and 60 cycles. The application of this current to the tubes of that time produced a loud humming noise in telephone receivers and loud speakers, and Freeman devoted himself to designing a cathode and connections by the use of which this fault might be corrected.

There were then two common types of cathode. In one, the electrons were emitted from the incandescent surface of a refractory conductor, or filament, directly heated by current from an A-battery. In the other, an A-battery also supplied direct current which heated a conductor and from this conductor heat for the cathode was indirectly derived. It seems to be generally admitted that the second type possessed advantages over the first in securing greater uniformity of emission throughout the whole sur-

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face of the cathode and thus, in considerable degree, avoiding undesirable irregularities in the electrical field between the anode and the cathode.

When it was attempted to utilize the alternating current of the electric light circuit for heating the filament, the humming noises mentioned were so pronounced that the necessity of discovering some means of getting rid of these noises was at once evident. Freeman ascertained that these noises had three distinct sources, which are conveniently designated as magnetic, electrostatic and thermal. The specification states:

> The principal object of our invention is to provide a device of the character described which may be employed for detecting, amplifying or rectifying alternating currents and which embodies a cathode structure adapted for excitation from a source of low-voltage, commercial-frequency alternating-currents without the introduction of the alternating-current noises heretofore observed in the operation of such devices.
>
> * * *
>
> Heretofore, it has not been practical to employ alternating currents for the excitation of the cathode or filament of a receiving or amplifying tube for the reason that such currents introduce variations in the plate current of the tube. Such variations are thought to be due to the following causes:
>
> 1. The variations in the intensity of the magnetic field established by the alternating currents traversing the filament, thereby resulting in a variable deflection of the electron stream emanating from the filament;
>
> 2. The variations in the electric field around the filament which are caused by the reversals in the potential distribution along the filament;
>
> 3. The variations in the emissivity which are caused by the alternate heating and cooling of the filament.
>
> We have found that the desirable results outlined hereinabove may be obtained by applying a cathode construction having an operating cathode surface which has no fall of potential along its surface, that is, a so-called "equipotential surface". Such cathode surface may be rendered thermionically active in a number of different ways, as by subjecting the same to heat or to an electron bombardment. In one form of embodiment of our invention, we provide a cathode construction comprising a central heater element and a co-operating equipotential cathode surface which is positioned immediately adjacent to the heater element. The thermal energy of the heater element may be transferred to the cathode surface either by conduction or by radiation.

There can be no doubt that by Freeman's combination these noises from all the sources are for practical purposes sufficiently suppressed. By giving to the cathode a substantial mass, a temperature which is virtually constant is maintained in it. As to magnetic hum, the legs of the U-shaped wire are so close together that the opposed magnetic fields go far to cancel each other; and Freeman has

by his device succeeded in reducing the effect of these fields to a point where it ceases to be of practical importance. Electrostatic hum disappears, the evidence shows, because Freeman's arrangement affords an effective shield against the electrostatic effects of the alternating potential.

I agree with the learned President of the Exchequer Court of Canada that the defence of anticipation has not been established and I think it unnecessary to add anything to his discussion of that branch of the defence.

The question of substance is: is there subject matter? Freeman, it must be remembered, was not engaged in a scientific investigation. He was trying to find a practical method for getting rid of the noises attending the use of alternating current for heating the cathode. He, of course, possessed the knowledge of scientific principles that we should naturally ascribe to any competent radio engineer; but the practical difficulties were stubborn. The primary object of the current was to produce the emission of electrons from the cathode by the agency of heat; and the heat generated by the current must have the required effect upon the cathode surface. At the same time the flow of electrons must be protected from disturbance due to the magnetic and electrostatic fields set up by the alternating current. This practical problem Freeman succeeded in solving.

The learned President says:—

> There can be no doubt that it was obviously desirable that generally radio receiving tubes be operated, if possible, by commercial alternating current, and apparently that was an object that engaged the attention of prominent workers in the art, prior to the date of Freeman. Freeman was the first to disclose a device which could use alternating current and at the same time eliminate the major alternating current hums or noises, and his device has been almost universally used for the purposes described and directed by him. It seems to me that a very strong case has been made for sustaining the validity of this patent. My conclusion is that Freeman is a true combination patent, a novel and useful device, almost universally used in all receiving and amplifying radio circuits using alternating current, and apparently it solved problems which were recognized, the solution of which was deemed desirable and sought for by others, and that there is subject-matter in Freeman.

With this I agree.

I am also satisfied with the conclusions of the learned President in respect of the issue of infringement and with his reason in support of those conclusions. I ought perhaps

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to say explicitly that I think the learned President has quite satisfactorily dealt with the argument based upon the Torrisi patent.

I now come to the defence based upon the Criminal Code. Paragraph 7 of the statement of defence is in the following words:

> The assignments by which the plaintiff, Thermionics Limited, purports to have acquired and holds the patents in suit are invalid because they were given for an illegal consideration, having been made in pursuance, or as a result of an agreement between or among the plaintiffs or some of them, whereby the said plaintiffs fix, control and unreasonably enhance the prices at which radio tubes are sold to dealers in and users of the said tubes, thereby restricting competition and detrimentally affecting the public, all of which is contrary to the provisions of the *Combines Investigation Act*, R.S.C., 1927, chap. 26, section 2, and amending Acts, and The Criminal Code, R.S.C. 1927, chap. 36, section 498.

The respondents put in evidence the following exhibits in support of the title of the patents in suit:

Exhibit no. 3

Assignment, dated January 2, 1936, of Langmuir patent 212,366 and other patents from Canadian General Electric Company, Limited, to Thermionics Limited, for consideration of one dollar.

Exhibit no. 4

Assignment, dated January 2, 1936, of Freeman and Wade patent 265,517, and other patents from Canadian Westinghouse Company, Limited, to Thermionics Limited for consideration of one dollar.

Exhibit no. 5

License agreement, dated January 2, 1936, from Canadian General Electric Company, Limited, to Thermionics Limited, granting licenses under "all present and future patents" of Licensor and Radio Corporation of America, relating to radio tubes, providing for and limiting the assignments of all patents, including the Langmuir patent in suit, and cancelling many other recited agreements.

Exhibit no. 6

License agreement, dated January 2, 1936, from Canadian Westinghouse Company, Limited, to Thermionics Limited, granting licenses under "all present and future patents" of Licensor and Radio Corporation of America, relating to radio tubes, and providing for and limiting the assignment of all patents, including the Freeman and Wade patent in suit, and cancelling many other recited agreements.

Exhibit no. 7

Admission by appellants, among other things that defendant Cutten-Foster & Sons, Limited, a jobber and one of the appellants, entered into a licensed radio tube sales agreement with the plaintiff Canadian Marconi Company, as of January 3, 1938, executed February 28, 1938.

Exhibit no. 9

The Cutten-Foster agreement, identified in exhibit 7

The Cutten-Foster agreement in question was entitled "Licensed Radio Tube Sales Agreement (Jobbers)" and defined, among others, the following terms as a basis upon which radio tubes would be furnished by Canadian Marconi Company, Limited, to Cutten-Foster & Sons, Limited.

It was recited that

"The Manufacturer is engaged in the business of manufacturing and/or selling Thermionic devices * * * hereinafter known and described as 'Radio Tubes';

"All said Radio Tubes are covered by various Letters Patent of the Dominion of Canada owned or controlled by Thermionics Limited";

"The Licensed Jobber desires to become an authorized jobber of the Manufacturer for the sale only of licensed Radio Tubes in accordance with the license terms and conditions applicable to the same";

(1) "The Manufacturer agrees to sell and the Licensed Jobber agrees to purchase such Radio Tubes";

(4) "The Manufacturer reserves the right at any time to change or modify the list prices, net prices or terms to the Licensed Jobber and/or dealers in respect of Radio Tubes merchandized by the Manufacturer";

(5) "The Licensed Jobber agrees to accept its appointment as a jobber licensed for the sale of only such Radio Tubes as are manufactured in accordance with * * * the manufacturing patent license enjoyed by the Manufacturer and will purchase only such tubes as are so licensed. The Licensed Jobber * * * will not sell * * * any licensed Radio Tubes at less than such net prices to dealers, service men and licensed amateurs as may be approved from time to time by the Manufacturer, nor will the Licensed Jobber sell to any customers * * * at less than such list prices as from time to time may be approved by the Manufacturer; * * * Any price lists * * * issued * * * by the Licensed Jobber shall contain the list prices only of licensed Radio Tubes as from time to time approved by the Manufacturer."

(6) "* * * The Licensed Jobber admits the validity of the Letters Patent under which said Radio Tubes are or may be licensed * * * and admits that all Radio Tubes manufactured in accordance with said Letters Patent are subject to the limited licenses set forth on the labels attached thereto, and to the conditions set out in this agreement or in the Manufacturer's patent license agreement."

The appellants' counsel, being called upon to state the facts which he proposed to establish under the plea based upon the *Combines Act* and the Criminal Code (para. 7), stated it was his purpose to prove that:

before the execution of the agreement in 1936, these four people were exercising their rights under their patents and in open competition. But the result of the agreement was to put the fixing of prices of all the radio tubes made in Canada in the hands of one person, who as a matter of fact, receives no benefit from it, because he gets no royalties except a small royalty from one,—who fixes the price of all radio tubes in Canada and entirely eliminates all competition.

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that they are the only manufacturers in Canada; that in 1936 they combined and put the right and the power to fix prices in Thermionics Limited, to whom they assigned their patent rights; and that that company, controlling as it does every manufacturer in Canada, has fixed prices, has fixed prices not only to the manufacturer but also to the retailer and the jobber. Therefore I say that of itself is an infringement not only of the Code but also of the *Combines Investigation Act*.

The appellants contend that, as a result of the ruling of the President of the Exchequer Court of Canada, they were denied the right to adduce evidence to establish *inter alia* the following facts and things:

That the respondents, then in open competition, entered into a combine to create a holding company for all of their patents on radio receiving tubes,

That they granted licenses to manufacture radio tubes only to three members of their own group, so that all radio tubes manufactured in the Dominion are limited to these sources,

That there was no consideration for the assignments of the patents on radio receiving tubes other than the illegal combine licenses,

That the respondents jointly fixed the prices of all radio tubes manufactured in the Dominion,

That the respondents kept no records of their price fixing,

That the respondent, Canadian General Electric Company Limited, used the respondent, Thermionics Limited, as a medium to bring patent suits against its competitors without prejudicing its own sales,

That practically all the research and patents which were pooled by the respondents were derived from their corresponding United States companies,

That they eliminated all competition and stifled trade to the detriment of the public, all contrary to the *Combines Invvestigation Act* and the Criminal Code,

And that the assignments upon which the respondents base this action were founded solely upon illegal agreements and combines.

The facts relied upon by the appellants beyond doubt point to the conclusion that the respondents had entered into an agreement to restrict competition among themselves in respect of radio tubes; and I shall assume that where A and B enter into an agreement to suppress competition in respect of articles of commerce they do not escape the provisions of section 498 of the Criminal Code merely by reason of the fact that these articles of commerce are protected by patents. I shall assume further that the learned trial judge ought to have permitted the appellants to proceed with evidence establishing the existence of such a combine, that is to say, a combine constituting a criminal offence under section 498.

I find myself faced with this difficulty. Prior to the arrangements of 1936, which are impeached by the plea

of the appellants, the Langmuir patent was vested in the General Electric Company—in point of fact the Canadian patent was issued to the Canadian General Electric Company—and the Freeman patent was vested in the Westinghouse Company, having been issued to that company. The illegal combination, assuming it to have been such, to which these companies were parties, did not effect a forfeiture of the statutory rights under the patents. Assuming the transactions between these companies and Thermionics Ltd. were illegal and void, the patents were still vested in them and they are, I think, entitled to enforce those rights. By sections 54 to 57 of the *Patent Act,* the patentee, as well as those claiming under him, is entitled to recover damages sustained by reason of the infringement, as well as, in a proper case, to an injunction. On this ground I am constrained to the conclusion that the defence embodied in paragraph 7 fails.

The appeal should be dismissed with costs.

The judgment of Rinfret and Taschereau JJ. was delivered by

TASCHEREAU J.—This is an action for infringement brought by Thermionics Limited, a patent holding company. By order of the Court, Canadian Marconi Company, Canadian General Electric Company, Canadian Westinghouse Company, and Rogers Majestic were added as plaintiffs.

The first of these patents, dated August 30th, 1921, bears no. 213,178 and is called the Langmuir patent; the second one, which is no. 265,517, dated November 2nd, 1926, has been referred to throughout the proceedings as the Freeman patent. Both relate to devices known as vacuum tubes used in radio sets.

In their statement of claim the plaintiffs allege that the defendants, the Philco Products Limited, and Cutten-Foster & Sons Limited, both having their head office in the city of Toronto, have infringed the rights of the plaintiffs under the two above-mentioned patents: the defendant Philco Products importing into Canada, and selling through Cutten-Foster & Sons, and this latter defendant re-selling in the ordinary course of business radio tubes of the types nos. 41E, 75, 78E, 6A, 7E, known

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as Philco tubes, which infringe both letters patent, and also Philco Radio tubes type 84 which infringe letters patent no. 265,517. The late president of the Exchequer Court of Canada came to the conclusion that both patents were valid, and that they had been infringed by the appellants.

As to the Langmuir patent, the appellants submit that it does not disclose any novel patentable subject-matter, that the claims in suit are anticipated by the prior art, and that there has been no infringement. Their submission as to the Freeman patent, is that Freeman did not do more than apply the knowledge common in the art, that it contains no subject-matter, and, as in the first patent, they also submit that there is no infringement.

Dealing first with the Langmuir patent no. 213,178, which is entitled "Electron Discharge Apparatus", and which relates to vacuum tubes, used in radio sets, it is necessary, I think, to indicate the history of the development of these vacuum tubes, for a better understanding of the case.

The early discoveries which lead to their creation go as far back as the beginning of this century. The first audion detector was operated with a Bunsen Burner, the flame of which heated salt in a small cup, with the result that small particles of the sodium were thrown carrying electric charges to an upper platinum wire. It was soon found to have great practical disadvantages. Deforest invented a new type of detector. In an ordinary incandescent lamp he placed a filament (cathode), which when heated gave off small particles of ions of metal or carbon, which were bombarded on a sheet of platinum (anode) placed very near the filament. This detector, based on the same principle as the previous one, constituted an improvement, but it did not obviate all the difficulties. The electrons were received only on the vertical plate placed on the side of the cathode, and it followed that all those projected in other directions were lost inside the lamp.

In order to improve this device, Fleming thought of putting a cylinder of platinum around the filament, thus allowing the anode to fulfil its role in a much more efficient way. This new tube was called the "Fleming Oscillation Valve".

At this state of the development of the art, these tubes were, therefore, merely composed of a lamp in which were found a filament or "cathode" (negative pole) from which there was a flow of electrons to the cylindrical "anode" (positive pole). Deforest, after substituting nickel to platinum for the "anode", found that if a "grid" of platinum wire were placed between the anode and the cathode, and properly loaded with electricity, the flow of electrons would become much more regular, and the efficiency of the tube greatly increased.

The next step was made by Langmuir. The improved Deforest Tube could furnish only a low voltage on account of the gas accumulated in the tube. On the 11th of May, 1920, Langmuir obtained patent no. 200,061 which is not the patent in suit. In his specification he says:

> My present invention comprises improvements in electron discharge apparatus having a high load capacity and operable with the highest voltages. The novel features of my invention will be pointed out with greater particularity in the appended claims.

The drawings accompanying the specifications show that in the tube are found an "anode", a "cathode" and a "grid" between both to regulate the flow of electrons. However, the claims make no mention of the grid. Claim no. 9 reads as follows:

> 9. A discharge tube having a cathode adapted to emit electrons, and anode adapted to receive electrons and tube walls fashioned or shaped so as to permit the free passage of a useful proportion of said electrons from cathode to anode, the gas content or residue of said tube and the relation of the parts of the tube being such that the tube is capable of operation with stable and reproducible results substantially unaffected by positive ionization and fluorescence with currents of at least 5 milliamperes and with voltage of at least 200 volts.

This patent, which expired in 1938, was properly called "the high vacuum patent". The tube did not contain any new devices, but, its capability of operating at a very high voltage and high load capacity, depended upon its evacuation to the degree specified in the patent. It is Langmuir himself, who said, speaking of this patent:

> Further investigation showed that with the elimination of the gas effects, all of the irregularities which had previously been thought inherent in vacuum discharges from hot cathodes were found to disappear. In order to reach this condition, however, it was not sufficient to evacuate the vessel containing the electrodes to a high degree, but it was essential to free the electrodes so thoroughly from gas that gas was not liberated from them during the operation of the device. It was also necessary to free the glass surfaces very much more thoroughly from gas than had been thought necessary previously.

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It is under these circumstances and with the above-described development of the art, that Langmuir applied for the first patent in suit, which was granted on the 30th of August, 1921. This patent is called the "Electron Discharge Apparatus".

In his specifications, Langmuir says:

> Devices of this nature are provided with an electron-emitting cathode, an anode, and a conducting body, commonly termed a "grid", consisting ordinarily of an electrical conductor located between cathode and anode for statically controlling the electrical discharge conditions of the tube. Electron discharge devices as described may be operated at exceedingly high voltages and have a high load capacity. This new apparatus is suited for use in a much wider field than former devices of this nature which were limited to low voltages and very feeble currents.
>
> The present invention comprises various structural features of novelty which co-operate to increase the range and capacity of a device of this type. For example, in accordance with my invention the grid is supported on a frame-work in such manner that mechanical displacement of the grid by static strains or by mechanical shocks cannot easily occur. Other features of novelty are pointed out with particularity in the claims.

Claims 2 to 5 which are the claims on which the plaintiffs rely in their particulars of breaches are as follows:

> 2. The combination of a highly evacuated envelope, and electron-emitting cathode, a co-operating anode, rods spaced apart and adjacent said cathode, a conductor constituting a grid supported by said rods, and having a plurality of sections transverse to said rods, and external connections for said electrodes and said grid.
>
> 3. An electron discharge apparatus comprising an evacuated envelope, an electron-emitting cathode, a co-operating anode, a frame-work spaced about said cathode, and a conductor mounted thereon closely adjacent said cathode.
>
> 4. An electron discharge apparatus comprising an evacuated envelope, a refractory conductor, connections for transmitting energy to incandesce said conductor, bars located on opposite sides of said conductor, a wire wound with closely adjacent turns on said bars to constitute a grid, but out of contact with said incandescing conductor, a second set of bars closely adjacent to the first set but insulated therefrom and a conductor constituting an anode mounted thereon in a plane substantially parallel to said grid, and leading-in conductors to said grid and anode.
>
> 5. A vacuum discharge tube comprising a highly evacuated envelope, a cathode adapted to be heated, a co-operating anode, a frame-work located adjacent thereto, a conductor mounted thereon, and located between the cathode and anode, and external connections for said electrodes and said conductor.

It is clear, I think, that what is claimed by this patent is a "combination" composed of a "highly evacuated envelope, and electron-emitting cathode, a co-operating anode", and a "conductor constituting a grid". I have no

trouble in coming to the conclusion that the various elements used in the construction of this "Electron Discharge Apparatus" are contrivances that were known long before this Langmuir patent was issued.

Deforest's filament in the incandescent lamp, bombarding electrons on a circular sheet of platinum as developed by Fleming, by many years anticipated the description of the devices given in Langmuir's patent; and theoretically, the "grid" later discovered by Deforest and placed between the anode and cathode to regulate the flow of electrons, clearly is a bar to Langmuir's claims of novelty. As to the highly evacuated envelope, it was the subject-matter of the patent issued to Langmuir himself under no. 200,061 on the 11th of May, 1920, and it was as a result of this former discovery that it has been made possible to obtain an electron discharge apparatus having a high load capacity and "operable with the highest voltages", as it has been said by Langmuir speaking of his 1920 patent.

The grid has been the subject of much discussion at the hearing, and with the highest respect, I am unable to agree with the conclusions of the learned president. The only descriptions of the grid, which may be found in the claims on which the respondents rely, are the following:

(*a*) (claim no. 2) A conductor supported by rods and having a plurality of sections transverse to the rods.

(*b*) (claim no. 4) A wire wound on bars, with closely adjacent turns.

(*c*) (claims 3 and 5) A conductor wound on a frame-work.

If there is any novelty in this grid, it is surely not in relation to its function, for as Langmuir says in the specifications in order to show the usefulness of this grid:

> For example, in accordance with my invention, the grid is supported on a frame-work in such manner that mechanical displacement of the grid by statics, strains or by mechanical shocks cannot easily occur. Other features of novelty are pointed out with particularity in the claims.

It is to the particular structure of the grid that Langmuir has applied his attention, and as to the other features of novelty, I have been unable to find them in the claims. And even the structure does not strike me as being a novelty.

In 1912, Mertz in "Electrician & Mechanic" illustrated a radio tube having a cathode, an anode and a "cylindrical grid" consisting of a helix of wire (as Langmuir's) interposed between the cathode and anode for controlling

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the electron stream. This tube which has been placed on the market was described as follows by Dr. Chaffee in his evidence:

> That illustration shows the looped filament, in fact two loops comprising the filament, sealed into the tube from the lower end, a cylindrical or helical grid coil surrounding the filament, and a cylindrical plate. Both the plate and the grid were supported from the upper press of the tube. I think those are the pertinent parts of this article.

And this is how he compares Mertz tube with the appellants' structure:

> There are of course some minor differences but essentially, referring in particular to the grid structure, the cylindrical Mertz grid and the defendants' are similar in that they are helical- or spiral-shaped grids, except that in the Mertz grid the helix is supported from the end whereas in the defendants' grid there are side bars put on to maintain the spacing of the various turns uniform, or at least as designed.

And this was confirmed by Mr. Hogan, the respondent's expert:

> Q. Is there any difference between the grid shown in the Mertz tube and the grids of defendants' tubes, except that side rods have been inserted in the defendants' tubes?—A. Broadly speaking, I think that is the only difference. The method of support, of course, is different but I am speaking about the grid itself, that is the fact with a helical grid as shown in Mertz and a helical grid as used by defendants. Both are helices.

Moreover, I find in the drawings of the "grid" of Langmuir's first patent such similarity with the "grid" of this patent in suit, that I am unable to see the differences, if there are any.

I believe that it may be said, that the application of side rods to Mertz cylindrical grid is not the work of inventive and creative faculties, but merely the ordinary mechanical modification which may from time to time be expected from skilled mechanics, in the normal development of an art.

Of course, I am not forgetful, and I have kept in mind that what is claimed here is a combination. The combination of known contrivances may be the proper subject matter of a patent, but, it has to achieve a combined result, which is the novelty. In the Langmuir patent, with respect, I see nothing of the kind. The co-acting parts described in the patent were before used together for all the purposes mentioned in the claims. The high voltage which is claimed as the result of this combination, is not

to my mind a statement based on the evidence. Dr. Chaffee, expert witness for the appellants, comes to the conclusion, and Dr. Hogan, called by the respondents, practically corroborates this assertion, that if properly evacuated the Deforest tube could be used at high voltages. The converse is also true, and if improperly evacuated the Langmuir tube would lose its virtue. It is the first Langmuir patent of 1920 that achieved the result of allowing such high voltages to be obtained, and I cannot sustain this patent in suit, unless I import from the expired patent what was its subject-matter. I believe that this Langmuir patent is invalid.

Patent no. 265,57 referred to as the Freeman patent, relates to "Thermionic vacuum tubes" and has also been assigned to the respondents.

In dealing with the Langmuir patent, we were dealing with a tube where direct current only was used to heat an unequipotential cathode, although, as it will be seen later, the equipotential cathode was not unknown. In November, 1920, when the returns of the Presidential election were broadcast, public attention was directed to radio, and the use of alternating current with radio receivers arose widespread interest.

However, in applying alternating current to the then existing radio sets, three noises or "hums" developed in the receiver, which were different in character and independent one from the other. They were found to be due to three different factors.

The voltage drop along the filament caused by the heating current, developed the electrostatic effect, which is an electrical condition existing whenever there is a difference of voltage. It has been described in the case of a tube having a filamentary cathode, as being the difference in voltage along the filament with the result that there is an unequal distribution of the electrostatic field, and consequently of the electron stream between the cathode and anode. If the voltage drop is produced by an alternating voltage the electron stream is disturbed by each cycle of the alternating voltage and a "hum" results.

The second disturbance is caused by the variation of temperature produced in the filament, and is called the thermal effect. When the temperature of the cathode varies appreciably with each cycle of the alternating heat-

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ing current, the flow of electrons varies likewise, and a second "hum" occurs. The third "hum" is due to the magnetic field. In going through a straight filament the heating current produces this magnetic field which will deflect the flow of electrons on the anode; and if the current be alternating, then the deflection will obviously create a disturbance (due to the numerous cycles) which is negligible when the source of heat is direct current.

It is the contention of the respondents that the "Thermionic Vacuum Tube" patented by Freeman on the 2nd day of November, 1926, eliminated all these three disturbances.

I read in the specifications:

> The principal object of our invention is to provide a device of the character described which may be employed for detecting, amplifying or rectifying alternating currents and which embodies a cathode structure adapted for excitation from a source of low-voltage, commercial-frequency alternating-currents without the introduction of the alternating-current noises heretofore observed in the operation of such devices.
>
> We have found that the desirable results outlined hereinabove may be obtained by applying a cathode construction having an operating cathode surface which has no fall of potential along its surface, that is, a so-called "equipotential surface". Such cathode surface may be rendered thermionically active in a number of different ways, as by subjecting the same to heat or to an electron bombardment. In one form of embodiment of our invention, we provide a cathode consrtuction comprising a central heater element and a co-operating equipotential cathode surface which is positioned immediately adjacent to the heater element. The thermal energy of the heater element may be transferred to the cathode surface either by conduction or by radiation.

The claims relied upon by the respondents are: 1, 4, 8, 24, 57 and 58. These claims read as follows:

> 1. In combination, an equipotential cathode structure comprising an equipotential surface, a non-inductive electrical heater for rendering said surface thermionically active and an alternating current supply circuit operatively associated with said electrical heater for energizing the same.
>
> 4. In a cathode structure, a mass of refractory material and a filament comprising branch portions disposed in said mass, said branch portions being so arranged that the magnetic fields established by currents traversing the branch portions balance one another.
>
> 8. In a space-current device, the combination with a heater element comprising adjacently disposed portions so arranged that the magnetic fields established by currents traversing said portions balance, of a member providing an equipotential cathode surface and refractory means for insulatingly supporting said heater element and for providing a thermally conductive path between said heater element and said member.

24. In a vacuum-tube device, a heater element in the form of a U-shaped conductor, the parallel members of said conductor being so closely adjacent that the resultant field is without substantial effect on the space current.

57. In an electron-discharge tube, a cathode member comprising a tubular casing having an outer surface adapted to emit electrons and a heating element comprising a plurality of parallel disposed wires within said casing, said heating wires being insulated from each other and from said casing by tubular insulating members individually surrounding said heater wires.

58. In an electron-discharge device, a cathode member having an outer surface adapted to emit electrons when heated, a U-shaped heater wire longitudinally disposed in said tubular casing and refractory tubular members for insulating the same with respect to each other and to the walls of said outer casing.

It will therefore be seen, that, what is claimed is a combination of an equipotential cathode, a non-inductive heater and an anode, the principal object of which is to provide a device heated by alternating currents without the introduction of "hums" or noises, heretofore observed in the operation of such devices.

I do not think this Freeman combination achieved any previously unknown results as claimed by the respondents. The equipotential cathode which is used and relied upon as the main factor eliminating the electrostatic and thermal effects, is not the invention of Freeman. In 1915, Nicholson obtained a patent for a cathode, the purpose of which was to eliminate the non-uniform distribution of the electron stream caused by the voltage drop; and as Nicholson said:

> This invention provides a thermionically active cathode which, while affording a large active area, will be devoid of the property of presenting a drop of potential between its terminals. It is in fact an equipotential cathode, that is, a cathode all parts of whose active surface can be maintained at the same potential. Thus, an even distribution of space current over the cathode surface is permitted, and the cathode as a whole may be worked at its maximum efficiency. This resullt is obtained by divorcing the heating agent from that which produces the thermionic activity.

The evidence reveals, that Nicholson has built these equipotential cathodes prior to 1920, and Mr. Hogan says in his evidence that the Nicholson tube was "theoretically and technically a very good equipotential tube".

Goucher in "Physical Review", in 1916 also describes experiments in which equipotential cathodes were used.

In 1921, Garnett Barber wrote in "Physical Review" that, in order to determine the exact potential at which secondaries begin to be emitted, an equipotential filament is used, and that a hot platinum tube coated with oxide serves as the source of primary electrons.

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In 1921 also, Morecroft, a professor at Columbia University, shows, in a text book entitled "Principles of Radio Communication", how voltage drop along the filament causes an equipotential distribution of the electron stream. He states that the equipotential cathode provides a uniform electrostatic field between the cathode and anode, obviously eliminating the electrostatic effect and also the thermal effect.

Sworykin, a co-worker of Freeman, filed in 1921 a patent application directed to a special alternating current cathode in which it is stated:

> Still another object of my invention is to provide such a filament-supply system that the effects of the potential drop along the filament upon the electron emission therefrom may be reduced to a low value, thereby providing a filament having the characteristics of an equipotential cathode.

And, in 1922, Lee Sutherlin also applied for a patent in the United States, entitled "Vacuum Tube Filament Structure". In his specifications he said:

> Heretofore, considerable difficulty has been experienced in the excitation of the cathode element of detecting and amplifying vacuum tubes of the three-electrode type by alternating currents of commercial frequency because of the periodic variation in the voltage-current characteristic of the tube, resulting in the so-called "alternating-current hum" in telephone devices associated therewith.
>
> A further disadvantage of many types of vacuum tubes heretofore employed consists in the microphonic action observed in the operation of the tube when the same is jarred. Such microphonic action may take the form of a sustained note of several minutes' duration and may be detected in the telephone receivers associated with the plate-filament elements of the tube.

It will be seen, that in all these patents, the equipotential cathode is well known. If applied to these cathodes, the alternating current does not develop any electrostatic or magnetic effects; on account of the construction of these cathodes and their mass, the emission of electrons is from the sleeve surrounding the filament, and they are, therefore, constantly provided with sufficient heat to emit a regular flow. The electrostatic effect disappears due to the elimination of the voltage drop or fall of potential along the cathode, and the thermal effect is also overcome, because the sleeve is massive enough to prevent any appreciable variation of cathode temperature.

These equipotential cathodes were therefore used long before Freeman, but, as a rule were heated with direct current. In embodying these cathodes into their tubes,

the appellants who sell them to be used without regard to the current to be employed, did not copy Freeman's device, but adapted to their tubes a cathode known since 1915.

When in 1920 and 1921, alternating current became a source of heat for radio tubes, it was common knowledge, that the electrostatic and thermal effects could be eliminated by the use of the equipotential cathode.

There remained, however, a third "hum" which was due to the magnetic field, caused by the use of a single filament. But, it was easily overcome by bending the wire back on itself into the form of a "hairpin". It was then as before common knowledge that the simplest way of eliminating an undesirable magnetic field was to neutralize it by opposing to it an equal field, and this is obtained by the use of the "hairpin" filament. The field due to the current passing up one side of the "hairpin" is balanced by the field of the current passing down the other. The art was well aware of the cause of the deflection of the electrons, and it knew also how to cope with this inconvenience.

Dr. Chaffee explained in his evidence that the magnetic field is circular around the wire, and that Ampere was the first to suggest that if the wire is doubled back on itself, the magnetic field according to the proximity of the wires is neutralized to a greater or lesser extent.

In 1914, Richardson found out that the effect of the magnetic field arising from the heating current is very important and, explained that under certain conditions the effect of this field is great enough to prevent any electrons from reaching the anode.

Marconi in British patent no. 6476 of 1915, entitled: "Improvements in or Relating to the Cathode of Vacuum Tubes Suitable for Use in Wireless Telegraphy" disclosed an equipotential cathode in which a cylinder constitutes the equipotential metallic sleeve from which the electrons are emitted. This sleeve is heated by two wires in the form of an inverted U. These wires are disposed within the cathode sleeve, and are connected by a link at the top so that a complete circuit is formed passing from the battery up through one wire and returning by the other wire to the battery.

Mr. Hogan said in his evidence:

> If you wish to cancel the effect of a magnetic field of a straight wire, as that field is exhibited some distance from the wire, then the simplest way to do that would be to set up an opposing field equal in amount from some other similar wire placed as close as possible to the first one.

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Mr. Hogan also says, speaking of the "hairpin" shape of the wire:

> It certainly was well known in 1920 and long before, that a so-called non-inductive winding or resistor could be made by doubling a resistance wire back upon itself, and that such a wire did not have a substantial magnetic field.

In the spring of 1921, Sutherlin had pointed out that if alternating current is applied on a straight filamentary cathode there will result a "hum", and that this can be avoided by the bending of the filament upon itself.

In 1921, Sutherlin had made a patent discovery witnessed by Freeman himself in which he stated:

> In the construction of vacuum tubes, the filaments of which are to be lighted with alternating current, it is desirable to have the filament made of two branches running parallel to each other and as close together as practicable so as to reduce the magnetic field. The current flows in opposite directions in the two branches.

There is some additional evidence in the record, but what I have pointed out is sufficient, I believe, to show that the existence of the magnetic field, its effect upon the flows of electrons, and the method of overcoming it was well known prior to the alleged invention of Freeman, and that, in order to eliminate it, he merely applied common knowledge.

The result, in my opinion, is that Freeman simply juxtaposed known contrivances (the equipotential cathode, and the hairpin filament), to serve a known purpose, which is the elimination of the electrostatic, thermal and magnetic effects. It is on account of the use of alternating current that the necessity of juxtaposition arose; but it was common knowledge before, that this method was the proper and only one that could be used, when time came to heat cathodes with this additional source of current. Freeman's device may have the merit of having been the first to be assembled, but I do not think it is an invention within the meaning of the *Patent Act*.

Another point raised by the respondents is that Cutten-Foster & Sons Limited, one of the appellants, is estopped from contesting the validity of the patents in suit, because on January 3rd, 1938, it entered into a one-year agreement with one of the respondents, Canadian Marconi Company, under which the validity of the letters patent was admitted.

The clause in the agreement read as follows:

> The licensed jobber admits the validity of the letters patent under which said radio tubes are or may be licensed and all trade marks owned by the manufacturer, and admits that all radio tubes manufactured in accordance with said letters patent are subject to the limited licenses set forth on the labels attached thereto, and to the conditions set out in this agreement, or in the manufacturer's patent license agreement.

I cannot see how Cutten-Foster & Sons Limited can escape the legal consequences that flow from the unequivocal terms of this agreement. It is true that it expired on the 31st of December, 1938, but it is for alleged infringements while it was in force that the proceedings were instituted. Cutten-Foster is, I think, estopped from contesting the validity of these letters patent, and as the evidence reveals that it has infringed, its appeal must fail.

As to the other defence based upon the Criminal Code and the *Combines Investigation Act*, I agree with the reasons given by my Lord the Chief Justice.

I, therefore, come to the conclusion that the appeal of Philco Products Limited should be allowed with costs throughout. I would vary the judgment of the Exchequer Court of Canada as to Cutten-Foster & Sons Limited so that the order against it be without costs, and I would dismiss its appeal without costs.

KERWIN J.—The first patent in suit, known as Langmuir, issued August 30th, 1921, on a petition dated April 4th, 1919, and filed May 3rd, 1919. The respondents proposed to assert that the invention described in this patent was made by Langmuir on or about March 12th, 1913, but there does not appear to be any evidence in the record as to any date earlier than October 16th, 1913, when a petition was filed in the United States patent office for a patent that is stated to be similar to the one in suit. In the first instance, many claims in the Langmuir patent were relied on but by amendment the respondents confined themselves to claims 2 to 5 inclusive, which read as follows:

> 2. The combination of a highly evacuated envelope, an electron-emitting cathode, a co-operating anode, rods spaced apart and adjacent said cathode, a conductor constituting a grid supported by said rods, and having a plurality of sections transverse to said rods, and external connections for said electrodes and said grid.
>
> 3. An electron discharge apparatus comprising an evacuated envelope, an electron-emitting cathode, a co-operating anode, a frame-work spaced about said cathode, and a conductor mounted thereon closely adjacent said cathode.

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4. An electron discharge apparatus comprising an evacuated envelope, a refractory conductor, connections for transmitting energy to incandesce said conductor, bars located on opposite sides of said conductor, a wire wound with closely adjacent turns on said bars to constitute a grid, but out of contact with said incandescing conductor, a second set of bars closely adjacent to the first set but insulated therefrom and a conductor constituting an anode mounted thereon in a plane substantially parallel to said grid, and leading-in conductors to said grid and anode.

5. A vacuum discharge tube comprising a highly evacuated envelope, a cathode adapted to be heated, a co-operating anode, a frame-work located adjacent thereto, a conductor mounted thereon, and located between the cathode and anode, and external connections for said electrodes and said conductor.

By petition dated June 5th, 1919, and filed August 11th, 1919, Langmuir applied for another patent. This was granted May 11th, 1920 (i.e., prior to the date of the one in suit), and expired before any of the appellants' activities complained of in this litigation. This other patent relates to a hard tube, by which is meant a highly evacuated tube, and is known as the high vacuum tube patent. Claim 2 may be taken as typical:

2. A discharge tube having a cathode adapted to emit electrons and an anode adapted to receive said emitted electrons, the tube walls being fashioned or shaped to permit the direct passage of a useful proportion of said electrons from cathode to anode, the gas content or residue of said tube and the relation of the parts of the tube being such that the tube is capable of being so operated in a range below saturation and materially above ionization voltages that the space current is governed or limited by the electric field of said electrons substantially unaffected by position (positive ?) ionization.

In my opinion all the advantages are present in this that were claimed for the Langmuir patent in suit. What is here claimed is a combination of,—

(*a*) a hard tube;

(*b*) a grid, consisting of a wire which may be very fine, wound upon a framework in turns closely adjacent to one another;

(*c*) a filament supported by two ends of the same frame that supports the grid and surrounded by the turns of the wire constituting the grid but not in contact with, although closely adjacent to it;

(*d*) the mounting of the grid, filament and plate upon a single pedestal.

The hard tube is covered by the high vacuum tube patent. The hard tube also permitted the use of a higher voltage which in turn would make it clear to one skilled in

the art that protection against electrical stresses would be afforded by the rigidity of the electrodes. That this rigidity could be secured by mounting the electrodes in the manner suggested by Langmuir did not require the use of any inventive faculty and it would also seem to be obvious that this same rigidity would protect the electrodes against mechanical shocks. There was nothing new in using a coarse wire in the grid and quite evidently a fine wire would require support to keep it from sagging or spreading. The combination of the features referred to does not afford subject-matter in Langmuir and as between the respondents and the appellant, Philco Products Limited, the patent granted on his application is invalid.

However, the appellant, Cutten-Foster & Sons Limited, is bound by the following clause in an agreement entered into by it:

> The licensed jobber admits the validity of the letters patent under which said radio tubes are or may be licensed and all trade marks owned by the manufacturer, and admits that all radio tubes manufactured in accordance with said letters patent are subject to the limited licenses set forth on the labels attached thereto, and to the conditions set out in this agreement, or in the manufacturer's patent license agreement.

Cutten-Foster & Sons Limited is the jobber referred to and by reason of its admission the Langmuir patent is valid as between it and the respondents. Unquestionably there was infringement.

The second patent in suit is the Freeman-Wade patent or, as it is called, Freeman. For the reasons stated by him, I agree with the learned President of the Exchequer Court of Canada that this

> is a true combination patent, a novel and useful device, almost universally used in all receiving and amplifying radio circuits using alternating current and apparently it solved problems which were recognized, the solution of which was deemed desirable and sought for by others, and that there is subject-matter in Freeman

and that the appellants have infringed. I also concur that Freeman was not anticipated and in that connection merely desire to point out that before us the appellants abandoned any reliance upon the Torrisi patent.

For the reasons stated by My Lord the Chief Justice, the defence based upon the Criminal Code and the *Combines Investigation Act* fails.

As regards the Langmuir patent, I would allow the appeal of Philco Products Limited and dismiss the action

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against it, with costs of the action and appeal of all the issues relating to that patent except the defence under the Criminal Code and the *Combines Investigation Act*. The respondents are entitled to hold their judgment in connection with that patent against Cutten-Foster & Sons Limited, but without costs, and the latter's appeal so far as it relates to that patent is dismissed without costs. The costs of the reference, if it is proceeded with, will be dealt with after the Registrar of the Exchequer Court of Canada shall have made his report.

As regards the Freeman patent, I would dismiss the appeal and allow the respondent their costs of the action and of the appeal so far as they relate to the issues involved therein, including the defence based upon the Code and the *Combines Investigation Act*.

Appeal dismissed in part, and appeal allowed in part.

Solicitors for the appellants: *Herridge, Gowling McTavish & Watt.*

Solicitors for the respondents: *Smart & Biggar.*

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*Mar. 15, 16.
*June 29.

TRUBENIZING PROCESS CORPORATION (PLAINTIFF) ..... } APPELLANT;

AND

JOHN FORSYTH, LIMITED (DEFENDANT) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Patents—License agreement between owner of patents and defendant—Effect of subsequent adjudications as to validity of the patents, and of filing of a disclaimer, on defendant's liability for royalties under the agreement—Plaintiff, as assignee of owner of the patents, suing defendant for royalties—Sufficiency of assignment—Sufficiency of notice thereof to defendant.

Plaintiff sued as assignee of C. Co. to recover from defendant minimum monthly royalties claimed under an agreement of May 28, 1935, whereby C. Co. granted to defendant a non-exclusive and non-transferable license to use the improvements under two Canadian letters patent, no. 265960 and no. 311185, to make and sell certain goods, and defendant agreed to pay C. Co. monthly in advance a minimum monthly royalty, and certain royalties, so far as these exceeded in

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

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any year the minimum monthly royalties, for shirts manufactured by defendant with parts, etc., "made with or containing cellulose acetate or other derivative of cellulose". C. Co. agreed that as long as the license remained in effect and defendant paid the royalties, it would not sue defendant for infringement of any patent then owned or controlled or thereafter acquired or controlled by C. Co. and relating to the specified goods. In the agreement, defendant admitted the validity of the patents and agreed not to contest their validity and not to become voluntarily a party to any procedure disputing the validity or tending to impair the value of any of the inventions or letters patent covering the same, during the period of the license and at all times thereafter "except as to such patent or patents as may be adjudicated invalid by a court of competent jurisdiction from whose decision no appeal is or can be taken".

Patent no. 311185 was held invalid by a judgment of the Exchequer Court of Canada on March 26, 1936, and no appeal was taken from that decision. During litigation as to patent no. 265960, C. Co., on April 3, 1937, filed a disclaimer restricting in terms the scope of the claims, and by judgment of the Judicial Committee of the Privy Council, of January 23, 1939, the claims in the patent "as made by the patentee in the specification as originally filed" were declared invalid. Defendant paid royalties down to July, 1937, but not thereafter.

Plaintiff claimed that the right which it now sought to enforce was acquired by it under what was called a "participation agreement", of May 1, 1939, between C. Co. and plaintiff, in which, *inter alia*, C. Co. covenanted that it was the owner of some 17 named Canadian patents, among which was included patent no. 265960 (but not patent no. 311185), and granted to plaintiff an exclusive license throughout Canada, with the right to grant sub-licenses, "to make, use or sell articles of apparel under said letters patent or any other patent * * * owned by [C. Co.] relating to the uniting of fabrics by fusion for use in articles of apparel" (para. 1 (*a*)); and C. Co. assigned to plaintiff all claims for royalties which C. Co. might have against the licensees "under licenses heretofore granted by it under any of the patents referred to in paragraph 1 (*a*) hereof * * * on account of manufacture or sale * * * occurring before May 1, 1939" and "all royalties and claims for royalties on account of manufacture or sale * * * occurring from and after May 1, 1939, which [C. Co.] may have against its licensees under licenses heretofore granted by it under any of the patents within the field of the exclusive license granted in paragraph 1 (*a*) hereof".

Plaintiff claimed the amount of minimum monthly royalties from August 1, 1937, to April 1, 1940, inclusive, with interest.

Held (Rinfret J. dissenting): Plaintiff should have judgment against defendant for the amount claimed, with interest. (Judgment of the Court of Appeal for Ontario, [1942] O.R. 271, reversed).

Defendant's covenant in the agreement of May 28, 1935, to pay to C. Co. a fixed monthly sum, irrespective of the exercise of any of the rights granted to it, was an independent covenant and remained operative and effective notwithstanding the adjudications made with respect to the two patents specifically mentioned in the agreement.

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The agreement of May 1, 1939, was sufficient to make over the debt now sued for, and, if proper notice of the assignment was given to defendant, plaintiff was entitled to sue in its own name; and a letter from plaintiff's solicitors to defendant before action, reading: "Our clients, [naming the plaintiff], have had some correspondence with you with respect to the royalties due under the agreement of May 28th, 1935, between yourselves and [C. Co.], the royalties under which have been assigned to our client" and demanding settlement, was sufficient notice under the relevant statute (R.S.O. 1937, c. 152, s. 52); all that is necessary is that the express notice in writing to the debtor should give him to understand that the debt has been made over by the creditor to some third person; if the debtor ignores such notice, he does so at his peril.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing the plaintiff's appeal from the judgment of Chevrier J. (2) dismissing the action.

In the action the plaintiff sought to recover from the defendant the sum of $9,900, being $300 due on the 1st day of August, 1937, and $300 on the 1st day of each month thereafter up to and including April 1, 1940; and interest. The writ was issued on April 4, 1940.

The said claim was for minimum monthly royalties alleged to be due under a certain agreement between Canadian Celanese Ltd. (hereinafter sometimes referred to as "Celanese") and defendant, dated May 28, 1935, by which Celanese granted to defendant, subject to the provisions thereof, a non-exclusive and non-transferable license to use the improvements under two Canadian letters patent, no. 265960 and no. 311185. Certain terms of this agreement are dealt with in detail in the judgment of Davis J. *infra,* and the agreement is set out in full in the judgment of Gillanders J.A. in the Court of Appeal for Ontario (3). The defendant paid royalties under the agreement down to July, 1937, but not thereafter.

In an action, *B.V.D. Co. Ltd.* v. *Canadian Celanese Ltd.,* by judgment in the Exchequer Court of Canada of March 26, 1936 (4), patent no. 311185 was held invalid, and no appeal was taken from that decision. By the same judgment, patent no. 265960 was held valid, but on appeal to the Supreme Court of Canada, it was, by judgment of

(1) [1942] O.R. 271; [1942] 2 D.L.R. 539; 2 Fox Pat. C. 128.
(2) [1942] O.R. 271, at 278-287; 2 Fox Pat. C. 11.
(3) [1942] O.R. at 274-278; [1942] 2 D.L.R. at 541-544; 2 Fox Pat. C. at 134-137.
(4) [1936] Ex.C.R. 139; [1936] 4 D.L.R. 159.

March 19, 1937 (1), declared to be invalid. After delivery of the latter judgment, Celanese, on April 3, 1937, filed in the Patent Office a disclaimer restricting in terms the scope of the claims of patent no. 265960; and subsequently applied to the Supreme Court of Canada for an order for a rehearing of the appeal by reason of the filing of the disclaimer and for an order providing in the formal judgment of the Court for the filing of said disclaimer, which application was, by judgment of June 1, 1937, dismissed (2). On appeal (from both said judgments of the Supreme Court of Canada) to the Judicial Committee of the Privy Council, the judgment of the Supreme Court of Canada (of March 19, 1937) declaring "the respondent's [Celanese] patent no. 265960 in question in this appeal" to be invalid, was varied by substituting for the said words "the respondent's patent no. 265960 in question in this appeal" the words "the claims in Patent 265960 as made by the patentee in the specification as originally filed", and in all other respects the said judgment, and also said judgment of June 1, 1937, were affirmed (3). The judgment of the Judicial Committee of the Privy Council was delivered on January 23, 1939.

The plaintiff claimed to have acquired the rights, which by the present action it sought to enforce, under what was called a "participation agreement", dated May 1, 1939, between Celanese and plaintiff. By this agreement, in paragraph 1 (*a*), Celanese covenanted that it was the owner of some seventeen named Canadian patents, among which was included patent no. 265960, but not patent no 311185, and granted to plaintiff an exclusive license throughout Canada, with the right to grant sub-licenses, to make, use or sell articles of apparel "under said letters patent or any other patent in the territory owned by Celanese relating to the uniting of fabrics by fusion for use in articles of apparel"; and, in paragraphs 1 (*b*) and 1 (*c*), Celanese assigned to plaintiff

all claims for royalties which Celanese may have against its licensees under licenses heretofore granted by it under any of the patents referred to in paragraph 1 (*a*) hereof for the uniting of fabrics by fusion for use in articles of apparel on account of manufacture or sale (upon whichever royalty payments are based) of articles of apparel occurring before May 1, 1939,

(1) [1937] S.C.R. 221; [1937] 2 D.L.R. 481.
(2) [1937] S.C.R. 441; [1937] 3 D.L.R. 449.
(3) [1939] 1 All E.R. 410; [1939] 2 D.L.R. 289.

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and all royalties and claims for royalties on account of manufacture or sale (upon whichever royalty payments are based) of articles of apparel occurring from and after May 1, 1939, which Celanese may have against its licensees under licenses heretofore granted by it under any of the patents within the field of the exclusive license granted in paragraph 1 (*a*) hereof.

The main questions dealt with in the judgment now reported are: whether defendant remained liable for payment of royalties under the said agreement of May 28, 1935; and, if so, whether the said agreement of May 1, 1939, operated to assign to plaintiff the royalties claimed, sufficiently, if proper notice of the assignment was given to defendant under the relevant Ontario statute, to entitle plaintiff to sue for the royalties in its own name. (No application was made to this Court to have the assignor added as a party). The question whether there was such notice was in dispute. The letter of February 12, 1940 (before action was begun), referred to in the judgment of Davis J. *infra* as being sufficient notice under the statute, was written by plaintiff's solicitors to defendant and was as follows:

> Our clients, the Trubenizing Process Corporation, have had some correspondence with you with respect to the royalties due under the agreement of May 28th, 1935, between yourselves and the Canadian Celanese Limited, the royalties under which have been assigned to our client. Under this contract there is a minimum payment of royalty of $300 per month, and we are informed that no payments have been made since July, 1937. If the earned royalty would exceed the minimum payment our client is entitled to an accounting thereof.
>
> We should be glad, therefore, if you would send the settlement due under the contract within seven days of this letter, otherwise our client will have no alternative but to bring proceedings.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellant.

C. F. H. Carson K.C. and *J. G. Middleton* for the respondent.

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

DAVIS J.—The appellant (plaintiff) sued in its own name as assignee to recover from the respondent (defendant) certain royalties alleged to be due and payable under and by virtue of a certain license agreement made May 28th,

1935, by and between Canadian Celanese Limited and the respondent covering certain rights under two Canadian patents, one No. 265,960, issued November 16th, 1926, and the other No. 311,185, issued May 12th, 1931, the royalties payable under the said licence agreement being alleged to have been assigned by Canadian Celanese Limited to the appellant, Trubenizing Process Corparation, by an agreement in writing dated May 1st, 1939. The amount claimed in the action, $9,900, is made up of monthly minimum royalties of $300 from the 1st of August, 1937, to the first day of April, 1940, inclusive, with interest. If the respondent is liable to the appellant, the amount is not, as I understand it, in dispute.

The substantial point in the case is whether or not, quite apart from the alleged assignment, the respondent remains liable under the licence agreement for the payment of the minimum royalties therein provided, or any royalties in fact, from and after August 1st, 1937 (the respondent's last payment being made in July, 1937), because one of the two patents, No. 311,185, was declared invalid by a judgment of the Exchequer Court of Canada delivered March 26th, 1936, after trial in that Court, and from which judgment no appeal was taken in respect of that patent. The respondent, while taking the position that the invalidity of one of the two patents was sufficient to release it from payment of the royalties under the licence agreement, relies upon the judgment of this Court in the same action, in which the other patent, No. 265,960, was held to be invalid (reversing in that respect the judgment of the Exchequer Court), although on appeal to the Judicial Committee, whose judgment was delivered January 23rd, 1939, the judgment of this Court was varied by substituting therein for the words "the respondent's patent No. 265,960 in question in this appeal" the words "the claims in patent No. 265,960 as made by the patentee in the specification as originally filed". The variation of the judgment gave recognition to a disclaimer that had been filed and recorded in the Patent Office, Ottawa, on April 3rd, 1937, subsequent to the delivery of the judgment in this Court. Their Lordships observed:

> In its present form the order [i.e., of the Supreme Court of Canada] declares the whole patent avoided; but the patent as it now exists is a patent protecting the invention which is described in the specification

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as amended by virtue of the disclaimer. It is obvious that no risk should be run of the patent, as it now exists, being avoided as a result of the present litigation.

It may be convenient here to observe that sec. 50 (2) of *The Patent Act, 1935*, provides that:

> The disclaimer shall thereafter be deemed to be part of the original specification.

There is the preliminary question of the scope and effect of the assignment and of the sufficiency of the notice of it before action to the respondent (defendant). I think the notice in the letter from Messrs. Smart and Biggar to the respondent dated February 12th, 1940, was a sufficient notice under the statute to entitle the assignee, if the debt claimed was covered by the assignment, to sue in its own name, although one might well have expected in a commercial transaction of this kind that the respondent would have been furnished, if not with a copy of the assignment, at least with some particulars of its date and provisions. The statutory law of Ontario as to assignment of choses in action is now to be found in *The Conveyancing and Law of Property Act*, R.S.O. 1937, ch. 152, sec. 52, and is almost word for word the same as the English statutory provision now found in the *Law of Property Act, 1925*, ch. 20, sec. 136 (which re-enacted sec. 25 (6) of the *Judicature Act, 1873*). The Ontario provision was in *The Judicature Act*, R.S.O. 1897, ch. 51, sec. 58 (5) and (6), until 1911, when it was repealed and re-enacted in *The Conveyancing and Law of Property Act*, 1 Geo. V, ch. 25, secs. 45 and 53. All that is necessary (as to notice) is that the debtor should be given to understand by express notice in writing that the debt has been made over by the creditor to some third person. If the debtor ignores such notice, he does so at his peril. In *Torkington* v. *Magee* (1) (reversed on appeal without deciding the point of law, the Court of Appeal holding there was no breach of contract by the defendant (2)), the meaning of the term "legal chose in action" came up for discussion. It was held that the benefit of a contract for the sale of an interest in property could be assigned so as to entitle the assignee to sue in his own name for a subsequent breach of the contract to sell; but that the assignee could not sue unless his assignor was in a position to do so.

(1) [1902] 2 K.B. 427. (2) [1903] 1 K.B. 644

Cozens-Hardy, L.J., in *Tolhurst* v. *Associated Portland Cement Manufacturers* (1), said:

> The section relates to procedure only. It does not enlarge the class of choses in action, the assignability of which was previously recognized either at law or in equity.

This case went to the House of Lords (2). Although equity would not assist an assignee to whom a debt or other legal chose in action had been transferred without valuable consideration, where the provisions of the section have been complied with a voluntary assignment will confer the legal right to sue. See *In re Westerton* (3).

It is contended by the respondent that the assignment here does not operate to assign the royalties provided for by the licence agreement. This is on the basis that only one of the two patents is specifically mentioned in the assignment—the one we may for convenience call "the disclaimer patent", i.e., No. 265,960. But the other patent, No. 311,185, had been declared invalid on March 26th, 1936, over three years before the assignment agreement. The exact provision relating to the assignment (the agreement itself is styled "participation agreement"), after reciting specifically (paragraph 1 (*a*)) some seventeen Canadian patents, including the disclaimer patent, of which Canadian Celanese said it was the owner, is as follows:

> (*b*) Celanese hereby assigns to Trubenizing all claims for royalties which Celanese may have against its licensees under licenses heretofore granted by it under any of the patents referred to in paragraph 1 (*a*) hereof for the uniting of fabrics by fusion for use in articles of apparel on account of manufacture or sale (upon whichever royalty payments are based) of articles of apparel occurring before May 1st, 1939, and Celanese hereby constitutes and appoints irrevocably Trubenizing its agent with power to give full and complete releases to such licensees, or any of them, of all such claims. * * * Trubenizing, within thirty days after the receipt thereof, shall pay to Celanese one-half of any and all sums, if any, which Trubenizing may collect from any of said licensees in settlement of any of said claims.
>
> (*c*) Celanese hereby assigns to Trubenizing all royalties and claims for royalties on account of manufacture or sale (upon whichever royalty payments are based) of articles of apparel occurring from and after May 1st, 1939, which Celanese may have against its licensees under licenses heretofore granted by it under any of the patents within the field of the exclusive license granted in paragraph 1 (*a*) hereof. * * *

By paragraph 3 (*a*) the Canadian royalties from and after May 1st, 1939, are to be divided in the proportion of 60 per cent. to Trubenizing and 40 per cent. to Celanese.

(1) [1902] 2 K.B. 660 at 676. (2) [1903] A.C. 414.
(3) [1919] 2 Ch. 104.

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It would have been much better had the agreement assigned, *inter alia*, all the royalties due and payable or to become due and payable under the particular licence agreement with which we are concerned, but I think the document quite sufficient between assignor and assignee in a commercial transaction of this kind to make over the debt, if there was one, between the assignor and the respondent. For reasons which will emerge upon a consideration of the terms and provisions of the licence agreement itself, my conclusion is that the assignment is good and sufficient to permit the assignee (appellant) to sue in its own name if its assignor was in a position to do so. No application was made to us to have the assignor added as a party.

Turning now to the licence agreement dated the 28th of May, 1935, made between Canadian Celanese Limited and the respondent, under which payment of the minimum royalties claimed in this action are sought to be recovered. By paragraph 1, Celanese granted to the respondent a non-exclusive and non-transferable licence to use the improvements under the two recited Canadian Letters Patent (those hereinbefore referred to, No. 265,960 and No. 311,185; at the date of the licence agreement neither of the said patents had, of course, been declared invalid) as fully as Celanese might by virtue of such patents, for the full term for which said Letters Patent had been granted. By paragraph 3 the respondent agreed to pay to Celanese a minimum monthly royalty of $300 in advance on the first day of August, 1935, and on the first day of each month thereafter. By paragraph 4 the respondent as licensee agreed to pay Celanese the following royalties:

(*a*) for shirts manufactured by the Licensee with stiffened attached or "matched" collars and/or cuffs (but not bosoms) made with or containing cellulose acetate or other derivative of cellulose a royalty of Twenty-five (25c) per dozen for each dozen shirts so manufactured by the Licensee.

(*b*) a royalty of fifty cents (50c) per dozen for each dozen shirts manufactured by the Licensee with stiffened attached bosoms with or without attached or "matched" collars or attached cuffs, made with or containing cellulose acetate or other derivative of cellulose.

The intention of the parties was expressed in paragraph 3 as being that in any calendar year the aggregate of all royalty payments by the licensee shall equal (*a*) the total of the minimum royalty payments specified for that year, or (*b*) the total of the earned royalties payable in that

year under the provisions of paragraph 4, whichever of said totals is the larger. In the present action the plaintiff merely sued for the amount of the minimum monthly royalties.

One difficulty in the case, in so far as the licence agreement is concerned, is that while two specific Canadian patents are covered by the licence, the payment of royalties, either the minimum monthly royalties under paragraph 3 or what are called the earned royalties under paragraph 4, are not expressly made referable to the said patents or to either of them.

By paragraph 7 (*a*) Celanese agreed that as long as the licence remains in effect and the licensee pays the royalties as in the agreement provided, it will not sue the licensee for infringement of any patent then owned or controlled or thereafter acquired or controlled by Celanese and relating to the goods specified in paragraph 4.

Paragraph 11 has given rise to the real controversy in this action. It reads as follows:

> 11. The Licensee admits the validity of the patents referred to herein and agrees not to contest the validity of any of the aforesaid patents and agrees not to become voluntarily a party directly or indirectly to any procedure disputing the validity or tending to impair the value of any of said inventions or Letters Patent covering the same, during the period of this licence and at all times thereafter except as to such patent or patents as may be adjudicated invalid by a court of competent jurisdiction from whose decision no appeal is or can be taken.

The respondent's contention is that, the patent No. 311,185 having been adjudicated invalid by the Exchequer Court of Canada and from whose decision no appeal was or can now be taken, no further royalties remain payable under the agreement. And the respondent says this notwithstanding that the patent was declared invalid in March, 1936, and the respondent continued thereafter down to and including July, 1937, to make the minimum monthly royalty payments. The respondent, while contending that it is not necessary to its defence to rely upon the fact that the other patent was subsequently declared invalid by this Court, whose order was merely varied by the Judicial Committee to preserve the patent as it now exists limited by the disclaimer recorded after the judgment in this Court, argues that its defence is fortified by the declaration of invalidity of "the claims in the patent

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as made by the patentee in the specification as originally filed", which was the state of the patent at the date of the making of the licence agreement; and that it, the respondent, cannot under the licence agreement be adversely affected by the subsequent disclaimer. But that does not give effect to the statutory provision of section 50 (2) of *The Patent Act* above mentioned, which provides that "The disclaimer shall thereafter be deemed to be part of the original specification".

Notwithstanding the course of the disclaimer patent in the earlier litigation, the respondent not only continued to pay the royalties under the licence agreement down to July, 1937, but continued, at least down to the time of the trial of this action, to manufacture and sell shirts that fell within the specification of the patent. Some 36,800 dozen shirts were made between July, 1937, and September, 1940. A disclaimer may well save a patent for a licensee's enjoyment and protection. The disclaimer in this case did not affect the invention as disclosed by the specification; it merely limited the claims to the invention.

In my opinion, the respondent's covenant in the agreement to pay Celanese a fixed monthly sum, irrespective of the exercise of any of the rights granted to it, is an independent covenant and remains operative and effective notwithstanding the adjudications that have been made with respect to the two patents specifically mentioned in the agreement. Paragraph 7 (*a*) of the agreement, to which I have already referred, is not to be overlooked in this connection. By that sub-paragraph Celanese agreed that as long as the licence remains in effect and the licensee pays the royalties as in the agreement provided, it will not sue the licensee for infringement of any patent "now owned or controlled or hereafter acquired or controlled by Celanese" and relating to the goods specified in paragraph numbered 4. A licence under an unspecified patent owned by Celanese at the time of the making of the agreement or under one or more patents subsequently acquired by Celanese might well have turned out or may well turn out to be of far greater value to the respondent than the licence under either of the specifically mentioned patents. And the provision of paragraph 7 (*a*) remains unless the whole agreement has fallen. The respondent acquired the benefit of that provision when it agreed to pay the fixed monthly sums.

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Further, by paragraph 14 of the agreement, the respondent had the right at its election to be relieved of the obligation to pay the minimum monthly royalties upon the conditions therein provided. But no notice was given by the respondent to Celanese under that paragraph and no advantage was taken of its provisions if it were in fact of advantage to the respondent.

I should therefore allow the appeal and direct judgment to be entered for the appellant against the respondent for the amount claimed, with interest and costs.

RINFRET J. (dissenting).—I have reached the conclusion that the judgment of the Court of Appeal for Ontario, which dismissed an appeal by the plaintiff from a judgment of Chevrier J. dismissing the action, is well founded and should not be disturbed.

The appeal should be dismissed with costs.

TASCHEREAU J.—For the reasons given by my brother Davis, I think that this appeal should be allowed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Macfarlane, Thompson, Littlejohn & Martin.*

THE PROCTOR & GAMBLE COMPANY OF CANADA LIMITED (PETITIONER) ..... APPELLANT;

AND

LEHAVE CREAMERY COMPANY LIMITED (RESPONDENT) ..... RESPONDENT.

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*March 2.
*June 29.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade marks—Application to expunge from Register the words "White Clover" as applied to "butter", in view of prior registration of same words as applied to "hydrogenated cottonseed and vegetable oils"—Question whether, on the evidence, the wares are "similar" within ss. 2 (l) and 26 (1) (f) of The Unfair Competition Act, 1932 (Dom.)—Summary procedure under ss. 52, 54, of said Act.

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

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In the Register of Trade Marks, appellant in 1934 caused to be registered the words "White Clover" as applied to hydrogenated cottonseed and vegetable oils (which are used for shortening in baking); and respondent in 1941 caused to be registered the same words as applied to butter. Appellant applied to the Exchequer Court under s. 52 of *The Unfair Competition Act, 1932* (Dom.) to have respondent's words expunged from the Register. The application was heard and determined on evidence adduced by affidavits (under s. 54 of said Act) and exhibits filed. In the Exchequer Court, Maclean J. dismissed the application, holding that the two products were quite different things, that primarily they were made and sold for different purposes or uses, that upon the evidence there was no probability of, and no evidence of, confusion, and that the use of the mark by respondent to indicate butter produced by it was not at all likely to cause purchasers to think that such butter was produced for sale by appellant. On appeal to this Court:

Held (The Chief Justice and Davis J. dissenting): The appeal should be allowed and appellant's application granted. Though the constituent elements, and appearance, of the two wares are entirely different, yet it was proved that they are dealt in by wholesale and retail grocers and in stores of the latter very often appear alongside each other; both are purchased by the general public and butter is used for shortening, though, in view of the difference in price, possibly not to the extent suggested by appellant. A consideration of all the evidence leads to the conclusion that retail grocers would infer that appellant, who had for some years put out shortening under the name "White Clover", had manufactured butter sold under the same name; and though the wrappers on the two wares indicate clearly the names of the respective manufacturers, and particularly careful purchasers might examine the wrapper to ascertain the manufacturer, yet the two wares are so associated with each other as to cause the great majority of the purchasing public to infer that the same person assumed responsibility for their character and quality. Therefore the wares are "similar" within the definition in s. 2 (*l*) and the meaning in s. 26 (*f*) of said Act.

The Chief Justice (dissenting) agreed with the conclusion in the Exchequer Court and concurred with the observations in this Court of Davis J. (dissenting).

Per Davis J. (dissenting): Opinion expressed that the summary procedure under said ss. 52 and 54 was never intended to be used in cases such as this, where substantial issues of fact might lie at the very foundation of the right to the relief sought. Quite apart from the procedure taken, the findings of the trial judge were such that this Court would not be justified in interfering with his judgment dismissing appellant's application.

APPEAL from the judgment of Maclean J., late President of the Exchequer Court of Canada (1), dismissing the present appellant's application for an order expunging from the Register of Trade Marks the words "White Clover" which the respondent had caused to be registered

(1) 3 Fox Pat. C. 16.

on November 1, 1941, as applied to butter; the appellant having caused to be registered on August 1, 1934, the words "White Clover" as applied to hydrogenated cottonseed and vegetable oils. The application to the Exchequer Court was made under s. 52 of *The Unfair Competition Act, 1932* (Dom., 22-23 Geo. V, c. 38) and was heard and determined summarily on evidence adduced by affidavits (under s. 54 of said Act) and exhibits filed.

O. M. Biggar K.C. and *C. Robinson* for the appellant.

E. H. Charleson for the respondent.

The CHIEF JUSTICE (dissenting).—I agree with the conclusion of the learned President of the Exchequer Court.

I also concur with the observations of Mr. Justice Davis in his judgment.

The appeal should be dismissed with costs.

The judgment of Rinfret, Kerwin and Taschereau JJ. (the majority of the Court) was delivered by

KERWIN J.—On August 1st, 1934, the appellant caused to be registered in the register of trade marks the mark "White Clover" as applied to hydrogenated cottonseed and vegetable oils. These oils are solid lard-like products which are used for shortening in baking. On November 1st, 1941, the respondent, which manufactures and sells creamery butter in Nova Scotia, caused to be registered the same mark "White Clover" as applied to butter.

In May, 1942, the appellant applied to the Exchequer Court, under subsection 1 of section 52 of *The Unfair Competition Act, 1932,* for an order expunging this last-mentioned entry from the register. It is contended that the respondent's mark was never properly registrable and that the entry complained of does not accurately express or define the respondent's existing rights. The relevant provisions of the Act are:—

2. In this Act, unless the context otherwise requires:—

(*l*) "Similar," in relation to wares, describes categories of wares which, by reason of their common characteristics or of the correspondence of the classes of persons by whom they are ordinarily dealt in or used, or of the manner or circumstances of their use, would, if in the same area they contemporaneously bore the trade mark or presented the distinguishing guise in question, be likely to be so associated with each

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other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality, for the conditions under which or the class of persons by whom they were produced, or for their place of origin;

26. (1) Subject as otherwise provided in this Act, a word mark shall be registrable if it

(*f*) is not similar to, or to a possible translation into English or French of, some other word mark already registered for use in connection with similar wares;

52. (1) The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.

The material filed by the appellant shows that the appellant has sold its shortening in Canada under its registered mark since the year 1934 and that in the years 1939, 1940 and 1941 the sales of its product under that mark averaged over one million pounds annually, fifty per cent. of such sales having been made in small household packages through the retail trade for domestic consumption. It is alleged that butter and hydrogenated cottonseed and vegetable oils have similar characteristics and are sold in the same shops and used by the same classes of persons. Edward J. Gouett, the manager of a wholesale grocery company in Ottawa, who had also been for fourteen years manager of the Sault Ste. Marie (Ontario) branch of another wholesale grocery company, states in an affidavit that he has been familiar for some time with the appellant's shortening under the name "White Clover"; that his company distributes it quite widely to retail stores in the Ottawa area; that while, by exception, his branch does not handle butter as well as shortening, all the other branches of his company do so, and that, in his experience, this is the usual practice of wholesale grocery companies; that it is by no means unusual for shortening and butter to be put out by the same producer,—that being true, for example, of Swift Canadian Company, Limited, and Canada Packers Limited; that one of the important purposes for which butter is used by the ultimate consumer is for shortening; that if he saw the name "White Clover" on butter, he would infer that the butter was a product of the appellant; and that he believed that the use of the name "White Clover" on butter, by any one other than the

appellant, would cause confusion in the trade and would be likely to cause the purchasers to think that the butter was put out by the appellant.

There are four other affidavits filed by the appellant, each made by a retail grocer in or near Ottawa, in which the affiant states that he has been familiar for some time with the shortening put out by the appellant under the name "White Clover" and that he has sold it in his store in one-pound packages; that he also sells butter in his store in one-pound packages of a size and shape similar to those used for shortening and normally displayed at the same counter, usually alongside the shortening; that, if he saw the name "White Clover" on butter, he would infer that the butter was a product of the appellant; and that in his belief the use of the name "White Clover" on butter, by any one other than the appellant, would cause confusion in the trade and would be likely to cause the purchasers to think that the butter was put out by the appellant.

On behalf of the respondent, an affidavit was filed by Mr. Gillingham, its President and Manager. From it and the regulations issued under the Dominion *Food and Drugs Act*, R.S.C. 1927, chapter 76, it appears that butter consists of milk fat minimum eighty per cent., water sixteen per cent. maximum, and usually contains salt and a small percentage of casein, which is a normal constituent of milk; and that cottonseed oil is the oil obtained from the seeds of cotton plants and subject to refining processes. Shortening, other than butter, lard or lard compound, is a combination of edible animal or vegetable fats, or edible oils, variously processed by hydrogenation or otherwise.

It is stated in the affidavit that hydrogenated cottonseed oil, as used for shortening, cannot be mistaken for butter as it is almost white in colour, while butter is coloured, and the flavour and composition are different; that hydrogenated cottonseed oil with colouring matter added resembles butter and is a type of oleomargarine, the sale of which is not permitted in Canada; and that butter is more expensive than hydrogenated cottonseed oil and is used to a very slight extent as shortening.

One paragraph in the affidavit, by adapting the provisions of clause (*l*) of section 2 of the Act, negatives in general terms the existence of the three reasons, for any

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one of which the two articles would, if in the same area they contemporaneously bore the mark "White Clover", be likely to be so associated with each other by dealers in and/or users of them as to cause such dealers and/or users to infer that the same person assumed responsibility for their character or quality. That, of course, is the very point to be determined in these proceedings,—the onus being upon the appellant to satisfy the Court that the respondent's mark should be expunged.

While it is shown that the butter of the respondent is sold in Nova Scotia, there is no evidence of the extent of the respondent's sales. On the other hand, it appears that the appellant has a very real and substantial business in the Dominion of Canada and has built up a valuable goodwill in connection with the sale of its product under its mark "White Clover".

The three reasons referred to above and set forth in clause (*l*) of section 2 are: (1) the common characteristics of the wares, (2) the correspondence of the classes of persons by whom they are ordinarily dealt in or used, and (3) the manner or circumstances of their use.

As to (1), the constituent elements, as well as the appearance, of butter and hydrogenated cottonseed oil are entirely different, so that the first reason need not be further considered. However, as to (2) and (3), it is proved that the articles are dealt in by wholesale and retail grocers, and in the stores of the latter very often appear alongside of each other; both are purchased by the general public and butter is used for shortening although, in view of the difference in price, possibly not to the extent suggested by the appellant.

From a consideration of all the evidence, I am of opinion that retail grocers would infer that the appellant, who had for some years put out shortening under the name "White Clover", had manufactured butter sold under the same name. The wrappers on the two articles indicate clearly the names of the respective manufacturers and it may be that particularly careful housewives or other purchasers of shortening and butter would examine the wrappers to ascertain who were the manufacturers; but the two articles are so associated with each other as to cause the great majority of the purchasing public to infer that the same person assumed responsibility for their character and quality.

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Kerwin J.

The appeal should be allowed and the application granted, with costs throughout.

DAVIS J. (dissenting).—The appellant, a Dominion company, is the registered owner of a word mark "White Clover", for "hydrogenated cottonseed and vegetable oils." No distinguishing guise or design is associated with the ordinary words "White Clover"—it is a word mark *simpliciter*. The respondent, a Nova Scotia company, is also the registered owner of a similar word mark, by later registration, for "butter".

The appellant took proceedings in the Exchequer Court against the respondent under sec. 52 of *The Unfair Competition Act, 1932,* to have the respondent's mark expunged from the Register.

Maclean J., the late President of the Exchequer Court, dismissed the application and I set out below his reasons for judgment in full:

> It seems to me quite clear that the product of the petitioner, hydrogenated cottonseed and vegetable oils, popularly known as "shortening", and the product of the respondent, "butter", are quite different things altogether. Primarily, they are made and sold for different purposes or uses, which I have no doubt the public quite clearly understand, and I cannot believe, at least upon the evidence before me, that there is any probability of confusion on the part of the purchasing public or anybody else, arising from each of the parties here using the mark "White Clover", and there is no evidence of such confusion. Nor do I think that the use of the trade mark "White Clover" by the respondent to indicate butter produced by it is at all likely to cause purchasers to think that such butter was produced for sale by the petitioner, for use as "Shortening" or otherwise, and this appears to be the main point raised in this application to expunge the respondent's mark. It is altogether immaterial, I think, that butter may be used as "Shortening". In any event, upon the material before me, I can see no grounds for granting the petition and I dismiss it with costs.

The application was heard and determined summarily on evidence adduced by affidavits as permitted by sec. 54 in a proper application under said sec. 52 of *The Unfair Competition Act, 1932,* which section reads as follows:

> 52. (1) The Exchequer Court of Canada shall have jurisdiction, on the application of the Registrar or of any person interested, to order that any entry in the register be struck out or amended on the ground that at the date of such application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark.
>
> (2) No person shall be entitled to institute under this section any proceeding calling into question any decision given by the Registrar of which such person had express notice and from which he had a right to appeal.

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Davis J.

I do not think that this summary procedure was ever intended to be used in cases such as this where substantial issues of fact may lie at the very foundation of the right to the relief sought. That is what I think the late President had in mind when in his judgment he used the phrases "at least upon the evidence before me" and "upon the material before me".

But the application was so heard and determined, apparently without objection. Quite apart from the procedure taken, the findings of the trial judge are such that this Court would not be justified, in my opinion, in interfering with the judgment whereby the appellant's application to have the respondent's mark expunged from the Register was dismissed.

I should dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitor for the respondent: *J. G. A. Robertson.*

1943

*May 20, 21.
*June 29.

ROGERS-MAJESTIC CORPORATION LIMITED ..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Assessment and taxation—Assessment Act, R.S.O. 1937, c. 272—Company assessed under s. 8 for business assessment; also under s. 9 (1) (b) in respect of certain income—Income assessable as not being derived from business in respect of which company was assessable under s. 8—Appeal under s. 85, as being "on a question of law or the construction of a statute".

Appellant company manufactured radios and other articles and, in respect of land occupied for that purpose, it was assessed by respondent city for business assessment as a manufacturer, under s. 8 (1) (*e*) of *The Assessment Act*, R.S.O. 1937, c. 272. Prior to 1934, appellant had also owned and operated on other land, as part of its business, a broadcasting station, but in 1934 a broadcasting company was incorporated to which appellant transferred certain capital assets including land, buildings and equipment used in the operation of

PRESENT:—Duff C.J. and Davis, Kerwin, Taschereau and Rand JJ.

the broadcasting branch of the business, and from that time the broadcasting company operated said station (and was assessed under s. 8 (1) (*k*) of said Act for business assessment in respect of the land occupied for that purpose). For its said transfer, appellant received the broadcasting company's issue of capital stock and bonds. Certain directors of appellant were also directors (and one of them was also manager) of the broadcasting company; the companies had the same president and secretary; the broadcasting company's books and its book-keeper were at appellant's head office (on land in respect of which appellant was assessed for business assessment); the broadcasting station was used to advance by advertising the sale of appellant's radio receiving sets without charge.

Respondent assessed appellant for income tax on a sum received as interest on said bonds of the broadcasting company held by appellant. Appellant disputed respondent's right to do so, claiming that the sum was not, within the meaning of s. 9 (1) (*b*) of said Act (having due regard to s. 8 (3), and to the facts), "income not derived from the business in respect of which" appellant was assessable under s. 8. Macdonell Co. Ct. J., on appeal from the Court of Revision, held that the sum was not taxable. On appeal by way of special case stated under s. 85 of said Act, his decision was reversed by the Court of Appeal for Ontario, [1943] O.R. 1.

Held (affirming judgment of the Court of Appeal): The sum in question was assessable. To escape assessment under s. 9 (1) (*b*), income of appellant would have to be derived from its business in respect of which it occupied land and was liable for business assessment; that business was the business of manufacturing and selling its products; from which the income in question was not derived.

Held, also, that respondent's appeal to the Court of Appeal was competent, being "on a question of law or the construction of a statute" within the meaning of s. 85 (1) of said Act (cases bearing on the question reviewed).

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing (Riddell J.A. dissenting) an appeal by the present respondent, by way of special case stated pursuant to s. 85 of *The Assessment Act,* R.S.O. 1937, c. 272, from the decision of His Honour Judge Macdonell, a Judge of the County Court of the County of York, in favour of the present appellant. The special case stated by His Honour Judge Macdonell was as follows (the present appellant being therein referred to as the "respondent" or the "respondent company", and the present respondent being therein referred to as the "appellant"):

Pursuant to the powers conferred by Section 123 of *The Assessment Act,* the Corporation of the City of Toronto enacted By-law 14140 dated June 25th, 1934, as amended by By-law 14584 dated June 29th, 1936, being a by-law respecting taxation of income.

The Respondent is a company with its head office at 622 Fleet Street West, in the City of Toronto, where it occupies or uses land for the

(1) [1943] O.R. 1; [1943] 1 D.L.R. 127.

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purpose of carrying on its business. It was assessed in the year 1939 for business assessment as a manufacturer under Section 8, paragraph (e) of *The Assessment Act*.

It was also entered on the roll of taxable income under Section 123 of the said Act for the year 1940 for taxable income for the sum of $14,625. The Respondent admitted that it had a taxable income of $4,125 but disputed its assessment for the balance of $10,500 and appealed to the Court of Revision, which confirmed the said assessment. The Respondent then appealed and the hearing came on before me at which time the Appellant asked me to make a note of any question of law or construction of statute that might arise and to state same in the form of a special case for the Court of Appeal.

The amount in dispute is the said sum of $10,500 which was credited to the Respondent Company by Rogers Radio Broadcasting Company Limited and received as interest on bonds of the latter company held by the Respondent Company.

Prior to 1934 the Respondent Company owned and operated broadcasting station CFRB as part of its business. In that year Rogers Radio Broadcasting Company Limited was incorporated and the Respondent Company transferred to the Broadcasting Company certain capital assets including land, buildings and equipment used in connection with the operation of the broadcasting branch of the business. The Respondent Company received as consideration for such transfer $200,000 in bonds of the Broadcasting Company as well as the entire issued capital stock. At the present time $150,000 of bonds are still held by the Respondent Company, the balance having been redeemed.

The Broadcasting Company was incorporated and the bond issue created in order that the Respondent Company might have an asset upon which it would borrow money for its purposes and the bonds were used for that reason.

The Broadcasting Company carried on the business of radio broadcasting thereafter (particularly in the year 1939, which is the year under consideration in this case), operating radio station CFRB, and was assessed for business assessment in respect of the premises occupied by it for this purpose at 37 Bloor Street West, in the City of Toronto, under Section 8, paragraph (k) of the said Assessment Act.

The Board of Directors of the Broadcasting Company consists of three of the Directors of the Respondent Company and two of the engineers of the Broadcasting Company. The companies have the same President and the same Secretary. Mr. Harry Sedgwick, the Manager of the Broadcasting Company, is a director of both companies.

The income of the Broadcasting Company is derived from the carrying on of the business of a broadcasting station. The books of the Broadcasting Company are kept at the Head Office of the Respondent Company and are under the general supervision of the Comptroller of the Respondent Company. The book-keeper for the Broadcasting Company was at the office of the Respondent Company, was paid by the Respondent Company and a part of her salary charged by journal entry against the Broadcasting Company.

The broadcasting station is used for the purpose of advancing by advertising the sale of the radio receiving sets of the respondent company without charge.

Equipment for the Broadcasting Company in some cases was made by the Respondent Company and charged to the Broadcasting Company at cost.

The interest which is in question was not paid in cash but was charged by the Respondent Company to the Broadcasting Company by means of journal entry and was thus received by the Respondent Company. The profits of the Broadcasting Company were turned over to the Respondent Company and treated as an asset of the Broadcasting Company and a liability of the Respondent Company.

The following powers are included in the Letters Patent of the Respondent Company dated May 13, 1925:

(a) To manufacture, sell, lease, purchase, import, export and otherwise dispose of and deal in radio and electrical machines, appliances, accessories and equipment of all kinds;

(b) To manufacture, sell, lease, purchase, import, export and otherwise dispose of and deal in all kinds of goods and merchandise directly or indirectly connected with or entering into the manufacture, construction and assembling of radio and electrical machines, equipment, accessories and appliances, or the erection, equipment and operation of radio reception and transmission stations;

(d) To build, acquire, equip, operate and dispose of radio reception and transmission stations;

(i) To purchase, take or acquire by original subscription or otherwise, and to hold, sell or otherwise dispose of shares, stock, debentures and other obligations in and of any other company and to vote all shares so held through such agent or agents as the directors may from time to time appoint.

The Respondent Company occupies three premises, one at 622 Fleet Street West, one at the Crosse and Blackwell plant on Fleet Street, and one in a building on Hanna Street, at all of which it is assessed for 60 per cent. of the value of the land occupied by it as a manufacturer. It manufactures radios, radio parts and equipment, electric refrigerators and similar products. Its income is derived from the sale of these products through a large jobber organization across Canada. The annual financial statement of the two companies indicate that both carry on a substantial business. In the year 1939 the Broadcasting Company had a net operating profit of $126,621.09 and the consolidated statement of the Respondent Company and its subsidiaries shows a net operating profit of $101,308.26.

DECISION

Upon these facts, I decided the said sum of $10,500 was not taxable and allowed the appeal reducing the assessment to $4,125.

REASONS FOR MY DECISION

Counsel for the Appellant contended that because there were two corporations, each liable for business tax, carrying on separate businesses, the said sum of $10,500 received by the Respondent Company from the Broadcasting Company as interest on bonds of the Broadcasting Company could not be income derived by it from the business in respect of which it was assessable under Section 8. He claimed that upon the proper construction of the said Section 9 (1) (b) the amount was assessable. I disagreed with this contention, whereupon counsel asked that I submit this question of law for the opinion of the Court of Appeal. Upon my construction of the statute I considered that I should find as a fact that the said sum was received as income derived from the business of the Respondent Company and was not assessable.

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QUESTION

Upon a true construction of *The Assessment Act*, particularly section 9, (1) (b), was I right in deciding that the said sum of $10,500 did not form part of the taxable income of the Respondent Company in the year 1940.

To the question above propounded in the stated case, the Court of Appeal (Riddell J.A. dissenting) answered in the negative. The Court of Appeal also held (unanimously) that the question for determination was a question of law and therefore an appeal lay to it under said s. 85.

Special leave to appeal to the Supreme Court of Canada was granted to the present appellant by the Court of Appeal for Ontario.

Besides other contentions, counsel for the appellant referred to s. 8 (3) of the Act (quoted in the reasons for judgment in this Court *infra*) and contended that the assessment of appellant as a manufacturer under s. 8 (1) (*e*) was no more than a fixing of the rate at which it should be assessed; assessment as a manufacturer only indicated that the business of manufacturing was the chief or preponderating business of those carried on by appellant in respect of which it was assessed for business tax; and that the Act should be so construed that the words "business in respect of which it is assessable" as they appear in s. 9 (1) (*b*) mean all business carried on by appellant upon the premises in respect of which it is assessed for business tax; it could not be said that the income which appellant received prior to 1934 from the broadcasting branch of its business was not income derived from the business in respect of which it was assessed for business tax and the mere fact that it created a separate corporate entity did not make the broadcasting business any less the business of the appellant; it derived the income from the broadcasting branch of its business by means of interest on the bonds instead of directly from its earnings as theretofore; that the broadcasting company was merely appellant's agent for the purpose of earning income for appellant as part of appellant's business.

Against such a contention it was argued (*inter alia*) that the sum paid to appellant as interest on bonds was income not derived from the business in respect of which appellant occupied land and carried on business, but was derived from the business in respect of which the broad-

casting company occupied land and carried on business; and, when received by appellant, was clearly assessable under s. 9 (1) (*b*); the fact that it was received from a subsidiary company did not make it income derived from the business in respect of which appellant was assessable for business tax; the holding of the bonds was an investment which might be part of the business of appellant in the general meaning of that word "business", but it was not part of the business in respect of which appellant was liable for business assessment, and the income derived from such bonds or investments was the very income which the Act makes assessable; appellant did not occupy or use land for the purpose of radio broadcasting; that business was carried on solely by the broadcasting company and it alone was liable for business assessment in respect thereof; the companies were separate and distinct entities, and the business of radio broadcasting was not appellant's, but the broadcasting company's, business; further, there was no finding that appellant carried on the business of radio broadcasting or that appellant controlled the broadcasting company, or that the latter carried on as agent for appellant.

Samuel Rogers K.C. and *B. V. Elliot* for the appellant.

J. Palmer Kent K.C. for the respondent.

The judgment of the Court was delivered by

KERWIN J.—By leave of the Court of Appeal for Ontario, Rogers-Majestic Corporation Limited appeals from a decision of that Court allowing an appeal by the present respondent, the Corporation of the City of Toronto, from the decision of a County Court Judge by way of a special case stated pursuant to section 85 of *The Assessment Act*, R.S.O. 1937, chapter 272. The first question that arises is whether there was a question of law or the construction of a statute within the meaning of subsection 1 of section 85 upon which an appeal to the Court of Appeal could be based; and the second is whether the appellant was properly assessed for certain income under section 9, subsection 1 (*b*), of the Act, as being income not derived from the business in respect of which the appellant was assessable for business assessment under section 8.

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The relevant part of section 8, section 9, and subsections 1, 2 and 3 of section 85 are as follows:

8. (1) Irrespective of any assessment of land under this Act, every person occupying or using land for the purpose of any business mentioned or described in this section shall be assessed for a sum to be called "business assessment" to be computed by reference to the assessed value of the land so occupied or used by him, as follows:

(*e*) Subject to the provisions of clause *j* every person carrying on the business of a manufacturer for a sum equal to sixty per centum of the assessed value, and a manufacturer shall not be liable to business assessment as a wholesale merchant by reason of his carrying on the business of selling by wholesale the goods of his own manufacture on such land.

(*k*) Every person carrying on the business of a photographer or of a theatre, concert hall, or skating rink, or other place of amusement, or of a boarding stable, or a livery, or the letting of vehicles or other property for hire, or of a restaurant, eating house, or other house of public entertainment, or of a hotel or any business not before in this section or in clause *l* specially mentioned, for a sum equal to twenty-five per centum of the assessed value.

(3) Subject to the provisions of subsections 4 and 5, no person shall be assessed in respect of the same premises under more than one of the clauses of subsection 1, and where any person carries on more than one of the kinds of business mentioned in that subsection on the same premises, he shall be assessed by reference to the assessed value of the whole of the premises under that one of those clauses in which is included the kind of business which is the chief or preponderating business of those so carried on by him in or upon such premises.

9. (1) Subject to the exemptions provided for in sections 4 and 8,—

(*a*) every corporation not liable to business assessment under section 8 shall be assessed in respect of income;

(*b*) every corporation although liable to business assessment under section 8 shall also be assessed in respect of any income not derived from the business in respect of which it is assessable under that section.

(2) The income to be assessed shall be the income received during the year ending on the 31st day of December then last past.

85. (1) An appeal shall lie to the Court of Appeal as hereinafter provided from the judgment of the judge on a question of law or the construction of a statute, a municipal by-law, any agreement in writing to which the municipality concerned is a party, or any order of the Ontario Municipal Board (except an order made under section 84).

(2) Any party desiring so to appeal to the Court of Appeal shall on the hearing of the appeal by the judge request the judge to make a note of any such question of law or construction, and to state the same in the form of a special case for the Court of Appeal.

(3) It shall be the duty of the judge to make a note of such request, and he may thereupon state such question in the form of a special case, setting out the facts in evidence relative thereto, and his decision of the same, as well as his decision of the whole matter.

Whether there is a question of law or the construction of a statute upon which an appeal lies to the Court of

Appeal is not always free from difficulty. Probably no satisfactory definition can be framed so as to cover all circumstances. In *Farmer* v. *Cotton's Trustees* (1), the Commissioners for the General Purposes of the Income Tax Acts had decided that certain premises were not "divided into and let in different tenements" within the meaning of a provision of the *Customs and Inland Revenue Act, 1878*. In the House of Lords, Earl Loreburn pointed out, at page 930, that the House had no jurisdiction to review the determination of the Commissioners upon any issue of fact. "We could, of course," he says,

> interpose if it were clear that the Commissioners had proceeded upon a wrong construction of the Act, and I think they did by regarding the question as one merely of structural separation; but they have not told us what construction they placed upon the Act.

He was disposed to remit the case to obtain that information, if it were necessary, but he decided there was another ground of law upon which the Commissioners were wrong. "There is, upon a true construction of the Act, no evidence in this case upon which their decision can be supported." Lord Atkinson concurred. Lord Parker, at page 932, states it is not always easy to distinguish between questions of fact and questions of law; that the views from time to time expressed in the House of Lords had been far from unanimous

> but in my humble judgment, where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only.

Lord Sumner, although dissenting in the result, stated in the opening of his speech, at page 938:

> In this case the Commissioners have furnished a description of the building in question, partly in words and partly by plans, so full that your Lordships know as much about it as they did. The rest is matter of law.

In *Girls' Public Day School Trust Limited* v. *Ereaut* (2), the House of Lords held that the term "public school", as used in a rule of Schedule A of the *Income Tax Act, 1918*, was not a term of art, and that the question of what was the common understanding of the term was a question of fact for the Commissioners; and that, there being ample evidence to support the conclusion, it could not be reviewed.

(1) [1915] A.C. 922. (2) [1931] A.C. 12.

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In *Re McIntyre Porcupine Mines Limited and Morgan* (1), Mr. Justice Hodgins of the Ontario Court of Appeal states at page 220:

> The construction of the words of any statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its terms is a question of fact:

but later on the same page he remarks:

> It is no doubt difficult to separate questions of law and fact in a case of this kind, where evidence which enables the Court to put itself in a position to construe the words of the Act is very often the same or practically the same as that which determines whether the statute covers the particular thing in question.

The substance of the first of these two sentences may be found in the judgment of this Court in *Township of Tisdale* v. *Hollinger Consolidated Gold Mines Limited* (2), but it is important, I think, to read the entire paragraph:

> The questions as to whether or not the buildings, plant and machinery are in or on mineral land, and are used mainly for obtaining minerals from the ground, or form part of the concentrators, are not exclusively of fact. The Ontario Railway and Municipal Board having found that the property attempted to be assessed is situate on "mineral land", it seems, as found by the Supreme Court of Ontario, that, upon the evidence adduced and the findings of the Board, we would be precluded from interfering therewith, if we agree, in law, with their view as to the meaning of the statute. The construction of a statutory enactment is a question of law, while the question of whether the particular matter or thing is of such a nature or kind as to fall within the legal definition of its term is a question of fact.

Mr. Justice Grant, in the Court of Appeal (3), had pointed out in this case that there was no definition of the words "mineral land" and I think it may be taken that the Court of Appeal and this Court decided that there was evidence upon which the Ontario Railway and Municipal Board could decide as it did.

In *The Corporation of the City of Toronto* v. *Famous Players' Canadian Corporation Ltd.* (4), this Court dismissed an appeal from the Court of Appeal for Ontario because it considered that it would be impossible to set aside the findings of the Board on the ground that, on the evidence, they were legally inadmissible; and considered it equally impossible to hold that, given the findings, the order of the Board was wrong in law.

(1) (1921) 49 O.L.R. 214.
(2) [1933] S.C.R. 321, at 323.
(3) [1931] O.R. 640, at 644.
(4) [1936] S.C.R. 141.

In *Loblaw Groceterias Co. Ltd.* v. *City of Toronto* (1), it is stated in the judgment of this Court at page 254:

> It is argued that, the courts below having reached the conclusion that the land and building were used as distribution premises, this is a finding of fact with which we ought not to interfere. But it is a question of law that is made the subject-matter of the right of appeal from the County Judge upon a stated case and we are bound to determine upon the proper construction of the amendment whether or not, upon the facts stated, the land and building are caught by the increased rate of assessment. Questions of this sort are constantly before the House of Lords on taxing statutes and are dealt with as raising the proper construction to be put upon the language of the statutes.

In the present case the County Court Judge states in the stated case, immediately before propounding the question, "Upon my construction of the statute I considered that I should find as a fact that the said sum was received as income derived from the business of the Respondent Company and was not assessable." The difficulty is that we do not know what his construction of the statute was, but, in my opinion, upon a true construction of the relevant provisions of *The Assessment Act,* there is no evidence upon which his decision can be supported.

This really involves the determination of the second question. By letters patent, the appellant was authorized, *inter alia,* to build, acquire, equip, operate and dispose of radio reception and transmission stations, and, prior to 1934, the appellant owned and operated a broadcasting station, CFRB, as part of its business. In that year Rogers Radio Broadcasting Company Limited was incorporated and the appellant transferred to it certain capital assets, including land, buildings and equipment used in connection with the operation of the broadcasting branch of the appellant's business. Since 1934 the Broadcasting Company has carried on the business of radio broadcasting, operating radio station CFRB, and was assessed for business assessment in respect of the premises occupied by it for that purpose at 37 Bloor Street West, Toronto, under paragraph (*k*) of subsection 1 of section 8 of *The Assessment Act.* Since 1934 the appellant has not owned or operated the broadcasting station. The appellant, to quote from the stated case,

(1) [1936] S.C.R. 249.

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occupies three premises, one at 622 Fleet Street West, one at the Crosse and Blackwell plant on Fleet Street, and one in a building on Hanna Street, at all of which it is assessed for 60 per cent. of the value of the land occupied by it as a manufacturer. It manufactures radios, radio parts and equipment, electric refrigerators and similar products. Its income is derived from the sale of these products through a large jobber organization across Canada.

It is apparent from the stated case, and particularly from that part of it to which I have just referred, that it is as a manufacturer that the appellant is assessable, and is assessed, for business assessment under section 8 (1) (*e*). There is no evidence that the appellant carries on any business other than the business of a manufacturer on the three premises referred to and there is, therefore, no basis for any inquiry as to whether it has a chief or preponderating business within the purview of subsection 3 of section 8.

No doubt the appellant has power to invest in shares or bonds of other companies and for some purposes the income from such shares or bonds, such as the income from the broadcasting Company's bonds here in question, might properly be said to be part of the income of the appellant. Under subsection 1 (*b*) of section 9 of *The Assessment Act*, that is not sufficient. It must be income derived from the business of the appellant in respect of which it occupies land and is liable for business assessment. That business is the business of manufacturing and selling its products. The income in question was not derived from that business and is therefore assessable. In the Court of Appeal for Ontario, the Chief Justice of the Common Pleas and Mr. Justice Riddell decided in this sense in *Re City of Toronto and John Northway and Son Limited* (1), and I agree that this is the proper interpretation of the clause.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Rogers & Rowland.*

Solicitor for the respondent: *C. M. Colquhoun.*

(1) (1923) 54 O.L.R. 81.

HENRY CHING (PLAINTIFF) ..... APPELLANT;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } RESPONDENT.

1943

*May 10.
*June 29.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Workmen's compensation—Negligence—Crown—Master and servant—Employee of Dominion Government injured in course of employment in Province of Alberta through negligence of servants of railway company, an employer in an industry within scope of Workmen's Compensation Act, Alta., 1938, c. 23—Action by said employee against railway company for damages—Question whether right of action affected by said Act, particularly s. 24 (6), or affected by dealings with and actions by Workmen's Compensation Board—Operation and effect of Government Employees Compensation Act, R.S.C. 1927, c. 30, as amended in 1931, c. 9.

Plaintiff, a resident of the province of Alberta, was employed by the Dominion Government as a postal clerk. While engaged in his duties on a railway mail car in defendant's train in said province, he was injured through negligence of defendant's employees. Certain forms in use in the administration of *The Workmen's Compensation Act*, Alberta, 1938, c. 23, were completed and sent to the Workmen's Compensation Board of the province. The Board paid plaintiff's medical and hospital expenses, charging at first the amount thereof to the Dominion Government's deposit with the Board, but later transferring the charge so that it was made, purportedly under the power given by s. 24 (6) of said Act, against the account of defendant, which was an employer in an industry within the scope of the Act. The Dominion Government continued payment of plaintiff's salary while he was off duty through his injuries, but later the said Board charged against defendant an amount equal to the compensation to which plaintiff would have been entitled had his salary not been paid, and (after getting completed a form of assignment by plaintiff) paid that amount to the Dominion Government. Plaintiff sued defendant for general damages. A defence was raised that, by force of s. 24 (6) of said Act, there was no right of action against defendant; that its only liability was under that section, and, by the Board's action in assessing against it the said expenses and compensation, defendant's liability had been discharged.

Held (reversing judgment of the Supreme Court of Alberta, Appellate Division, [1943] 1 W.W.R. 93): Plaintiff was entitled to maintain his action. His right of action was not destroyed by said s. 24 (6).

A consideration of said s. 24 (6), and the language and scheme of said Act as a whole, makes it clear that s. 24 (6) is dealing only with cases in which both the workman and his employer are bound by the Act; and the employer in this case, the Crown in right of the Dominion, is not so bound, and neither, then, is its employee. The designation, in Schedule 2 of the Act, of "employment by Dominion Government" as an employment to which the Act applies must be

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taken, in view of s. 2 (*h*) (which in the definition of "employer" includes the Dominion Crown "in so far as the latter, in its capacity as master, may submit to the operation of the Act"), as implying the words "as an employer within the Act"; and until there is a submission under s. 2 (*h*) the Dominion Government is not such an employer, and s. 19 creating the right to compensation does not operate in favour of its employees. The enactment of the *Government Employees Compensation Act*, R.S.C. 1927, c. 30, as amended in 1931, c. 9, (hereinafter called the Dominion Act), had not the effect of a submission by the Crown under said s. 2 (*h*) of the *Workmen's Compensation Act* (hereinafter called the Provincial Act). What the Dominion Act does is to make full provision for the creation of rights in, and the payment of compensation to, Dominion Government employees; for the purpose of administration, either the existing machinery under the compensation laws of the various provinces, or new machinery set up under the Dominion Act itself, may be used; the authority given by the Dominion Act to the Provincial Board is strictly limited and the right of Dominion Government employees to compensation is unencumbered by a referential incorporation of provisions of the Provincial Act dealing with consequential matters; by s. 3 (1) of the Dominion Act, which gives a right to compensation to employees, it is the liability of the Dominion Government to pay and the amount of compensation which are to be determined, not the resulting effects upon collateral rights against third parties; to suggest that the enactment of a special code of provisions with the powers (as given in the Dominion Act) of carrying them into administration without reference to the provincial Board, is a submission in any sense of the term to a provincial Act constituting another code, is to disregard the precise and individual character of the Dominion enactment.

As to the contention that plaintiff by his dealings with the Board had so brought himself within the Provincial Act as to be estopped from asserting a right which that Act purports to have abolished: What plaintiff did was clearly under the procedure of the Dominion Act; the Board functioned as contemplated by that Act, and its forms were conveniently used to enable it to make the necessary determination of the Dominion Government's liability for and the amount of compensation; it was only the circumstance that an employer under the Provincial Act was legally responsible for the injury that gave rise to the questioning of those steps; and an erroneous assumption by the Board that all provisions of the Provincial Act were applicable to Dominion Government employees was no warrant for transmuting appropriate measures under the Dominion Act into like proceedings under the Provincial Act.

As to the contention that the Board had found that plaintiff, as an employee of the Dominion Government, was a workman under the Provincial Act and that such a finding, by s. 10 of that Act, was not open to question: In dealing with plaintiff the Board was acting not under the Provincial Act but as the administrator of the Dominion law; its assumption, therefore, that plaintiff was a workman within the meaning of s. 24 (6) of the Provincial Act and its action under said s. 24 (6) in relation to defendant were by reason of what it conceived to be the true effect of the Dominion enactment; but to action by the Board in that capacity said s. 10 has no application.

APPEAL by the plaintiff from the judgment of the Supreme Court of Alberta, Appellate Division (1), dismissing his appeal from the judgment of Howson J. (2) dismissing his action, which was brought to recover from the defendant general damages for injuries received in an accident.

The plaintiff, a postal clerk employed by the Dominion Government, and residing at Calgary, Alberta, was, while engaged in his duties on a railway mail car in a train of the defendant railway company, injured by an accident which occurred on March 15, 1940, in the province of Alberta, through negligence of employees of the defendant.

The Dominion Government continued payment of plaintiff's salary while he was off duty through his injuries.

The District Director of Postal Services completed and filed with the Workmen's Compensation Board of Alberta a form "Employer's Report of Accident", and subsequently the plaintiff completed and sent to the Board a form "Workman's Report of Accident and application for compensation". The Board paid plaintiff's medical and hospital expenses, and charged the amount thereof against the Dominion Government's deposit with the Board, but later transferred the charge so that it was made, purportedly under the power given by s. 24 (6) of *The Workmen's Compensation Act,* Alberta, 1938, c. 23, against the account of the defendant, which was an employer in an industry within the scope of that Act. Later the Board charged against defendant an amount equal to the compensation to which plaintiff would have been entitled had his salary not been paid to him, and paid that amount to the Receiver General of Canada. Before making that payment the Board required from plaintiff an assignment in favour of the Receiver General and for that purpose sent a form to plaintiff, which was completed but not sent to the Board for a time, during which there was certain correspondence between plaintiff's solicitors and the Board. In that correspondence plaintiff's solicitors took the attitude that the services of the Provincial Compensation Boards are employed by the Dominion Government only to the extent contemplated by the Dominion *Government Employees Compensation Act* (R.S.C. 1927, c. 30, as amended

(1) [1943] 1 W.W.R. 93; [1943] 1 D.L.R. 134.
(2) [1942] 2 W.W.R. 73; [1942] 3 D.L.R. 749.

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by c. 9 of the Statutes of Canada, 1931); and that the latter Act does not contemplate any restriction upon the employees' rights of action; and that plaintiff was not bound by the limitations of the Provincial *Workmen's Compensation Act;* and, in sending the completed form to the Board, stated that it was sent on the express understanding that plaintiff had signed and was returning the form without prejudice to his contention that his rights against defendant were not in any way restricted by s. 24 of the last mentioned Act.

Plaintiff sued defendant for general damages, not including claim for loss of salary or medical and hospital expenses. Defendant denied that plaintiff had suffered damage, and also defended on the ground, dealt with and given effect to in the Courts below, that by force of s. 24 (6) of the said Provincial *Workmen's Compensation Act,* there was no right of action against defendant; that its only liability was under that section, and, by the Board's action in assessing against it the said expenses and compensation, defendant's liability had been discharged.

R. L. Fenerty for the appellant.

James McCaig K.C. for the respondent.

David Mundell for the Attorney-General of Canada, intervenant.

The judgment of the Court was delivered by

RAND J.—The facts of this appeal can be shortly stated. The appellant, a postal clerk, while engaged in his duties on a railway mail car, was injured in an accident in Alberta through the negligence of employees of the respondent. The appellant and the District Director of Postal Services submitted the usual reports of accident to the Workmen's Compensation Board of Alberta, which administers the *Government Employees Compensation Act* (ch. 30, R.S.C. 1927) as amended by ch. 9 of the Statutes of Canada, 1931. Payment of medical and hospital expenses was authorized by the Board but, as the appellant's salary, under the *Civil Service Act* and its regulations, was continued while off duty, no compensation was included. The amount of these expenses was charged against the funds of the Dominion

Government on deposit with the Board, as contemplated by section 3 (3) of the Dominion Act. Some time afterwards, following correspondence between the Board and the Officer in Charge of Compensation in the Department of Transport, the Board transferred the charge to the account of the respondent, purportedly under the power given by section 24 (6) of the Provincial Compensation Act. Still later the Board charged against the respondent an amount equal to the compensation the appellant would have been entitled to had his salary not been paid him, and issued a cheque for the same amount in favour of the Receiver General of Canada. The appellant then brought this action for damages other than those already dealt with. The respondent defended substantially on the ground that, by force of section 24 (6) of the Provincial Act, there was no right of action against the respondent; that the only liability of the latter was under that section and that, by the action of the Board in assessing against it the expenses and compensation mentioned, its liability had been discharged. The trial Judge upheld that defence and his judgment was affirmed on appeal.

Harvey, C.J.A., with whom Lunney, J.A., concurred, took the view that the Provincial Act, by force of its own terms, created a right to compensation in the appellant as a Dominion Government employee against the Accident Fund set up by the Provincial Act and that this was so, regardless of whether the Dominion Crown as employer had under section 2 (*h*) submitted to the Provincial Act, or whether the appellant was entitled to receive compensation under a Dominion enactment. From this it followed, under section 24 (6) of the Provincial Act, that no right of action had arisen against the respondent.

Ford, J.A., with Ewing, J.A., and Macdonald, J., concurring, based his opinion on a construction of the Dominion Act, which he held assimilated the rights of Dominion employees thereunder to those of employees generally within the Provincial Act, and from this the same conclusion followed that no right of action against the respondent had arisen. He was disposed to think also that the finding of the Board under section 10 (9) (*j*) of the Provincial Act, which defines the Board's exclusive jurisdiction, that the appellant was a workman under that Act, could not be challenged.

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The first ground is based upon the construction given to the opening words of section 72: "This Act shall apply to all classes of employment enumerated in the schedules hereto." Class 95 of schedule 2 is "Employment by Dominion Government". From this the conclusion is drawn that under section 19 rights in employees of that class arise absolutely and regardless of the position of the Crown in relation to the Act.

This view quite ignores the conditional application of the statute to the Crown as an "employer". Section 2 (*h*) in its definition of that term contemplates the inclusion of the Crown "in so far as the latter, in its capacity as master, may submit to the operation of the Act". To the extent, therefore, that the provisions of the statute deal with "employer" that submission, whatever its form, is a condition of their application, upon which, among others, section 51, expressly contemplating the assessment of the Crown, is intended to become, vis-à-vis that employer, operative.

But under section 72 it is the Act and not merely certain of its provisions that is to apply to the enumerated classes of employment; and when the schedule designates "Employment by Dominion Government" as a class it must be reconciled with section 2 (*h*). That reconciliation is quite apparent: "Employment by Dominion Government" implies "as an employer within the Act"; but until there is a submission under 2 (*h*), the Government is not such an employer and section 19 creating the right to compensation does not operate in favour of its employees.

A similar conclusion follows from the language of section 24 (6):

> In any case within the provision of subsection (3), neither the workman nor his dependents nor the employer of such workman shall have any right of action in respect of such accident against an employer in any industry within the scope of this Act; and in any such case where it appears to the satisfaction of the Board that a workman of an employer in any class is injured owing to the negligence of an employer or of the workman of an employer in another class within the scope of this Act, the Board may direct that the compensation awarded in such cases shall be charged against the last mentioned class.

Now the question is whether within that section there can be a workman whose employer is not bound by the Act. Does the first part of the subsection apply where only one right of action, namely, that of the workman, is

destroyed? It clearly cannot be taken that the subsection would remove a right of action from an employer to whom it gave no compensating benefit. But in that case, although the employer responsible for the wrong is released from liability to the workman, his class is not made responsible in the accounting adjustment; that takes place only when both employers are under the Act. These considerations make it clear that the subsection is dealing only with cases in which both the workman and his employer are bound by the statute and, as here, on the assumption underlying the first ground, the Crown is not so bound, neither then is the employee of the Crown.

That conclusion is not only consistent with but it seems to be required by the scheme of the Act as a whole. An examination of its provisions makes it evident that, with the possible exception of the special cases within section 22 (2), what are contemplated are workmen and employers both amenable to those provisions. The "workman" within the Act has his "employer" within the Act and, conversely, the "employer" his "workman". These correlative capacities are conceived as coexisting before rights vest in the one or obligations attach to the other.

There is, too, a necessary rejection given by the language of the Act to a construction that would create a right to compensation in a Dominion Government employee out of a fund to which his employer was not bound to contribute. General industry in Alberta was not visualized as the source of monies to meet the responsibility to its employees of that Government. The right to compensation, which, as Harvey, C.J.A., observes, is to be the substitute for the right of action against the wrongdoer, must be absolute and effective. Anything less would be an abortive declaration binding on neither the Dominion Crown nor the Accident Fund and quite incapable of being treated as the "right" intended as a substitute for the real right against the wrongdoer.

It is next contended that there has been a submission by the Dominion Crown under section 2 (*h*) by the effect of the Dominion enactment itself. What the latter does is to make full provision for the creation of rights in, and the payment of compensation to, Dominion Government employees. For the purpose of administration, either the existing machinery under the compensation laws of the

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various provinces, or new machinery set up under the Dominion Act itself, may be used; and if the questions arising in this case are examined in the light of an administration by a Dominion body or officer rather than by the Provincial Board, most of the difficulties encountered disappear. The authority given by the Dominion Act to the Provincial Board is strictly limited and, under the language of the principal section, the right to compensation is unencumbered by a referential incorporation of provisions of the Provincial Act dealing with consequential matters.

It may be useful here to set out the first subsection of section 3:

> (1) An employee who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of an employee whose death results from such an accident, shall, notwithstanding the nature or class of such employment, be entitled to receive compensation at the same rate as is provided for an employee, or a dependent of a deceased employee, of a person other than His Majesty under the law of the province in which the accident occurred for determining compensation in cases of employees other than of His Majesty, and the liability for and the amount of such compensation shall be determined subject to the above provisions under such law, and in the same manner and by the same board, officers or authority as that established by such law for determining compensation in cases of employees other than of His Majesty, or by such other board, officers or authority, or by such court as the Governor in Council shall from time to time direct: Provided that the benefits of this Act shall apply to an employee on the Government railways who is caused personal injury by accident arising out of and in the course of his employment, and the dependents of such an employee whose death results from such an accident, to such an extent and such an extent only as the Workmen's Compensation Act of the province in which the accident occurred would apply to a person in the employ of a railway company or the dependents of such persons under like circumstances.

The important words are: "And the liability for and the amount of such compensation shall be determined * * * in the same manner and by the same board." It is the liability of the Dominion Government to pay and the amount of the compensation, the right to which is given earlier in the section, which are to be determined; not the resulting effects upon collateral rights against third parties. To suggest, therefore, that the enactment of a special code of provisions with the powers of carrying them into administration without reference to the Provincial Board, is a submission in any sense of the term to a Provincial Act constituting another code, is to disregard the precise and individual character of the Dominion enactment.

Ford, J.A., stresses the proviso to section 3 (1) and attributes to it an implication which, apparently, expands the scope of the words of reference to the Provincial Act to embrace in effect the whole of its substantive provisions including section 24 (6). What the proviso deals with is Dominion employees in the service of the Government Railways; and it does no more than limit their benefits to those enjoyed by employees of company railways. But the "benefits" of the Dominion Act are the various items of compensation; and neither this language nor any implication from it carries us into the field of the collateral provisions of the Provincial Act.

It is then urged that the appellant, by his dealings with the Board, has so brought himself within the Provincial Act as to be estopped from asserting a right which that Act purports to have abolished. What the appellant did was clearly under the procedure of the Dominion Act. Admittedly, the Board functioned as contemplated by that Act; the deposit of funds was made; it was aware the appellant was a Dominion Government employee; its forms were conveniently used to enable it to make the necessary determination of the liability of the Dominion Government for and the amount of compensation to which the appellant was entitled, a course doubtless followed in many cases; and it is only the circumstance that an employer under the Provincial Act was legally responsible for the injury that gives rise to the questioning of those steps. The evidence of the witness Rose indicates that the Board assumed all provisions of the Provincial Act to be applicable to Dominion Government employees but that misconception is no warrant for transmuting appropriate measures under the Dominion Act into like proceedings under the Provincial Act.

There remains the contention that the Board has found the appellant, as an employee of the Dominion Government, to be a workman under the Provincial Act and that such a finding, by section 10 of that Act, is not open to question.

But in dealing with the appellant, the Board was acting not under the Provincial Act but as the administrator of the Dominion law. Its assumption, therefore, that the appellant was a workman within the meaning of section 24 (6) of the Provincial Act and its action under that

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section in relation to the respondent were by reason of what it conceived to be the true effect of the Dominion enactment; but to action by the Board in that capacity, section 10 of the Provincial Act clearly has no application.

The judgments appealed from fully recognize that the appellant can lose his rights against the respondent only in virtue of legislation which, by express words or by clear implication, takes them away. The point of difference between us is that, in my opinion, there is no such clear implication. The appeal should, therefore, be allowed and the case remitted for an assessment of damages, with costs to the appellant throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Fenerty, Fenerty & Bessemer.*

Solicitor for the respondent: *James McCaig.*

Solicitor for the Attorney-General of Canada: *F. P. Varcoe.*

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*May 27, 28.

DAME MARY EDDELINE MUSSEN (PLAINTIFF) ..... } APPELLANT;

AND

CROWN TRUST COMPANY AND W. H. CLARENDON MUSSEN (DEFENDANTS) ..... } RESPONDENTS.

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

Will—Executors—Trustees—Payment by executors to an alleged creditor of estate—Action by an heir alleging illegality of such payment—Executors taking reasonable precautions and acting "en bons pères de famille"—Executors not to be sued personally—Action by legatee must be for accounting or for "réformation de compte"—Action not for one particular act of misadministration, but must cover whole administration of executors.

An action was brought by the appellant, owner of the residue of her mother's estate, who was not entitled to any revenue from the estate until her father's death, against the respondents, the executors, personally only, in connection with the payment of certain debts made by them as such executors. The appellant prayed for a declaration that the alleged creditor could not and did not make any advances or loans to the deceased, that the executors did not legally satisfy themselves that the alleged creditor made advances or loans

*PRESENT:—Duff C.J. and Davis, Hudson, Taschereau and Rand JJ.

to the deceased, that consequently the executors personally were debtors jointly and severally liable to the estate in the sum so paid and that they be ordered to pay that sum into the capital of the estate. The judgment of the trial judge, dismissing the appellant's action, was affirmed by the appellate court.

Held, affirming the judgment appealed from ([1942] K.B. 466), that the appeal must fail. The respondents, and the trial judge so held, before making the impugned payment, took reasonable precautions and have acted "en bons pères de famille"; and the appellant has not proven the accusations of fraud and of reckless administration, as alleged in her statement of claim.

Held, also, that the appellant could not bring action against the respondents personally. Under such circumstances as in this case, the recourse of an interested party, if any, is not by direct action for a specific amount, but is by way of a demand for accounting when there has been none, or by "réformation de compte", when there has been one.

Held, also, that, under the laws of Quebec, a dissatified heir has not the right, as in this case, to sue for a particular act of misadministration, and thus unduly multiply the recourses to the courts of justice. The demand must cover the whole administration of the executors or the period for which the plaintiff is entitled to an accounting. *Davidson* v. *Cream* (27 Can. S.C.R. 362; Q.R. 6 K.B. 34).

Held, further, that the rule is, in such cases, that the defendants must be sued in their quality of executors, and not personally. It is as administrators that they owe an accounting, and their personal liability is involved only for the residue, if there is any.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Belleau J., and dismissing the appellant's action.

The appellant sued the respondents in connection with the payment of certain debts to Mussens Limited amounting to $13,894.01 and made by them as executors of the estate of her mother, the late Dame Mima L. E. Sharpe. By her action, which was taken against the respondents not as executors but personally, the appellant asked (*a*) for a declaration that Mussens Limited, could not and did not make any advances or loans of any kind to the deceased and that neither she, at her death, nor her estate at any time, was indebted to Mussens Limited in any amount whatever, save for funeral expenses; (*b*) for a declaration that the respondents, purporting to act as executors, could not and did not legally satisfy themselves that Mussens

(1) Q.R. [1942] K.B. 466.

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Limited did at any time advance or loan to the deceased the sums referred to in the statement of account; (*c*) for a declaration that the respondents, purporting to act as executors, paid the above sum of $13,894.01 to Mussens Limited in flagrant disregard of their duties and in breach of their trust, fraudulently and with full knowledge of the fraud; (*d*) for a declaration that the respondents were debtors of, and jointly and severally liable to, the estate in the said sum. The appellant then proceeded to ask for judgment ordering the respondents to pay into the capital of the estate the said sum, in default of which the appellant be authorized to execute said judgment against them jointly and severally, and the proceeds thereof to be paid into the capital of the estate of Dame Mina L. E. Sharpe, and finally for judgment in favour of the appellant against the respondents jointly and severally for the sum of $3,994.50, which would represent half the interest on the capital sum asked for, from the date of the payment to the date of the action.

Walter S. Johnston K.C. and *J. T. Fenston* for the appellant.

J. A. Mann K.C. for the respondent Crown Trust Company.

A. H. Elder K.C. for the respondent Mussen.

At the close of the argument by counsel for the appellant, and without calling on counsel for the respondents, the Court dismissed the appeal with costs.

THE COURT.—We are of the unanimous opinion that this appeal, where no question arises as to the scope of the powers of this Court to grant or refuse an amendment, must fail. We agree with the trial judge, Mr. Justice Belleau, that the executors of the estate of Mrs. W. H. C. Mussen, W. H. Clarendon Mussen, and the Crown Trust Company, the respondents, before making the impugned payment of $14,391.81 to Mussens Limited, took reasonable precautions, have acted "en bons pères de famille", and that the appellant has not proven the accusations of fraud and of reckless administration, as alleged in the statement of claim.

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We are also of opinion that the appellant could not bring action against the defendants personally. Under such circumstances, the recourse of an interested party, if any, is not by direct action for a specific amount, but is by way of a demand for accounting when there has been none, or by "réformation de compte", when there has been one.

Under the laws of the province of Quebec a dissatisfied heir has not the right, as in this case, to sue for a particular act of misadministration, and thus unduly multiply the recourses to the courts of justice. The demand must cover the whole administration of the executors or the period for which the plaintiff is entitled to an accounting. (*Davidson & Cream* (1)). And the rule is also that the defendants must be sued in their quality of executors, and not personally. It is as administrators that they owe an accounting; their personal liability is involved for the residue, if there is any.

During the argument, the attention of the Court was drawn to a particular item of $1,000 which in the appellant's views has been improperly charged to capital account. The rights of the appellant to have the necessary corrections made, if there has been any error, cannot be prejudiced by this judgment, and are reserved.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *John Fenston.*

Solicitors for the respondent Crown Trust Company: *Wainwright, Elder & McDougall.*

Solicitors for the respondent Mussen: *Mann, Lafleur & Brown.*

(1) (1897) 27 Can. S.C.R. 362; (1896) Q.R. 6 KB. 34

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*May 25.
*June 29.

ALBERT DUDEMAINE (PLAINTIFF).... APPELLANT;

AND

ROLAND COUTU AND CARRIERE LUMBER COMPANY, LIMITED (DEFENDANT) ..... RESPONDENTS.

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

Jury trial—Practice and procedure—Option made after expiration of delay—Consent of parties to extend delay—Right to jury trial forfeited and cannot be revived—Rule not one of mere procedure—Conditions prescribed for jury trial are imperative—Jurisdiction of jury extinguished after expiration of delay—Article 442 C.C.P.

The appellant brought an action against the respondents for damages caused to him through the death of his son, killed by the respondent company's truck driven by the other respondent, and made option in his statement of claim for a trial by jury. On the 12th of December, 1941, the trial resulted in a disagreement. On the 7th of February, 1942, counsel for the appellant prepared a motion to call a new jury and to fix the date of the second trial, and counsel for the respondents agreed in writing to the motion. But, on the day fixed for the trial, objection was entered by counsel for the respondents against the hearing of the case by a jury, on the ground that the consent given by him was not valid. The trial judge overruled the objection, and, after verdict by a jury, awarded $3,199.60 to the appellant. The appellate court reversed this judgment on the sole ground that the appellant had forfeited his right to a jury trial, and the record was sent back to the Superior Court for trial before a judge without a jury.

Held that the appeal to this Court should be dismissed.

Per Kerwin, Hudson and Taschereau JJ. When both parties to an action have forfeited their right to a jury trial through the expiration of the delay prescribel by article 442 C.C.P., either of them cannot, even with the consent of the other, revive such right, no more than they could give a valid consent to a jury trial when the law does not grant right to it. The obligation, imposed by that article and drawn up in imperative terms, is more than an ordinary rule of procedure prescribing a delay, which rule the parties would at liberty follow or extend. The right to a jury trial is subordinate to the conditions which are intimately connected with it. The law has not only granted a right to the litigants, but it has also conferred jurisdiction to twelve persons to hear the case and has imposed upon them the obligation to perform their duties, when the request has been made to the court within the prescribed delay. Consequently, when the delay has expired, a conditional right has been lost because the condition has not been fulfilled; and the jurisdiction of the jury has passed away and cannot be re-established, even with the consent of the parties.

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

APPEALS from the judgments of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Savard J. and referring the case back to that Court for a new trial.

The appellant, on the 9th of October, 1941, brought an action against both respondents claiming damages for an amount of $5,199.79 and making option for a trial by jury. On the 23rd of December, 1940, the truck of the respondent company, driven by the respondent Coutu, had struck and killed the appellant's son. A few days before the trial, the appellant filed an incidental demand for seizure before judgment of the respondent company's truck. A first trial before jury took place in December, 1941, but the jury disagreed. Following the mistrial, it is contended by the appellant that pourparlers of settlement had been in order within the thirty days' period after the date of the first judgment; and both parties admitted that, on the 8th of January, 1942, a letter was written by the respondents' counsel offering $500 in full settlement of the claim, which offer was refused on the 15th of January, 1942. On the 7th of February, 1942, counsel for the appellant prepared a motion to call a new jury and to fix the date of the trial; and counsel for the respondents agreed in writing to the motion. But, on the day fixed, counsel for the respondents objected to the trial and moved to strike the panel on the ground that the consent given was not valid and that more than thirty days had elapsed from the date of the first judgment to the date of the motion for a new trial. The trial judge overruled the objection and ordered the parties to proceed with the trial. The respondents were condemned, after verdict by a jury, to pay to the appellant $3,199.79 for damages, and the incidental demand respecting the seizure of the truck was also maintained. The appellate court, without considering the other grounds of appeal, reversed that judgment, holding that the appellant had lost his right to a jury trial by failing to proceed within the delay prescribed by article 442 C.C.P.; consequently, the verdict was quashed and the case was referred to the Superior Court to be heard before a judge without jury. The appellant appealed to this Court.

Louis Morin K.C. for the appellant.

J. A. Gagné K.C. and *W. Desjardins K.C.* for the respondents.

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The judgment of the Chief Justice and Davis J. was delivered by

THE CHIEF JUSTICE.—I concur in the judgment dismissing the appeal with costs.

The judgment of Kerwin, Hudson and Taschereau JJ. was delivered by

TASCHEREAU J. — Le fils du demandeur a été frappé par l'automobile de la Carrière Lumber Company, conduite par un nommé Roland Coutu, qui à ce moment était dans l'exercice de ses fonctions d'employé. Il est décédé quelques heures après l'accident, et l'appelant a réclamé des dommages au montant de $5,199.79.

L'action a été instituée le 19 octobre 1941, et le 22 novembre de la même année, par voie de demande incidente, le demandeur a fait saisir avant jugement le camion de la défenderesse.

La cause a été entendue une première fois devant un jury à Amos le 12 décembre 1941, mais par suite d'un désaccord un nouveau procès s'instruisit le 10 mars 1942. Cette fois, le jury rendit un verdict accordant au demandeur la somme de $3,199.60, et, par jugement en date du 12 mars, M. le juge Savard confirma ce verdict.

En cours du Banc du Roi, les défendeurs ont attaqué ce jugement en invoquant les raisons suivantes: —

1. Absence de responsabilité.

2. Faute contributoire du jeune Dudemaine.

3. Dommages excessifs.

4. Le demandeur avait perdu son droit à un procès par jury lors du second procès, n'ayant pas fait les procédures voulues dans les trente jours tel que l'exige l'article 442 du Code de Procédure Civile.

A l'exception de M. le juge St-Germain qui enregistra sa dissidence après avoir examiné tous les points soulevés par les défendeurs, la Cour du Banc du Roi ne considéra que le dernier argument, et en vint à la conclusion que le demandeur était bien déchu de son droit au procès par jury et que le dossier devait être retourné à la Cour Supérieure pour qu'il en soit disposé de la manière ordinaire devant un juge. Et comme conséquence de ce premier

jugement, la Cour du Banc du Roi a maintenu aussi le second appel des défendeurs se rapportant à la demande incidente, et a rendu la même ordonnance.

C'est l'article 442 du Code de Procédure Civile qui doit déterminer les droits respectifs des parties; il se lit ainsi:

442. A défaut par la partie qui a demandé le procès par jury de procéder sur cette demande dans les trente jours qui suivent celui où la cause est mûre pour le procès ou pour un nouveau procès, elle est de plein droit déchue de la faculté de le faire; mais le juge peut, sur demande faite dans l'intervalle, lui accorder un délai additionnel pour raison valable.

L'autre partie peut, dans les quinze jours après l'expiration de ce délai, procéder au procès par jury.

A défaut de le faire dans aucun de ces cas, la cause peut être instruite pour enquête et audition en la manière ordinaire.

L'appelant admet évidemment que son application pour un second procès par jury était tardive, car elle n'a été faite que le 7 février 1942, quand le premier verdict avait été rendu le 12 décembre 1941. Les délais étaient clairement expirés, mais, l'appelant invoque un consentement signé par les parties à ce qu'il soit procédé à la formation du rôle des jurés le 11 février 1942. Mais, il est bon de noter que, malgré le consentement donné, le procureur des défendeurs s'est objecté à la formation du rôle, parce que les délais étaient expirés et que le consentement était invalide. C'est cette prétention que la Cour du Banc du Roi a maintenue, et elle en est venue à la conclusion que le délai de trente jours est de rigueur, que les parties avaient perdu leurs droits respectifs au procès par jury, et que le consentement ne pouvait les faire revivre.

Il est certain, et la Cour du Banc du Roi admet ce principe, que lorsqu'il s'agit d'une simple question de procédure, les tribunaux doivent donner effet aux consentements donnés par les parties. Mais, la question qui se pose ici a-t-elle le même caractère? Quand un droit exceptionnel est donné à condition qu'il soit exercé dans un certain délai, peut-on faire revivre par consentement ce délai expiré? Car, il est indiscutable que dans la province de Québec, le cours normal de la procédure est que tout procès doit s'instruire devant un juge sans jury. C'est par exception qu'en certains cas, déterminés par le code, il y a lieu au procès par jury. Mais, lorsque le demandeur désire exercer ce droit restreint, il doit procéder sur cette demande dans les trente jours qui suivent celui où la cause est mûre pour le

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procès, et à défaut de le faire, il est déchu de son droit. Le défendeur peut, dans les quinze jours qui suivent, faire la même demande, mais il est lui aussi frappé de la même déchéance s'il néglige d'exercer ce privilège. Même le juge ne peut accorder de prolongation quand les délais sont expirés.

Cette obligation, imposée par l'article 442 du C.P.C. et rédigée dans des termes impératifs, me semble être plus qu'une simple règle de procédure déterminant un délai que les parties peuvent respecter ou prolonger à volonté.

Le droit au procès par jury est subordonné à des conditions qui y sont intimement liées, et qui pour ainsi dire en font partie. On ne peut choisir un procès par jury sans accepter toutes les obligations qui en découlent. Le code, en décrétant en quels cas il y aura lieu à ce mode de procès, a non seulement accordé un droit aux plaideurs, mais il a aussi conféré une juridiction à douze hommes d'entendre ce litige, et leur a imposé l'obligation de servir, quand la demande est faite au tribunal dans les délais voulus.

La Cour du Banc du Roi a décidé que les deux parties, déchues de leur droit, ne pouvaient faire revivre ce droit expiré, pas plus qu'elles ne pourraient donner un consentement valide à un procès par jury, quand le code ne l'accorde pas. Un droit conditionnel a été perdu, faute de la réalisation de la condition. La juridiction est maintenant disparue; et celle-ci ne peut être rétablie par un consentement.

Les tribunaux de la province de Québec ont toujours interprété sévèrement cette disposition de l'article 442 C.P.C., qui détermine dans quel délai doit agir celui qui veut conserver son droit au procès par jury. Ainsi, en 1902, Sir Alexandre Lacoste, parlant pour la Cour du Banc du Roi, disait dans *Canadian Pacific Railway* v. *Foster* (1),

> Le droit au procès par jury est un droit d'exception et il faut strictement se conformer aux exigences de la loi pour pouvoir en réclamer le bénéfice.

Le même principe a été réaffirmé en 1940 par la Cour du Banc du Roi dans *Consolidated Theatres Limited* v. *Nihon* (2): —

(1) (1902) Q.R. 12 K.B. 139, at 140.

(2) (1940) Q.R. 68 K.B. 373.

La demande pour le choix et l'assignation du jury et pour la fixation des dates doit être faite dans les trente jours de la définition des faits. La demande pour la définition des faits doit être faite dans les trente jours qui suivent celui où la cause est mûre pour le procès. Faute d'observer ces délais, le demandeur perd tous ses droits au procès par jury.

Et, plus récemment encore, dans *Wise* v. *Boxenbaum* (1): —

Le droit au procès par jury est un droit d'exception; pour en pouvoir réclamer le bénéfice, il faut se conformer strictement aux exigences de la loi. Il ne suffit pas d'avoir opté pour cette forme de procès et par là d'avoir acquis le droit de s'en prévaloir; il faut encore conserver ce droit en observant les délais prescrits. Ainsi la définition des faits doit être demandée dans les trente jours qui suivent celui où la cause est mûre pour le procès; et la cause est mûre pour le procès quand la contestation est liée, ou à l'expiration du délai dans lequel elle devait l'être. Faute d'observer ces délais, la partie perd tous ses droits au procès par jury.

Je ne crois pas pouvoir, malgré les inconvénients pratiques qui peuvent en résulter, entretenir une opinion différente de celle exprimée dans le jugement dont il y a appel, et je le confirmerais.

L'appelant a cité le précédent de *Lord* v. *La Reine* (2). Dans cette cause, il s'agissait de savoir si les articles 1020 et 1209 du Code de Procédure Civile de la province de Québec, qui limitent le temps pour présenter une inscription devant la Cour du Banc du Roi, imposent des conditions impératives sans lesquelles la cour d'appel n'a pas juridiction, et si les parties peuvent de consentement prolonger ces délais. La Cour en est venue à la conclusion qu'il s'agissait d'une question de procédure, où les parties pouvaient donner un consentement valide. Je ne crois pas, cependant, que cette décision puisse être interprétée comme voulant dire que les parties peuvent consentir à soumettre leur litige à un jury quand ce dernier n'a plus juridiction pour l'entendre.

Quant à l'autre précédent de cette Cour, *The Montreal Tramways* v. *Séguin* (3), je crois qu'il n'a aucune application dans l'espèce. Dans cette cause, on s'est demandé si les parties avaient oui ou non droit à un procès par jury; mais la demande avait été faite dans les délais prévus au code. Personne ne s'y était objecté, et cette Cour a décidé, en conséquence, qu'il y avait acquiescement et chose jugée sur ce point, et qu'on ne pouvait pas invoquer ce moyen devant un tribunal d'appel. Dans le cas actuel, lorsque le

(1) (1940) Q.R. 70 K.B. 9, at 11. (2) (1900) 31 S.C.R. 165.
(3) (1915) 52 S.C.R. 644.

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jury a été convoqué, l'intimé s'est objecté à cette convocation vu l'expiration des délais, et on ne peut en conséquence lui reprocher un acquiescement ou invoquer contre lui l'autorité de la chose jugée.

Pour les motifs ci-dessus, je suis d'opinion que les deux appels de l'appelant doivent être rejetés avec dépens et vu la conclusion à laquelle j'arrive, il est inutile de discuter les autres moyens soulevés par l'appelant.

Appeal dismissed with costs

Solicitor for the appellant: *Remy G. Taschereau.*

Solicitor for the respondents: *Demers et Desjardins.*

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*May 28, 31

*Aug. 3

HUGO FORTIER (DEFENDANT) ..... APPELLANT;

AND

CHRISTIAN G. MILLER (PLAINTIFF)... RESPONDENT;

AND

LEOPOLD-M. FORTIER ET AL.,

(GARNISHEES).

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

Alimony—Legacy—Declared by testator to be exempt from seizure—Automobile accident—Damages awarded for hospital and medical expenses, and for incapacity resulting from injury—Execution of judgment—Amount of legacy liable to seizure—Compensation is "alimony" within meaning of article 559 C.C.P.

In an action for damages resulting from an automobile accident, the respondent was awarded a sum of $6,976.85, for hospital and medical expenses, for disability and for loss of automobile. In execution of that judgment, less a sum of $200 being the value of the car, the respondent seized by way of garnishment, in the hands of the executors of the estate of the appellant's father, all sums bequeathed to the appellant under the will. The garnishees made a declaration that the appellant was entitled to one-third of the net revenue of the estate; but that the testator had expressly declared such legacy to be given as an alimentary pension and upon the condition of it being exempt from seizure. The trial judge ordered the garnishees to be discharged from the seizure. The appellate court, reversing that judgment, held that the respondent's claim showed an alimentary characteristic and could be included within the meaning of the words "dettes alimentaires" and "aliments" contained in article 559 C.C.P.

*PRESENT:—Duff C.J. and Kerwin, Hudson, Taschereau and Rand J.J.

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Held that the judgment appealed from (Q.R. [1943] K.B. 12) should be affirmed and the appeal to this Court be dismissed.

Per Hudson and Taschereau JJ.—Sums of money or pensions given or bequeathed as alimony, even though the donor or testator has expressly declared them to be exempt from seizure, may, however, be seized for debts similar to the one created by the judgment in this case. Such a claim presents, indeed, a real alimentary character: the indemnity granted to the respondent is precisely for hospital and medical expenses and for incapacity; and, moreover, the evidence established that the respondent had no other source of revenue. The word "alimony", in its juridical sense, means the things absolutely necessary for the maintenance of a person. The quasi-offence, from which the respondent has been an innocent victim, has deprived him of these essential things. It is in order to enable the respondent to pay medical expenses and to procure the necessities of life, that the judgment has granted him compensation. This constitutes alimony within the meaning of article 559 C.C.P., and, therefore, any exemption from seizure of sums of money or pensions given as alimentary provisions cannot be raised against the payment of such compensation.

Review of the decisions rendered by the courts of Quebec and in France, since 1881, and of the opinions expressed by French authors on the subject.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Gibsone J. and maintaining a seizure, by way of garnishment, taken in execution of a judgment rendered in favour of the respondent against the appellant.

Hector Lalonde for the appellant.

John Bumbray and *Pascal Lachapelle* for the respondents.

THE CHIEF JUSTICE.—I concur in dismissing the appeal with costs.

The judgment of Kerwin and Rand JJ. was delivered by

KERWIN J.—If it were not for the body of judicial opinion to the contrary, I would be disposed to allow the appeal and, in my opinion, my conclusion in that regard would be strengthened by the terms of the statutory amendment of 1928. However, in view of the decisions in the Quebec courts prior to that amendment, I think the

(1) Q.R. [1943] K.B. 12.

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Kerwin J.

matter has become too well settled to warrant any alteration in the law and I concur in the order dismissing the appeal with costs throughout.

The judgment of Hudson and Taschereau JJ. was delivered by

TASCHEREAU J.—Le demandeur-intimé Miller, comme conséquence d'un accident d'automobile, a obtenu jugement en Cour Supérieure contre l'appelant pour la somme de $6,976.85. M. le juge Cousineau a réparti ainsi le montant des dommages:—

Perte auto	$ 200 00
Frais d'hôpitaux	676 85
Incapacité totale permanente	600 00
Incapacité partielle permanente	5,500 00
Total	$6,976 85

Le défendeur n'a pas appelé de ce jugement, et le demandeur a alors fait émettre un bref de saisie-arrêt entre les mains des tiers-saisis. Ceux-ci ont déclaré que le défendeur comme héritier de son père retirait de cette succession une somme mensuelle de $175.00, et dans le testament qui a été produit au dossier on y lit la clause 11 qui décrète l'insaisissabilité de ce revenu:—

> Tous legs de quelque nature par moi ci-dessus faits à qui que ce soit, le sont à titre de pension alimentaire et seront en conséquence insaisissables sur aucun de mes légataires, devant de plus être incessibles.

Le défendeur a contesté cette saisie-arrêt et en a demandé main-levée vu cette clause d'insaisissabilité. Le demandeur a répondu que sa créance, sauf le montant de $200.00 pour dommages à l'automobile, a un caractère alimentaire, et qu'en conséquence cette rente mensuelle est saisissable en satisfaction de sa créance. M. le juge Gibsone de la Cour Supérieure a accordé la main-levée, mais la Cour du Banc du Roi, MM. les juges St-Germain et Walsh dissidents, a donné raison au demandeur-intimé et a déclaré valide la saisie-arrêt. C'est contre ce jugement de la Cour du Banc du Roi que se pourvoit l'appelant.

Il ne peut y avoir de doute que le testateur avait droit, en faisant ce leg à son fils, d'inclure dans son testament cette clause d'insaisissabilité et d'incessibilité. Dans

ce cas, le revenu provenant de la succession ne peut être saisi par les créanciers pour une dette ordinaire. Mais, comme il arrive souvent, la loi a créé des exceptions. L'article 599 du Code de Procédure Civile, paragraphe 4, se lit ainsi:—

Sont insaisissables * * *

4. Les provisions alimentaires adjugées par la justice, et les sommes et pensions données à titre d'aliments, encore que le donateur ou le testateur ne les ait pas expressément déclarées insaisissables. Elles peuvent cependant être saisies pour *dettes alimentaires.*

14. Sous-paragraphe 2. Nonobstant toutes stipulations contraires, les sommes et pensions mentionnées au paragraphe 4 peuvent cependant être saisies en exécution de tout jugement condamnant le donataire, le légataire ou le bénéficiaire à payer lui-même *une pension alimentaire* ou *des aliments.*

La question qui se pose est de savoir si la créance du demandeur basée sur le jugement condamnant le défendeur à réparer un tort civil comme résultat d'un quasi-délit, présente un caractère alimentaire, et peut être comprise dans les mots "dettes alimentaires" et "aliments" que l'on trouve aux paragraphes 4 et 14 de l'article 599 C.P.C.? Dans l'affirmative, la rente mensuelle de $175.00 est saisissable—sinon, quelque favorable que soit la créance du demandeur, la rente ne peut être le sujet d'une saisie valide.

Dans la province de Québec, cette question a donné lieu à de nombreux litiges. Certains jugements ont maintenu que la dette, qui naît d'un quasi-délit ou d'un délit sous l'empire de l'article 1053 du Code Civil, présente en certains cas un caractère alimentaire, tandis que d'autres ont soutenu le contraire. Quelques arrêts sont à l'effet que, si la créance de la personne qui réclame sous l'article 1056 C.C. est alimentaire, il n'en est pas ainsi de celle créée en vertu de l'article 1053 C.C.

Lors de l'entrée en vigueur du Code de Procédure Civile, les dispositions concernant l'insaisissabilité étaient quelque peu différentes. L'article correspondant à l'article 599 C.P.C. était alors l'article 558 C.P.C. qui se lisait ainsi:—

Sont aussi insaisissables * * *

2. Les provisions alimentaires adjugées par la justice.

3. Les sommes et objets donnés ou légués sous la condition d'insaisissabilité.

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4. Les sommes et pensions données à titre d'aliments, encore que le donateur ou testateur ne les ait pas expressément déclarées insaisissables. Néanmoins les provisions alimentaires et choses données comme aliments peuvent être saisies et vendues pour *dettes alimentaires.*

Taschereau J.

Quelque temps plus tard, cet article fut amendé et lors de la revision du Code de Procédure Civile, les parties de l'article 599 C.P.C. qui nous intéressent se lisaient de la façon suivante:—

Sont insaisissables * * *

4. Les provisions alimentaires adjugées par la justice, et les sommes et pensions données à titre d'aliments, encore que le donateur ou le testateur ne les ait pas expressément déclarées insaisissables. Elles peuvent cependant être saisies pour dettes alimentaires.

Et finalement, en 1928, le législateur a ajouté à cet article 599 C.P.C. le deuxième sous-paragraphe du paragraphe 14 que j'ai eu l'occasion de citer déjà, et où il est dit que les sommes et pensions données à titre d'aliments peuvent être saisies en exécution de tout jugement condamnant le donateur, le légataire ou le bénéficiaire à payer lui-même *une pension alimentaire* ou *des aliments.*

Depuis la codification, je trouve en premier lieu, un jugement de M. le juge Papineau, dans une cause de *Beauvais et al.* vs. *Leroux et la Cie des Moulins à Coton de V. Hudon* (1), rendu en 1881, et où il a été décidé:—

That a sum of money awarded by the Court as indemnity for personal injuries of a permanent nature partakes of the nature of an alimentary provision and is "insaisissable".

A la page 493, M. le juge Papineau dit:—

La Cour considère que la somme adjugée au défendeur Leroux, contre la Compagnie, lui a été adjugée à raison d'une infirmité corporelle, d'un caractère permanent, causée par l'imprudence d'un des employés de cette Compagnie, et qu'elle participe à la nature d'une provision alimentaire, exempte de la saisie en vertu de l'article 558 de notre Code de Procédure Civile.

Quelques années plus tard, en 1884, le même juge dans une cause de *Maurice* vs. *Desrosiers et Lessard* (2), décidait ce qui suit:—

Une somme accordée comme réparation civile d'une injure personnelle, est de sa nature insaisissable.

Dans le même sens, nous trouvons une décision de M. le juge Pagnuelo rendue en 1890, *Cressé* vs. *Young* (3):

Que les dommages accordés en réparation de blessures corporelles et pour soins médicaux, perte de temps, etc. ne sont pas saisissables.

(1) (1881) 2 M.L.R. 491. (2) (1884) 7 L.N. 361.
(3) (1890) 18 R.L. 186.

M. le juge Taschereau, dans une cause de *Cloutier* vs. *Compagnie des Chemins de Fer de Colonisation* (1), décidait aussi que:—

Les dommages réels accordés pour blessures sont de nature alimentaire et partant insaisissables et non compensables.

En 1903, M. le juge Loranger, dans la cause de *Lafond* vs. *Marsan et al,* (2):—

Les dommages accordés pour la réparation de torts personnels, blessures corporelles et soins médicaux en résultant, sont de la nature d'une créance alimentaire et sont insaisissables.

La Cour du Banc du Roi de la province de Québec, dès 1909, dans une cause de *James* vs. *Leroux* (3);

Une somme d'argent accordée par un jugement de la Cour sur le verdict d'un jury comme dommages à un père pour la mort de son fils qui était son seul soutien est insaisissable.

La Cour de Revision en 1909, dans une cause de *Laganière* vs. *Desjardins* (4):—

La somme que l'auteur responsable de la mort d'une personne est condamné à payer à ses père et mère en vertu de l'article 1056 est une provision alimentaire adjugée par la justice au sens du quatrième paragraphe de l'article 599 C.P.C. et par suite, elle est insaisissable.

Et plus récemment, dans la cause de *Lamarre* vs. *Malo* (5), la Cour du Banc du Roi décidait:—

Where a woman carrying on business obtains a judgment for damages in consequence of an automobile accident and, as a result of her inability to look after her affairs, falls into bankruptcy, the trustee who took up the instance in a seizure by garnishment in the hands of an insurance company, is entitled to the items comprised in the judgment relating to the administration of the debtor's business; but the damages representing compensation for personal injuries, medical expenses and loss of future earning capacity must be assimilated to an alimentary provision and, as such, are exempt from seizure.

Et très récemment, M. le juge Philippe Demers de Montréal, dans une cause de *Goodman* vs. *Becker* (6), décidait:—

Les dommages-intérêts accordés pour perte de salaire, pour la partie insaisissable, et pour frais médicaux, sont de nature alimentaire. Ceux qui sont alloués pour souffrances ne le sont pas.

Et enfin, dans la présente cause (7), la Cour du Banc du Roi s'est prononcée dans le sens des décisions ci-dessus citées, et M. le juge Marchand dit dans ses notes:—

(1) (1900) 6 R. de J. 512.
(2) (1903) Q.R. 24 S.C. 22.
(3) (1900) 16 R. L.n.s. 20.
(4) (1909) Q.R. 37 S.C. 513.
(5) (1935) Q.R. 58 K.B. 559.
(6) (1936) Q.R. 74 S.C. 228.
(7) Q.R. [1943] K.B. 12.

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La nature alimentaire de l'indemnité accordée par jugement à la victime d'un quasi-délit pour compenser ce que la faute de l'auteur de ce quasi-délit lui fait perdre de ses moyens de pourvoir lui-même à sa subsistance ne semble plus faire de doute aujourd'hui. Ce caractère lui a été souvent reconnu par nos tribunaux.

M. le juge Francœur s'exprime ainsi:—

Le jugement ne qualifie pas l'indemnité; il l'accorde telle que demandée, décrétant que du quasi-délit commis est née une créance de réparation, conséquence de l'invalidité partielle et permanente qui amoindrit les moyens de travail, unique ressource du demandeur pour obtenir sa subsistance, nourriture, logement, vêtements, frais de maladie, etc. En d'autres termes, l'indemnité est accordée pour compenser la perte de capacité et assurer l'obtention de toutes les choses indispensables à la vie. Elle constitue une créance alimentaire dont le tribunal a rendu le défendeur responsable.

Et enfin, M. le juge Prévost dit:—

La conclusion s'impose donc que les revenus afférents à l'intimé de la succession de son père à titre d'aliments, peuvent être saisis pour assurer le paiement de la dette alimentaire qu'il doit à l'appelant.

Les principaux arrêts cités par l'appelant au soutien de la proposition contraire sont les causes de *Archambault* vs. *Lalonde* (1) et *Desrosiers* vs. *Meilleur* (2), mais, je ne crois pas que l'on doive attacher une grande autorité à ces deux décisions, car elles ne portent pas sur la question qui nous est soumise, et déclarent seulement que les dommages accordés pour libelle n'ont pas de caractère alimentaire et ne sont pas exempts de la saisie.

Dans la cause de *Renaud* vs. *Malo* (3), il a été décidé que le montant accordé comme résultat d'un quasi-délit était saisissable.

La Cour de Banc du Roi, avant de rendre l'arrêt cité plus haut dans la cause de *Lamarre* vs. *Malo* (4) et dans la cause actuelle, avait décidé, en 1895, dans *Wilson* vs. *Brisebois* (5), que la créance de celui qui réclame des aliments reconnue par un jugement, n'est pas une dette alimentaire au sens de l'article 558 du Code de Procédure Civile, et que partant, le créancier ne pouvait pas saisir, en exécution de son jugement, une pension léguée à son débiteur à titre d'aliments, et stipulée incessible et insaisissable.

Mais, c'est sur le précédent de *Cochrane* vs. *McShane* (6), que s'appuie surtout l'appellant. Dans cette cause,

(1) (1887) 3 M.L.R., K.B. 486.
(2) (1892) Q.R. 2 S.C. 411.
(3) (1900) 7 R. de J. 107.
(4) (1935) Q.R. 58 K.B. 559.
(5) (1898) Q.R. 4 Q.B. 238.
(6) (1904) Q.R. 13 K.B. 505.

il a été décidé que, quand la victime exerce l'action qui lui compète exclusivement, le montant de l'indemnité n'est pas de la nature d'une provision alimentaire, et tombe dans son patrimoine; partant, cette somme peut être saisie par les créanciers de la victime, et il leur est loisible d'exercer leur droit, par voie de saisie-arrêt. M. le juge Hall, parlant pour la Cour, s'exprime de la façon suivante à la page 516:—

Very few legal propositions are more debatable or have been more ably debated than the question submitted to us by this appeal, viz, whether a judgment granting indemnity for personal injuries falls in the patrimony of the injured person and can be attached by his ordinary creditor.

A la page 518, il dit ceci:—

If the judgment were in the nature of aliments, he would secure his exemption under the provisions of C.P. 599; but, as I have said above we cannot accept the contention that a judgment for a *fixed sum* of injury previously received is an alimentary allowance.

Ce jugement de la Cour de Banc du Roi a été commenté par M. le juge Hall dans la cause de *Lamarre* vs. *Malo* (1) et, parlant pour une Cour unanime, il fait la remarque suivante:—

I venture to express the opinion that, in spite of the failure of the Court of Appeal in the *McShane* case (2) to distinguish between ordinary damages and compensation for medical expenses, the jurisprudence and authors justify the opinion that the items for hospital, doctors and nurses expenses were properly declared by the learned trial judge to be exempt from seizure.

In the present case, the particular item of damages is $4,500 for incapacity, that is, compensation for the plantiff's inability to earn a livelihood in the future.

This sum is clearly to be distinguished from the paltry item of $490 awarded Mr. McShane for injuries which apparently did not interfere with his business, and certainly not affect the salary on which he was dependent for his livelihood. There is, in my opinion, therefore, ample justification for declining to follow the *McShane* judgment, (2) because it is irrelevant to the circumstances in the present case.

En France, la question a également été débattue et les dispositions du Code de Procédure de France se trouvent à l'article 582:—

Les provisions alimentaires ne pourront être saisies que pour cause d'aliments.

Appelés à interpréter cet article, les tribunaux français, se basant sur la doctrine des auteurs, ont rendu plusieurs arrêts.

(1) (1935) Q.R. 58 K.B. 559. (2) (1904) Q.R. 13 K.B. 505.

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La Cour d'Appel de Colmar (1) a jugé que la somme adjugée à un ouvrier à raison d'un accident dont il a été victime, alors que cet ouvrier n'a pas d'autres ressources pour vivre, avait un caractère alimentaire.

En 1870 (2), il a été décidé que l'indemnité sous forme de pension viagère accordée à un ouvrier à raison d'un accident qui l'a mis dans l'impossibilité de travailler, avait un caractère alimentaire et qu'elle ne pouvait être saisie.

Le Tribunal Civil de Point-l'Evêque avait décidé dans une cause de *Missonier* vs. *Boulanger* (3), en 1893, que les dispositions du Code de Procédure Civile français qui énumère les sommes et pensions insaisissables ne sont pas limitatives, et qu'elles ne s'appliquent pas seulement aux sommes et pensions allouées pour aliments, par donation ou par testament, mais à toutes les sommes et pensions ayant un caractère alimentaire, et notamment à l'indemnité due par suite d'un accident qui a occasionné une incapacité partielle de travail. La Cour d'appel a adopté les motifs des premiers juges en 1893, et on trouvera ce rapport dans la Jurisprudence générale de Dalloz 1894, deuxième partie, p. 318. Et l'arrêtiste ajoute que la jurisprudence paraît aujourd'hui fixée en faveur de l'insaisissabilité totale ou partielle, suivant le cas, de toute créance qui présente un caractère alimentaire quelle que soit d'ailleurs son origine.

C'est aussi l'enseignement des auteurs en France, et Pigeau (Procédure Civile du Chatelet de Paris, vol. 1, 1787, p. 650), après avoir énuméré les objets et les sommes d'argent qui ne sont pas sujettes à la saisie, par la loi ou la jurisprudence, s'exprime de la façon suivante:—

> La réparation civile n'est pas non plus saisissable: elle est accordée pour réparer un tort fait par un crime à une personne; elle ne remplirait pas le but de la loi si on pouvait en arrêter le paiement: cela a lieu contre tous créanciers du débiteur, et à plus forte raison, contre celui qui est condamné à cette réparation, lequel, s'il est d'un autre côté créancier de celui qui l'a obtenue, ne peut néanmoins former opposition en ses mains, ni compenser et refuser en aucune manière d'acquitter les condamnations, sauf à se pourvoir contre son débiteur: s'il en était autrement, un créancier de mauvaise humeur, qui ne pourrait se faire payer en argent, de son débiteur, se paierait en mauvais traitements, en se livrant envers lui à des excès, et offrant la compensation de ce qu'il serait condamné a payer, sur ce qu'il devrait pour cette réparation.

(1) (1863) Journal de Palais, 576. (2) (1870) Sirey 70, 2, 53.
(3) (1893) Dalloz 94, 2, 318.

Et Carré & Chauveau (Procédure Civile et Commerciale, tome 4, p. 666-667), sans se prononcer catégoriquement, exposent des théories fort utiles pour nous aider à solutionner le problème.

Demogue (vol. 4, Des obligations, n° 479), nous dit:—

Les biens qui sont insaisissables peuvent-ils par exception être saisis lorsque le créancier est devenu tel à la suite d'un acte illicite dont il a été victime?

La question ne comporte pas une réponse unique. Si la loi en créant l'insaisissabilité ou en permettant de l'établir a eu surtout en vue des nécessités d'ordre public qui seraient méconnues par la saisie, l'insaisissabilité subsiste. Si au contraire, elle a surtout en vue de permettre de protéger des intérêts privés, la saisie est licite.

Et il ajoute au n° 480:—

Si l'insaisissabilité résulte de la volonté de l'homme autorisée par la loi, comme au cas de biens déclarés insaisissables par le donateur ou le testateur, la saisie est possible pour une créance née de délit, même antérieure à la libéralité.

Et Mazeaud (Traité de la Responsabilité Civile, tome 3, p. 641), s'exprime ainsi:—

Insaisissabilités d'intérêt privé: Les autres ne sont, au contraire, établies que pour protéger des intérêts privés. Dans le conflit qui s'élève alors entre ces intérêts privés garantis par l'insaisissabilité et les intérêts de la victime du délit, ces derniers paraissent plus digne encore de protection; ils vont l'emporter. Une telle insaisissabilité n'est opposable qu'à celui qui, malgré son existence, a consenti à devenir créancier. Ce n'est pas le cas du créancier délictuel. Cette insaisissabilité ne sera donc pas opposable à la victime d'un délit ou d'un quasi-délit quant au montant total de sa créance de réparation, qu'il s'agisse de restitution, de dommages-intérêts ou de dépens.

Et à la page 645, Mazeaud ajoute:—

Concluons qu'en principe la victime qui a obtenu un jugement de condamnation ne peut l'exécuter sur les biens insaisissables du responsable. Néanmoins, lorsque l'insaisissabilité est seulement édictée dans un but d'intérêt privé, elle n'est pas opposable à la victime d'un délit ou quasi-délit.

Sourdat (Traité de la Responsabilité, vol. 1, 5ième édition, aux pages 195 à 207), traite de cette question. Parlant des biens dotaux de la femme qui sont inaliénables, il les croit tout de même saisissables en certains cas, et dit que le principe d'équité qui oblige chacun à réparer le dommage qu'il a causé par sa faute, est évidemment supérieur aux considérations d'intérêt général qui ont fait déclarer les biens de la femme inaliénables. A la page 196, voici comment il s'exprime:—

La loi n'a posé la règle de l'inaliénabilité qu'au point de vue des obligations volontairement contractées. Elle a pu sans doute déclarer que

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ceux qui traiteraient avec une femme mariée sous le régime dotal ne pourraient faire exécuter sur les biens dotaux les engagements qu'elle aurait pris avec eux. Ils agissent alors à leurs risques et périls. Mais la personne lésée par un délit de la femme ne s'est pas volontairement exposée aux conséquences de ce délit, et sa créance doit nécessairement être préférée aux intérêts de la femme elle-même.

Et à la page 207, l'auteur poursuit:—

> Mais laisser ce dernier jouir en toute sécurité et sans réduction aucune de la somme qui lui est fournie à titre d'aliments, pourrait devenir un scandale d'impunité. Les pensions alimentaires sont parfois d'un chiffre élevé puisqu'elles doivent être allouées dans la proportion des besoins de celui qui les réclame et de la fortune de celui qui les doit. Or, il serait intolérable qu'un individu qui jouit quelquefois d'une pension de 4,000 ou 5,000 francs et même plus, à titre d'aliments, puisse la conserver entière sans être obligé d'en donner aucune part à ceux qu'il a lésés le plus gravement et peut-être réduits à la misère. Nous sommes conduits ici par la force des choses à étendre, même à ce cas, la disposition finale de l'article 582 du Code de Procédure, malgré les termes de son premier paragraphe qui paraissent limitatifs.

En France, Roger (Saisie-arrêt n° 353 et suivants) a souligné que la provision alimentaire ne peut être saisie que par les créanciers, et non par ceux à qui le créancier de la provision doit des aliments. Cependant, la grande majorité des auteurs ne partagent pas cette opinion et Carré & Chauveau, tome 4, question 1986), Boitard (tome 2, n° 837), Bioche (n° 69), Rodière (tome 2, p. 200), pensent, contrairement à l'opinion émise par Roger, que la provision alimentaire insaisissable peut cependant être saisie par ceux à qui le créancier de la provision doit des aliments.

Avant l'amendement de 1928, les pensions données à titre d'aliments ne pouvaient être saisies que pour dettes alimentaires, tel que le prévoyait l'article 599 C.P.C., paragraphe 4. L'opinion de Roger avait donc plus de valeur ici qu'elle n'en avait en France, où le Code Français permettait de saisir les pensions pour cause d'aliments.

On prétendait que seuls les créanciers qui avaient fourni des aliments, comme les produits comestibles, le vêtement, le logement, les choses essentielles à la vie, pouvaient saisir la pension autrement insaisissable. Et c'est ce qui justifie jusqu'à un certain point le jugement de la Cour du Banc de la Reine dans la cause de *Wilson* vs. *Brisebois* (1) et dont parle M. le juge St-Germain dans son jugement. Les notes de M. le juge Bossé (ne sont pas rapportées par l'arrêtiste, mais elles sont citées au long par M. le juge St-Germain) font voir que dans cette cause, la pension a

(1) (1895) Q.R. 4 Q.B. 238.

été déclarée insaisissable parce que la créance n'était pas pour fourniture d'aliments, mais pour une pension alimentaire due par le bénéficiaire de la somme déclarée insaisissable. Voici ce que dit M. le juge Bossé:—

> Toute la question réside dans l'interprétation à donner à l'article 558 (maintenant 599) du Code de Procédure Civile, et de savoir si les mots *dettes alimentaires* veulent dire des dettes dues à ceux qui ont fourni les aliments, ou bien s'ils veuleut dire aussi les dettes dues par celui à qui une pension alimentaire est payable.

L'honorable juge en vient à la conclusion que ces mots signifient les dettes dues à ceux qui ont fourni les aliments, et signale la différence qui dans le temps existait avec l'article 382 du code français.

Mais comme je l'ai dit déjà, notre code a été amendé en 1928, et on a ajouté un sous-paragraphe au paragraphe 14, et maintenant les pensions peuvent être saisies quand le bénéficiaire de la pension doit lui-même une "pension alimentaire" ou "des aliments".

Lorsqu'en 1928 le législateur a ainsi incorporé ce texte nouveau (2ème paragraphe du paragraphe 14 à l'article 599 C.P.C.) il avait certes en vue de donner une signification plus étendue aux mots "dettes alimentaires" et voulait couvrir non seulement la créance du fournisseur d'aliments, mais aussi la pension alimentaire et tous les autres aliments que le bénéficiaire de la pension insaisissable pouvait devoir. Autrement il faudrait dire qu'il a légiféré inutilement et que l'amendement n'est qu'une répétition du paragraphe 4 de 599 C.P.C.

Il semble ressortir de toute cette jurisprudence, tant dans la province de Québec qu'en France et des opinions exprimées par les auteurs, ainsi que des textes, que les sommes données à titre d'aliments, même si elles sont déclarées insaisissables, peuvent cependant être saisies pour des dettes du caractère de celle créée par le jugement condamnant le défendeur à payer au demandeur la somme de $6,776.85. Car cette créance a en effet un véritable caractère alimentaire; l'indemnité accordée à l'intimé est précisément pour frais d'hôpitaux et pour incapacité de travailler, et la preuve révèle en outre qu'il n'a aucune source de revenus.

Le mot "aliments", dans son sens juridique, signifie les choses indispensables à la subsistance d'une personne.

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Le quasi-délit, dont l'intimé a été la victime involontaire, l'a privée de ces choses essentielles. C'est pour qu'elle paye ces frais médicaux, qu'elle se procure les nécessités de la vie, que le jugement lui accorde une compensation. Cela constitue, je crois, des aliments au sens de l'article 599 C.P.C., devant lesquels disparaît l'insaisissabilité des pensions données à titre d'aliments.

On a objecté, et dans plusieurs des arrêts cités par l'appelant on y trouve cette même objection, que le montant accordé comme conséquence d'un délit ou quasi-délit ne peut pas créer une créance alimentaire, car il n'est pas proportionné aux besoins de celui qui réclame et aux moyens de celui qui paye. Ceci est vrai pour la pension alimentaire, dont parle le Code Civil aux articles 165 et suivants, et ailleurs; mais le législateur fait une différence, entre pension alimentaire et aliments, et comme le dit M. le juge Marchand, dans son jugement:—

> Ce dernier mot d'"aliments", dans sa généralité, comprend toutes les autres expressions.

Mais les deux ne doivent pas être confondus.

La pension alimentaire est une obligation légale, fondée sur la famille, et les devoirs que se doivent les époux, les ascendants, et les descendants de se maintenir mutuellement. Le donataire a les mêmes devoirs, et son refus de fournir une pension, serait de l'ingratitude qui justifierait la révocation de la donation. L'obligation, qui est ainsi créée par la loi, de payer en certains cas une pension alimentaire est réciproque; elle a un caractère de variabilité qui souvent s'éteint pour renaître ensuite, et elle est proportionnée aussi aux moyens de celui qui doit cette pension et aux besoins de celui qui la réclame. Comme elle doit satisfaire des besoins successifs, elle est payée par versements, et c'est ce qui explique la série de prestations auxquelles elle donne lieu.

Mais en outre de la pension alimentaire que se doivent réciproquement certaines personnes, et qui est soumise à certaines règles, il existe des dettes et créances qui ont un caractère alimentaire, et qui se payent non pas par versements, mais qui s'éteignent par la prestation d'un montant global.

Ainsi, la créance d'un fournisseur des choses nécessaires à la vie, les frais d'hôpitaux, les frais de médecins, les pro-

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duits comestibles, le vêtement, le logement, sont des créances alimentaires pour celui qui les réclame et des dettes alimentaires pour celui qui les doit. Et, ces dettes alimentaires et aliments dont parle l'article 599 C.P.C., paragraphes 4 et 14, n'ont pas les caractères de la pension alimentaire. Il n'existe pas de relation entre les moyens de celui qui les paye et les besoins de celui qui réclame, elles ne sont pas payées par prestations successives et ont pourtant, au sens de la loi et de la jurisprudence, un caractère alimentaire.

Et si, comme on ne peut en douter, le créancier d'une pension alimentaire peut en vertu de la loi, faire saisir des sommes déclarées insaisissables, pourquoi refuser le même droit à l'intimé qui réclame le salaire perdu, les soins d'hôpitaux comme résultat du quasi-délit dont il a été la victime? Le code place sur un pied d'égalité le créancier de "la pension alimentaire" et le créancier des "aliments", et dans les deux cas, les revenus insaisissables perdent le caractère que leur donne la loi.

Je suis donc d'opinion que le jugement de la Cour du Banc du Roi est bien fondé, et que le présent appel doit être rejeté avec dépens de toutes les cours.

Appeal dismissed with cost.

Solicitor for the appellant: *Hector Lalonde.*

Solicitors for the respondent: *Bumbray and Carroll.*

IN THE MATTER OF A REFERENCE AS TO WHETHER MEMBERS OF THE MILITARY OR NAVAL FORCES OF THE UNITED STATES OF AMERICA ARE EXEMPT FROM CRIMINAL PROCEEDINGS IN CANADIAN CRIMINAL COURTS.

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*June 14, 15, 16, 17, 18.
*Aug. 3.

International law—Constitutional law—Military and naval forces of United States of America—Present in Canada with consent of Dominion Parliament for military operations in connection with present war—Whether exempt from criminal jurisdiction of Canadian courts—If not exempt, whether Dominion Government, or Governor General in Council under War Measures Act, have jurisdiction to enact legislation to grant such exemption.

The following questions were referred to this Court:

1. Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Govern-

*PRESENT:—Duff C.J. and Kerwin, Hudson, Taschereau and Rand JJ.

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ment of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

2. If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the *War Measures Act,* jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942*?

On these questions, opinions were given as follows:

Per curiam: Question 2 should be answered in the affirmative. The Dominion Parliament, more especially under head 7 of section 91 of the B.N.A. Act, has jurisdiction to enact legislation similar to the statute of the United Kingdom entitled *The United States of America (Visiting Forces) Act, 1912,* i.e. to exempt visiting American troops during the present war from the criminal jurisdiction of the Canadian courts. The Governor General in Council, acting under the *War Measures Act,* has also jurisdiction to enact similar legislation.

As to question 1:

Per the Chief Justice and Hudson J.:—

As a preliminary observation:

In virtue of the Order in Council of the 15th of April, 1941 (set out in the reasons *infra*), as amended by the Order in Council of the 6th of April, 1943, the service courts and service authorities of the United States of America may, subject to the provisions of the first-mentioned Order in Council, in relation to members of its forces (military, naval and air) present in Canada, or on board a Canadian ship or aircraft, exercise within Canada all such powers as are conferred upon them by the law of the United States in matters concerning discipline and internal administration. The code of discipline in force in the United States army is very sweeping in its provisions and seems to be broad enough to embrace almost any offence against the criminal law of this country.

As to the jurisdiction of Canadian courts:—

First, as to land forces. There is no rule of law in force in Canada which deprives the Canadian civil courts (that is to say, non-military courts) of jurisdiction in respect of offences against the laws of Canada committed by the members of such forces on Canadian soil. The Canadian criminal courts do not in fact exercise jurisdiction in respect of acts committed within the lines of such forces, or of offences against discipline generally committed by one member of such forces against another member in cases in which the act or offence does not affect the person or property of a Canadian subject.

Secondly, as to naval forces. The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offence committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship. As regards offences committed on shore by

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members of the crew, they are not exempt from the jurisdiction of the criminal courts of Canada, but the criminal courts of Canada do not exercise jurisdiction in respect of such offences where the offence is one committed by one member of the crew against another member of the crew, except at the request of the commander of the ship.

Per Kerwin and Taschereau JJ.: The members of the military and naval forces of the United States of America present in Canada with the consent of the Canadian Government for purposes of military operations in connection with or related to the state of war now existing, whether such members are attached to a unit or ship stationed in Canada or elsewhere or are absent on duty or on leave from their unit or ship stationed here, are exempt from criminal proceedings prosecuted in Canadian criminal courts. This immunity may be waived by the United States and in any event does not apply to members of the forces who may enter Canada as tourists or casual visitors. The powers of arrest, search, entry or custody by Canadian authorities are not interfered with.

Per Rand J.: The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law, wherever committed, against other members of those forces, their property and the property of their government; but the exemption is only to the extent that United States courts exercise jurisdiction over such offences.

Per The Chief Justice and Hudson J.: The United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them; in other words, no rule of international law, by which the visiting forces of an Ally in the United Kingdom would be exempt as of legal right from the jurisdiction of the British civil courts, has ever been a part of the law of England. This applies equally to Canada: the fundamental constitutional principle with which it is inconsistent is a part of the law of every province of Canada, the constitutional principle by which a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country. Nothing short of legislative enactment, or its equivalent, can change this principle.

Per Kerwin J.: The general rule is that every one in Canada is subject to the laws of the country and to the jurisdiction of its courts. But there are exemptions grounded on reason and recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary. By international law, there exists an exemption from criminal proceedings prosecuted in Canadian criminal courts of the visiting members of the United States forces; and, as a result of the order in council of April 6th, 1943 (set out in the reasons), nothing that had been done by Canada should be taken as prejudicing or curtailing such exemption. The Government of Canada having invited into the Dominion the military and naval troops of the United States of America as a part of the scheme of defence of the north half of the Western Hemisphere and, therefore, not merely for the benefit of the United States but for that of both parties and, in fact, for the benefit of all allied

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nations in the present conflict, the invitation must be taken to have been extended and accepted on the basis that complete immunity of prosecution in Canadian criminal courts would be extended to members of the United States forces.

Per Taschereau J.: There exist rules of international law adopted by the civilized nations of the world granting immunity to organized forces visiting a country with the consent of the receiving Government. These immunities are not based on the theory of exterritoriality, but they rest on the ground that "a sovereign" extending the invitation "is understood to cede a portion of his territorial jurisdiction, when he allows the troops of a foreign prince to pass through his dominions". *Schooner Exchange* case (7 Cranch 116) These rules of international law have been accepted by the highest courts of the United States and some of them, applicable to the present case, have also been accepted by the Judicial Committee; their existence must be ackowledged and they must be treated as incorporated in our domestic law. There is nothing in the laws of the land inconsistent with their application within our territory.

Per Rand J.: Constitutional principle in England has for several centuries maintained the supremacy of the civil law over the military arm. That principle, however, cannot be said to be infringed by jurisdiction in a military court of the United States over its own forces which for the purposes of both countries are temporarily on Canadian soil. But that principle stands in the way of implied exemption under international rules, when the act complained of clashes with civilian life. The question is what is the workable rule implied from the invitation, that fits into the fundamental legal and constitutional system to which it is offered. It is from the background of that system that the invitation and its acceptance must be interpreted. It cannot be said to be clear that there has been a recognition of either a usage or principle, emanting from rules of international law, by the parliament or the courts of this country or of Great Britain that would raise the immunity against the constitutional safeguard of accountability before a common tribunal. That safeguard, however, is concerned primarily to vindicate, not Canadian courts, but Canadian civil liberty. It does not, therefore, stand in the way of a rule limited to the relations of members of a foreign group admitted into Canada for temporary national purposes with persons other than members of the Canadian public.

REFERENCE by His Excellency the Governor General in Council, under the authority of section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of certain questions which are cited in full in the head-note and in the Order in Council below, to the Supreme Court of Canada for hearing and consideration.

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

The Committee of the Privy Council have had before them a report, dated 8th April, 1943, from the Minister of Justice, representing:—

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That, with the consent of the Government of Canada, the Government of the United States of America has stationed and will station units of its military and naval forces in Canada;

That a question has arisen as to the relationship of the authorities and courts of Canada to the aforesaid forces and more particularly as to whether criminal proceedings may be prosecuted in Canada before any Canadian court against a member of the military or naval forces of the United States of America;

That United States authorities contend that the members of their military and naval forces aforesaid present in Canada with the consent of the Government of Canada are exempt from prosecution as aforesaid;

That cases have already occurred in which members of the military forces of the United States of America present in Canada have been charged with having committed criminal offences in Canada and questions have arisen as to whether such members are subject to be prosecuted in the criminal courts of Canada or whether service courts established for the purpose by the United States military authorities have exclusive jurisdiction in that behalf;

That certain regulations enacted under the *War Measures Act* enttiled the Foreign Forces Order, 1941, provide that, when a foreign force to which the Order is made applicable is present in Canada, the service courts of the foreign power may exercise within Canada, in relation to members of that force, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that power, subject to certain exceptions set out in a proviso to section three of the said Regulations, which exceptions, however, are not applicable in the case of the forces of the United States of America; and

That these Regulations have, subject to the qualification mentioned in the next preceding paragraph, been extended to the forces of the United States of America, which extension was made for the purpose of placing service courts of the forces of the United States of America in no less advantageous position than those of our other allies and it was expressly provided in the Order that the application of the Foreign Forces Order, 1941, to the forces of the United States of America shall not be construed as prejudicing or curtailing in any respect whatsoever any claim to immunity from the operation of the municipal laws of Canada or from the processes of Canadian courts exercising either criminal or civil jurisdiction by members of the forces of the United States of America (P.C. 2813 dated 6th April, 1943).

The Minister is of opinion that important questions of law are raised, and recommends that, pursuant to the powers vested in the Governor in Council by section fifty-five of the *Supreme Court Act*, the following questions be referred to the Supreme Court for hearing and consideration:

1. Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

2. If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from Criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting

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under the *War Measures Act*, jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942*?

The Committee concur in the foregoing recommendation and submit the same for approval.

A. D. P. Heeney,
Clerk of the Privy Council.

F. D. Smith K.C., G. E. Read K.C. and *C. Stein* for the Attorney-General of Canada.

C. R. Magone K.C. for the Attorney-General for Ontario.

G. C. Papineau-Couture K.C. for the Attorney-General for Quebec.

W. S. Gray K.C. and *H. J. Wilson K.C.* for the Attorney-General for Alberta.

E. Pepler K.C. for the Attorney-General for British Columbia.

The judgment of The Chief Justice and Hudson J. was delivered by:

THE CHIEF JUSTICE.—The two questions referred to us are these:—

(1) Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

(2) If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the *War Measures Act*, jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942*?

It is more convenient to deal first with the second question. Under head 7 of section 91 of the *British North America Act* exclusive jurisdiction "in relation to Militia and Defence" is vested in the Dominion Parliament "notwithstanding anything in this Act". Construing and applying section 91 in light of the judgment in the *Fort Frances* case (1) and the judgment of this Court in *Re Gray* (2), the Dominion Parliament has, in my view,

(1) [1923] A.C. 695. (2) (1918) 57 Can. S.C.R. 150.

jurisdiction to legislate in the sense indicated in the second question: that is to say, to exempt visiting American troops during the present war from the criminal jurisdiction of the Canadian courts. Further, by the enactments of the *War Measures Act* the Governor General in Council has full discretionary authority to pass any such measure.

A similar proposal was made in 1942 in England and, while it was unanimously agreed by competent authorities that the proposal to divest the British courts of jurisdiction in relation to offences committed by the members of any army, domestic or foreign, in Great Britain was "unprecedented", there was a general agreement that in the circumstances the necessary legislation should be passed granting the exemption which the American Government desired. The general view was expressed by Lord Atkin in a letter to *The Times* during the progress of the measure through Parliament in this sentence:—

> It is a proposal unique in the constitutional history of this country, but the Government of the United States have been so ungrudging in the aid given to this country that if they expressed a desire for such legislation no one would hesitate to grant it.

I cannot doubt that this is the spirit in which any such legislation would be regarded in this country.

In this view of the second question it seems to me, if I may say so without disrespect, that the first question is (as regards the American forces) almost academic in its nature. Nevertheless, the Governor General in Council, in the exercise of his undoubted authority and discretion, has considered that the question ought to be answered and it is our duty to examine and pronounce upon it.

I apply myself first to the consideration of the position of the members of a land force; afterwards I will discuss the case of the naval forces. First then as to a visiting army. The rule, it should be recalled, which it is now said is a part of the law of this country restricting the jurisdiction of the criminal courts of this country, is deduced from the doctrine laid down in a passage in the judgment of Marshall C.J., in *Schooner Exchange* v. *M'Faddon* (1):

> The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

(1) (1812) 7 Cranch 116.

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It is not contended, it is important also to observe, that there is any statute or any legislative enactment in the form of an Order in Council having the force of a statute which gives legal effect to any such rule. No such contention is advanced and there could be no basis for it. The rule contended for is not put and could not be put upon any pretended statutory sanction. If there is such a rule in force in this country in the sense contended for, it derives its validity solely from alleged principles of international law to which the nations, including the United Kingdom and Canada, are supposed to have agreed.

My view can be stated very briefly. It is, I have no doubt, a fundamental constitutional principle, which is the law in all the provinces of Canada, that the soldiers of the army of all ranks are not, by reason of their military character, exempt from the criminal jurisdiction of the civil (that is to say, non-military) courts of this country. In fact, at the time the United States forces entered this country there was in the Order in Council of the 15th of April, 1941, a declaration in these terms:—

> 4. (1) Nothing in the last preceding section shall affect the jurisdiction of any civil court in Canada to try a member of any foreign force for any act or omission constituting an offence against any law in force in Canada.
>
> (2) If a person sentenced by a court exercising jurisdiction by virtue of the last preceding section to punishment for an offence is afterwards tried by any such civil court as aforesaid in respect of any act or omission which constituted that offence, the civil court, shall, in awarding punishment in respect of that act or omission, have regard to any punishment imposed on him by the said sentence.
>
> (3) A court shall not have jurisdiction by virtue of the last preceding section to try any person for any act or omission constituting an offence for which he has been acquitted or convicted by any such civil court as aforesaid.

The subsequent amendment of this Order in Council by the Orders in Council of the 27th of July, 1942, and the 6th of April, 1943, does not affect this declaration in its relation to powers other than the United States; and as regards the forces of such other powers it is still in full vigour and effect.

That is a well-settled principle which has always been jealously guarded and maintained by the British people as one of the essential foundations of their constitutional liberties. I quote two passages on the subject—the first is from Dicey's "Law of Constitution", and the second is

from Dr. Goodhart, the distinguished lawyer who is the successor of Maine and Pollock in the chair of jurisprudence at Oxford University and is the editor of the Law Quarterly Review; this passage is taken from an article written by Dr. Goodhart for the American Bar Association Review for the information of American lawyers. At page 300 of Dicey it is stated:—

> A soldier's position as a citizen—The fixed doctrine of English law is that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen. "Nothing in this Act contained" (so runs the first Mutiny Act) "shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law." These words contain the clue to all our legislation with regard to the standing army whilst employed in the United Kingdom. A soldier by his contract of enlistment undertakes many obligations in addition to the duties incumbent upon a civilian. But he does not escape from any of the duties of an ordinary British subject.
>
> The results of this principle are traceable throughout the Mutiny Acts.
>
> A soldier is subject to the same criminal liability as a civilian. He may when in the British dominions be put on trial before any competent "civil" (i.e. non-military) court for any offence for which he would be triable if he were not subject to military law, and there are certain offences, such as murder, for which he must in general be tried by a civil tribunal. Thus, if a soldier murders a companion or robs a traveller whilst quartered in England or in Van Diemen's Land, his military character will not save him from standing in the dock on the charge of murder or theft.

Referring to the legislation introduced in 1942 and passed by the Parliament of the United Kingdom, Dr. Goodhart says:—

> The important constitutional principle which was involved is one of the essential ones on which the English constitution is based. It is described by Dicey as "the fixed doctrine of English law that a soldier, though a member of a standing army, is in England subject to all the duties and liabilities of an ordinary citizen". It is part—and perhaps the most important part—of "the rule of law" which is the distinctive feature of the British system. "It becomes, too, more and more apparent that the means by which the courts have maintained the law of the constitution have been the strict insistence upon the two principles, first of "equality before the law", which negatives exemption from the liabilities of ordinary citizens or from the jurisdiction of the ordinary courts, and, secondly, of "personal responsibility of wrong-doers", which excludes the notion that any breach of law on the part of a subordinate can be justified by the orders of his superiors." This means that the British soldier is subject to the jurisdiction of the ordinary courts, and is responsible to them for any breaches of the law which he may commit. So long as this principle is maintained, it will be impossible for anyone to establish a military dictatorship in Great Britain.

I have no doubt that this principle applies to all armies, British or foreign, except in cases in which by the legisla-

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tion mentioned dealing with the American forces in England, it has been changed by legislative enactment, or the equivalent thereof. There can be no doubt that in Great Britain it is settled as indisputable that this is a principle of law applicable in strict law to all armies there, except in so far as it has been modified by statute. The circumstance that in the United Kingdom and in Canada the civil courts would not, except at all events at the request of the commander of the visiting military forces, exercise jurisdiction in respect of acts beginning and ending within the lines of those forces and taking no effect externally to them, or probably in matters which exclusively concern the discipline of the visiting forces and/or the relations of the members of those forces to one another, is not, of course, in any way inconsistent with what I am saying. The course of the proceedings in England in the years 1940 and 1942 in relation to foreign forces present there illustrate this in the most striking way.

In 1940 an Act was passed by the Parliament of the United Kingdom to make provision with respect to the discipline and internal administration of allied and associated forces, and for the application in relation to those forces of the *Visiting Forces (British Commonwealth) Act, 1933*. This Act dealt with the authority of military, naval and air force courts of any foreign power allied with His Majesty for the time being present in the United Kingdom, or on board any of His Majesty's ships or aircraft. The Act authorized the Government by Order in Council *inter alia* to empower the naval, military and air force courts of such powers, subject to the provisions of the statute, to exercise within the United Kingdom or on board any such ship or aircraft in relation to members of those forces, in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of that Power.

In 1942 an Order in Council was passed applying to the Visiting American Forces (with all necessary modifications) the terms of section 1 (1) of the *Visiting Forces (British Commonwealth) Act, 1933*. The effect of these provisions was that the American service courts could exercise the necessary jurisdiction, while the English government departments were enabled to assist them, for example, by detaining in an English prison or detention barrack any person convicted in those courts.

By section 2 of the Act of 1940 it was enacted as follows:—

2. (1) Nothing in the foregoing section shall affect the jurisdiction of any civil court of the United Kingdom or of any colony or territory to which that section is extended, to try a member of any of the naval, military or air forces mentioned in that section for any act or omission constituting an offence against the law of the United Kingdom, or of that colony or territory, as the case may be.

(2) If a person sentenced by a court exercising jurisdiction by virtue of the foregoing section to punishment for an offence is afterwards tried by any such civil court as aforesaid in respect of any act or omission which constituted that offence, the civil court shall, in awarding punishment in respect of that act or omission, have regard to any punishment imposed on him by the said sentence.

(3) A court shall not have jurisdiction by virtue of the foregoing section to try any person for any act or omission constituting an offence for which he has been acquitted or convicted by any such civil court as aforesaid.

The visiting forces, therefore, were subject to the jurisdiction of the British courts. The Attorney-General, in introducing the Bill, explained that the British courts did not in fact exercise jurisdiction within the lines of the visiting forces, unless the person or property of a British subject was involved.

Then followed the Act of 1942 by which the jurisdiction of the British courts, in respect of offences committed by members of the American forces, was withdrawn. The Bill was introduced into the House of Lords and the observations of the Lord Chancellor in relation to it are important. There could be no doubt, he said, and, of course, there could be no doubt about it, that the jurisdiction of the British civil courts in relation to the members of the American forces could only be taken away by legislation. The Lord Chancellor made it perfectly plain that this legislation was being enacted in response to the desire of the Government of the United States. It is quite clear that, speaking on behalf of His Majesty's Government, he did not recognize any right (in virtue of international law) of an allied power to the exclusion of the jurisdiction of His Majesty's courts in relation to its visiting forces in Great Britain. The Lord Chancellor does refer to the fact that in the First Great War there was an agreement between the Government of Great Britain and the Government of the French Republic, by which jurisdiction over the members of the British Forces in respect of offences committed in France was given exclusively to the

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British military courts. But at the conclusion of his speech he says:—

I think your Lordships will see that this is a very interesting and, I admit, a most unusual proposal; one which would never be justified or tolerated except under conditions of war, and except under conditions of the closest feeling of comradeship and of common legal traditions which exist between the United States and ourselves. I commend the Bill to the House; and, if you will allow me to say so, His Majesty's Government tender it to the United States as a proof and a pledge of the genuineness of our confidence in them and our sense that we are indeed in this business together from the beginning to the end. In that spirit I feel sure that American Courts will seek to administer the exclusive powers they will now possess, and in that spirit I beg to move the Second Reading of the Bill.

It is very obvious that the British Government recognized, and recognizes, no such right as that now claimed as arising out of any rule of international law.

In the House of Commons there was an important statement by the Attorney-General. He emphasized the principle that legislation is necessary to restrict the jurisdiction of British courts in relation to the members of any army on British soil, and he says:—

May I say a word or two on the more general issues that are raised? Obviously this is an unprecedented proposal, but we live in unprecedented times. It is undoubtedly true that in the course of our history we have on many fewer occasions had the Forces of an Ally present on British soil than in the case of Continental countries. There have been some Dutch Forces here from time to time in our past history, and I was told of an assault committed by a Dutch soldier on a local inhabitant and the magistrate having great difficulty in preventing the commanding officer stringing him up the nearest oak tree. But that was a long time ago. We had American troops in the last war, and the Americans made exactly the same request that they are making to-day; it was only because the time was shorter, and that agreement was not come to, that Parliament was not asked to legislate on these lines. But in fact American soldiers were dealt with by our courts, and they made exactly the same request.

There was indeed unanimity in both Houses upon the point that the proposal to restrict the jurisdiction of British courts in the manner suggested was absolutely unprecedented, and that the proposal affected a fundamental constitutional principle that could only be modified by statute.

Indeed it is plain that the correspondence which is attached as a schedule to the Bill, when carefully read, embodies the same assumptions. Mr. Eden's phrase

in view of the very considerable departure which the above arrangements will involve from the traditional system and practice of the United Kingdom

expresses in measured language the substance of what is stated by the Lord Chancellor and the Attorney-General. The necessity for Parliamentary authority is emphasized in the first sentence of Mr. Eden's note and is recognized in the last paragraph of Mr. Winant's note (1).

I repeat that the practice followed in 1940 before the passing of the statute in 1942, as explained by the Attorney-General, in refraining from exercising or claiming jurisdiction in relation to acts within the lines of the visiting troops, in which neither the person nor property of a British subject was involved, in no way militates against this attitude of His Majesty's Government with regard to the strict law of the matter.

The attitude of His Majesty's Government from beginning to end was quite unambiguous. The authority of the service courts of the United States to exercise their powers under American law in the United Kingdom was given by Order in Council under the statute of 1940. The jurisdiction of the British courts in relation to American soldiers could only be abrogated or limited by Parliamentary action. There is nowhere a suggestion that His Majesty's Government recognized the existence of any rule of international law by which the visiting forces of an Ally in the United Kingdom would be exempt as of legal right from the jurisdiction of the British civil courts; and the proceedings from beginning to end are quite inconsistent with the assumption that any such view would have received any countenance from Parliament or His Majesty's Government.

(1) Reporter's note.—The first sentence of Mr. Eden's note is:

"Following the discussions which have taken place between representatives of our two Governments, His Majesty's Government in the United Kingdom are prepared, subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the Service courts and authorities of the United States Forces should, during the continuance of the conflict against our common enemies, exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces, and they are ready to introduce in Parliament the necessary legislation for this purpose."

The last paragraph of Mr. Winant's note is:

"It is my understanding that the present exchange of notes is regarded as constituting an agreement between the two Governments to which effect shall be given as from the date on which the necessary Parliamentary authority takes effect."

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In considering the question whether the United Kingdom has or has not assented to some rule of international law modifying one of her fundamental constitutional principles, it is, in my opinion, legitimate to refer to the statement made by the Lord Chancellor, not in his judicial capacity, but on his responsibility as representing the Government of the United Kingdom in introducing a Bill giving legislative sanction to an arrangement entered into between the Government of the United Kingdom and the Government of the United States subject to such sanction. It is also, in my opinion, legitimate to refer to the statements made by the Attorney-General to the House of Commons on his responsibility as Attorney-General on the existing state of the law in the United Kingdom. The decisive thing is, of course, as it seems to me, the position taken by the Government of the United Kingdom and by the Parliament of the United Kingdom in relation to the expressed desire of the Government of the United States that its forces in the United Kingdom should be exempt from the criminal jurisdiction of the British courts; that position has been fully explained.

Some comment is perhaps desirable upon an argument which was based upon negotiations which took place between the British and American Governments in 1917-18. I have already quoted from the speech of the Attorney-General in the House of Commons in which he deals with this subject. The important points are, first: that only by the authority of Parliament could an agreement restricting the jurisdiction of British courts have been validly effected, and, secondly: that in point of fact American soldiers were dealt with by British courts. What the Attorney-General says is incompatible with any recognition of the notion that there is some rule of international law which deprives the courts of jurisdiction, in the absence of legislative enactment or its equivalent.

I find it impossible to escape the conclusion that the United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them. In other words, no such rule as that now insisted upon has ever been a part of the law of England; and this applies equally to Canada. The fundamental constitutional principle with which it is inconsistent is a part of

the law of every province of Canada, the constitutional principle by which, that is to say, a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country. Nothing short of legislative enactment, or its equivalent, can change this principle.

Some stress was laid upon the agreement between the United Kingdom and the Republic of France in the last war; and it might conceivably be argued that the agreement places the Government of the United Kingdom under a diplomatic obligation at least to introduce legislation into the British Parliament, if any question should arise as to the jurisdiction of British criminal courts over French soldiers in the United Kingdom; but it is beyond doubt that His Majesty's Government did not and could not regard this arrangement with France as having in itself, without legislative sanction, the effect of depriving the courts of the United Kingdom of their jurisdiction.

Reverting to the agreement with the United States in 1942, it was pointed out by the Lord Chancellor that such an agreement should at least in principle be reciprocal. Paragraph 7 of Mr. Eden's note is in these words:—

> It would accordingly be very agreeable to His Majesty's Government in the United Kingdom if Your Excellency were authorized to inform me that in that case the Government of the United States of America will be ready to take all steps in their power to ensure to the British forces concerned a position corresponding to that of American forces in the United Kingdom.

In Mr. Winant's note the only reference is in the general words:—

> My Government agrees to the several understandings which were raised in your note.

In this correspondence both Governments treated the matter, as the Lord Chancellor did in the House of Commons, as a subject of reciprocal arrangements. There is no declaration on either side of the existence of any rule of law such as that now contended for; nor indeed is there any formal or unqualified undertaking by the American Government that the State courts of the United States, or indeed the United States courts, will enter into a valid waiver of jurisdiction.

I ought perhaps to say a word upon the argument of Mr. Read founded upon the special circumstances in which the United States forces came into Canada. If the assent

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of the Government of Canada to the presence of those troops in this country in those special circumstances could properly be interpreted as involving an implied diplomatic obligation in relation to the jurisdiction of Canadian criminal courts over the members of such forces, it could not, in my opinion, fairly be supposed to extend beyond an undertaking on behalf of the Government to do everything in its power by legislation, for example, to exempt the members of such forces from such jurisdiction. No such diplomatic obligation could have the effect *ipso jure* of depriving the Canadian courts of jurisdiction.

I now turn to the naval forces. In the memorandum of the Lord Chief Justice, Sir Alexander Cockburn, a memorandum which Lord Atkin in the *Cheung case* (1), at p. 171 says "is worthy to be compared with the judgment of Marshall C.J.", and which he quotes at p. 172, it is stated:—

> The rule which reason and good sense would, as it strikes me, prescribe, would be that, as regards the discipline of a foreign ship, and offences committed on board as between members of her crew towards one another, matters should be left entirely to the law of the ship, and that should the offender escape to the shore, he should, if taken, be given up to the commander of the ship on demand, and should be tried on shore only if no such demand be made. But if a crime be committed on board the ship upon a local subject, or if, a crime having been committed on shore, the criminal gets on board a foreign ship, he should be given up to the local authorities.

That was the view of the Lord Chief Justice as to what the law ought to be and it will be observed that it is not inconsistent with the statement of the Attorney-General made in the House of Commons in 1942 on the occasion of the passing of the Bill to which reference has been made. The view of the Lord Chief Justice was that, as regards offences committed on board a ship by a member of the crew as against a member of the crew, matters should be left to the law of the ship and, if the offender should escape to the shore and should be taken, he should be given up to the commander of the ship on demand and should be tried on shore only if such demand were not made. His view is that the jurisdiction should not be exercised if the authorities of the ship desired themselves to exercise it. On the other hand, he recognizes the jurisdiction of the local courts where the crime is committed

(1) [1939] A.C. 160. *Chung Chi Cheung* v. *The King*.

on shore, and expresses the view that in such a case, if the offender escapes to the ship, he should be given up to the local authorities.

In the judgment of Lord Atkin in the *Cheung case* (1) at p. 173 reference is made to para. 55 of Hall's International Law, as follows:—

> There the author states that a public vessel is exempt from the territorial jurisdiction; but that her crew and persons on board of her cannot ignore the laws of the country in which she is lying as if she were a territorial enclave. Exceptions to their obligation exist in the case of acts beginning and ending on board the ship, and taking no effect externally to her, in all matters in which the economy of the ship, or the relations of persons on board to each other, are exclusively concerned.

And at p. 175 Lord Atkin says:—

> In relation to the particular subject of the present dispute, the crew of a warship, it is evident that the immunities extend to internal disputes between the crew. Over offences committed on board ship by one member of the crew upon another, the local courts would not exercise jurisdiction.

It will be observed that Lord Atkin's proposition is confined to the case of an offence committed by one member of the crew upon another and does not extend to the case considered by Sir Alexander Cockburn, that of an offence committed by a member of the crew on board the ship against a subject of the local jurisdiction. The next sentence in the judgment seems to recognize this distinction:—

> The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with, and members of the crew withdrawn from its service, by local jurisdiction.

Lord Atkin proceeds:—

> Questions have arisen as to the exercise of jurisdiction over members of a foreign crew who commit offences on land. It is not necessary for their Lordships to consider these.

I do not think Sir Alexander Cockburn had any doubt about the jurisdiction of the local courts in such a case, and it is possible Lord Atkin's sentence, standing in its context, ought to be read as restricted to offences committed by one member of the crew against another. In such a case, assuming there was no legislation dealing with the matter, and assuming the offence was not murder or one of like gravity, it is probable that the local jurisdiction would recognize the disciplinary jurisdiction of the ship. The question we are asked, however, is a question relating

(1) [1939] A.C. 160.

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to jurisdiction; and, if I were not under a legal obligation to answer it, I should leave it where Lord Atkin leaves it. Being under an obligation to answer it, it must, I think, be answered on principle in the negative, in the sense, that is to say, that in the United Kingdom, or in Canada, the offender is not in point of law exempt from local jurisdiction.

Some reference ought perhaps to be made to the judgment of this Court on the Reference respecting the taxation of Legations (1). The immunities of displomatic representatives have been recognized for centuries by common consent of the nations, and evidence of the adherence of the United Kingdom to this principle is to be found, as was pointed out in the judgments on that Reference, in the legislative enactments beginning with the Statute of Anne and extending down to the nineteenth century, and in numerous decisions in the eighteenth and nineteenth centuries, including judgments of great judges, like Lord Campbell, and judgments of the Court of Appeal. The immunity of diplomatic representatives from judicial process extends, speaking broadly, to the public property of the foreign country in use for diplomatic purposes, as well as at least to foreign public ships of war. The precise limits of this immunity in relation to public property is not, as regards the courts of the United Kingdom, finally settled. There is nothing in these principles in any way inconsistent with the views I have expressed in this judgment.

The following are my answers to the questions referred:

As to the first interrogatory. To prevent a misconception a preliminary observation is necessary. In virtue of the Order in Council of the 15th of April, 1941, as amended by the Order in Council of the 6th of April, 1943, the service courts and service authorities of the United States of America may, subject to the provisions of the first-mentioned Order in Council, in relation to members of its forces (military, naval and air) present in Canada, or on board a Canadian ship or aircraft, exercise within Canada all such powers as are conferred upon them by the law of the United States in matters concerning discipline and internal administration. The code of discipline in

(1) [1943] S.C.R. 208.

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force in the United States army is very sweeping in its provisions and seems to be broad enough to embrace almost any offence against the criminal law in this country.

As to the jurisdiction of Canadian courts:

First, as to land forces. There is no rule of law in force in Canada which deprives the Canadian civil courts (that is to say, non-military courts) of jurisdiction in respect of offences against the laws of Canada committed by the members of such forces on Canadian soil. The Canadian criminal courts do not in fact exercise jurisdiction in respect of acts committed within the lines of such forces, or of offences against discipline generally committed by one member of such forces against another member in cases in which the act or offence does not affect the person or property of a Canadian subject.

Secondly, as to naval forces. The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offence committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship. As regards offences committed on shore by members of the crew, they are not exempt from the jurisdiction of the criminal courts of Canada, but the criminal courts of Canada do not exercise jurisdiction in respect of such offences where the offence is one committed by one member of the crew against another member of the crew, except at the request of the commander of the ship.

As to interrogatory no. (2), the answer is "Yes".

KERWIN J.—The first question submitted for our consideration by the Governor General in Council is as to whether certain members of military and naval forces of the United States of America are exempt from criminal proceedings prosecuted in Canadian criminal courts. The members referred to are those who are now in Canada with the consent of the Canadian Government for purposes of military operations in connection with or related to the state of war now existing.

The general rule is that everyone in Canada, even though he be an alien and here only temporarily, is subject to the laws of the country and to the jurisdiction of our courts, but to this, there are several well-known

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exemptions. These exemptions are grounded on reason and are recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary. The question is whether the members referred to are within any of these exemptions.

The genesis of our Government's consent to the presence in Canada of the United States forces is found in the declaration by the Prime Minister of Canada and the President of the United States of America regarding the establishing of a permanent joint board of defence. This declaration was made on August 18th, 1940, at the conclusion of conversations held at Ogdensburg in the State of New York and is as follows:—

> The Prime Minister and the President have discussed the mutual problems of defence in relation to the safety of Canada and the United States.
>
> It has been agreed that a Permanent Joint Board on Defence shall be set up at once by the two countries.
>
> This Permanent Joint Board on Defence shall commence immediate studies relating to sea, land, and air problems including personnel and material.
>
> It will consider in the broad sense the defence of the north half of the Western Hemisphere.
>
> The Permanent Joint Board on Defence will consist of four or five members from each country, most of them from the services. It will meet shortly.

At this time there was already on the statute books of the Dominion, *The Visiting Forces (British Commonwealth) Act, 1933.* In that Act, "Visiting force" was declared to mean:—

> any body, contingent or detachment of the naval, military and air forces of His Majesty raised in the United Kingdom, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State, or Newfoundland, which is, with the consent of His Majesty's Government in Canada, lawfully present in Canada;

by subsection 1 of section 3:—

> 3. (1) When a visiting force is present in Canada it shall be lawful for the naval, military and air force courts and authorities (in this Act referred to as the "service courts" and "service authorities") of that part of the commonwealth to which the Force belongs, to exercise within Canada in relation to members of such Force in matters concerning discipline and in matters concerning the internal administration of such Force all such powers as are conferred upon them by the law of that part of the Commonwealth.

On April 15th, 1941, by the Foreign Forces Order, 1941, the Governor General in Council promulgated provisions

similar to some of those contained in this Act, with respect to the naval, military and air forces of certain foreign powers carrying on naval, military and air training in Canada with the consent of the Government of Canada. These foreign powers were Belgium, the Czechoslovak Republic, The Netherlands, Norway, Poland, and any other Power which might be designated by the Governor General in Council as a foreign power to which the order should apply. This order does not purport to permit the exercise of any jurisdiction by the service courts of foreign powers except in matters concerning discipline and internal administration and, in fact, by section 4 it was provided that nothing should affect the jurisdiction of any domestic court in Canada to try a member of any foreign force for any act or omission constituting an offence against any law in force in Canada.

The attack on Pearl Harbour occurred on December 7th, 1941, and on June 26th, 1942, the Governor General in Council, by an order reciting that, with the consent of the Canadian Government, the Government of the United States of America had stationed and would station units of its armed forces in Canada, and that it was necessary, as an interim measure, to make immediate provision therefor, designated the United States as a foreign power to which the Foreign Forces Order, 1941, should apply.

This interim measure was revoked on April 6th, 1943, by another order in council which designated the United States as a foreign power to which the Foreign Forces Order, 1941, except the proviso contained in section 3, should apply. Clause 3 is the one which, when a foreign force is present in Canada or on board any of His Majesty's Canadian ships or aircraft, permitted the service courts and service authorities of the foreign power to which the force belonged to exercise, subject to the provisions of the order, within Canada or on board any such ship or aircraft, in relation to members of that force, in matters concerning discipline and internal administration, all such powers as were conferred upon them by the law of that Power. The proviso thereto, which applies to the foreign powers named in the Foreign Forces Order, 1941, but which by the Order in Council of April 6th, 1943, does not apply in the case of the forces of the United States, reads as follows:—

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Provided that such service courts or authorities shall not have jurisdiction in respect of any acts or omissions which would constitute the offences of murder, manslaughter or rape under the Criminal Code; and provided further that such service courts or authorities acting under or pursuant to the provisions of this section shall not have jurisdiction to sentence any person to death for any offence, except for an offence which, under the law of the foreign Power to which the force belongs, is an offence for which a member of that force may be so sentenced and which is an offence of the same nature as one for which a member of a like home force would, under the law applicable to such home force, be liable to be sentenced to death.

Section 2 of the Order in Council of April 6th, 1943, provides:—

2. The application of the Foreign Forces Order, 1941, as aforesaid, to the forces of the United States of America shall not be construed as prejudicing or curtailing in any respect whatsoever any claim to immunity from the operation of the municipal laws of Canada or from the processes of Canadian courts exercising either criminal or civil jurisdiction by members of the forces of the United States of America founded on the consent granted by His Majesty's Government in Canada to such forces to be present in Canada;

The result of this last Order in Council of April 6th, 1943, is that if by international law there exists an exemption from criminal proceedings prosecuted in Canadian criminal courts of the members of the United States forces referred to in the first question, nothing that had been done by Canada should be taken as prejudicing or curtailing such exemption.

In determining whether such an exemption exists, we might note what happened on the continent and in Britain during the last great war. On December 15th, 1915, an agreement was arrived at between the British Government and the Government of the French Republic by which they

agree to recognize during the present war the exclusive competence of the tribunals of their respective armies with regard to persons belonging to these armies in whatever territory and of whatever nationality the accused may be.

In Le Statut Juridique des Troupes Alliées pendant la Guerre, 1914-1818, thèse, Paris, Les Presses Modernes, 1927, by Miss Aline Chalufour, the author states that this agreement continued the practice that had prevailed from the first appearance of British troops on French soil. Her exact language is:—

Le texte relatif à la compétence pénale de l'armée britannique date du 15 décembre 1915; il avait été préparé par la conférence franco-anglaise des 19-23 mars 1915 dont le projet contient toute la substance de la convention; il paraît surprenant que seize mois et demi de séjour

continu des troupes britanniques sur le sol français aient précédé la parution d'une déclaration officielle sur la matière, mais d'après une enquête faite auprès d'officiers anglais et d'interprètes français, il ressort que la pratique des premiers mois coïncidait sensiblement avec les principes émis dans la déclaration du 15 décembre 1915.

In an exchange of notes between the United States and France dated January 3rd and January 14th, 1918, it was provided in part as follows:—

> The Government of the United States of America and the Government of the French Republic agree to recognize during the war the exclusive jurisdiction of the tribunals of their respective land and sea forces with regard to persons subject to the jurisdiction of those forces whatever be the territory in which they operate or the nationality of the accused. In the case of offences committed jointly or in complicity with persons subject to the jurisdiction of the said military forces, the principals and accessories who are amenable to the American land and sea forces shall be handed over for trial to the American military or naval justice, and the principals and accessories who are amenable to the French land and sea forces shall be handed over for trial to the French military or naval justice.

A similar agreement between the United States and Belgium provided for the exclusive jurisdiction of the military authorities of each country over members of their armed forces on the territory of the other. Agreements recognizing the same immunities in the cases of other foreign forces on French territory were also concluded. Clunet in Journal du Droit International, vol. 45, 1918, pp. 516 and 517, as to the presence in France of armed forces of the allies and the agreements referred to, comments as follows:—

> En principe, là où une armée est réunie sous le drapeau national, pour défendre le cause nationale, elle transporte avec elle un pouvoir juridictionnel et les éléments de puissance utiles à sa propre conservation. Par le moyen de ses conseils de guerre et dans l'aire du territoire où ses troupes évoluent—encore que ce territoire soit étranger—l'armée occupante réprime les infractions commises par les individus, militaires ou non prévues par la loi militaire.
>
> Cette situation s'est produite, dans un cas notoire "d'occupation consentie" lors de la présence d'une armée française dans les Etats pontificaux, du consentement du Pape, souverain territorial (1849-1870).
>
> Les conseils de guerre français ont puni les attentats commis contre la troupe, sans distinction de la qualité ou de la nationalité des délinquants. A maintes reprises, la Cour de Cassation française a reconnu cette compétence (Cf, Juridiction des armées d'occupation, etc. Clunet 1882, p. 516).
>
> En 1859, la présence de l'armée française accourue à l'aide du roi Victor-Emmanuel, dans sa lutte contre l'Autriche, avait été l'occasion d'appliquer ces règles.
>
> La présente guerre nous fournit déjà le cas d'armées étrangères occupant des territoires amis en France, en Italie, en Grèce, etc.

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Aucune difficulté en France sur les effets juridiques de cette "occupation consentie". Des accords sont intervenus pour confirmer les règles issues de la coutume—entre le France et l'Angleterre (15 décembre 1915, Clunet 1916, p. 356)——entre la France et la Belgique (29 janvier 1916, Clunet 1916, p. 726)—entre la France et la Serbie (14 décembre 1916, Clunet 1917, p. 1169)—entre la France et le Portugal (le 15 octobre 1917, Clunet 1918, p. 418).

En conséquence, notamment de l'accord franco-belge, des conseils de guerre belges ont été installés et fonctionnent tant sur la fraction du territoire français où "opère" l'armée belge, que sur d'autres points du même territoire, en dehors de la zone de combat, au Havre, à Calais, à Dieppe, à Cherbourg, puis à Caen, à Parigné-l'Evêque, etc.

En fait matériel de "l'occupation" du territoire "consentie" à une armée alliée, les pouvoirs juridictionnels reconnus à cette armée dans sa sphère d'action immédiate pour sa protection personnelle, l'installation de ses tribunaux militaires sur le front ou, par commodité dans telle ou telle ville du pays, ne modifient point le caractère juridique de "l'occupation". Le sol où combattent les armées alliées n'est devenu ni anglais, ni belge, ni américain, etc. Les villes du Havre, de Calais, de Dieppe, de Caen où siègent les conseils de guerre et les autres services militaires des Alliées sont demeurées françaises.

Toutes ces portions du territoire ne sont en quoi que ce soit provisoirement "dénationalisées" par les concessions qui y ont été octroyées; elles persistent en l'obédience française. Tout individu qui s'y rencontre est en France. Nul ne peut s'y prétendre en Angleterre, en Belgique, aux Etats-Unis, etc.

Courtoise et déférente, la France offre à ses Alliés une hospitalité pleine d'élan et sans limites; elle reste cependant la maitresse de la maison.

Correspondence occurred between the Governments of Great Britain and the United States upon the same subject-matter but the armistice intervened before a formal arrangement was arrived at. In this exchange of notes the United States Government throughout took the position that members of her forces in Britain were exempt from prosecution in the British courts. As to the present conflict, on July 27th, 1942, after the United States had entered the war as one of the allied nations, Mr. Eden, the Foreign Secretary of the United Kingdom, and the United States Ambassador exchanged notes by which an agreement was made defining the relationship of the authorities and courts of the United Kingdom to the military and naval forces of the United States who were, or might thereafter be, present in the United Kingdom or on board any of His Majesty's ships or aircraft, and facilitating the exercise in the United Kingdom or on board any such ships or aircraft of the jurisdiction conferred on the service courts and authorities of the United

States by the law of that country. In order to give effect to this agreement, the Imperial Parliament passed *The United States of America (Visiting Forces) Act, 1942.*

Section 1 of this Act provides:—

(1) Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America:

Provided that upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a Secretary of State may by order direct that the provisions of this subsection shall not apply in that case.

(2) The foregoing subsection shall not affect any powers of arrest, search, entry or custody, exercisable under British law with respect to offences committed or believed to have been commited against that law, but where a person against whom proceedings cannot, by virtue of that subsection, be prosecuted before a court of the United Kingdom is in the custody of any authority of the United Kingdom, he shall, in accordance with such general or special directions as may be given by or under the authority of a Secretary of State, the Admiralty, or the Minister for Home Affairs in Northern Ireland, for the purpose of giving effect to any arrangements made by His Majesty's Government in the United Kingdom with the Government of the United States of America, be delivered into the custody of such authority of the United States of America as may be provided by the directions, being an authority appearing to the Secretary of State, the Admiralty, or the Minister, as the case may be, to be appropriate having regard to the provisions of any Order in Council for the time being in force under the Act hereinbefore recited and of any orders made thereunder.

(3) Nothing in this Act shall render any person subject to any liability whether civil or criminal in respect of anything done by him to any member of the said forces in good faith and without knowledge that he was a member of those forces.

By section 2, all persons who are by the law of the United States for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces, and the purpose of any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may be appointed for the purpose by the United States Government, stating that a person of the name and description specified in the certificate is or was at the time so specified subject to the military or naval law of the United States, shall be conclusive evidence of that fact.

It has not been overlooked that in paragraph 3 of Mr. Eden's letter to Mr. Wynant it is stated:—

In view of the very considerable departure which the above arrangements will involve from the traditional system and practice of the

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United Kingdom, there are certain points upon which His Majesty's Government consider it indispensable first to reach an understanding with the United States Government.

I take it that refers to a departure in the sense that foreign troops had not been on the soil of Great Britain for many years with the exception of the last great war.

The particular rule of international law with which we are concerned is referred to in the famous judgment of Chief Justice Marshall in *Schooner Exchange* v. *M'Faddon* (1). The Chief Justice was immediately concerned with the question of the immunity of a foreign vessel of war from the local jurisdiction but his reasoning and conclusion are based upon the foundation that by the very reason of the thing there is a rule of international law which permits such an immunity. In discussing the exceptions to the full and complete power of a nation within its own territory, he pointed out that they must be traced to the consent of the nation itself, which consent may be either expressed or implied. This consent was to be tested by common usage and by common opinion growing out of that usage, and these tests revealed classes of cases in which every Sovereign was understood to waive the exclusive territorial jurisdiction which was an attribute of his nation. After discussing two cases of exemptions, i.e., the exemption of the person of the sovereign from arrest or detention within a foreign territory and the immunity which all civilized nations allow to foreign ministers, he stated:—

> A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and dispositions of this force. The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

(1) (1812) 7 Cranch 116.

After quoting Vattel on the immunity of ambassadors and ministers, the Chief Justice continues:—

> Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

In *Chung Chi Chueng* v. *The King* (1), Lord Atkin, speaking on behalf of the Judicial Committee, states that this judgment is one "which has illumined the jurisprudence of the world". He further points out that there was a difference of opinion among writers on the subject of international law as to the theory upon which the immunity exists but that it must now be taken as settled that the correct theory is that it is a mere right of immunity which may be waived by the foreign state.

The Government of Canada having invited into the Dominion the military and naval troops of the United States of America as a part of the scheme of defence of the north half of the Western Hemisphere and, therefore, not merely for the benefit of the United States but for that of both parties and, in fact, for the benefit of all the allied nations in the present conflict, the invitation must be taken to have been extended and accepted on the basis that complete immunity of prosecution in Canadian criminal courts would be extended to members of the United States forces. A member of a military or a naval force stationed here is immune whether he be absent from his unit or ship on duty or on leave. The immunity would extend to any member of the forces, whether attached to a unit stationed, or a ship present, in Canada or not, so long as his presence in Canada is in pursuance of the invitation and consent of our Government. Because of the nature of the services that he is sent here to perform, such a member must be subject only to the laws of his country. The immunity does not extend to a member of the United States forces coming to Canada on his own business or pleasure as he would not be here for the purpose of military operations.

However, as Lord Atkin pointed out in the decision referred to (1), this immunity may be waived by the

(1) [1939] A.C. 160.

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United States in any particular case, in which event the courts of Canada would not be without jurisdiction to try a member of a United States force for an offence alleged to have been committed against our laws. Furthermore, the powers of arrest, search, entry or custody exercisable under Canadian law with respect to offences committed or believed to have been committed against that law are not interfered with. My answer, therefore, to the first question would be that the members of the United States forces referred to are exempt from criminal proceedings prosecuted in Canadian criminal courts to the extent and under the circumstances mentioned.

I turn now to the second question. The waiver of immunity by the United States is provided for in *The United States of America (Visiting Forces) Act, 1942,* in a manner that might, on occasion, be different from that which I conceive applies by international law and many matters of detail are covered by the statute that might properly be reduced to writing. In my opinion Parliament or the Governor General in Council acting under the *War Measures Act* has jurisdiction to enact legislation similar to that statute. Without attempting to exhaust all the provisions of *The British North America Act* that might apply, such jurisdiction falls under head 7 of section 91 thereof. It would appear too clear for argument that Parliament, and therefore the Governor General in Council under the *War Measures Act* must have, under that head, complete authority to legislate for the defence of Canada.

TASCHEREAU J.—By Order in Council dated April 9th, 1943, the following questions have been referred to this Court for hearing and consideration:—

(i) Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

(ii) If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the War Measures Act, jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942?*

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The Foreign Forces Order enacted in April, 1941, has been made applicable to the United States forces in Canada by Order in Council, and, the military and naval forces of the United States of America are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the war.

The United States forces are therefore subject to all the provisions of the Foreign Forces Order but, the United States Service Courts, however, are exempted from the limitations in that Order which prevent other foreign Service Courts from exercising jurisdiction in cases of murder, manslaughter and rape, and which limit their power to impose the sentence of death.

The last Order in Council passed on the 6th of April, 1943, and by which the previous Order in Council of June 24th, 1942, was revoked, stated that the application of the Foreign Forces Order 1941 to the forces of the United States shall not be construed as prejudicing or curtailing any claim to immunity from the operation of the municipal laws of Canada, by the members of the forces of the United States of America.

The first question therefore raises the question as to whether under international law the members of the United States forces are exempt from criminal proceedings prosecuted in Canadian courts.

The Attorney-General of Canada has submitted, that the first question should be answered in the affirmative, because under international law, Canada is under an obligation to accord immunity from jurisdiction in such cases, and the doctrine of international law involved has become a part of our municipal law. He also submits that question 2 should receive an affirmative answer. The various provinces represented, namely, Ontario, Quebec, British Columbia, Nova Scotia, and Alberta, claim that both questions should be answered in the negative.

The answer to the first interrogatory raises many questions of public international law, on which many distinguished text-writers in the leading countries of the world have expressed opinions, which have not always been unanimous. In order to reach a proper judicial conclusion it is necessary first to seek if there exists, and if the Court can acknowledge a body of rules accepted by the nations of the world, to the effect that the troops of a foreign sovereign visiting a country, with the consent of

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the latter's Government, are exempt from criminal proceedings prosecuted in that country. And secondly, having reached on that point an affirmative conclusion, the further question that must be solved is: Are these recognized principles of international law adopted by our domestic law?

It will be useful, I think, to cite here the opinion of some authors who have written on the matter.

Lawrence "Principles of International Law", 7th ed., p. 225:—

We will first consider the case of land forces and then discuss the extent of the immunities of sea forces. It is necessary to separate the two because the rules with regard to them differ. The universally recognized rule of modern times is that a state must obtain express permission before its troops can pass through the territory of another state, though the contrary opinion was held strongly by Grotius, and his views continued to influence publicists till quite recently. Permission may be given as a permanent privilege by treaty for such a purpose as sending relief to garrisons, or it may be granted as a special favour for the special occasion on which it is asked. The agreement for passage generally contains provisions for the maintenance of order in the force by its own officers, and makes them, and the state in whose service they are, responsible for the good behaviour of the soldiers towards the inhabitants. In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction and control of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise. * * *

Strupp "Recueil des Cours de l'Académie de Droit International de La Haye", vol. 47, pp. 529-531, entertains the following opinion:

Les corps de troupes séjournant en temps de paix sur un territoire étranger, avec la permission de l'Etat souverain dudit territoire, jouissent de l'immunité, en tant qu'*unité* représentant leur Etat, donc seulement tant que les liens de la hiérarchie et de la discipline militaires subsistent, réunissant les divers membres dudit corps en *un seul tout*. Si ces conditions sont réalisées, les membres de la troupe sont soustraits à la juridiction civile du territoire où se trouve leurs corps. Ils restent soumis à leur juridiction militaire, en vertu du principe: *la loi suit le drapeau*.

Calvo "Le Droit International", 1896, tome 3, p. 341, says:

Lorsqu'un Etat indépendant accorde à une armée étrangère la permission de passer ou de séjourner sur son territoire, les personnes qui composent cette armée ou se trouvent dans ses rangs ont droit aux prérogatives de l'exterritorialité. Une semblable permission implique, en effet, de la part du gouvernement qui l'accorde, l'abandon tacite de ses droits juridictionnels et la concession au général ou aux officiers étrangers du privilège de maintenir exclusivement la discipline parmi leurs soldats et de rester seuls chargés de réprimer les méfaits qu'ils viendraient à commettre.

Valéry "Droit International Privé", p. 100, says also:

107. Un corps de troupe français peut être amené à séjourner sur un territoire étranger soit par des opérations de guerre, soit à la demande d'un Etat anxieux d'être protégé contre certains dangers, ainsi que cela se produisit lorsque le Saint-Père obtint en 1849 et en 1866 l'envoi à Rome d'une armée française, soit à raison de la nécessité de sauvegarder des intérêts nationaux comme l'occupation de Casablanca en fournit un exemple (1907-1910). Ce sont là des faits qui se présentent, d'ailleurs, rarement. Il est très fréquent, au contraire, qu'un ou plusieurs navires de guerre français pénètrent dans les eaux littorales d'un Etat étranger et mouillent dans ses ports. Mais dans l'une et l'autre de ces deux hypothèses le droit des gens admet que la force militaire ou navale n'est pas assujettie aux lois du territoire où elle séjourne.

Aline Chalufour "Le Statut Juridique des Troupes Alliées pendant la Guerre", p. 45:

Comment fut résolue, au point de vue pénal, la compétence respective des autorités françaises et alliées?

Le principe dominant en la matière est celui-ci: une armée opérant sur un territoire étranger est entièrement soustraite à la souveraineté territoriale et possède une juridiction exclusive sur les membres qui la composent. Sur ce point la doctrine, les législations et la pratique sont d'accord, qu'il s'agisse d'occupatio bellica, d'occupation convenue résultant d'un traité, d'occupation de police ou simplement comme dans le cas qui nous occupe, de la présence des troupes sur un territoire dans un but de coopération avec l'armée du pays.

And also, Travers "Le Droit Pénal International", vol. II, para. 879:

Le principle est que la loi pénale locale est inapplicable aux membres des armées étrangères, amies ou alliées, autorisées implicitement ou formellement à venir, en cette qualité, sur le territoire. Cette règle découle, au cas où il n'y a pas d'occupation, seule hypothèse que nous envisageons ici, de la considération suivante.

Le membre d'une armée étrangère, pris en cette qualité, c'est-à-dire considéré comme partie intégrante de la force publique de l'Etat étranger, ne peut être soumis à la juridiction répressive locale sans qu'il y ait conflit avec la souveraineté de l'Etat étranger, et entrave à son droit de libre disposition de sa force armée.

En outre, le gouvernement, qui accepte la présence sur son territoire de troupes étrangères consent implicitement à ce que l'autorité étrangère conserve sur ces troupes la juridiction exclusive qui est nécessaire pour le parfait maintien de la discipline.

One of the leading cases on this subject is that of *The Schooner Exchange* v. *M'Faddon and others* (Supreme Court of the United States) (1). Chief Justice Marshall speaking for the Court said:

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their

(1) (1812) 7 Cranch, pp. 116 to 147.

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sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

And, after dealing with the immunity which all civilized nations allow to foreign ministers, he expressed the following views as to troops:

> A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

There seems to be a strong preponderance of authority in favour of the view that there exists a rule of international law amongst the civilized nations of the world, granting immunity to organized forces visiting a country with the consent of the receiving Government. These immunities are not based on the theory of exterritoriality which has been definitely rejected by Lord Atkin in *Ching Chi Cheung* v. *The King* (1). In that case, the doctrine of the "floating island", as expressed by Mr. Oppenheim, was found quite impracticable when tested by the actualities of life, on board ship and ashore; but it was held that the ground upon which rested the immunities, was that the sovereign extending the invitation is understood to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass

(1) [1939] A.C. 160, at 174.

through his dominion. Their Lordships had to determine the jurisdiction of the Hong Kong courts. The murder had been committed on board a Chinese armed public ship in the territorial waters of Hong Kong. It was held that the immunities granted are conditional and can themselves be waived by the nation to which the ship belongs. The Chinese Government not having made a request for the surrender of the accused, the jurisdiction of the British court was held to have been validly exercised.

From this judgment of the Judicial Committee it flows clearly to my mind, that some immunities exist in favour of foreign troops. It is true that in the *Cheung* case (1) the Judicial Committee was dealing with the legal status of an armed ship, but, the essence of the decision does not apply only to ships in territorial waters, but applies equally to all armed forces.

If the principle of exterritoriality, or of the "floating island", had been admitted by their Lordships, the position might be different, but it has been clearly established, as Lord Atkin said, that the immunities flow from "a waiver by the local sovereign of his full territorial jurisdiction". If the receiving sovereign is presumed to waive his jurisdiction as to members of the crew of a foreign ship, can it not be said that the same presumption exists as to land troops visiting a foreign country?

This view, I think, has been implicitly accepted by the Judicial Committee, and is in accordance with the doctrine of the authors, the practice followed by the nations of the world and by the Supreme Court of the United States.

Dealing with the immunities of public ships owned by other nations, Lord Atkin says:

> * * * What, then, are the immunities of public ships of other nations accepted by our Courts, and on what principle are they based?
>
> The principle was expounded by that great jurist Chief Justice Marshall in *Schooner Exchange* v. *M'Faddon* (2), a judgment which has illumined the jurisprudence of the world: "The jurisdiction of Courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. * * * All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being

(1) [1939] A.C. 160.

(2) (1812) 7 Cranch 116.

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composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. * * *

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."

* * *

The judgment then proceeds to the third case "in which a sovereign is understood to cede a portion of his territorial jurisdiction," namely, "where he allows the troops of a foreign prince to pass through his dominions". The Chief Justice lays down that "The grant of a free passage therefore implies a waiver of all jurisdiction over the troops during their passage; and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."

This decision of the Judicial Committee covers a very broad field, and must be construed as including not only the members of the crew of an armed ship, but also all land forces. The principles enunciated cannot but lead to that conclusion.

Of course, I do not forget that international law has no application in Canada unless incorporated in our own domestic law. In the *Cheung* case (1) it was said:

It must be always remembered that, so far at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure.

The same principle has been held by this Court in the *Foreign Legations Reference* (2), where my Lord the Chief Justice said at page 230:

I think, I repeat, that the proper conclusion from the legislation of the Imperial Parliament, particularly in the eighteenth century, in force, as some of the statutes were, when the common law was formally introduced into Upper Canada, from the decisions and judgments I have cited, and from the text writers, is that this rule, recognized by France, is also implicit in the principles of international law recognized by the law of England; and, consequently, by the law of Ontario.

(1) [1939] A.C. 160. (2) [1943] S.C.R. 208.

If not accepted in this country, international law would not be binding, but would merely be a code of unenforceable abstract rules of international morals.

But the Judicial Committee further added:

> The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

I have to come to the conclusion that there exists such a body of rules adopted by the nations of the world. These rules have been accepted by the highest courts of the United States, and some of them, applicable to the present case, have also been accepted by the Judicial Committee. I have to acknowledge their existence, and treat them as incorporated in our domestic law, following the direction given in the *Cheung* case (1). And I see nothing in the laws of the land inconsistent with their application within our territory.

I have read with much care various agreements which have been entered into during the last war between the British Government and the Government of the French Republic, and also between the United States of America and the French Republic, and the United States of America and Belgium. All these agreements tend to show the existence of this universally adopted rule of international law, and the agreement between England and France embodied in the declaration of both Governments is drafted in unequivocal terms:

> His Britannic Majesty's Government and the Government of the French Republic agree to recognize during the present war the exclusive competence of the tribunals of their respective armies with regard to persons belonging to these armies in whatever territory and of whatever nationality the accused may be.
>
> The two Governments further agree to recognize during the present war the exclusive competence in French territory of French justice with regard to foreign persons in the British Army who may commit acts prejudicial to that army, and the exclusive competence in British territory of British justice with regard to foreign persons in the French Army who may commit acts prejudicial to the said army.

The words "in whatever territory" can leave no room for doubt, that the British Government recognized the competence of the French military courts over members of the French army on British soil. If I held different views, I

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feel I would disregard what I think is an established practice, which is a source of public international law, and which has been accepted since many decades amongst nations, not only to prevent unfortunate conflicts between the judicial authorities of different countries, but also to safeguard the dignity of the sovereign, and ensure the necessary discipline of the army.

I would therefore answer the first interrogatory in the affirmative. But what I have said cannot be interpreted as meaning, that my conclusion is that the Canadian judicial authorities have completely waived their jurisdiction over American troops visiting this country. The principles enunciated in the *Cheung* case (1) must be kept in mind. In coming into Canada, American naval and land troops import with them the jurisdiction of their service courts, and there is an implicit waiver by the Canadian authorities of their territorial jurisdiction, which can be waived by the visiting forces, implicitly or explicitly, and if this is done, then, to borrow the expression of Lord Atkin, "the original jurisdiction of the receiving sovereign flows afresh".

This immunity, as I have said, applies to all forces, whether on duty or on leave, but not to members of the forces who may enter Canada as tourists or casual visitors.

Moreover, the powers of arrest, search, entry or custody which may be exercised by Canadian authorities with respect to offences committed or believed to have been committed are not interfered with.

As to the second question, I would like to point out that the *United States of America (Visiting Forces) Act, 1942,* enacted by the United Kingdom, differs from what I think are the settled and accepted principles of international law in relation to immunities.

As I have said in dealing with the first interrogatory, the jurisdiction of the Canadian courts exists, if the American authorities waive implicitly or explicitly their right to exercise their own jurisdiction; but under the Imperial statute, the British courts may act only if representations are made to the Secretary of State on behalf of the Government of the United States, with respect to any particular case.

(1) [1939] A.C. 160.

These differences, however, do not affect in any way the powers of Parliament or of the Governor General in Council acting under the *War Measures Act*, to enact legislation similar to the statute of the United Kingdom, entitled *The United States of America (Visiting Forces) Act, 1942*, and, in view of the decisions of the Judicial Committee and of this Court on the matter, I would unhesitatingly answer the second interrogatory in the affirmative.

RAND J.—His Excellency in Council has been pleased to refer to this Court the following questions:

(1) Are members of the military or naval forces of the United States of America who are present in Canada with the consent of the Government of Canada for purposes of military operations in connection with or related to the state of war now existing exempt from criminal proceedings prosecuted in Canadian criminal courts and, if so, to what extent and in what circumstances?

(2) If the answer to the first question is to the effect that the members of the forces of the United States of America are not exempt from criminal proceedings or are only in certain circumstances or to a certain extent exempt, has Parliament or the Governor General in Council acting under the *War Measures Act*, jurisdiction to enact legislation similar to the statute of the United Kingdom entitled the *United States of America (Visiting Forces) Act, 1942*?

As is seen, they are related directly to the presence in Canada, at this time and in existing circumstances, of units of United States military and naval forces. What those circumstances are is a matter of public knowledge. Canada and the United States are not only allies in a world struggle; they have joined in special and concerted measures for the common defence of the two countries. On what must be taken as an invitation from the Canadian Government, United States forces have entered this country for the purposes of that joint program. They are serving the strategic necessities of the greater part of North America, for which the territories of both countries have become one field of operations. It is unnecessary to add that the measures taken are of an exceptional nature and are justified only by the grave threat to national safety.

By an order in council of April 6th, 1943, the Foreign Forces Order of 1941, with the proviso to section 3 eliminated, was made applicable to those forces; but that application reserved all immunities which by international law

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attached to them in the circumstances of their entry into this country. Under the authority of that order the service courts of these forces are exercising the disciplinary jurisdiction vested in them by United States law. The order, however, does not affect the jurisdiction of the Canadian civil courts over acts which are offences against any law in force in Canada. The point of the first question is, therefore, whether an immunity, absolute or qualified, from Canadian jurisdiction has, under the law of nations, arisen in favour of the members of these forces.

The conventions and usages of international law are of voluntary adoption by sovereign states as rules according to which their international relations shall be governed. These relations are of many kinds and those here dealt with fall within a class in which representatives of a foreign state enter and continue upon the territory of another. Territorial jurisdiction is absolute and exclusive over all persons and things within it: but when this impact of a foreign power takes place, at once the questions of sovereignty, its dignity, its freedom from all other authority, and its equality of rank and attribute, to the formal recognition of which all states are peculiarly sensitive, present the necessity for that international etiquette which is embodied in legal formulations. For many of these contacts, the rules are precise and settled. The person of a foreign sovereign, or other chief officer of a state, and generally his property are accorded, within another jurisdiction, and under conditions of amity, an absolute immunity from the local law: *Reference as to Powers to levy rates on Foreign Legations* (1). Likewise, with qualifications unnecessary for the present purposes to consider, are diplomatic representatives of a foreign state, their staffs and their property used for official purposes, privileged.

Apart from treaties, these rules lie in practices and principles, and each depends upon its special circumstances and their significance in the reasoning to which courts subject them. What we have to determine in this case is the compromise in jurisdictional conflict which is presumed to be deduced from "the nature of the case and the views under which the parties requiring and conceding" the privilege must be supposed to have acted: *The Schooner Exchange* v. *M'Faddon* (2).

(1) [1943] S.C.R. 208.

(2) (1812) 7 Cranch 116.

The usages of nations in relation to the armed forces of one state within the territories of another, have not, in the past, been given that consideration by jurists which the present importance of the question would lead us to expect. Hall speaks of the scanty references by commentators in the following language:

> Either from oversight or, as perhaps is more probable, because the exercise of exclusive control by military and naval officers not only over the internal economy of the forces under their command, but over them as against external jurisdiction, was formerly too much taken for granted to be worth mentioning, the older writers on international law rarely give any attention to the matter * * *

In the case of *The Schooner Exchange* (1), Marshall C.J., in a judgment of characteristic power, puts the matter thus:

> 3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.
>
> In such cases, without any express declaration waiving, jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.
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> Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.
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> The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

Westlake, in International Law (1910), vol. 1, pp. 264-265, treats the matter in these words:

> * * * In each case the physical extent of the normal operation of a foreign force penetrates a geographical territory, and in each that circumstance is only brought about by the express or tacit permission

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of the geographical sovereign. Consequently, in both, the international rules of jurisdiction to be applied are often treated, especially by British and American writers, as dependent on the terms on which the geographical sovereign may be presumed to have given his consent to the presence of the foreign element. But since usage and reason furnish the only arguments which can be employed in ascertaining the terms to be presumed, the mode of treating the question is merely a veiled method of referring it to usage and reason. And it cannot even in theory be applied to the case of foreign ships passing through littoral seas, which presents the same circumstance of the interpenetration of territorial and quasi-territorial rights, since the ships are there by virtue of no permission, even tacit, but by virtue of the right of innocent passage, which has always been deemed to be reserved when the right of a land sovereign over any part of the sea has been described as one of sovereignty.

Standing then on the ground of usage and reason, the case which may occur on land is one on which no doubt has been felt, and it may be disposed of in the words of Wheaton. "The grant of a free passage (to an army) implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require."

The preponderance of opinion would seem to support the foregoing views but a qualification appears in Oppenheim's International Law, 5th ed., vol. 1, p. 662, sec. 445:

> 445. Whenever armed forces are on foreign territory in the service of their home State, they are considered extraterritorial and remain therefore under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State. This rule, however, applies only in case the crime is committed, either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply if, for example, soldiers belonging to a foreign garrison of a fortress leave the rayon of the fortress, not on duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them * * *

The immunity of a foreign vessel of war is frequently said to apply in respect of members of the crew while on shore and "on duty". This undoubtedly has furnished the concept applied by Oppenheim to an army. Based on the theory of exterritoriality, the latter is a "body" and immunity beyond its "lines" is confined to members "on duty". In the case of United States troops in Canada, however, there is no defined area; they are here generally and are available wherever they may be required.

Now it is of interest to observe how, in practice, these rules were worked out during the Great War. On December 15, 1915, a joint declaration by Great Britain and France provided for

the exclusive competence of the tribunals of their respective armies with regard to persons belonging to those armies in whatever territory and of whatever nationality the accused may be.

That declaration confirmed the practice followed up to its date from the time the British force reached France late in August, 1914. Canadian troops from the latter part of 1914 until December 15, 1915, formed part of the British Army in France and came within that practice. In January, 1918, a similar declaration was passed between the Secretary of State for the United States and the French Ambassador in Washington. During 1918 negotiations for an agreement on the same matter took place between Great Britain and the United States. Although the correspondence indicates an original view on the part of Great Britain possibly more restrictive than that expressed by Oppenheim, it was not pressed, and acceptance was given to the proposal of the United States for a convention on the terms of the declaration with France. The early withdrawal of United States troops from Britain rendered its formal conclusion unnecessary. But it appears that over offences committed outside the camps of these forces, the British courts exercised jurisdiction.

There seems to have been some doubt whether the declaration of December 15th, 1915, was valid as applied to French troops in Britain. A similar doubt was expressed as to what effect the courts in the United States would give to the informal agreement proposed by that country and Great Britain: (Letter of February 15th, 1918, The Acting Secretary of State to the United States Ambassador in London). In each case the doubt arose from the lack of legislative confirmation.

In the present war, a treaty between Great Britain and Egypt excludes the criminal jurisdiction of the latter country over members of the British forces. By the *United States of America (Visiting Forces) Act (1942)* no prosecution in Britain against persons subject to the military law of the United States can be instituted except upon a request from a proper representative of that country. That Act goes beyond the declaration of 1915 and international usage in its inclusion of persons and groups who are not technically members of military forces but are associated with them and are subject to military law. Agreements substantially to the same effect have been made between most of the allied countries.

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In determining what has been implied in the invitation, its scope and the object to which it is addressed become significant circumstances. What has been invited into Canada is an army with its laws, courts and discipline. It cannot be assumed that such an organization would take the invitation to mean that, once the international border was crossed, its disciplinary powers should be suspended and its functions, except as to innocuous motions, come to an end. To these circumstances there is to be applied, in the words of Sir Alexander Cockburn, quoted by Lord Atkin in *Chung Chi Cheung* v. *The King* (1): "the rule which reason and good sense * * * would prescribe".

Lord Atkin, in the same decision, says:

> When the local court is faced with a case where such immunities come in question, it has to decide whether, in the particular case, the immunity exists or not. If it is clear that it does, the court will, of its own initiative, give effect to it. * * * The foreign sovereign could not be supposed to send his vessel abroad if its internal affairs were to be interfered with and members of the crew withdrawn from its service by the local jurisdiction.
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> * * *
>
> It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.

From that language, I do not understand that the ordinary methods of judicial determination are not to be resorted to. To insist upon precise precedent in usage would sterilize judicial action toward changing international relations: and in the reduction of terms of an implied arrangement the court must be free to draw upon all sources of international conventions, including "reason and good sense".

But the question remains whether any conclusion that might follow from these circumstances and views is in conflict with a rule or principle declared or adopted by the courts or Parliament of this country or accepted as embodied in its constitutional practices. There is no doubt that constitutional principle in England has for

(1) [1939] A.C. 160.

several centuries maintained the supremacy of the civil law over the military arm. If that principle meets the rule of immunity to foreign forces arising in the circumstances stated, then the latter must give way. The principle is intended to maintain a nation of free men through an equality before the law and a common liability to answer to the same civil tribunals. The citizen taking on the special duties of a soldier abates no jot of that accountability. The independence of that law and its courts in the armed forces would open the way to military domination and the loss of that freedom which equality secures.

Can that principle be said to be infringed by jurisdiction in a military court of the United States over its own forces which for the purposes of both countries are temporarily on our soil? It is, of course, not foreign but domestic military usurpation against which the principle is a bastion and it might be strongly argued that the objection to conceding such a jurisdiction is not that it is military but that it is foreign. But I have come to the conclusion that that principle stands in the way of implied exemption when the act complained of clashes with civilian life. The question is what is the workable rule implied from the invitation, that fits into the fundamental legal and constitutional system to which it is offered. It is from the background of that system that the invitation and its acceptance must be interpreted. It cannot be said to be clear that there has been a recognition of either a usage or principle by the parliament or the courts of this country or of Great Britain that would raise the immunity against the constitutional safeguard of accountability before a common tribunal. That safeguard, however, is concerned primarily to vindicate, not Canadian courts, but Canadian civil liberty. It does not, therefore, stand in the way of a rule limited to the relations of members of a foreign group admitted into Canada for temporary national purposes with persons other than members of the Canadian public: *Cheung* case (1) and the memorandum of Sir Alexander Cockburn in the Report of the Royal Commission on Fugitive Slaves quoted therein.

The point of the controversy is whether the adjudication upon infractions of the local law by members of foreign forces shall be carried out by the tribunals of those forces.

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The principle enunciated in the *Schooner Exchange* decision (1) has as a necessary corollary the implied obligation on the foreign court to accept that responsibility. The principle of immunity laid down in the case of *Chung Chi Cheung* v. *The King* (2) is that the local jurisdiction withdraws before the assertion of jurisdiction by the foreign authority: if the latter fails to make that assertion, it must be taken as waiving it and in such a case the local processes are considered not to have been displaced. Likewise the foreign jurisdiction may waive the local exercise of preliminary or ancillary process. In such a conception, an act in violation of the local law is not permitted an escape, jurisdictionally, from appropriate juridical action.

On the second question, it is not necessary to say much. The decision of the Privy Council in the case of *Fort Frances Pulp & Paper Co. Ltd.* v. *The Manitoba Free Press* (3) puts beyond question the powers of the Dominion to provide for the defence and security of the country. These powers place upon Parliament and Government the duty and responsibility of acting in the fullest exercise of them for the preservation of the nation. In the aspect of measures for the country's safety, questions of the distributed normal peace powers seem somewhat irrelevant. What these measures are designed to do is to defend the constitution which provides for that distribution; and the suspension or supersession of normal functions in the means adopted must be regarded as incidental to the necessities of the nation's purpose. In that sense, the exercise of judicial functions by courts of foreign forces is not an encroachment on the jurisdiction of provincial courts. It lies within a zone underlying that jurisdiction and essential to its continued existence. In any other view, constitutional formalities might bind us to impotence in the supreme effort of self-preservation.

The powers committed by the *War Measures Act (1914)* to the Dominion Government are necessarily of wide scope: *Fort Frances Pulp & Paper Co. Ltd.* v. *The Manitoba Free Press* (3); *Reference on Validity of Regulations in Relation to Chemicals* (4); and they would, in my opinion, be competent to the legislative measures mentioned.

(1) (1812) 7 Cranch 116.
(2) [1939] A.C. 160.
(3) [1923] A.C. 695.
(4) [1943] S.C.R. 1.

I would therefore answer the questions as follows:

1. The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law wherever committed, against other members of those forces, their property and the property of their government, but the exemption is only to the extent that United States courts exercise jurisdiction over such offences.

2. Both Parliament and the Governor General in Council acting under the *War Measures Act* have jurisdiction to enact legislation similar to that of the *United States Visiting Forces Act (1942)*.

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G. (HUSBAND) (COUNTER-PETITIONER)..... APPELLANT;

AND

G. (WIFE) (RESPONDENT)..... RESPONDENT.

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*May 17, 18.
*Oct. 5.

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

Husband and wife—Divorce—Law of New Brunswick—Divorce sought on ground of respondent's adultery—Decree granted, notwithstanding petitioner's adultery—Exercise of trial judge's discretion.

Under the law of New Brunswick (Statutes of New Brunswick, 1791, c. 5, and 1860, c. 37, mainly referred to), the Court of Divorce and Matrimonial Causes of that Province has jurisdiction to grant a divorce from the bond of matrimony on the ground of adultery of the petitioner's spouse, and the fact that the petitioner has himself (or herself) committed adultery is not an absolute, but only a discretionary, bar to granting the decree. (The law relating to divorce, in England and in New Brunswick, historically discussed, with regard particularly to the latter point.)

The judgment of Baxter C.J., Judge of the said Court (16 M.P.R. 191), granting a husband's cross-petition for divorce on the ground of his wife's adultery, notwithstanding an act of adultery by the husband (subsequent to his wife's adultery), which judgment was reversed by the Appeal Division, N.B. (16 M.P.R. 405), was restored; this Court holding that the law was as stated above; and that there appeared to be no error in principle in the considerations underlying the exercise by the trial Judge of his discretion, and therefore there was no justification for reversal of his decision.

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

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APPEAL by the cross-petitioner (husband) from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), allowing (Grimmer J. dissenting) the appeal to that Court of the present respondent (wife) from the judgment of Baxter C.J., Judge of the Court of Divorce and Matrimonial Causes (2), granting the prayer of the counter-petitioner (husband) and a decree *nisi* for dissolution of marriage.

The present respondent (wife) petitioned in the Court of Divorce and Matrimonial Causes, Province of New Brunswick, for divorce from her husband, the present appellant. The latter counter-petitioned for divorce. The ground in each case was alleged adultery of the other party. The parties were married in and were domiciled in said province.

The trial Judge, Baxter C.J., dismissed the wife's petition but granted the husband's counter-petition. He found that the wife committed adultery, which was prior to an admitted act of adultery by the husband. Under all the circumstances in question and in the exercise of his judicial discretion, which he held he had the power to exercise, he gave judgment to the effect above stated.

The wife appealed to the Supreme Court of New Brunswick, Appeal Division, from that part of the judgment of the trial judge whereby decree *nisi* was ordered to be entered in favour of the husband on his counter-petition.

The said appeal was allowed by the Appeal Division, which ordered that the decree *nisi* for the dissolution of the marriage, entered for the husband, be set aside. Fairweather J. held that, the adultery of both parties having been proved, the trial judge had no jurisdiction to grant a divorce to either; and further that, assuming that a discretion was vested in the trial judge enabling him, while refusing to grant relief to a guilty wife, to grant relief to an admittedly guilty husband, the discretion had not been properly exercised upon the facts proved; that the evidence did not support the trial judge's finding that a distinction could be drawn between the parties; they were equally at fault and neither was deserving of the relief prayed for. LeBlanc J. agreed with Fairweather J. in the result. Grimmer J., dissenting, held that the trial

(1) 16 M.P.R. 405; [1942] 4 D.L.R. 451.
(2) 16 M.P.R. 191; [1942] 1 D.L.R. 633.

judge had the power of judicial discretion; that he had properly exercised his power; and that the Appeal Division should not interfere; he also agreed with the trial judge's reasons.

Leave to appeal to the Supreme Court of Canada was granted to the husband by the Supreme Court of New Brunswick, Appeal Division.

J. J. F. Winslow K.C. and *H. F. G. Bridges* for the appellant.

W. P. Jones K.C. for the Attorney-General of New Brunswick.

R. D. Mitton for the respondent.

The judgment of the Chief Justice and Rand J. was delivered by

RAND J.—The question raised in this appeal is whether, under the law of New Brunswick enacted in 1791, in a suit for divorce *a vinculo* on the ground of adultery, a recrimination of that offence is an absolute bar to a decree. Baxter C.J. at the trial held that it was not. On appeal, Fairweather J., with LeBlanc J. concurring, took the contrary view. Grimmer J., dissenting, agreed with the Chief Justice. The point has not arisen before and it calls for an examination of both the law of divorce as it was in England at the time of the settlement of New Brunswick and the extent and form, if at all, in which the plea is to be presumed now to be in force in that province.

Historically, the regulation in England of the personal rights and obligations arising out of marriage, from the Norman Conquest until the middle of the nineteenth century, was in large measure accepted as lying within the moral and spiritual discipline of the church. It was part of the wider administration of that discipline by the ecclesiastical courts throughout Europe, in the course of the development of which there had been built up a system of rules and practices based upon the Scriptures, the civil law, the pronouncements of church councils, and papal decretals. This, in England, became the body of Canon law, not as it was generally accepted on the continent, but as it was adopted and carried into practice by her spiritual tribunals, and from time to time amended or otherwise

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dealt with by the English Parliament. It was the law administered by an ecclesiastical judiciary, but dealing with civil rights of the people of England and, to the extent recognized by the civil courts or Parliament, constituting a part of the public law of that country.

From the end of the sixteenth century, that law, as it had to do with the control and severance of matrimonial cohabitation, can be considered as being clearly settled. Expressed in terms of the jurisdiction exercised by the church courts, there were the remedies of declaration of nullity, restitution of conjugal rights, and divorce *a mensa et thoro*. The first was based upon the assumption of an impediment to the formation of the vinculum of marriage; the second arose from a conception of the duty of married persons to cohabit and the inherent right of the church, in its pastoral responsibility, to enforce that duty even to the extent of coercive sanctions; and the third involved, under the same view of responsibility, an intervention designed to meet those special cases in which a temporary or indefinite interruption of cohabitation became necessary.

It is the last of these with which we are concerned. A divorce *a mensa et thoro,* so called, was a sentence of the court, made upon proof of adultery or cruelty, suspending the duty of cohabitation in the interest of the innocent party. The marriage vinculum remained unaffected. The decree in its usual form and certainly in intent looked to a reconciliation of the parties and, upon that happening, the decree, with or without such a provision, became *functus* (*St. John* v. *St. John* (1); Bishop on Marriage & Divorce, 6th Ed., Vol. 2, p. 228). There was no effect at law upon the general property rights of either party. Under the Canon law of the continent, upon the adultery of the petitioner, the decree was vacated and restitution of rights ordered.

In a suit for such a form of relief, the ecclesiastical law, in addition to absolute defences of connivance, collusion and condonation, admitted what was known as *compensatio criminis* or, as it is now called, recrimination, as a plea in bar to the petition. The rule was taken from the civil law, but its precise legal principle is not clear. To a suit based on adultery, a recrimination only of adultery was allowed; neither cruelty, which itself was a ground for

(1) (1805) 11 Vesey Jr. 525.

a decree, nor wilful desertion was admitted. In a suit based on cruelty, recrimination of adultery was allowed. There could also be recrimination against recrimination, or to any such plea condonation might be set up. From its background of an *a priori* logic, this procedure inevitably took on a mechanical characteristic. It tended to disregard the actual elements of conduct involved and to make use of categories of behaviour as if the controversy were a contest between concepts rather than a problem between human beings: *Constantinidi* v. *Constantinidi* (1).

The cases contain many references to the nature of the recriminatory plea. It is a "set-off"; it is "*eodem delicto*"; it is "*par delictum*"; it is analogous to a breach of contract; it is a spiritual offence, and the suitor should come into court with clean hands. But in its application there was no weighing of the moral force or strength of the act upon which it was based, nor any examination of that act as it was part of an interplay in the common life of two persons. In the language of *Lempriere* v. *Lempriere* (2):

> And the more so because this doctrine of *compensatio criminis* is not a wholly satisfactory one, or capable of being logically adopted as a guide in giving or refusing relief. It is said that the cruelty of the husband will not justify the adultery of the wife; but so neither will his own adultery, and yet this latter has ever been held a bar. Again, what is *par delictum?* What standard has the Court for the measure of matrimonial offences, except the punishment with which they are visited, or the relief to which they give a title?

Underlying this, as well as the entire law of divorce as administered by the ecclesiastical tribunals, were two fundamental conceptions: that marriage was a sacrament and that it was indissoluble. From the former came principally associations of criminality with moral transgressions. From the latter arose the necessity in actual experience for the device of an impediment *ab initio* leading to annulment; and from it also in part came the justification for both the notion of episcopal supervision of the marital state and the means adopted to compel the observance of its duties.

From this sketch of the background in doctrine and practice of the ecclesiastical law of divorce, we get a view of the function played by recrimination in its administra-

(1) [1903] P. 246, at 254.

(2) (1868) L.R. 1 P. & D. 569, at 571.

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tion; and the question is to what extent, if any, should that practice and the principles on which it is based be admitted in this case.

The enactment of 1791 rejects the doctrine of the indissolubility of marriage. By it, marriage (apart from the fact of mutual promises) is assumed to be a social status subject to such incidents as the law may ascribe to it. The rule of recrimination was applicable in the procedure of a mechanism of legalized separation within the marriage conceived to be indissoluble and subject to an episcopal discipline. It is contended that we are bound to apply that same rule in all its rigidity to a new remedy differing both in effect and in the assumptions upon which it is based. There is no doubt that the first settlers of New Brunswick brought with them generally as their laws the established customs and usages of the common law of England. It would be difficult to exclude from this the rules and principles regulating marriage and divorce so far as they had been accepted by and incorporated into that law. The statute itself, by its resort to the vocabulary and specific remedies of that administration, impliedly imports whatever of the adopted practice may be necessary to its full scope and intent. But whether it is considered in the former or in the latter sense, the incorporation of the common law into the life of the newly settled country must be only so far as that law may be suitable to the new conditions and as specific circumstances do not imply the requirement or freedom of modification.

Now the Act of 1791 is significant by two circumstances: it creates a new general civil right to a divorce *a vinculo* not committed to the judicature of England until sixty years later; and it omits any reference to the body of rules and practices so long established in the ecclesiastical courts as those according to which the new enactment should be administered. From the fact that, early in the establishment of both the Provinces of Nova Scotia and of New Brunswick, among the first legislative measures to be passed were laws dealing with divorce, it may be assumed that this subject was among the matters of substantial public interest, and that it was so recognized by the legislature. It is, therefore, seen that not only is the doctrinal basis of the previous law rejected and the jurisdiction transferred from an ecclesiastical to a civil tribunal, but

that, by the introduction of a new and fundamentally different remedy and the significant omission of any reference to a specific juridical setting in which the law should be administered, the statute can only be taken to imply an intent that the court should be untrammelled by any other than the general rules and principles, ecclesiastical as well as civil, constituting the unwritten law of the new province.

In this conclusion I am excluding from the scope of implied adoption, either of law carried by founders or by legislative enactment, the rules and procedure more or less uniform of the British Parliament in legislative divorce. What the statute of 1791 did was to add to the body of public law of the province positive rights and remedies to be enforced by tribunals established by public law and bound by public duty. Parliament was not such a tribunal, nor was it administering, in any sense, public law. Each divorce bill ran the gamut of parliamentary vicissitude. Whatever was conceived desirable in any case, whether embodied in the bill itself or required as a collateral arrangement—such as a property adjustment or allowance —was made part of a legislative settlement. Parliament was bound by no precedent. It was at liberty at any time to change its usual practice, as it did, among other instances, in the allowance in 1886, in an Irish case, of divorce to a woman on the grounds of adultery and cruelty (Gemmill, p. 15). It was not always consistent in its requirements. From 1669 to 1749, when the first governor of Nova Scotia was commissioned, forty such bills had been passed and they were appropriately termed *privilegia.* At the highest, a petitioner could claim only a moral right to a relief that others had been accorded. The "law" of that right, and the practice in general followed, did not, therefore, constitute law which could be held to be the subject of adoption by implication from the statute of 1791 or by attraction of colonial settlement.

There are decisions of the courts of New Brunswick in which, in proceedings for divorce *a mensa* under the Act, it has been laid down that the rules of the ecclesiastical courts must be taken as governing. For instance, in *Currey* v. *Currey* (1), on appeal, Barker C.J. used the following language:

(1) (1910) 40 N.B. Rep. 96, at 139.

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As to the first point we all agree in thinking that the learned judge was right in accepting *Russell* v. *Russell* (1), as holding that the judgment of Lord Stowell in *Evans* v. *Evans* (2) correctly lays down the rule by which the Divorce Court must be governed as to what in point of law constitutes *legal cruelty*, and that if the evidence fails in establishing it the separation must be refused. According to that decision, by which we are also bound, the evidence must satisfactorily establish either actual bodily hurt or injury to health or such acts or circumstances as are likely to produce an apprehension of such hurt or injury. This is substantially the rule acted upon by this Court in *Hunter* v. *Hunter* (3). And of course each case must be governed by its own circumstances.

But there the court was dealing only with the application, in a case of divorce *a mensa*, of the law of the ecclesiastical courts relating to that precise remedy.

We are then to determine from the conventions of the common law of New Brunswick what, in the light of present-day circumstances, a rule of the nature in question should be. That some such rule should be maintained seems to follow from the general principles underlying legal remedies. Although its basis has not been formulated with precision, it is essentially a refusal, by a court, of relief from obligations which a suitor has himself flouted and a refusal to hear him complain of a consequence to which his own conduct has contributed; inherent in it, also, is a recognition of the fundamental interest of the state in the maintenance of the marriage unity.

It is pertinent to observe the conceptual as well as psychological elements involved in the determination of that question as it was treated in the ecclesiastical administration. These are well indicated in the following excerpt from a pronouncement of the greatest expositor of this field of law, Sir William Scott (as he then was) (4):

I do not find any express text, that applies to the particular case of granting a legal separation to a husband, who had remained constant to his marriage bed till after he had detected the infidelity of his wife, and retired from her society. No such favourable distinction is intimated anywhere in that system, as far as I recollect. There can be no doubt that the Canon Law acknowledged none such; the contrary flowed naturally from its peculiar doctrine of the absolute indissolubility of marriage. For the *vinculum* remaining perfectly unaffected by the adultery of either party, or by a private separation consequent thereon, the parties *remanent conjuges*, and an adultery then committed, was as direct and gross an infraction of that *vinculum* as if committed at any other period, and as such, was held equivalent to it. It was a *par delictum*, subject to the same rule of compensation, which leaves the parties to find their com-

(1) [1897] A.C. 395.
(2) (1790) 1 Hagg. C.R. 35.
(3) (1863) 10 N.B.R. 593.
(4) *Proctor* v. *Proctor*, (1819) 2 Hagg. Cons. Rep. 292, at 298.

mon remedy in common humiliation, and mutual forgiveness. It provides against the mischiefs to which a husband might be exposed by such a wife living apart, by its known doctrine, that all separations merely voluntary are totally illegal, not to be either tolerated or presumed. It acknowledges no intermediate state between a cohabitation and a formal separation. It, therefore, presumes, when it withholds its divorce of separation, that the parties return to cohabitation; all matters return to their former course, but with increased vigour; the husband and wife live again on their former footing, and there is no anticipation of separate debts, or of the probability of a spurious offspring.

On the same point, before the Royal Commission on Divorce of 1910, Lord Desart expressed himself as follows:

> I have found a great deal of difficulty in forming an opinion [as to recrimination], because as King's proctor I have felt over and over again, at any rate in a considerable number of cases, that my intervention has done more harm than good.

A glance over the course of the past century shows the unmistakable change in attitudes towards these social and individual relationships. The *Divorce and Matrimonial Causes Act* of 1857, notwithstanding its asserted purpose of creating only a new jurisdiction, modified from an absolute to a discretionary bar the plea of recrimination of adultery and introduced discretionary bars for cruelty, desertion and other misconduct. The course of the exercise of divorce jurisdiction by the Canadian Parliament reflected that change in the adoption in practice of the same ground for relief for both husband and wife (Gemmill on Divorce, p. 56). In 1925 Parliament enacted *The Divorce Act*, ch. 41 of the statutes of that year, by the effect of which the plea of recrimination, even in New Brunswick, is, in the case of a petitioning wife, a discretionary bar only. In the case of *McLennan* v. *McLennan* (1), this Court held, under the law of New Brunswick, that there was jurisdiction to award alimony upon a divorce *a vinculo*, a decision which recognized the intention of the Act of 1791 to liberalize the law of divorce and to extend the field of judicial discretion. If the rule of the ecclesiastical courts were to apply unmodified, neither the grossest cruelty on the part of the husband nor his wilful desertion could be raised against his right to divorce *a vinculo: Cocksedge* v. *Cocksedge* (2); *Morgan* v. *Morgan* (3).

(1) [1940] S.C.R. 335. (2) (1844) 1 Rob. Ecc. 90.
(3) (1841) 2 Curt. Rep. 679.

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As the reasons underlying recrimination in the ecclesiastical courts in divorce *a mensa* do not obtain in the field of divorce *a vinculo*, the rule itself cannot there be held to be applicable: *Bourne* v. *Keane* (1). But, as the examination of the question has shown, the essential defect of the rule lies in its limitations and its rigidity. What is called for is a flexible means through which the relevant legal considerations can be applied; and that, in the circumstances, must be found in a judicial discretion. Such a rule, it may be added, is already the law in six provinces of the Dominion.

There still remains the question whether here that discretion was properly exercised by the trial judge. The considerations in principle, underlying that exercise, which have emerged in the course of administering the Act of 1857, in my opinion, meet the requirements of a sound judicial policy. They are indicated in the decisions mentioned in the judgment of Baxter C.J.; and in the light of them I am unable to say that the Chief Justice was clearly wrong in the view at which he arrived.

The appeal, therefore, should be allowed and the judgment of the trial Court restored without costs in this Court or in the Appeal Division.

DAVIS J.—The respondent, wife of the appellant, commenced proceedings against her husband by petition in the New Brunswick Court of Divorce and Matrimonial Causes for a divorce on the ground of adultery. The appellant counter-petitioned against his wife for a divorce on the ground of adultery. The petitions were heard together by Chief Justice Baxter, the Judge of the Court of Divorce and Matrimonial Causes, and after trial he dismissed the wife's petition but granted the husband's counter-petition. The wife did not appeal the judgment dismissing her petition but she did appeal to the Appeal Division of the Supreme Court of New Brunswick from the judgment granting her husband's petition. The Appeal Division by a majority—LeBlanc and Fairweather JJ.—Grimmer J. dissenting, allowed the appeal and set aside the decree *nisi* for the dissolution of the marriage, entered for the respondent, without costs. The husband has appealed from that judgment to this Court. Counsel for the

(1) [1919] A.C. 815.

Attorney-General of New Brunswick was heard on the argument of the appeal, as the question of the jurisdiction of the New Brunswick courts in divorce is directly in issue.

The contention of the respondent is, and it was given effect to by the majority of the Appeal Division, that the English ecclesiastical law became part of the law of New Brunswick, as well as the common law of England, and that the old ecclesiastical rule which barred the granting of a divorce where the petitioner had himself been guilty of adultery still prevails in the province of New Brunswick. The husband in this case had himself been guilty of adultery but the learned trial judge, exercising the discretion which he thought he had, granted the divorce notwithstanding. As counsel for the Attorney-General of New Brunswick pointed out, the case is of considerable importance in the province because the subject matter of divorce having by the *British North America Act, 1867*, been given into the exclusive legislative authority of the Dominion, leaves the province unable itself to deal with the matter if the majority of the Appeal Division were right in applying the old ecclesiastical rule. The main question then in the appeal is the question of the jurisdiction of the New Brunswick Court to grant the divorce without reference to the old ecclesiastical rule. A further and rather subsidiary point arises in that it is contended by the respondent that even if there was a discretion in the trial judge to grant or withhold a divorce under the circumstances, that discretion had not been properly exercised by the trial judge in this case and should have been exercised to bar the relief sought.

Mr. Justice Fairweather, who wrote the majority judgment in the Appeal Division, very carefully and at considerable length reviewed the evidence and the relevant legislation in the province of New Brunswick before and since the separation of New Brunswick from the province of Nova Scotia in 1784. He came to the conclusion that the substantive ecclesiastical law of England existing at the time the original Nova Scotia Court was constituted in 1758 for divorce must be treated in like manner as the English common law, and that both the common law and the ecclesiastical law applied to that Court; and that it followed that when New Brunswick was separated from Nova Scotia, the English ecclesiastical and the common

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law extended to the new province of New Brunswick and, except where changed by statute, have been carried down to the present time. The reasoning of Mr. Justice Fairweather was that, the ecclesiastical law being still in force in New Brunswick, the doctrine of recrimination or *compensatio criminum* of the ecclesiastical courts, which barred relief when the petitioner was himself guilty of adultery, is a valid bar in the province of New Brunswick to the granting of the divorce sought by the counter-petitioner, and that therefore the Judge of the Divorce Court of New Brunswick had no jurisdiction under the circumstances to grant the divorce to him. Chief Justice Baxter, at the trial, and Grimmer J., in the Appeal Division, took the contrary view.

In my opinion, it cannot be successfully contended that when the province of Nova Scotia was created or subsequently when the province of New Brunswick was separated from that province, the substantive law of the ecclesiastical courts of England became implanted, as did the common law of England, as part and parcel of the law of the province. But be that as it may, the ecclesiastical courts never had jurisdiction—in fact no court in England had jurisdiction until 1857—to grant a divorce *a vinculo;* prior to 1857 a decree of dissolution could only be obtained by Act of Parliament; the ecclesiastical courts were limited in this respect to suits for judicial separation or divorce *à mensâ et thoro.* When it is contended that the doctrine of the ecclesiastical courts of recrimination or *compensatio criminum* applies, it seems to me essential to recall that the doctrine did not apply to a divorce *a vinculo* because the ecclesiastical courts had no power to grant such a divorce. But in any case, in 1791 New Brunswick enacted its own local law regulating marriage and divorce, 31 Geo. III, ch. 5. By section 5 the Governor and Council were constituted, appointed and established a Court of Judicature for the province and it was enacted that suits for divorce, "as well from the bond of Matrimony, as divorce, and separation, from bed and board, and alimony, shall, and may be heard" by the court so established "with full authority, power, and jurisdiction, in the same". By section 9 of the Act, adultery was one of the causes of divorce "from the bond of Matrimony, and of dissolving, and annulling Marriage". That New Brunswick statute

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of 1791 plainly gave the court jurisdiction to grant divorces *a vinculo* on the ground, amongst others, of adultery; the jurisdiction was not restricted or qualified; and sections 5 and 9, read together, exclude the rule of recrimination. It was not until 1857 that the English Act was passed which for the first time gave the English courts jurisdiction in divorce *a vinculo*. The rule of recrimination was by that Act made applicable to divorce *a vinculo*, but it was expressly left discretionary. In 1860 New Brunswick set up its present Court of Divorce and Matrimonial Causes (ch. 37 of the Statutes of 1860) and all jurisdiction formerly vested in the court of the Governor and Council was transferred to the new court. By section 10 of that statute,

> The practice and proceedings of the said Court shall be conformable, as near as may be, to the practice of the Ecclesiastical Court in England, prior to an Act of Parliament made and passed in the year one thousand eight hundred and fifty-seven, intituled *An Act to amend the Law relating to Divorce and Matrimonial Causes in England*, subject however to the provisions of this Act, and the existing rules, orders, and practice as now established in the Court of Governor and Council in this Province.

The important words for the present purpose are, "The practice and proceedings" of the Court are to be conformable, as near as may be, to the practice of the Ecclesiastical Court in England prior to the English Act of 1857. That section is not dealing with substantive law, but procedure, and has been dealt with by the province ever since as procedural.

In the result, in my opinion, the ecclesiastical rule of recrimination or *compensatio criminum* has no application to the law of divorce in the province of New Brunswick.

Some interesting history of the old ecclesiastical courts in England is given in the judgment of Goddard L.J., in *Blunt* v. *Park Lane Hotel* (1).

But undoubtedly the trial judge was not bound to grant the divorce sought; he had a discretionary power. That raises the second point in the appeal, whether or not the trial judge properly exercised his discretion. The majority in the Appeal Division held that the husband, appellant, on the facts of the case was not deserving of the relief prayed for and, assuming, contrary to their view, that a discretion was vested in the trial judge to grant relief,

(1) [1942] 2 K.B. 253, at 257.

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such discretion had not been properly exercised upon the facts proved in the case. It is unnecessary, in view of the very recent judgment in the House of Lords in *Blunt* v. *Blunt* (1), to extend the authorities. It is plain, I think, now from that judgment that the question is whether the exercise of the discretion was erroneous and not whether we should have exercised the discretion in the same manner as the trial judge did. In the absence of some error in principle, one court is not entitled to substitute its discretion for the discretion of another court. There was no error in principle here.

The appeal should be allowed and the judgment at the trial should be restored, without costs here or in the Court below.

KERWIN J.—The Judge of the Court of Divorce and Matrimonial Causes for New Brunswick decided that in that province the adultery of the husband is not an absolute bar to his cross-petition for divorce by reason of his wife's adultery. An appeal to the Appeal Division of the Supreme Court of the Province was allowed *per* Fairweather J., with whom LeBlanc J. concurred, while Grimmer J., dissenting, agreed with the trial judge. On this question I find myself in agreement with the conclusion arrived at by the latter.

It is unnecessary to refer to any law of Nova Scotia before the erection of the Province of New Brunswick because by chapter 2 of the Fifth Session of the First Assembly of the latter, it was enacted that no such law should be of any force or validity therein. In the same session, the Assembly passed an enactment dealing with the subject of divorce, but, whether this was reserved for the signification of His Majesty's pleasure or was disallowed, it was, in any event, repealed by chapter 5 of the same session, enacted in the year 1791.

By section 5 of this Act of 1791:—

* * * all causes, suits, controversies, matters, and questions, touching and concerning Marriage, and contracts of Marriage, and Divorce, as well from the bond of Matrimony, as divorce, and separation, from bed and board, and alimony, shall, and may be heard, and determined, by, and before the Governor, or Commander in Chief of this Province, and His Majesty's Council:

(1) (1943) 59 Times Law Reports 315.

and the Governor, or Commander in Chief, and Council, or any five or more of the Council, together with the Governor or Commander in Chief as President, were "constituted, appointed, and established, a Court of Judicature, in the matters and premises aforesaid, with full authority, power, and jurisdiction, in the same".

Section 9 states the grounds of divorce as follows:

IX. And it is hereby declared and enacted, That the causes of divorce, from the bond of Matrimony, and of dissolving, and annulling Marriage, are, and shall be frigidity, or impotence, adultery, and consanguinity within the degrees prohibited, in and by an Act of Parliament, made in the Thirty-second year of the reign of King Henry the Eighth, intituled "An Act, for Marriages to stand, notwithstanding precontracts", and no other causes whatsoever.

In 1860, by chapter 37, it was provided that all jurisdiction vested in or exercisable by the Court of Governor in Council under the authority of the Act of 1791 in respect of suits, controversies and questions concerning marriage and contracts of marriage, and divorce, as well from the bond of matrimony as divorce and separation from bed and board, and alimony, should belong to and be vested in a Court of Record to be called "The Court of Divorce and Matrimonial Causes". The substance of these provisions is contained in chapter 115 of the latest revision of the statutes (R.S.N.B. 1927). By section 18 of the Act of 1860, all parts of the Act of 1791 that were inconsistent with the 1860 Act were repealed. By section 19 of chapter 50 of the Consolidated Statutes of New Brunswick of 1877, section 9 of the Act of 1791 is declared to be unrepealed, and a similar provision is contained in the subsequent consolidations and now appears as section 39 of the Revised Statutes of New Brunswick, 1927, chapter 115.

Section 10 of the Act of 1860 is as follows:

10. The practice and proceedings of the said Court shall be conformable, as near as may be, to the practice of the Ecclesiastical Court in England, prior to an Act of Parliament made and passed in the year one thousand eight hundred and fifty-seven, intituled *An Act to amend the Law relating to Divorce and Matrimonial Causes in England,* subject however to the provisions of this Act, and the existing rules, orders, and practice as now established in the Court of Governor and Council in this Province.

In my view, it never had any bearing upon the question of jurisdiction because it mentions only "the practice and proceedings" of the new Court; because "the Ecclesiastical Court in England", referred to, had no

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jurisdiction to grant a divorce *a vinculo matrimonii* and because the provision that the practice and proceedings of the new court should be conformable, as near as may be, to the practice of the Ecclesiastical Court in England prior to the Imperial Act of 1857, was specifically made subject to the New Brunswick Act of 1860. It was subsequently amended and finally, in 1934, repealed.

The result is that by these New Brunswick enactments, the Court of Divorce and Matrimonial Causes has full authority, power and jurisdiction to grant divorce from the bond of matrimony on the ground of adultery. The enactments do not state that the Court must grant a divorce and I think it follows, therefore, that a judicial discretion is lodged in the Court to refuse a decree in certain cases and, in other cases, to grant a decree even though the petitioner may have been guilty of adultery.

This jurisdiction is the same as existed from the time of the coming into force of the Act of 1791. What were the principles that governed the exercise of the discretion in the early days and what are the principles that should now govern? So far as appears, this is the first case in New Brunswick in which the point has been raised, but it is obvious that, as there was no power in England prior to 1857 to grant a divorce except by a Special Act of Parliament, no assistance could have been gained by the New Brunswick Courts from decisions in England until after that date. Such decisions are, of course, based on the provisions of the Act of 1857 and particularly section 31 by which, in certain circumstances, the Court "shall pronounce a decree declaring such marriage to be dissolved", with a proviso "that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery". Granted the legal right to divorce, these decisions may, therefore, be of assistance to a Court whose jurisdiction to exercise a discretion is unfettered by any statutory enactment.

In the present case the trial judge founded his discretion upon his conclusion as to the rules presently applicable in England according to the decisions of the Probate, Divorce and Admiralty Division of the High Court of Justice. Since then judgment has been given by the House of Lords in *Blunt* v. *Blunt* (1). There, Viscount Simon states

(1) (1943) 59 T.L.R. 315.

four chief considerations which ought to be weighed in appropriate cases as helping to arrive at a just conclusion, which considerations had been mentioned by Sir Henry Duke in *Wilson* v. *Wilson* (1), and referred to with approval by Lord Chancellor Birkenhead when he was sitting in the Divorce Court and deciding *Wilkinson* v. *Wilkinson* (2). These four points are: (*a*) the position and interest of any children of the marriage; (*b*) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage; (*c*) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; and (*d*) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably. To these four considerations Viscount Simon added a fifth

> of a more general character, which must indeed be regarded as of primary importance—namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the Court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused.

While the first three considerations do not apply in the present action, I think the case falls within the fourth and fifth, and certainly it has not been shown that the trial judge—to again quote Viscount Simon—"acted under a misapprehension of fact in that he either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant". Applying these to the case before us, I find it impossible to say that the trial judge exercised his discretion improperly. The correspondence referred to by Mr. Justice Fairweather is certainly of importance but no doubt it was not overlooked by the trial judge and, in any event, so much would depend upon the view taken of the character and proclivities of the husband that the judge who saw him was in the best position to exercise a judicial discretion.

The appeal should be allowed and the judgment of the trial judge restored without costs here or in the Appeal Division.

(1) [1920] P. 20.
(2) (1921) 37 T.L.R. 835.

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HUDSON J.—I have had the opportunity of reading the judgments prepared by my brothers Davis, Kerwin and Rand, and agree with their views as to the proper disposition of this appeal. I have little to add.

The New Brunswick statute authorizes the court to grant a divorce *a vinculo* where the respondent has been proved guilty of adultery. It does not impose any limitation or condition here relevant. On the other hand, it is not in terms imperative and, therefore, on the face of the statute the court must have been given a discretion. How this discretion should be exercised would depend primarily on the facts in each particular case. The admitted misconduct of the plaintiff is a matter which the court should take into account before making a decree, but the defendant goes further and contends that such misconduct provides an absolute defence. This contention rests on a supposed analogy to the rule prevailing in the ecclesiastical courts at the time this statute was passed, by which a decree *a mensa et thoro* was never granted where the plaintiff had been proved guilty of misconduct. The analogy is not real because the ecclesiastical courts never had jurisdiction to grant a decree *a vinculo*. Here an entirely new jurisdiction was created under colonial conditions. It does not appear that the courts in New Brunswick ever accepted any such rule as absolute.

In exercising the discretion given, the court may properly take into account the prevailing social and ethical views of the country. As said by Sir Frederick Pollock, 45 L.Q.R. 295, "the duty of the court is to keep the rules of law in harmony with the enlightened common sense of the nation". Chief Justice Baxter has dealt with the present case on this basis and, in my opinion, no sufficient reason has been shown to justify a reversal of his decision.

The recent case of *Blunt* v. *Blunt* (1) supports this position. I would allow the appeal and restore the judgment at the trial.

Appeal allowed and judgment at trial restored, without costs in this Court or in the Court below.

Solicitor for the appellant: *H. F. G. Bridges.*

Solicitor for the respondent: *R. D. Mitton.*

(1) (1943) 59 T.L.R. 315.

IN THE MATTER OF THE ESTATE OF JAMES D. MORICE, DECEASED

1943
*Oct. 6.
*Oct. 18.

CAROLINE MORICE ..... APPELLANT;

AND

C. W. DAVIDSON, EXECUTOR OF THE SAID ESTATE, AND SAMUEL A. MOORE, ADMINISTRATOR OF THE ESTATE OF JESSIE M. GAUVREAU, DECEASED, REPRESENTING, BY DIRECTION OF THE COURT, ALL PERSONS INTERESTED IN THE SAID MORICE ESTATE EXCEPT THE APPELLANT..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Devolution of estates—Administration of estates—Testator's widow taking under the Dower Act, Man.—Her life estate in the homestead —Sale of the homestead by consent—Basis of division of proceeds— Reference to determine values of life estate and remainder—Widow's share of the estate.

APPLICATION on behalf of the appellant to have the minutes of judgment as settled by the Registrar varied, as set out in the reasons now reported.

The judgment of this Court (1) as pronounced on February 2, 1943, was as follows:

The judgment of the Court below should be amended by striking out the third answer to the questions submitted to the Court below and substituting therefor the following answer as the answer to the second question:

"The net proceeds of the sale of the homestead should be divided in proportion to the respective values of the life estate and of the remainder, the widow accordingly receiving out of the proceeds the share representing the value of the life estate."

The costs of both parties should be paid out of the estate.

and the minutes of judgment were settled by the Registrar in accordance with the wording of that pronouncement.

The questions submitted to Mr. Justice Adamson and his answers thereto, as set out in the formal judgment in the Court of King's Bench, affirmed by the Court of Appeal for Manitoba, appear in the reasons for judgment in this Court reported in [1943] S.C.R. 94, at pp. 96-97.

O. M. Biggar K.C. for the motion.

G. Henderson contra.

*PRESENT:—Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.

(1) Reasons reported in [1943] S.C.R. 94.

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In re MORICE ESTATE. MORICE *v.* DAVIDSON ET AL.

THE COURT.—This is an application on behalf of the appellant to vary the minutes of judgment as settled by the Registrar in respect of two matters.

The first is that the judgment of Mr. Justice Adamson, referred to in the minutes, should be varied by directing the omission of the words "except two-thirds of the amount received from the sale of the homestead, before any other beneficiaries are paid".

The second, by inserting a direction that in the event of the parties failing to agree as to the respective values of the life estate and the remainder, it be referred to the Master to determine such respective values, such a direction being the direction which the Courts below should have given in accordance with the provisions of Manitoba Rule 539 (1) in order to avoid the necessity for the commencement by the parties of fresh proceedings to determine their respective rights.

Counsel for respondent raises no objection to a reference and the minutes should be varied as applied for. This appears to be authorized by Rule 539 of the Manitoba Court of King's Bench.

As to the other matter, the answer of Mr. Justice Adamson to the first question received little or no attention on the argument before us and the significance of the exception to the answer to the first question was overlooked in the reasons for judgment.

The Court decided that the sale of the homestead property was the sale of two separate estates, viz., the life estate of the appellant and the remainder of the fee which the executor held for the estate of the deceased, and that the proceeds should be divided on this basis.

As a consequence, the appellant's share in the proceeds will come to her in full satisfaction *of her life estate* in the homestead. In addition to this, the appellant is entitled to one-third of the net value of the estate including the value of the homestead.

The share of the proceeds of the sale of the homestead retained by the executor forms part of the net estate, of which the appellant is entitled to one-third.

Under section 20 of *The Dower Act,* the widow is entitled to receive one-third as if the same were a debt of the testator at the time of his death, and thus in priority to other beneficiaries. This was provided for in the answer

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of Mr. Justice Adamson to question 1. The exception was added to his answer because of the view which he took of the disposition of the proceeds of the sale of the homestead. In view of the decision of this Court on the main question, the exception should be stricken out as applied for. There will be no costs of this application.

Application granted; minutes of judgment varied; without costs.

Solicitors for the appellant: *Coyne & Coyne.*

Solicitor for the respondents: *N. J. D'Arcy.*

SPUN ROCK WOOLS LIMITED (DEFENDANT) ..... APPELLANT;

AND

FIBERGLAS CANADA LIMITED AND OWENS-CORNING FIBERGLAS CORPORATION (PLAINTIFFS) AND THE CUSTODIAN (DEFENDANT).... RESPONDENTS.

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*May 5, 6, 7.
*Oct. 5.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Invention—Remedies of licensee against infringer—Measure, basis, of damages.

In an action for infringement of a patent for alleged new and useful improvements in the production of fibres or threads from glass, slag and the like meltable materials, the judgment of Maclean J., [1942] Ex. C.R. 73, in favour of the plaintiff was now reversed and the action dismissed by this Court on the ground that there was not invention in the claim sued upon (claim 1) of the patent. Rand J. dissented.

Plaintiff claimed to be the licensee of the rights conferred by the patent. The Custodian, as being the person in whom had become vested the patentee's interest in the patent, was a party defendant. There was a question (assuming a valid patent) as to plaintiff's right to maintain the action; and with regard thereto opinions were expressed as follows:

Per Davis and Taschereau JJ.: For the purposes of s. 55 of the *Patent Act* (Dom., 1935, c. 32) a licensee is a "person claiming under" the patentee "for all damages sustained" by such person by reason of infringement. The profits made by an infringer are not the measure of the damages sustained by a licensee. In the present case there was nothing in the evidence to guide the Court in ascertaining whether any damages were sustained and nothing to lay the basis for a

*PRESENT:—Davis, Kerwin, Hudson, Taschereau and Rand JJ.

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proper ascertainment of damages, if any were sustained; in the peculiar circumstances of the case, plaintiff never having made any commercial use of the patented process so far as the evidence disclosed, either in this country or in the United States, it was difficult to see that it had suffered any damages; but plaintiff, if the patent were to be held valid, would be entitled, at its own risk, to a reference as to amount of damages.

Per Kerwin J.: If it were held that the claim of the patent sued on was valid, plaintiff, as exclusive licensee, would be entitled to the usual order of restraint against an infringer. As to damages: An exclusive licensee claims under the patentee within the meaning of s. 55 of the *Patent Act* (*supra*) and the presence of the Custodian as a party defendant in this case would be sufficient if plaintiff had worked the invention in Canada. This did not occur and there was no basis for the fixing of any damages suffered by plaintiff. A claim for damages suffered by the Custodian (as being the person for the time being entitled to the benefit of the patent) might be permitted by amendment in a proper case; but even then it was doubtful if any further evidence could be adduced which would assist in coming to a conclusion as to the damages suffered by him, when the patent was not worked in Canada.

Per Rand J. (who, dissenting, held in favour of validity of the patent, and who would dismiss the appeal from the judgment in the Exchequer Court, which judgment granted, *inter alia*, an injunction, right to recover damages, if any, or profits, if any, made by reason of infringement, as plaintiff might elect, and enquiry as to damages or profits): The action was maintainable, all interested parties being before the Court.

APPEAL by the defendant Spun Rock Wools Limited from the judgment of Maclean J., late President of the Exchequer Court of Canada, in favour of the plaintiffs (1). The action was for an injunction, damages and other relief, by reason of alleged infringement by said defendant of letters patent No. 333,788 granted on July 4, 1933, to N. V. Mij. tot Beheer en Exploitatie van Octrooien (referred to, for short, in the judgments as "Maatschappy") as assignee of Friedrich Rosengarth and Fritz Hager, in respect of alleged new and useful improvements in the production of fibres or threads from glass, slag and the like meltable materials; the plaintiff Fiberglas Canada Limited claiming, through certain agreements, to be the licensee of the rights conferred by said letters patent.

Claim 1 of the patent, on which the plaintiff relied, was:

1. A method of producing fibres from molten glass, slag and the like meltable material, consisting in setting-up a flowing stream of

(1) [1942] Ex.C.R. 73; [1942] 3 D.L.R. 378; 2 Fox Pat. C. 189.

molten material, delivering this stream onto a rapidly rotating surface and causing it to be thrown off the said surface by centrifugal force in the form of fine fibres.

The said defendant in its statement of defence admits that it produces fibres by delivering a stream of molten material on to a rapidly rotating surface as stated in claim 1 of the said Patent but says that it has not thereby infringed any rights of the plaintiff because the said Patent and particularly claim 1 thereof, is and always has been invalid for the reasons stated in the particulars of objections delivered herewith.

and in its "particulars of objections" stated, as reasons for such invalidity, that "the alleged invention was not new, but had been described in" certain patents named, and that "there was no invention having regard to the common knowledge of the art and to the patents aforesaid and" certain patents and printed publications named.

In the judgment of Maclean J. leave was granted to the plaintiff Fiberglas Canada Limited to add Owens-Corning Fiberglas Corporation (a party to certain of the agreements above mentioned) as a plaintiff upon filing the latter's consent. The latter was subsequently added as a plaintiff and is one of the present respondents.

The patentee ("Maatschappy" aforesaid), being a company incorporated under the laws of Holland, with its principal office at The Hague, in the Kingdom of Holland, became an enemy in May, 1940, whereupon its interest in the patent became vested in the Custodian by virtue of the provisions of s. 21 of the Consolidated Regulations respecting Trading with the Enemy, 1939. The Custodian was made by the plaintiff an original party, as defendant, to the action.

By the formal judgment in the Exchequer Court, the plaintiff was granted: leave to add the other plaintiff as aforesaid, an adjudication for validity of the patent and of infringement, an injunction, a declaration that plaintiff was entitled to recover damages, if any, sustained by it, or the profits, if any, made by the present appellant, by reason of infringement, as the plaintiff might elect after the filing of statements, etc., as ordered, an enquiry by the Registrar of the Court as to damages or profits (as the case might be), and delivery up of articles.

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W. D. Herridge K.C. and *W. A. MacRae* for the appellant.

R. S. Smart K.C. and *Christopher Robinson* for the respondents Fiberglas Canada Limited and Owens-Corning Fiberglas Corporation.

The judgment of Davis and Taschereau JJ. was delivered by

DAVIS J.—This appeal arises out of an action for infringement of Canadian Patent No. 333788, for an alleged invention of certain new and useful improvements in the production of fibres or threads from glass, slag and the like meltable materials. The patent was granted July 4th, 1933; application filed November 20th, 1931. The action was commenced in the Exchequer Court of Canada, the statement of claim being filed September 15th, 1941. The principal defence is based on want of novelty and subject-matter, that is, want of invention. The appellant (defendant) admits infringement if the patent is valid.

The object of the alleged invention is stated in the early paragraphs of the specification as follows:

> The production of fibres or threads from molten glass, so-called glass silk, is hitherto performed by means of spinning machines on which the threads are drawn from prepared glass rods or from the molten mass through nozzles, while in the manufacture of slag wool the threads are produced by the aid of steam or air blowers.
>
> It is the object of the invention to provide a novel method and device for making fibres or threads of the kind stated. According to this invention, the hot liquid glass or slag mass is flown in a continuous and uniform thin stream onto a rapidly rotating body, such as a disc of suitable material. On the disc the liquid mass is scattered into minute drops, which are thrown off by the centrifugal force and simultaneously formed into thin threads which sink down in the space around the rotating disc and can be collected as a uniform fibrous web.
>
> Owing to the higher momentum imparted to heavier particles, such as thicker drops and threads, these are thrown off the disc to a greater distance and thus can be easily separated from the threads of the normal or desired thickness.

Claim 1 of the patent, which is the only claim on which the respondent (plaintiff) sued, is as follows:

> 1. A method of producing fibres from molten glass, slag and the like meltable material, consisting in setting-up a flowing stream of molten material, delivering this stream onto a rapidly rotating surface and causing it to be thrown off the said surface by centrifugal force in the form of fine fibres.

There are only some sixty pages in the voluminous record taken up with the oral testimony, and much of that testimony is of little help. The question of validity largely turns upon the examination and interpretation of many prior publications and prior patents. The trial judge, while he thought it might fairly be stated that the art here involved is old, concluded that the alleged invention, though it "may be a narrow one," disclosed "such new and useful improvements and required that degree of the inventive power as to merit a patent".

Rock wool, slag wool, or mineral wool is a furnace product which has been made and sold for at least seventy years as a non-conductor of heat and sound. All rock or slags will not make wool. A slag or rock material too rich in iron will blow into "shot", without a trace of wool; slags or rock too rich in the alkaline earths blow into short wool and even into dust. To make the long-fibred wool, a substance is required that has a prolonged period of plasticity (or viscosity) and there must be a wide range of temperature between softening and complete fusion. This phenomenon is best exhibited by glass.

There has been much common knowledge and practice in the art for many years past. In the first place, it was known to be essential that the material must be a substance which when melted will have a high degree of viscosity (the quality or fact of being viscous, that is, having a gluey or sticky or ropy character). Certain kinds of rock have peculiar advantages; because of their viscosity they can be converted into the form of threads or fibres. For instance, the rock formation in the Niagara Peninsula in Ontario is of an acceptable nature to be melted into liquid form and it is at Thorold, Ontario, in the Niagara Peninsula, that the appellant company (defendant) carries on its manufacturing of rock wool, which is alleged to be an infringement of the patent in question. Glass, while a very viscous substance, is proportionately expensive for commercial use compared with slag or rock. Further, it was well known that the regulation of the heat was of essential importance and that the range of temperatures, having regard to the melting process and to the subsequent disintegration or dispersal of the liquid material, required careful determination. No objection was taken by counsel for the appellant to the

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breadth of the claim sued on notwithstanding that the quality of the material that may be used is not given nor the range of appropriate temperatures, nor is there reference to any particular shape or form of the surface of the disk that is specified to be used. Counsel for the appellant plainly desired to put the defence upon the broad ground that there was no novelty or subject-matter in the alleged invention.

The manufacturing operations are comparatively simple and have been well known for many years. Roughly stated, the suitable material is put in a furnace and heated to a point where it has become melted into liquid form. There is a small hole or holes in the bottom of the furnace through which the molten material drops as a stream. By means of some form of contrivance this stream may be blown or struck so that it is thrown through the air varying distances as desired and then caught in a receptacle. If the original material has not been of the nature best suited to the operation or if the heat has not been properly regulated, some of the liquid stream as it passes beyond the furnace quickly forms into little hard particles, sometimes called "pellets" but perhaps more commonly called "shot". If the purpose of the disintegration or dispersal of the liquid matter is for producing such materials as cement, the amount of the "shot" is not material; but if a thread-like or fibrous or silky substance is sought to be obtained, then "shot" must be avoided as far as possible and the molten material driven with sufficient speed and at a sufficient distance to create long, thin threads or fibrous substance.

There are two old and well-known processes for dispersing or breaking up the molten material. The earlier was what is known as the "jet" method. Rock or mineral wool has been made by that method since at least 1870. Steam or air forced through a jet is thrown against the stream of the molten material. This method has the effect of dispersing or breaking up the molten material into countless small bead-like particles, each of which as it flies away carries behind it a delicate thread of finely-drawn or spun rock or slag. This method was used and I understand is still used commercially in the manufacture of rock or mineral wool. The loss through a high percentage of "shot" is said to have made this method expensive

for glass. The other method or process employed before the present patent was that known as the "Gossler" process, which is described by Saborsky (in 1923) at pp. 156 et seq. of the Case. In this process glass was melted in the furnace from the bottom of which glass drops were permitted to fall onto a revolving drum, and these drops drew after them glass filaments which were wound on the turning drum. "The drops themselves were thrown off by the centrifugal force of the turning drum, which retained only the pure and light wool." It is contended by the respondent that the Gossler process was slow and intermittent in its operation. The respondent claims that the process of the patent here in question eliminated disadvantages in both the "jet" and the "Gossler" processes in that it is claimed to produce a wool of extremely low "shot" content and produces fibres by a continuous and quick process compared to that of the Gossler process.

It is important to our problem to observe that the Gossler process used a revolving or rotating drum and, as the drum revolved, drops were thrown off by the centrifugal force of the turning drum. It is true these drops formed "shot" while the patent in question in this action specifies a rapidly rotating disk on the surface of which the molten material falls and from which it is thrown off by centrifugal force to form wool. But what is said against the patent in issue is that the use of a rotating or revolving contrivance and the throwing off of the drops by centrifugal force was too old and well known in the art to constitute the basis of the invention claimed.

It may be well here to repeat exactly what the claim in the patent sued on is:

> 1. A method of producing fibres from molten glass, slag and the like meltable material, consisting in setting-up a flowing stream of molten material, delivering this stream onto a rapidly rotating surface and causing it to be thrown off the said surface by centrifugal force in the form of fine fibres.

The claim is to the use of a "rapidly rotating surface" and the molten material being thrown off the said surface "by centrifugal force". It is to be observed that the "rapidly rotating surface" on which the stream is to be delivered is not in any way defined, and it must be assumed, I take it, to be a flat or smooth surface. As a matter of fact the patent in question has never been put into use in

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Canada nor has its corresponding United States patent been put into use there. Slater, the respondent's (plaintiff's) principal witness, Vice-President in charge of research and engineering with the American company, admitted that they had done "considerable experimental work with the process" under the corresponding United States patent, "but we make our glass fibres by a different process". The process, he said, which they had developed involves a lot of platinum orifices from which they flow over fine streams of glass into a steam jet. Slater admits that the plaintiff company has never manufactured commercially under the Hager process, which is the name generally given to the patent in question. The appellant company (defendant) also found a flat or smooth surface disk impracticable and they use bevelled edges, slanting downwards, grooved to give the necessary friction. As the material falls at one point on the revolving disk it is subject to the friction of the disk and is thrown off instead of sliding. The appellant (defendant) contends that the device used commercially by it marks the difference between the inoperability of the process covered by the patent in question and the device used commercially by the appellant.

What is said against the patent in issue here is, I repeat, that the use of a revolving disk and the throwing off of the liquid material by centrifugal force has been common knowledge in the art for many years and that the patent adds nothing new and useful in the patentable sense.

It is to be kept in mind that the appellant company manufactures its product from certain kinds of rock only, by the centrifugal force of a rotating disk. It is significant, I think, that Elbers in his United States patent, application for which was filed as early as 1876 (the invention being said to have for its object to provide means for reducing molten scoriaceous substances to a fibrous condition, for producing what is known as "mineral wool"), stated in his specification:

> I am aware that shot has already been produced by the centrifugal force of a rotary disk, upon whose face the molten metal was poured; and this I do not claim, as my invention refers to the production of mineral wool, and to the use of a wheel having projecting paddles, that strike the molten mass as they revolve, and affect it mechanically.

His object, he says, is to reduce molten substances to "a fibrous condition" and his method was exposing the

material in a fluid state to the action of a rotary paddle-wheel. Elbers describes the wheel as having a suitable number of projecting blades at the edge placed beneath the outlet or discharge opening of a trough or conduit that contains the molten material, the wheel being so placed that, in revolving with proper velocity, its blades will strike and diffuse the molten mass, whirling it with considerable force through the air, and causing its disintegration into fibres or other small particles, whose form will, of course, vary according to the nature and composition, and even degree of heat, of the matter acted upon. There was some debate at the trial between the witnesses on the two sides as to whether there was the use of centrifugal force in the Elbers process, but I think it perfectly obvious that it was only by some centrifugal force from the revolving contrivance that the stuff was thrown off. Elbers does not appear to have been put into commercial use, and there is no defence of analogous user based on it. It is relied on as showing what was common knowledge in the art as early as 1876, when the Elbers patent was taken out.

Much stress was laid by Mr. Smart for the respondent upon the judgment of the Privy Council in the *Pope Appliance* case (1), and there are some similarities, no doubt, in the two cases. But, as Viscount Dunedin said, there was no controversy in the *Pope Appliance* case (1) as to the device being completely successful. It had, he said, been universally adopted. Nor had he any doubt that it was adequately described in the patent and adequately claimed. The contrivance in that case satisfied a long-felt want in the particular industry, and the Privy Council said that the patent, being good, could not be escaped by such an obvious mechanical equivalent as adopted by the respondents in that case.

Lord Russell of Killowen, delivering the judgment of the Privy Council in *Paper Sacks Proprietary Limited* v. *Cowper* (2), used the following very precise language at p. 54:

> In determining the question of inventive step, a very important consideration is whether the alleged invention has satisfied a long-felt want and has in so doing proved a commercial success.

(1) *Pope Appliance Corpn.* v. *Spanish River Pulp and Paper Mills, Ltd.*, [1929] A.C. 269.

(2) (1935) 53 R.P.C. 31.

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My conclusion is that there is not invention in the claim of the patent sued upon in this action and that accordingly the appeal should be allowed and the action dismissed.

If the patent is not valid, then the question of the status of the plaintiff need not be determined. But as the question was argued at considerable length and is of general importance, I think it well to make a few observations on that branch of the case. Counsel for the respondent before us maintained that the plaintiff's status was, in point of law, that of an assign—not a mere licensee. The formal judgment after the trial follows the somewhat usual form where a patentee or his assign sues, in that the plaintiff is granted an injunction, and damages, if any, sustained by it, or, at its election in lieu of damages, the profits, if any, which the defendant has made by reason of the infringement; an order is directed against the defendant to file statements duly verified on oath showing the number of articles sold from time to time, the prices at which the same were sold, "and of the profit made by the said defendant on such sale"; and an inquiry was directed to be made by the Registrar as to the damages sustained by the plaintiff "or the profits made" by the defendant, as the case may be. But the plaintiff sued expressly as licensee of the rights conferred by the Letters Patent granted to a Dutch company (which for convenience has been referred to as "Maatschappy"), the assignee of the alleged inventors Rosengarth and Hager; and the plaintiff pleaded, and it is admitted by the defendant, that Maatschappy, being a company incorporated under the laws of Holland with its principal office at The Hague, became an enemy in the month of May, 1940 (prior to the commencement of this action), whereupon its interest in the said patent became vested in the Custodian by virtue of the provisions of sec. 21 of the Consolidated Regulations respecting Trading with the Enemy, 1939. The plaintiff made the Custodian a party defendant. Mr. Smart for the respondent said at the opening of the trial:

> Just as a matter of title. In effect the suit is being brought by a licensee under the Patent Act and the Act requires, where the action is brought in the name of the licensee, that the owner of the patent should be joined as a party.

The relevant provision of the *Patent Act* is sec. 55 of ch. 32 of the Statutes of 1935, and reads as follows:

55. (1) Any person who infringes a patent shall be liable to the patentee and to all persons claiming under him for all damages sustained by the patentee or by any such person, by reason of such infringement.

(2) Unless otherwise expressly provided, the patentee shall be or be made a party to any action for the recovery of such damages.

The statutory remedy provided is an action "for all damages sustained". A licensee is, I think, for the purposes of the section, a person claiming under the patentee, but the statutory liability is "for all damages sustained" by such person by reason of such infringement. What is the measure of damages in any case is usually a difficult matter to determine, but certainly the profits made by the infringing person is not the measure of the damages sustained by a licensee. There is nothing in the evidence in this case to guide the Court in ascertaining whether any damages were sustained and nothing to lay the basis for a proper ascertainment of damages if any were sustained. In the peculiar circumstances of the case, the plaintiff never having made any commercial use of the patented process so far as the evidence discloses, either in this country or in the United States, it is difficult to see that it has suffered any damages. This Court, at any rate, has no evidence upon which it could go to fix an amount if the patent were to be held valid, but the plaintiff would be entitled, at its own risk, to a reference for this purpose to the Registrar of the Exchequer Court. The position of a licensee and the measure of damages were fully discussed by this Court in the judgment delivered in *Electric Chain Company of Canada, Ltd.* v. *Art Metal Works Inc. et al.* (1).

After the judgment at the trial and by leave granted by that judgment, the plaintiff added Owens-Corning Fiberglas Corporation, a company incorporated under the laws of the State of Delaware, having its principal office in Toledo in the State of Ohio, one of the United States of America, as a party plaintiff, and amended the statement of claim accordingly, and that company is one of the respondents before us. Mr. Smart admitted that it was probably unnecessary to have added that company. In my view, the company was neither a necessary nor a

(1) [1933] S.C.R. 581.

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proper party, and in any event of the disposition of the appeal the respondents should not, in my view, be allowed any costs in connection with the application or amendment.

KERWIN J.—This is an appeal by the defendant, Spun Rock Wools Limited, from a judgment of the Exchequer Court declaring that as between the appellant and the plaintiff, Fiberglas Canada Limited, claim 1 of Canadian Letters Patent No. 333788, bearing date July 4th, 1933, is valid and has been infringed by the appellant and restraining the appellant from making, constructing, using and/or vending to others, to be used in Canada, the invention defined by the said claim, during the continuance of the said letters patent in respect of the said claim. The judgment also, in the usual form, declares that the said plaintiff is entitled to recover from the appellant as the plaintiff may elect, the damages, if any, sustained by it by reason of the said infringement, or the profits, if any, which the appellant has made by reason of the said infringement.

The original parties to the action were those already mentioned and, as a defendant, the Custodian. By the judgment now in appeal, leave was given to add Owens-Corning Fiberglass Corporation as a party plaintiff upon filing its consent. This consent was filed and the statement of claim amended in pursuance of the judgment but no relief was granted the added plaintiff. The alleged invention was made by two German subjects but the patent issued to their assignee, a company called, for short, Maatschappy. The latter company never assigned the patent but granted exclusive licences to certain intermediate parties who in turn transferred those rights to Fiberglas Canada Limited. The added plaintiff was one of the intermediate licensees and its presence in the litigation adds nothing to the rights or liabilities of the other parties.

Maatschappy was incorporated under the laws of Holland with its principal office at The Hague in the Kingdom of Holland, and in May, 1940, became an enemy, whereupon its interest in the patent became vested in the Custodian by virtue of the provisions of section 21 of the Consolidated Regulations respecting Trading with the Enemy, 1939. The Custodian was made a party defendant and, the appellant admitting infringement if it be held

that the claim sued on is valid, Fiberglas Canada Limited, as exclusive licensee, would be entitled in that event to the usual order of restraint against the appellant.

In *Electric Chain Company of Canada Limited* v. *Art Metal Works Inc.* (1), it was held that under the provisions of the *Patent Act* of 1923 a licensee was not entitled to a judgment for damages since section 32 of that Act provided that any infringer "shall be liable to the patentee or his legal representatives in an action of damages for so doing" and the term "legal representatives" was defined by section 2 (*c*) as including the heirs, executors, administrators, guardians, curators, tutors, assigns or other legal representatives, and by section 2 (*e*) "patentee" meant the person for the time being entitled to the benefit of a patent. When the *Patent Act* was recast in 1935, the definition of the word "patentee" remained the same, but section 55 provides:

> 55 (1) Any person who infringes a patent shall be liable to the patentee and to all persons claiming under him for all damages sustained by the patentee or by any such person, by reason of such infringement.
>
> (2) Unless otherwise expressly provided, the patentee shall be or be made a party to any action for the recovery of such damages.

So far as a claim for damages is concerned, therefore, an exclusive licensee claims under the patentee within the meaning of this section, and the presence of the Custodian as a party defendant in this litigation would, I think, be sufficient if the plaintiff had worked the invention in Canada. This did not occur and there is no basis for the fixing of any damages suffered by Fiberglas Canada Limited. Although no claim is made in the action for any damages suffered by the Custodian as being the person for the time being entitled to the benefit of the patent, there would appear to be no reason why such a claim should not be permitted by amendment in a proper case. Even then it is doubtful if any further evidence could be adduced which would assist the Court in coming to a conclusion as to the damages suffered by the Custodian, when the patent was not worked in Canada.

However, the action fails and must be dismissed for lack of invention. I have had the advantage of reading the judgment of my brother Davis and on this point I agree with what he has stated. The appeal should be allowed and the action dismissed with costs throughout.

(1) [1933] S.C.R. 581.

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Hudson J.

HUDSON J.—I have had an opportunity of reading the judgment prepared by my brother Davis and agree with him that this appeal should be allowed on the ground that the claim in the patent in question lacks novelty and subject-matter, that is, the want of invention.

As the patentee and the original licensees are before the Court, I think it is unnecessary for me to express any opinion as to the status of the plaintiff to bring the action. I would allow the appeal and dismiss the action.

RAND J. (dissenting)—This is an appeal in an action for the infringement of a patent for a process of making what is known as glass or mineral wool. The patent is challenged on the grounds of anticipation and want of subject-matter. Utility is unquestioned and infringement admitted. The trial judge found for validity and from that finding this appeal is brought.

The process deals with meltable materials such as glass, slags and other minerals and mixtures of which silica alumina and lime are the chief constituents. It consists of the delivery of a continuous thin stream of molten substance on to a rapidly rotating disc. The effect of this is to break the stream into small particles and by its rotatory force fling them off the disc to trail into very fine threads or filaments which drop in a "jack-straw" arrangement beneath. The product resembles ordinary sheep's wool and is used for many purposes of insulation.

The methods of the art in 1933 when the patent was issued were somewhat simple and limited. Glass wool was made by what was known as the Gossler process which consisted of causing molten material to drop through small openings on to a revolving drum around which the glass was drawn in fine fibres. When the skein was full the drum was stopped and the wool cut and removed. It was then fluffed manually to produce the condition necessary to insulation properties.

Slag and minerals were reduced to wool by subjecting the molten stream to a blast of air or steam. This dispersed the material into small droplets and at the same time forced them through the air to tail off into very fine threads.

In both of these operations there was present in the wool more or less of particles of the material which had not been spun out. These were called shot, and the grade

of the product was determined largely by the quantity of this unspun material present. In both, also, the length of, and, in fact, the property of being convertible into the fibre depended on the viscosity of the substance used. This is measured by the range between the fusing and the hardening points, beyond which the meltable substance cannot be pulled or spun to fibre.

There is no doubt that there was a commercial pressure for over fifty years before the issue of the respondents' patent for improved means of utilizing waste slags, chiefly from the vast steel and iron industry developed during that period; and from the beginning of the present century there has been a steadily expanding field and demand for the use of these insulation materials. The search, therefore, for more efficient means and processes for the production of glass and mineral wool has, for over a quarter of a century, been general and persistent.

The point of anticipation can be disposed of shortly. The test laid down in the cases cited in the judgment below rules out the patents mentioned in the particulars of the defence. It must, in my opinion, be taken that no one who was facing the problem posed, upon being presented with any of them, would be able to say: "that is what I am seeking". This objection, therefore, fails.

The remaining contention of the appellant is in substance this: the principle of disintegration of molten material by means of a rotating disc has long been a matter of common knowledge; that of the production of fine fibres by propelling globules of molten material, of suitable viscosity, through the air, equally so: the bringing together of these two well-known operations by the method challenged was an ordinary extension of the art and not one which called for the exercise of invention.

Is, then, the new method but an ordinary and inevitable step from the two principles already mentioned? On this the patent of 1876 by Elbers (exhibit "M"), who was associated with the production of mineral wool in the United States from its beginning, and his observations on the art to that time are of significance. He says:

> This invention has for its object to provide means for reducing molten scoriaceous substances to a fibrous condition, for producing what is known as "mineral wool". Heretofore such reduction was usually effected on scoriaceous substances by a jet of air or steam propelled through or against a stream of molten slag or scoria; but in practice I

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have found that, upon striking the flowing mass, the force of the jet of steam or air is spent to a greater or less degree, and the reduction consequently not as perfect as it would be if less changeable power were applied. In the production of mineral wool a very considerable proportion of objectionable bead-like globules is therefore produced, simply because the jet of air or steam does not remain sufficiently powerful to follow all the parts of the diffused matter and reduce them in proper manner.

My invention consists in the use of a rotary paddle-wheel, which I apply to the molten scoriaceous matter.

* * *

Heated or cooled air or steam may be used in connection with my process and apparatus. Thus, in order to prevent the diffused particles of slowly-solidifying mineral wool from reuniting on contact, they may be thrown into or through a current of cold air, which may assist in further dividing or reducing the particles which fly from the wheel.

* * *

I am aware that shot has already been produced by the centrifugal force of a rotary disk, upon whose face the molten metal was poured; and this I do not claim, as my invention refers to the production of mineral wool, and to the use of a wheel having projecting paddles, that strike the molten mass as they revolve, and affect it mechanically.

That language, stressed by the appellant, indicates to me that the possibility of using the centrifugal force of the rotating disc as the propellant of particles to elongate them into fibres quite missed the inventor. He was anxious to disclaim the production of shot and equally to emphasize the use of the mechanical force of a paddle to produce wool. This specification was made in 1876. In an article published by him in 1899 (exhibit "E"), the history of mineral wool production is fully given. There is in it no reference to the invention of 1876, and the only process mentioned for other material than glass is that of the steam jet. This paper not only evidences the interest and authority of Elbers in the art itself, but it confirms the fact that the utilization of centrifugal force for the spinning action had never suggested itself to his mind.

Underlying Mr. Herridge's argument that all that remained to be done in order to convert the shot produced by rotatory disintegration into fibre was to use material having the necessary viscosity, is, I think, the fallacious assumption that ordinary skill could perceive that the centrifugal force imparted by the rotating disc would adequately serve as the required propellant for the disintegrated material. That, in my opinion, goes to the essence of the discovery and is the point for determination. In the documentary history of the prior art presented by

Mr. Herridge, nothing is disclosed to indicate appreciation of that possibility. The disc operation could disintegrate and disperse, that was familiar; but that its rotatory force could at the same instant be utilized for whirling the minute particles through the air and into fibres does not appear until the invention of the respondents.

There is no evidence that any of the patented processes claimed to be anticipations were ever put into practical use and the respondents raise the point that nothing in them can, therefore, be taken to support the application of the principle of analogous user. But even if it were assumed that there is sufficient in the case to justify the conclusion that the method of disc disintegration was one that had seen actual use, it cannot, in my opinion, be said that the adaptation of such a machine to produce glass wool through a combined action of disintegration and propulsion is analogous to disintegration alone for entirely different purposes. It is a new use with a new product not cognate in any sense of patent law with the previous operation or its product.

The question remains, then—and it is the same if we treat the matter as well from the standpoint of a step in advance of the general knowledge of the art—did the recognition of the possibility of the new use of the disc involve an act of the inventive faculty? Was the function of propulsion by the disc for the purpose of reduction to fibre so near to that involved in disintegration merely that we have here simply the act of adapting the disc to another use that would occur to any skilled worker who set his mind to the problem? I cannot think so. To elude the experimenters for over fifty years is evidence of the existence of a barrier, or a lack of kinship, between the two conceptions that in the minds of skilled workers kept them apart.

In an article published in 1923 in the Journal of the American Ceramic Society on Glass Wool Heat Insulation in Europe (exhibit "B"), A. D. Saborsky furnishes a detailed account of the development of this art in Europe during the last war. He states that, up to the year 1914, the manufacture of glass wool was by the crude and simple method of melting the tip of a glass rod over a flame, seizing the forming drop by another glass rod in the hand of the operator and, by a quick twist, throwing it over a

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hand-operated rotating drum. Around this the soft glass was pulled in fine threads. The machine used had a number of glass rods clamped in a horizontal position; these were fed gradually into the gas flame and turned slowly to make the heat even. Later on, "the biggest advance" in the spinning was by the

> very obvious and long-delayed improvement of placing the revolving drum underneath the falling glass drops * * * This simple improvement proved to be so basic in the art, that very strong patents were obtained on this feature.

The next step was to substitute a direct flow of molten glass from the furnace instead of using glass rods. After much experimenting, a method for that was finally achieved and, from 1922, the use of glass rods discarded. Between that year and 1930, when the respondents' application was filed in Germany, the so-called Gossler process held the glass wool field alone.

Saborsky's description of the intense development work in Germany is of some interest:

> In 1914 the War started, and with it an immediate and entire lack of asbestos importations for Central Europe set in, aggravated by a still greater necessity for the preservation of fuel. Glass wool, whose excellent insulation qualities were already recognized, was then called upon irrespective of cost. A firm of ship chandlers in Hamburg, who up to that time had carried a line of asbestos insulations, started to supply the rapidly growing demand for glass wool, at first employing the crude manufacturing methods then available. Gradually as they found themselves unable to comply with the steadily increasing demand, different methods to improve the manufacture were repeatedly tried, put into production and abandoned again, when better ways were discovered. In this way they covered the ground from the semi-manual making of glass wool from glass rods to present-day automatic production directly from a vat of molten glass, with scrap glass as the raw material.
>
> * * *
>
> Several patents were obtained during the development of the manifold processes and machines. All thinkable possibilities were tried, out of which the present machines finally crystallized. This process of producing glass wool directly from a molten mass of glass is new, and has been well protected in all civilized countries.

"All thinkable possibilities," however, did not include the process of a rotating disc. That the use of such a disc in disintegrating slags for cement purposes was well known in Germany at that time—1923—can be taken without much hesitation. One patent put in evidence specifically claims it. Fellner (exhibit "H") was a manufacturer of Frankfort-on-the-Main and his patent is put forth by the

appellant as an anticipation because of this particular feature; then, of course, there is the contention that such a use was part of the common knowledge of the industry. It is, therefore, a significant commentary on the quality of the ingenuity behind the patent of the respondents that, through that period of intense groping for a new method, no mind associated the well-known disc with the purpose before it. There is, too, a striking illustration of the fact that simple solutions are sometimes most invisible, in the evolution of the Gossler process. "The simple improvement," as Carlson calls it, of moving the drum under the molten glass rods and allowing the drops to fall by gravity did not occur to any person until toward the end of the last war.

The challenged process, moreover, realizes substantial advantages over the prior methods. It eliminates, by its mechanical separation of the shot, the necessity for carding the wool; it is continuous in operation; it produces about ten times the quantity of glass wool as the Gossler machine; its fibre is exceedingly fine with a low shot content; and it offers in addition to these advantages a practical method of production not calling for high capital outlay and available for limited markets.

The appellants have obtained patents for the infringing process. The testimony of the witness Richard Buss shows experimental work of over one and a half years in developing the metal and apparatus. It seems to have been a chance suggestion from his brother, who was familiar with centrifugal machines, which lead to experimentation with the disc method. But this discovery, as well as that of the respondents, came at the end of a long period of baffled effort in the field generally, and that circumstance seems to be most significant to the question raised.

I agree, therefore, with the trial judge that there was patentable subject-matter in the invention of the respondents.

A further defence was raised as to the right of the respondents to maintain the action. The original plaintiff claimed to be the exclusive sub-licensee of the added plaintiff, Owens-Corning Fiberglas Corporation, under exhibits 3, 4 and 5: but that these documents conveyed

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such an interest was seriously challenged. The capacity of the added plaintiff, in turn, was alleged to be that of exclusive licensee of the patentee. There does not appear to be any doubt of that fact, and the inclusion of the corporation in the action cures any defect in parties of beneficial interest. The patentee was a corporation of Holland and, by the provisions of the regulations respecting Trading with the Enemy (1939), the legal title to the patent has been vested in the defendant Custodian. All interested parties are, therefore, before the court and whether as plaintiff or defendant would not, in the circumstances, appear to be material.

The appeal should, therefore, be dismissed with costs.

Appeal allowed and action dismissed with costs throughout.

Solicitor for the appellant: *William A. MacRae.*

Solicitors for the (plaintiffs) respondents: *Smart & Biggar.*

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Oct. 6.
Oct. 18.

LE COMITE PARITAIRE DE L'INDUSTRIE DE L'IMPRIMERIE DE MONTREAL ET DU DISTRICT (PLAINTIFF). } APPELLANT;

AND

DOMINION BLANK BOOK COMPANY LIMITED (DEFENDANT) ..... } RESPONDENT;

AND

DOMINION BLANK BOOK COMPANY LIMITED EMPLOYEES' ASSOCIATION (MISE-EN-CAUSE).

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

Appeal—Jurisdiction—Collective labour agreement under The Professional Syndicates Act—Decree by Lieutenant-Governor in Council under The Collective Agreement Act—Whether relations between employer and employees to be governed by the decree or the agreement—Judgment by trial judge, declaring agreement void in so far as incompatible with decree, reversed by the appellate court—Motion for leave to appeal—Matter in controversy—Future rights—Matter of sufficient general importance—Supreme Court Act, section 41—The

PRESENT:—Rinfret, Davis, Kerwin, Hudson, Taschereau and Rand JJ.

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Professional Syndicates Act, R.S.Q., 1941, c. 162—The Collective Labour Agreements' Act, (Q) 1 Geo. VI, c. 49; 2 Geo. VI, c. 52; 4 Geo. VI, c. 38.

The appellant brought an action against the respondent, praying *inter alia* that a collective labour agreement, entered into between the respondent and its employees' association, mise-en-cause, under the provisions of *The Professional Syndicates Act,* be declared illegal and set aside, and that the respondent be ordered to abstain from denying to the inspectors of the appellant access to its premises to inspect its books, etc., under the authority of a decree made by the Lieutenant-Governor in Council under *The Collective Agreement Act.* The respondent contended that it was not subject to the decree, as the latter concerned the printing industry and printing was not its principal business; and it also pleaded that, after the promulgation of the decree, a collective labour agreement entered into between it and its employees became the law of the respondent and its employees and that they were no longer subject to the decree. The Superior Court maintained the appellant's action; but the judgment was reversed by the appellate court. The appellant moved before this Court for special leave to appeal, on the grounds that the issue between the parties involved future rights, as upon the decision to be rendered depends whether the relations between the respondent and its employees should be governed by the decree or by the agreement, they being inconsistent with each other, and that an important matter ought to be decided as to whether there was an implied partial repeal of the provisions of *The Professional Syndicates Act* by the provisions of *The Collective Agreement Act.*

Held, that special leave to appeal should be granted. The matter in controversy in the appeal "involves matters by which rights in future of the parties may be affected" (*Supreme Court Act, s. 41*), and is of sufficient general importance to justify this Court in granting leave to appeal.

MOTION for leave to appeal to this Court, from the judgment of the Court of King's Bench, appeal side, province of Quebec, reversing the judgment of the Superior Court, Bertrand J., and dismissing the appellant's action.

The appellant brought an action against the respondent, praying that a collective labour agreement entered into between the respondent and its employees association, mise-en-cause, under the provisions of *The Professional Syndicates Act,* be declared illegal and set aside, that the respondent be ordered to abstain from denying to the inspectors of the appellant access to its premises to inspect its books, etc., under the authority of a decree made by the Lieutenant-Governor in Council under the *Collective Agreement Act,* that an interlocutory injunction granted to that effect be confirmed and that the respondent be ordered to pay to the appellant $105 as damages. The

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respondent, by its plea, contended that it was not subject to the decree concerning the printing industry; that, even if the respondent did exercise a trade contemplated by the decree, the latter did not apply to it because printing was not its principal business; and, finally, when the respondent, after the promulgation of the decree, formed with its employees a professional syndicate and deposited a collective labour agreement, permissible under *The Professional Syndicates Act,* with the Minister of Labour, that this collective labour agreement became the law of the respondent and its employees and they were no longer subject to the decree. The judgment of the Superior Court maintained the appellant's action, declaring the agreement void in so far as incompatible with the terms of the decree, confirming the interlocutory injunction and condemning the respondent to pay to the appellant $38.80 as damages. This judgment was reversed by the appellate court: Galipeault and St. Germain JJ. being of the opinion to dismiss the appellant's action because the *Collective Agreement Act* under which the decree had been made did not affect the power to enter into agreements between employers and employees under the *Professional Syndicates Act,* an agreement under that statute being valid even if made subsequently to the decree, within the latter's field of operation and in terms incompatible with its provisions; St. Jacques J. being of the opinion that if the agreement was radically void an action to set it aside was useless and that an injunction was not the proper remedy under the circumstances; Marchand J. being of the opinion that the judgment of the Superior Court was not sufficiently precise in not indicating what part of the agreement was void and further that the injunction was a mandatory one and such an injunction is not known to the laws of Quebec; and Barclay J. being of the opinion that, while the action was well founded, the order was too vague and the case should be remitted to the Superior Court to make it more precise. The appellant moved for leave to appeal to this Court.

Aimé Geoffrion K.C. for the motion.

L. E. Beaulieu K.C. contra.

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THE COURT.—We have come to the conclusion that special leave to appeal should be granted in this case.

In our view, the matter in controversy "involves matters by which rights in future of the parties may be affected" and is of sufficient general importance to justify this Court in granting leave.

The costs of the application will follow the event of the appeal.

Leave to appeal granted.

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of the immunities conceded to a foreign sovereign and his property. The general language of the enactments imposing the taxation in question must be construed as saving the privileges of foreign states under the principles above stated. (It was pointed out that the principles governing the immunities of a foreign sovereign and his diplomatic agents and his property do not limit the legislative authority of the legislature having jurisdiction in the particular matter affected by any immunity claimed or alleged.) *Per* Rinfret J.: A principle of international law which has acquired validity in the domestic law of England and, therefore, in the domestic law of Canada, is that a foreign minister is not subject to the laws of the state to which he has been sent as a diplomatic representative; he enjoys an entire independence from its jurisdiction and authority; consequently, he is exempt from the jurisdiction of its courts. It is a necessary consequence of the legal impossibility of collecting the taxes against foreign states or diplomats that such taxes may not be assessed and levied on the properties owned and occupied by them and used for diplomatic purposes; nor, consistently with principle, can the municipal corporation create any effective charge upon the property, because, as this would affect the price for which the property could be sold later to an ordinary purchaser, it would only be an indirect way of coercing the foreign state. *Per* Taschereau J.: It is a settled and accepted rule of international law in practically all the leading countries of the world, that property belonging to a foreign government, occupied by its accredited representative, cannot be assessed and taxed for state or municipal purposes. The immunity of the foreign minister from legal process in the country where he is sent extends to the property of his state, which is exempt from all forms of taxation. It is with this in mind that the *Assessment Act* of Ontario must be read. Concurrence expressed with the reasons of the Chief Justice. *Per* Kerwin J.: On the basis that the questions submitted refer to the powers of the councils of the municipal corporations to impose assessments, taxes and charges, and not to their powers or those of the corporations acting through their officers and agents to compel payment of these taxes, questions 1 and 4 should be answered in the affirmative. As to the properties owned by the foreign states, there is nothing to prevent the ordinary procedure being taken (whatever may be the ultimate result thereof), that is, for the assessor to enter them on the assessment roll and the countries concerned as owners thereof, and for the collector's roll to be prepared and for the proper municipal authorities to enter in that roll the amount of taxes

ASSESSMENT AND TAXATION—
Continued

either for general or special rates or assessments; and for the tax collector to send a notice in the usual form showing the amount of taxes. *Per* Hudson J.: Questions 1 and 4 should be answered in the affirmative, meaning thereby that the council of the municipality can impose such taxes, but this is qualified by the fact that assistance of the courts would not be given to enforce payment so long as the diplomatic immunity continued. The Dominion has the right to give a status to diplomatic representatives, and the Province is bound to recognize their status, but not necessarily bound to accord them privileges in matters falling within provincial legislative jurisdiction under s. 92 of the *B.N.A. Act;* the granting of the status does not carry with it immunities from provincial laws beyond those immunities recognized by the provincial legislature. There is no legislation of Canada or of Ontario granting immunities in respect of foreign legations, so that, if any exist, it must be by virtue of general principles of international law or of imperial legislation, having the force of law in Ontario. A consideration of the extent of such immunities under such principles and legislation leads to the conclusion that a court would be bound to hold that in Ontario no action could be proceeded with against any foreign sovereign or state or its diplomatic representatives who pleaded immunity, in respect of taxes imposed by municipal corporations, and the same rule would apply to any proceedings in court calculated to disturb their occupation of the land. But such immunity or privilege is one from action or molestation; it does not destroy liability. The Ontario legislature, which is supreme in the matters of municipal institutions and property and civil rights in the province, has not seen fit to exempt the land used for legations from municipal taxes. The tax when imposed creates a lien and charge on the land; and, on severance of diplomatic relations or disposal of the land by the foreign state or its representative, the lien might well become effective. Again, a substanital part of municipal taxation is imposed to pay for the services rendered by the municipality, such as water, sewerage, etc., which it would have a right to withhold until taxes are paid.—(References were made in the opinions to distinction between taxes which constitute payment for services rendered for the beneficial enjoyment of the particular property in respect of which they are assessed (as water rates, etc.) and those which are levied for general purposes. As to the first class: Per the Chief Justice: There is no obligation to provide the envoy from a foreign state gratuitously with water, or electricity, and it would be generally agreed that

CONSTITUTIONAL LAW—*Continued*

of persons seeking to avoid payment of the land tax. Under the system of municipal assessment and taxation provided by the *Municipal District Act,* the tax is a land tax, and the means authorized for enforcing payment are generally of the same type as those which have been employed by the provinces for that purpose for over fifty years. The liability of the owner, or of a purchaser or a mortgagor with even an economic interest of the slightest, to pay taxes on the assessed value of the land is a liability which has in a pecuniary sense no necessary relation to the value or nature of the taxpayer's interest in the land. Furthermore, the special lien which is created by section 354 is enforceable by the statutory proceedings under which the interest of everybody in the land, excepting the interests specified in the enactment, is extinguished by the sale; subject to a recognition of these interests, the land, irrespective of the persons who may have legal interests in it, is treated as an economc thing upon which a contribution by way of a tax is levied and which may, if necessary, be sold for the purpose of obtaining payment of that contribution. A provincial legislature cannot delegate to a municipality authority to levy a tax which it cannot levy directly: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* ([1896] A.C. 348, per Lord Watson at 364). But there is no ground upon which it can be affirmed that a direct tax upon land, or in relation to land, loses its character as a direct tax by reason of the fact that moneys due in respect of it are declared to be a lien upon the crops grown upon the land both before and after severance, as provided by section 31. As to the point raised that the personal liability to pay imposed by section 354 (*a*) (4) is in effect an indirect tax because the taxpayer will seek to recoup himself from the persons directly liable to pay the tax, it must be observed that the tax is a single tax which when once paid is extinguished and until paid is a lien on the crop. A purchaser of the crop takes it *cum onere.* Furthermore, the persons affected are prohibited from receiving, or accepting any such crop or any part of the proceeds of the sale of such crop until the tax has been paid. Also, if certain provisions of the *Bank Act* and other Dominion statutes conflict with section 31, it may be that, to that extent, this section will be overborne by such Dominion legislation in particular cases in which a conflict arises. Assuming the primacy of the first-mentioned legislation, and that the provincial legislation would be displaced in case of such a conflict, it does not follow that the provincial legislation is *ultra vires;* the provisions of the *Tax*

CONSTITUTIONAL LAW—*Continued*

Act have full effect in all cases in which the facts do not bring the Dominion legislation into play. *Attorney-General for Ontario* v. *Reciprocal Insurers* ([1924] A.C. 328, at 345, 346); *McColl* v. *Canadian Pacific Railway Co.* ([1923] A.C. 126, at 135). As to section 88 of the *Bank Act* and especially subsections dealing with seed grain, fertilizer and binder twine, it must be observed that, while the Dominion Parliament has exclusive jurisdiction in relation to banks and banking, it does not follow that banks are taken out of the province. They remain within the province and subject to validly enacted provincial laws: they and their property are subject to taxes imposed by a province in the lawful exercise of its authority in relation to direct taxation. *Canadian Pacific Railway Co.* v. *Parish of Notre Dame de Bonsecours* ([1889] A.C. 367). But the question whether a lien arising under these provisions of the *Bank Act* possesses priority over a tax lien as the one in this case, ought to be reserved for decision in a concrete case between a bank and the taxing authority. The effect of the provisions of section 31 is not to impose a liability upon persons and corporations outside the province. *Attorney-General for Ontario* v. *Reciprocal Insurers* ([1924] A.C. 328, at 345). *Per* Rinfret and Taschereau JJ.—The legislation enacted by section 31 is nothing else than legislation in municipal matters imposing a municipal tax and providing security to assist in the collection of that tax. Such legislation was meant to be confined to local transactions, and it must be so construed; it is legitimate taxation within the province in the exercise of the powers devolved upon provincial legislation in relation to municipal institutions in the province, within the provisions of section 92 B.N.A. Act. If, in a sense, such legislation affects subject-matters reserved to the Dominion Parliament it does so only collaterally and in no wise so as to entail unconstitutionality or, as a consequence, invalidity. Charges or imposts, authorized by provincial legislation, acting within its sphere, ought not to be declared unconstitutional upon the ground of an apparent conflict or a dispute, as to the priority, between a lien, such as the one enacted in section 31, and liens created by Dominion legislation. In such case, it would be purely a matter for the courts to decide and to adjudge the respective priorities enacted by Dominion and provincial legislation: *Silver Brothers Ltd.* v. *Hart* ([1932] A.C. 514; [1929] S.C.R. 557). Also, section 31 is not directed to trade and commerce as understood under the decided cases, not to any of the specific heads of section 91 B.N.A. Act; and if it affects any of the matters under that sec-

COPYRIGHT—*Musical work performed on coin-operated gramophone placed in restaurant under arrangement between owner of gramophone and owner of restaurant—Injunction asked by owner of public performing right in the musical work—Copyright Amendment Act, 1931 (Dom., 1931, c. 8) and amendments—Effect or application of subs. 6 (a) of s. 10B—Copyright Act (1921, c. 24; R.S.C. 1927, c. 32).*]—Defendants V. Bros. carried on the business of installing in restaurants, etc., and looking after, electrically operated phonographs, with disc records, so arranged that a musical work could be performed by depositing a coin in the machine. They installed such a machine (with records, which were changed from time to time) in the restaurant of defendant R. Co., under arrangement that V. Bros. received $10 per week and, subject to that, the receipts from performances went to R. Co. Plaintiff society owned the public performing right in a musical work "Star Dust", which was performed by said machine in said restaurant, and sought to restrain defendants from public performance thereof. Under *The Copyright Amendment Act, 1931,* (Dom., 1931, c. 8) as amended, a society, etc., carrying on a business such as plaintiff's (dealing in performing rights) must file at the copyright office lists of musical works in current use in respect of which it has the right to grant performing licenses, and file statements of all fees, charges or royalties which it proposes during the next ensuing year to collect, in respect of performance of its works in Canada; and in case of neglect to file such statements, action to enforce any remedy for infringement is forbidden, without written consent of the Minister. After certain proceedings, such statements are considered by the Copyright Appeal Board and, with any alterations made therein by the Board, are certified by it as approved. The statements so approved are to be the fees which the society may sue for or collect in respect of the issue or grant by it of licenses for performance during the ensuing year, and it shall have no right of action for infringement against any person who has tendered or paid the approved fees. By subs. 6 (*a*) of s. 10B, in respect of public performance by

COPYRIGHT—*Continued*
gramophone (in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made), no fees, etc., are collectable from the owner or user of the gramophone, but the Board shall, "so far as possible", provide for the collection in advance from gramophone manufacturers of appropriate fees, etc., and shall fix the amount of the same. Plaintiff had filed a statement of fees, etc., which it proposed to collect for grant of licenses, including license for public performance of "Star Dust", and by the kind of machine in question; but the Board had not, under said subs. 6 (*a*), provided for the collection in advance from gramophone manufacturers of fees, etc., covering such a performance; and defendants had paid no fee, charge or royalty. *Held, per* Rinfret, Kerwin and Taschereau JJ. (the majority of the Court): Plaintiff was entitled to an injunction. The absence of provision by the Board for collection from the gramophone manufacturers under said subs. 6 (*a*) did not justify defendants in giving the public performance complained of. Subs. 6 (*a*) forms part of the *Copyright Act* (R.S.C. 1827, c. 32) and stands to be construed in the light of all the provisions of that Act. As no fee, charge or royalty had been paid by or for defendants, they had acquired no right to such performance. It was to no purpose to argue that, though plaintiff had complied with the Act, the Board had not, so far, provided for collection from the gramophone manufacturers. In the circumstances, plaintiff's rights, and remedy by injunction against infringement thereof, under general provisions of the *Copyright Act,* remained unaffected. A license from a copyright owner permitting the manufacture of phonograph records does not by itself entitle the purchaser of a record from the licensee to use it for the giving of public performances. *Per* the Chief Justice and Davis J.: As to public performances coming under said subs. 6 (*a*), it is clear from the statutory provisions that owners or users of gramophones have a statutory license for which no fees, charges or royalties are to be exacted from them; their statutory license is not in any way conditional upon the actual payment of fees prescribed by the Board and payable by gramophone manufacturers. Further, a supposed statutory intention that such owners or users, who are relieved from payment of charges, should be exposed to proceedings by owners of performing rights, and might be obliged, for permission to perform, to pay any charge demanded, would be a result quite incompatible with the policy of the legislation. (It was pointed out that a public performing right is a statutory right resting upon

CRIMINAL LAW—*Continued*

2.——*Perjury—Declaration made by vendor pursuant to Bulk Sales Act—Statement proved to be false—Whether offence is perjury under section 172 Cr. C.—Substitution of lesser offences under sections 175 and 176 Cr. C.—Criminal Code, sections 170, 171, 172, 173, 174, 175, 176, 951 (1), 1016 (2)—Bulk Sales Act, R.S.B.C. 1936, c. 29—British Columbia Evidence Act, R.S.B.C., 1936, c. 90.*—The *Bulk Sales Act* of British Columbia provides that the vendor of any stock in bulk shall give to the purchaser a list of his creditors with the amount of all accounts owing by him in connection with his business. Such statement had to be verified by the solemn statutory declaration of the vendor. The respondent sold his café business and gave the required statement to the purchaser, declaring that he did not owe any debts. The declaration proved to be false and he was convicted on a charge of perjury. The conviction was quashed by a majority of the appellate court. *Held,* affirming the judgment appealed from (58 B.C.R. 51), Kerwin and Hudson JJ. dissenting, that the respondent did not give a false statement under oath while called as a witness in a judicial proceeding (s. 170 Cr. C.) nor did he give a false oath in a judicial proceeding in the manner contemplated by section 172 Cr. C., and therefore, cannot be charged of having committed the crime of perjury under these sections. *Per* Rinfret and Taschereau JJ.: Section 170 Cr. C., defining perjury, enacts that it may be committed only "by a *witness* in a judicial proceeding"; and section 172 Cr. C. provides that "every one is guilty of perjury who * * *". So, any violation of this last section amounts to *perjury:* it must necessarily be perjury as defined in section 170 Cr. C. and, therefore, in a judicial proceeding. *Per* Davis J.: The concluding words of section 176 Cr. C.: "makes a statement which would amount to perjury if made on oath in a judicial proceeding" show that section 172 Cr. C. is limited to false statements made on oath in a judicial proceeding. *Per* Kerwin J. dissenting: Section 172 Cr. C. contains no reference to section 170 Cr. C. nor does it state that the enumerated acts must be done by a witness or in a judicial proceeding. By section 172 Cr. C., Parliament has enacted that every one who does the things specified is guilty of a crime (perjury). In view of the plain language of that section, a person falling within its terms is just as guilty of what Parliament has chosen to call perjury as one who falls within the ambit of section 170 Cr. C.—The respondent's solemn statutory declaration contains the statement that such declaration was of the same force and effect as if made under

CRIMINAL LAW—*Continued*

oath and by virtue of the *Canada Evidence Act.* The declaration having been proven to be false, the respondent was guilty of perjury under section 172 Cr. C. *Per* Hudson J. dissenting: The taking of the statutory declaration falsely, by the respondent, is perjury within the meaning of section 172 Cr. C. As to the question whether or not a conviction could or should have been made for a lesser offence under sections 175 and 176 Cr. C., pursuant to sections 951 (1) and 1016 (2) Cr C., *Held* that the respondent could not have been found guilty under 176 Cr. C. *Per* Rinfret and Taschereau JJ.: There is no evidence that the commissioner, before whom the respondent gave the statutory declaration, was an officer authorized by law to receive a statement or a declaration of the particular character mentioned in section 176 Cr. C.—No opinion expressed as to whether that section contains the elements of a lesser offence. *Per* Davis J.: Perjury, as defined in the Criminal Code (s. 170) does not "include" the commission of the offence defined in section 176 Cr. C.; and perjury was the only offence charged in this case. *Per* Kerwin J.: The offence dealt with in section 176 Cr. C. is not a lesser offence but a different one, as the declaration mentioned therein simpliciter is not the same as the statutory declaration referred to in section 172 Cr. C. *Held,* also, that it is not open to this Court to decide the question whether the respondent may have been found guilty of a lesser offence under section 175 Cr. C., as there was no dissenting opinion on that point in the Appellate Court. THE KING *v.* ORFORD **103**

3.——*Evidence—Statements by accused to police officers before charge or arrest made—Admissibility.*]—The appeal was from the affirmance by the Court of Appeal for Manitoba (two Judges dissenting) of appellant's conviction of having unlawfully received gasoline ration books, knowing them to have been stolen. Two police officers, bearers of a search warrant, had gone to appellant's home (before any charge or arrest was made) and talked to him, one of them, H., stating that "it would be better" for appellant to return the books. At the end of their visit they told appellant that he was to accompany them to the police barracks to talk to A., a police inspector, who, on their arrival, talked to and questioned appellant. Later some gasoline ration books were received by the police from some person through the mail. At the trial, evidence was given by the police officers of statements by appellant in the aforesaid interviews, the evidence of A. in this respect being that mainly relied on by the magistrate in con-

DAMAGES—*Continued*

public street, were struck by an automobile operated by one of the respondents and owned by his father, the other respondent, and they were so severely injured that the wife died within a few hours and the daughter within a few days thereafter. The appellant brought two actions, one as administrator of his wife's estate for damages for loss of expectation of her life under the *Administration Act* and also for damages for his benefit personally as husband and for the benefit of her daughter (represented by him as her administrator) under the *Families' Compensation Act;* and, in the second action, the appellant sued as administrator of his daughter's estate for damages for loss of expectation of her life. The two actions were consolidated; and the respondents admitted liability. The trial judge awarded damages, first, under the *Administration Act,* for loss of wife's expectation of life, $1,000, and for loss of child's expectation of life, $750, and, secondly, under the *Families' Compensation Act,* for loss of wife's services, $125; and the trial judge added that "the above amounts are without abatement". The appellant, as administrator of his wife's estate, appealed to the Court of Appeal on the ground that the damages of $1,125 were insufficient; and the respondents cross-appealed on the ground that nothing should have been awarded for loss of the wife's services. Both the appeal and the cross-appeal were dismissed. *Held,* affirming the judgment of the Court of Appeal ([1942] 3 W.W.R. 719), that the appeal to this Court should be dismissed with costs. The principle of law applicable to a claim for compensation in cases as the present one has been clearly stated by the Judicial Committee in *Grand Trunk Railway Co. of Canada* v. *Jennings* (13 App. Cas. 800), where it was held that the right to recover damages is restricted to the actual pecuniary loss sustained. Under the circumstances of this case and applying such principle to the evidence, which is meagre and inconclusive, it cannot be held that the trial judge and the majority of the appellate court were clearly wrong, and this Court ought not to interfere with the assessment of damages. *Per* Rinfret, Hudson and Taschereau JJ.—The point raised by the appellant, that the trial judge failed to allow to the estate of the infant, for the death of the mother, damages to which the infant was entitled under the *Families' Compensation Act,* is not well founded. The Court is entitled to inform its mind of subsequent events throwing light upon the realities of the case: *Williamson* v. *John I. Thornycroft and Co.* ([1940] 2 K.B. 658). Although the amount allowed for loss of expectaton of life is not questioned, it cannot be ignored when considering the award which should be made to the appellant in respect of the loss of his wife's services: *Davies* v. *Powell Duffryn Associated Collieries Limited* ([1942] A.C. 601). The total amount awarded under either headings went to the appellant himself, so that he received in respect of the two headings an aggregate of $1,125 in respect of the wife's death, and he recovered a further sum of $750 in respect of his child's death, both these events having taken place within a few days. Therefore, when the realities of this case are taken into account, the amount of damages awarded should not be disturbed. *Per* Kerwin J.—The expression used by the trial judge "The above amounts are without abatement" would be idle, unless it is construed as meaning that he had fixed the damages of the husband, under the *Families' Compensation Act,* at $1,125, and deducted from it the amount allowed under the *Administration Act.* And, in this, the trial judge did exactly what the House of Lords, in *Davis* v. *Powell Duffryn Associated Collieries Limited* ([1942] A.C. 601), decided was proper. Construing the direction for judgment in that way, there is nothing to indicate that the trial judge did not take into consideration all relevant matters. On the assumption that $1,125 was fixed as the damages under the *Families' Compensation Act,* there should not be an abatement of one-half of the $1,000 awarded under the *Administration Act* because the husband would be entitled to that proportion and the child, represented by her father as administrator, to the balance. The trial judge, the child having died, undoubtedly treated the matter in a realistic manner, knowing that the full amount allowed under the *Administration Act* would go to the husband. The gain in money to the husband under that Act accrued to him by reason of the death of his wife although one-half came from another source, and the total should therefore be deducted from the award under the *Families' Compensation Act.* PONYICKI *v.* SAWAYAMA..... **197**

DAMAGES—*Continued*

2.——*Amount—Personal injuries—Jury's award—Unreasonable amount—Mistaken view of the case—Case as put to the jury—Consideration of verdict by appellate court—New trial directed as to amount.*] —The action was for damages for injuries to plaintiff caused by his being struck by an automobile owned by one defendant and driven by the other defendant. At trial, upon findings of a special jury, judgment was given for plaintiff for $165,000; which was affirmed by the Court of Appeal for Ontario. Defendants appealed. *Held:* There should be a new trial,

EXPROPRIATION OF LAND— *Continued*

properly with its postponed value over its present market value. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. The future advantages, therefore, may be taken into account in determining the value of the property, but in so far only as they may help to give to the property its present value. (*Cedars Rapids Manufacturing and Power Co.* v. *Lacoste*, [1914] A.C. 569, at 576). *Held*, also, that the owner was entitled to interest at 5 per cent. per annum from the date the land was taken by the Crown to the date of the judgment of this Court, for, an appeal having been taken to this Court, the date of its judgment becomes "the date when judgment is given" within the meaning of s. 32 of the said *Expropriation Act*. (The discretion of the Minister of Finance to allow interest under s. 53 of the *Exchequer Court Act* may be exercised only from the date of the final determination of the amount until payment by the Government). THE KING *v.* ELGIN REALTY CO. LTD. 49

2.—*Expropriation by railway company —Amount of compensation—Method of valuation used by trial judge—Appellate court will interfere on question of quantum, when satisfied that amount allowed by trial judge is clearly excessive—Lands not subdivided into lots—Evidence, as to value of lands, tendered and accepted as if so subdivided—Trial judge proceeding on wrong principle in fixing value on such evidence—Present value of all advantages which lands possess, present and future, to be fixed by trial judge—Damages must be assessed once and for all—No reservation to claimant of any right to recover further amounts.*]—About 29 acres of the lands of the respondent company were expropriated by the appellant railway company and were taken by the deposit of three plans, on November, 1936, October, 1937, and March, 1940. The respondent company, in October, 1940, brought an action for $47,480, being $28,820 as value of the lands at $1,000 per acre, $11,416.41 as damages to the lands and $7,244.19 as an amount alleged to be payable to the province of Quebec on the basis that a plan would be prepared later by the respondent subdividing the expropriated lands and that under a clause of an agreement with the province, a sum of $30 would have to be paid for every subdivided lot having an area of 5,000 square feet or less. The appellant company calculated its total liability at $50 per acre or a total of $1,441. The trial judge, estimating the value of the lands as if they were subdivided lots, awarded the sum of $28,820,

EXPROPRIATION OF LAND— *Continued*

being $1,000 per acre, deducted $7,532.40 representing the amount which may be payable to the province under the above agreement and $1,000 as the estimated cost of making and registering a plan of subdivision, added $3,000 for depreciation of neighbouring lots still owned by the respondent, and, as a net result awarded the respondent the sum of $23,287.60. The trial judge reserved the mines and minerals in the lands expropriated and also reserved to the respondent the right to recover from the appellant a sum of $7,244.19 or such other sum as the respondent would have to pay to the province and also any future damages resulting from the expropriation. The railway company appealed. *Held*, Rinfret and Taschereau JJ. disenting, that the appeal should be allowed, the judgment appealed from set aside and for it substituted a judgment reciting an undertaking of the appellant (set forth in the reasons for judgment) and declaring that the lands expropriated, excepting the mines and minerals therein and thereunder, are the property of the appellant. *Held*, also, Rinfret and Taschereau dissenting, that this Court ought to interfere on the question of *quantum*, as the amount allowed by the trial judge is clearly excessive. *Trudel* v. *The King* (49 Can. S.C.R. 501), and that, upon consideration of the facts and the evidence in the case, the indemnity to be granted for the lands and for all damages resulting from the expropriations should be reduced to the sum of $8,705. *Held*, also, that the trial judge, in fixing the value of the lands expropriated, proceeded upon a wrong principle, and that is always a ground upon which this Court will set aside an award. The trial judge proceeded upon evidence tendered and accepted as if the lands had been subdivided and did not fix the present value of all advantages which the lands possess, present or future. *Cedars Rapids Manufacturing and Power Co.* v. *Lacoste* ([1914] A.C. 569, at 576). Rinfret and Taschereau JJ. dissenting. *Held*, by the Court, that right to claim further sums from the appellant should not have been reserved to the respondent, as in expropriation cases damages must be assessed once and for all. In any event, the allowance of $7,244.19 or any part thereof, which the respondent may have to pay to the province under the agreement, could not be allowed as damages nor could it enhance the value of the lands expropriated and therefore, such allowance could not be claimed by the respondent from the appellant. *Per* Rinfret and Taschereau JJ. dissenting: This Court ought not to disturb the findings of the trial judge as to the valuation of the expropriated

6th of April, 1943, the service courts and service authorities of the United States of America may, subject to the provisions of the first-mentioned Order in Council, in relation to members of its forces (military, naval and air) present in Canada, or on board a Canadian ship or aircraft, exercise within Canada all such powers as are conferred upon them by the law of the United States in matters concerning discipline and internal administration. The code of discipline in force in the United States army is very sweeping in its provisions and seems to be broad enough to embrace almost any offence against the criminal law of this country. As to the jurisdiction of Canadian courts: First, as to land forces. There is no rule of law in force in Canada which deprives the Canadian civil courts (that is to say, non-military courts) of jurisdiction in respect of offences against the laws of Canada committed by the members of such forces on Canadian soil. The Canadian criminal courts do not in fact exercise jurisdiction in respect of acts committed within the lines of such forces, or of offences against discipline generally committed by one member of such forces against another member in cases in which the act or offence does not affect the person or property of a Canadian subject. Secondly, as to naval forces. The members of a crew of an armed ship of the United States are exempt from the jurisdiction of the criminal courts of Canada in respect of an offence committed on board ship by one member of the crew against another member of the crew and generally in respect of acts which exclusively concern the internal discipline of the ship. As regards offences committed on shore by members of the crew, they are not exempt from the jurisdiction of the criminal courts of Canada, but the criminal courts of Canada do not exercise jurisdiction in respect of such offences where the offence is one committed by one member of the crew against another member of the crew, except at the request of the commander of the ship. *Per* Kerwin and Taschereau JJ.: The members of the military and naval forces of the United States of America present in Canada with the consent of the Canadian Government for purposes of military operations in connection with or related to the state of war now existing, whether such members are attached to a unit or ship stationed in Canada or elsewhere or are absent on duty or on leave from their unit or ship stationed here, are exempt from criminal proceedings prosecuted in Canadian criminal courts. This immunity may be waived by the United States and in any event does not apply to members of the forces who may enter Canada as tourists

or casual visitors. The powers of arrest, search, entry or custody by Canadian authorities are not interfered with. *Per* Rand J.: The members of United States forces are exempt from criminal proceedings in Canadian courts for offences under local law committed in their camps or on their warships, except against persons not subject to United States service law, or their property, or for offences under local law, wherever committed, against other members of those forces, their property and the property of their government; but the exemption is only to the extent that United States courts exercise jurisdiction over such offences. *Per* The Chief Justice and Hudson J.: The United Kingdom has never assented to any rule of international law by which British courts are restricted in their jurisdiction in respect of visiting armies or members of them; in other words, no rule of international law, by which the visiting forces of an Ally in the United Kingdom would be exempt as of legal right from the jurisdiction of the British civil courts, has ever been a part of the law of England. This applies equally to Canada: the fundamental constitutional principle with which it is inconsistent is a part of the law of every province of Canada, the constitutional principle by which a soldier does not, in virtue of his military character, escape the jurisdiction of the civil courts of this country. Nothing short of legislative enactment, or its equivalent, can change this principle. *Per* Kerwin J.: The general rule is that every one in Canada is subject to the laws of the country and to the jurisdiction of its courts. But there are exemptions grounded on reason and recognized by civilized countries as being rules of international law which will be followed in the absence of any domestic law to the contrary. By international law, there exists an exemption from criminal proceedings prosecuted in Canadian criminal courts of the visiting members of the United States forces; and, as a result of the order in council of April 6th, 1943 (set out in the reasons), nothing that had been done by Canada should be taken as prejudicing or curtailing such exemption. The Government of Canada having invited into the Dominion the military and naval troops of the United States of America as a part of the scheme of defence of the north half of the Western Hemisphere and, therefore, not merely for the benefit of the United States but for that of both parties and, in fact, for the benefit of all allied nations in the present conflict, the invitation must be taken to have been extended and accepted on the basis that complete immunity of prosecution in Canadian criminal courts would be extended to members of the United States