1954

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LAW REPORTS

Supreme Court of Canada

Editors

ADRIEN E. RICHARD, B.C.L.
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JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Stuart Sinclair Garson, Q.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Ralph O. Campney, Q.C.
The Hon. W. Ross Macdonald, Q.C.

87583—1½

MEMORANDA

On the 22nd day of June, 1954, the Right Honourable Thibaudeau Rinfret, Chief Justice of Canada, upon attaining the age of seventy-five years, retired from the bench pursuant to s. 9 (2) of the *Supreme Court Act*, R.S.C. 1952, c. 259.

On the 1st day of July, 1954, the Honourable Patrick Kerwin, Puisne Judge of the Supreme Court of Canada, was appointed Chief Justice of Canada.

On the 1st day of July, 1954, the Honourable Charles Douglas Abbott, a member of the Queen's Privy Council for Canada and one of Her Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of Canada.

ERRATA

Page 93 fn. (3) for 550 read 555.
Page 159 fn. (1) and page 161 fn. (2), for O.L.R. read O.R.
Page 161 fn. (4) for 41 read 49.
Page 194 fn. (2) after [1925] insert A.C.
Page 196 fn. (2) for 306 read 396.
Page 558 line 38 for "dismissed" read "allowed".

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.

A. G. for Ontario and Others v. *Winner and Others* [1951] S.C.R. 887. Appeal dismissed and Cross-Appeal allowed, Winner to have costs, 22nd February, 1954.

Heaps Waterous v. *Trans-Canada Forest Products* [1954] S.C.R. 240. Petition for special leave to appeal dismissed with costs, 14th July, 1954.

Labour Relations Board v. *L'Alliance des Professeurs* [1953] 2 S.C.R. 140. Petition for special leave to appeal dismissed, 27th April, 1954.

Lipsett Engine v. *Trans-Canada Forest Products* [1954] S.C.R. 240. Petition for special leave to appeal dismissed with costs, 14th July, 1954.

Nisbet Shipping v. *The Queen* [1953] 1 S.C.R. 480. Petition for special leave to appeal granted, 29th March, 1954.

UNREPORTED JUDGMENTS OF THE SUPREME COURT OF CANADA

In addition to the judgments reported in this volume, the Supreme Court of Canada, between the 17th of December 1953, and the 19th of December, 1954, delivered the following judgments which will not be reported in this publication:—

Agar & Tolmie v. *Chatham Public General Hospital*, [1953] 1 D.L.R.736, appeal allowed, order of Court of Appeal set aside and judgment at trial restored, the Chief Justice and Kellock J. dissenting, November 1, 1954.

Bamford v. *Bowes*, [1953] 1 D.L.R. 440, appeal allowed and judgment at the trial restored with costs, December 18, 1953.

Calgary, City of, v. *Fuller* (Alta.) (not reported), appeal allowed and action dismissed with costs throughout, Taschereau and Kellock JJ. dissenting, January 26, 1954.

C.N.R. v. *Hucul* [1953] 10 W.W.R. (N.S.) 193, appeal allowed and action dismissed with costs throughout, June 26, 1954.

Colonial Coach Lines Ltd. v. *Garland* (Ont.) (not reported), appeal dismissed with costs throughout, Cartwright J. dissenting, April 12, 1954.

Cotie v. *County of Renfrew*, [1951] O.W.N. 75, appeal dismissed with costs, March 8, 1954.

Delisle v. *Speer & Adams*, Q.R. [1954] Q.B. 593, appeal dismissed with costs, December 9, 1954.

Deyo & Stevenson v. *Kingston Speedway* [1954] O.W.N. 232, appeal dismissed with costs, December 8, 1954.

Edmundston, City of v. *Le Bel* [1953] 1 D.L.R. 376; 23 M.P.R. 355; appeal dismissed with costs, October 5, 1954.

Farrugio v. *Langlais* Q.R. [1954] Q.B. 666, appeal dismissed with costs, November 22, 1954.

Foote v. *Moresby* [1953] 4 D.L.R. 128, appeal allowed and action dismissed with costs throughout, June 26, 1954.

Fortin v. *De Carufel* Q.R. [1952] Q.B. 404, judgment appealed from is modified, December 18, 1953.

Fraser v. *Fraser* (Ont.) (not reported), appeal dismissed with costs of motion to quash, March 31, 1954.

Gairdner Securities v. *Minister of National Revenue* [1952] Ex. C.R. 448, appeal dismissed with costs, January 26, 1954.

Hayden Warehouse v. *City of Toronto* [1953] O.W.N. 792, appeal dismissed with costs, October 5, 1954.

Humphreys v. *Pollock* 31 M.P.R. 190, appeal dismissed with costs, October 5, 1954.

Jeffs. v. *Matheson* [1951] O.W.N. 483, appeal allowed and judgment of the Court of Appeal set aside with the exception of paragraph 3 thereof. The judgment at trial is restored, March 19, 1954.

Koch v. *Watson* [1953] 10 W.W.R. (N.S.) 617, appeal dismissed with costs, May 19, 1954.

Kostiw v. *Kostiw* (Ont.) (not reported), appeal dismissed with costs, June 9, 1954.

Labrecque v. *Pigeon* Q.R. [1953] Q.B. 574, appeal dismissed with costs, Rand and Cartwright JJ. dissenting, November 1, 1954.

Lohnes v. *Sarty* 33 M.P.R. 191, appeal and cross appeal dismissed with costs throughout, June 26, 1954.

Manitoba Power Commission v. *Adams* [1953] 8 W.W.R. (N.S.) 484, appeal dismissed, December 18, 1953.

Morin & Gardiner v. *The Queen* (Alta.) (not reported), appeal dismissed, May 6, 1954.

Nadeau v. *Vaudreuil* Q.R. [1954] Q.B. 84, appeal dismissed with costs, Cartwright J. dissenting, November 1, 1954.

O'Malley v. *Traverse de Levis*, Q.R. [1953] Q.B. 573, appeal dismissed with costs, October 5, 1954.

Provincial Insurance Company v. *Atlantic Freighting Company* [1954] 1 D.L.R. 235, appeal quashed with costs of a motion to quash, March 15, 1954.

Provincial Transport v. *Lessard* Q.R. [1953] Q.B. 329, appeal dismissed with costs, October 7, 1954.

Rebus v. *Minister of National Revenue* [1953] Ex. C.R. 277, appeal dismissed with costs, March 10, 1954.

Reinig v. *The Queen* (Exch.) (not reported), if within 30 days from the date of the delivery of this judgment the appellant so elects, the appeal shall be allowed and a new trial directed, limited to the question of liability; if the appellant does not so elect, the appeal will be dismissed without costs. Taschereau J. dissenting, would have allowed the appeal, January 26, 1954.

Scarborough, Township of, v. *Markham Developments Limited* [1954] O.W.N. 81, appeal dismissed with costs, May 27, 1954.

Shackleton v. *Hayes* [1953] O.W.N. 157, appeal dismissed with costs, Rand and Estey JJ. dissenting, June 26, 1954.

Ship "Baranoff" v. *Gratsos* [1953] Ex. C.R. 74, appeal dismissed with costs Locke J. dissenting. Cross appeal dismissed with costs, March 8, 1954.

Société Coopérative de Chateauguay v. *Minister of National Revenue* [1952] Ex. C.R. 366, appeal dismissed with costs, April 8, 1954.

Théberge v. *Létourneau* Q.R. [1953] Q.B. 575, appeal dismissed with costs, April 12, 1954.

Thibault v. *Frégeau* Q.R. [1953] Q.B. 572, appeal allowed and judment of the trial judge restored with costs throughout, May 19, 1954.

Toronto General Trusts & Rigby v. *Kucher* [1952] 3 D.L.R. 114, appeal allowed with costs and cross appeal dismissed with costs, Kellock and Locke JJ. dissenting, November 1, 1954.

Turcott v. *Studdert* [1953] 8 W.W.R. (N.S.) 176, appeal allowed in part, February 15, 1954.

Tyson v. *Waldie* (B.C.) (not reported) appeal allowed with costs throughout Locke J. dissenting, February 15, 1954.

Vincent v. *The Queen* Q.R. [1953] Q.B. 82, appeal dismissed, November 15, 1954.

Welsh v. *T.T.C.* (Ont.) (not reported) appeal allowed with costs and judgment at trial restored, March 8, 1954.

Woodward Stores Limited v. *Kraus* [1953] 10 W.W.R. (N.S.) 385, appeal dismissed with costs, May 19, 1954.

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CASES

DETERMINED BY THE

SUPREME COURT OF CANADA
ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

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HER MAJESTY THE QUEEN .....APPELLANT;

AND

ARTHUR McKAY .....RESPONDENT.

1953

*Dec. 2, 3
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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal Law—Trial—Appeal—Jury's verdict set aside by appellate court—Crown appeals—Power of Supreme Court to restore verdict—The Criminal Code, R.S.C. 1927, c. 36, s. 1024—The Supreme Court Act, R.S.C. 1927, c. 36, s. 46.

The respondent, on evidence that was wholly circumstantial, was found guilty by a jury of unlawful assault with intent to rob. The Ontario Court of Appeal, Hogg J.A. dissenting, set the conviction aside on the ground that there was no evidence implicating the accused to go to the jury. The Crown appealed on the ground that the dissenting judgment was right in law.

Held: (Cartwright J. dissenting), that the appeal should be allowed and the order of the Court of Appeal set aside.

Held: also, (Kerwin J. dissenting), that an order should be made restoring the verdict of the jury.

Per: Taschereau, Kellock and Fauteux JJ.: The suggestion that a difference as to the person appealing, i.e. the Crown, or an accused, calls for a distinction in law as to this court's powers find no support either in the enactments defining them, (the *Criminal Code,* s. 1024; the *Supreme Court Act,* s. 46), or in the judicial pronouncements interpreting such enactments, *Manchuk* v. *the King* [1938] S.C.R. 341 at 349; *Savard and Lizotte* v. *the King* [1946] S.C.R. 20 at 33, 39; *Lizotte* v. *the King* [1951] S.C.R. 115. Since it does not appear that the verdict of the jury was unreasonable and this court being in as good a position to decide that question as the court below, it should, consonant with the diligence required in the proper administration of justice, do so.

Per: Kerwin J. (dissenting in part). The dissent was on the question of law—whether there was any evidence to go to the jury. Hogg J.A. was right in holding there was, but the majority of the Court having decided the contrary, did not determine the question raised in the respondent's notice of appeal, that even if there was such evidence the verdict should be set aside as unreasonable. It had the authority to do so whereas the jurisdiction of this court is strictly limited and the situation on an appeal by the Crown is different from that when the accused is the appellant and, therefore, the decision in *Fraser* v. *the King* [1936] S.C.R. 296, is not applicable. An order should therefore go that the case be remitted to the Court of Appeal in order that it may, if leave be given, pass upon the point, the only one upon which the respondent is entitled to its decision.

Cartwright J. dissenting, entertained doubts as to the jurisdiction of this court, as it seemed to him implicit in the reasons of the majority of the Court of Appeal, that they had held the conviction ought to be set aside under s. 1014(1)(*a*) of the *Criminal Code,* a ground of fact or of mixed fact and law. Dealing with the matter however on the assumption that the sole ground of the decision of the majority of the

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

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Court of Appeal was that there was no evidence to go to the jury and that the ground of dissent was that there was, he would have dismissed the appeal.

APPEAL by the Crown pursuant to the provisions of s. 1023 (3) of the *Criminal Code* from the judgment of the Ontario Court of Appeal (1), Hogg J.A. dissenting, which allowed the appeal of the accused from his conviction and directed an acquittal.

C. P. Hope, Q.C. for the appellant.

C. F. Scott for the respondent.

KERWIN J.: (dissenting in part):—After a joint trial with a jury, the respondent McKay, and Wood and Quinlan were convicted of having unlawfully assaulted a person with intent to rob. Wood did not appeal and on the appeal of McKay and Quinlan, counsel for the Crown admitted that there was no evidence to connect the latter with the offence charged, and the Court of Appeal therefore allowed his appeal and set aside his conviction. Judgment on McKay's appeal was reserved and ultimately the Court of Appeal by its judgment set aside his conviction and directed an acquittal with Hogg J.A. dissenting. From that judgment the Crown appeals.

Having considered the reasons for judgment of the majority, delivered by Laidlaw J.A., and those of the dissenting judge, I am of opinion that the dissent is on the question of law whether there was any evidence to go to the jury. I also conclude that Hogg J.A. was right in holding that there was legal evidence against the present respondent upon which the jury were entitled to find the respondent guilty.

In an appeal by the Crown to this Court an accused may raise the other grounds of law taken by him before the Court of Appeal. The respondent argued that he was at least entitled to a new trial because of alleged defects in the trial judge's charge to the jury but I think there was no such defect. The trial judge put it to the jury as to whether the respondent had access to the "hide" or secret closet, and in my opinion that was sufficient without the necessity of referring to the question of possession of the "hide". It was also contended that the trial judge had charged the jury

(1) [1953] O.R. 774.

that the Crown had proven beyond any doubt that the signatures which appear on some of certain writings were McKay's signatures. This is based upon the absence in the transcript of the word "no" but, in any event it is quite clear from what immediately follows that the trial judge was not saying that to the jury but in fact something diametrically opposite. Finally, there is no substance in the argument that the trial judge failed to deal adequately with the case against the respondent as distinct from the case against Wood. The appeal should therefore be allowed and the order of the Court of Appeal set aside.

However, in his notice of appeal to the Court of Appeal the respondent asked leave to appeal on questions of fact. After deciding that there was no evidence to go to the jury, the Court of Appeal did not proceed to determine that, even if there was evidence, the verdict should be set aside on the ground that it was unreasonable. They had the authority so to do but our jurisdiction is strictly limited. In considering the proper order to be made on an appeal by the Crown, the situation is far different from that when the accused is the appellant and, therefore, in my opinion the decision in *Fraser* v. *The King* (1), is not applicable, even though, here as there, the evidence against the accused be purely circumstantial. There is nothing in the record to indicate that the respondent's application to the Court of Appeal for leave to appeal on questions of fact was granted, and the proper judgment appears to me to be to remit the case to that Court in order that it may, if leave had been given, or will be given, pass upon the question as to whether the verdict was unreasonable in the light of all the evidence. That is the only point upon which the respondent will have a right to a decision of the Court of Appeal.

The judgment of Taschereau, Kellock and Fauteux JJ. was delivered by:—

FAUTEUX J.:—For the reasons given by my brother Kerwin, I agree that the appeal of the Attorney General should be allowed and the order of the Court of Appeal set aside.

With respect, however, to the order to be then made by this Court, I think that the verdict of the jury should be restored.

(1) [1936] S.C.R. 296.

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Fauteux J.

As to authority to make such an order, I have no doubt. The relevant terms of s. 1024 of the *Criminal Code* and of s. 46 of the *Supreme Court Act* are:—

1024:—The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of a conviction or for granting a new trial, or otherwise . . . as the justice of the case requires.

46:—The Court may . . . give the judgment . . . which the court whose decision is appealed against, should have given . . .

In *Manchuk* v. *The King* (1), Sir Lyman Duff, delivering the judgment of the majority, said at page 349:—

There remains for consideration the grave question as to the order that ought to be made by this Court. We have concluded, after full consideration, that, by force of section 1024, coupled with the enactments of the *Supreme Court Act,* this Court has authority, not only to order a new trial, or to quash the conviction and direct the discharge of the prisoner, but also to give the judgment which the Court of Appeal for Ontario was empowered to give in virtue of s. 1016(2);

In *Savard and Lizotte* v. *The King* (2), Taschereau J., speaking for the majority, stated at page 33:—

La question de droit qui donne juridiction à cette Cour, qui en réalité la saisit du litige, est formulée par la Cour du Banc du Roi, mais le remède qui doit être apporté, quand elle est jugée fondée, est du ressort de cette Cour, qui peut et doit alors rendre l'ordonnance que requiert la justice. (*Manchuk* v. *The King* (1)).

The view of Kellock J., on the point, is thus expressed at page 49:—

While the existence of a dissent on a question of law, as provided by section 1023, is a condition precedent for an appeal to this Court, in a case like the present, this Court, once seized of the appeal is not limited to the remedy considered appropriate in the dissent, but has complete jurisdiction to direct the remedy which, in its opinion, the Court appealed from ought to have granted.

In *Lizotte* v. *The King* (3), Cartwright J., delivering the judgment of the Court, said at the bottom of page 135:—

In my opinion, once this court reaches the conclusion, on one or more of the points properly before it, that there has been error in law below it is unfettered in deciding what order should be made by the views expressed in the Court of Appeal.

It is true that in each of these cases, the appeal, contrary to what is the situation in the present instance, was entered by the accused and not by the Crown. But the suggestion that this difference as to the person appealing calls for a distinction in law as to the powers of this Court finds, in

(1) [1938] S.C.R. 341. (2) [1946] S.C.R. 20 at 33.
(3) [1951] S.C.R. 115.

my respectful view, no support, either in the enactments defining them or in the above judicial pronouncements interpreting such enactments.

As to the appropriateness of this order in the present case, I am equally satisfied. The initial question which this Court had affirmatively to answer in order to reach the conclusion that the appeal should be allowed, was whether, contrary to the view of the majority in the Court below, there was, in the record, legal evidence upon which a jury was entitled to find the respondent guilty. The evidence being wholly circumstantial, the question, in the light of the classical direction to the jury as laid down by Alderson B., in the *Hodge's* case (1), was, more precisely, whether a jury could be satisfied "not only that those circumstances were consistent with his having committed the act, but also that the facts were such as to be inconsistent with any other *rational* conclusion than that the prisoner was the guilty person."

In the consideration of the question, the reasonableness of a verdict of guilty based upon such evidence is not, to say the least, a foreign matter. On an exhaustive review of the evidence, it does not appear that the verdict of the jury was unreasonable.

In this view, it would not, in my opinion, be consonant with the diligence required in the proper administration of justice in criminal matters to return this case to the Court of Appeal in order that it may pass on that question, i.e., whether the verdict is unreasonable, which this Court is in as good a position as the former to determine.

The appeal should be allowed and the verdict of the jury restored.

CARTWRIGHT J. (dissenting):—The respondent was tried jointly with one Woods and one Quinlan before Le Bel J. and a jury and all three were convicted on the charge that "on or about the 12th of November, 1952, being armed with offensive weapons, they did unlawfully assault Gordon Robinson, an employee of the Canadian Bank of Commerce, with intent to rob him of the property of the Bank then in his charge or custody as such employee;"

(1) (1838) 2 Lew. C.C. 227.

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Cartwright J.

The respondent and Quinlan appealed to the Court of Appeal for Ontario. Counsel for the Crown stated that in his opinion there was not sufficient evidence to support the verdict against Quinlan and the Court of Appeal being of the same opinion thereupon allowed his appeal and directed his acquittal. The Court later delivered judgment in the case of the respondent allowing his appeal and directing his acquittal. Hogg J.A., dissenting, would have dismissed the appeal.

It is common ground that the evidence against the respondent was wholly circumstantial. During the argument I entertained doubts as to our jurisdiction, which have not been completely dispelled, as it seemed to me to be implicit in the reasons of the majority, delivered by Laidlaw J.A. and concurred in by Mackay J.A. that in their opinion the conviction ought to be set aside under s. 1014(1)(*a*) of the *Criminal Code,* that this ground was one of fact or of mixed fact and law, and would not be invalidated by reason of its being held, as was done by Hogg J.A., that there was sufficient evidence for the consideration of the jury to justify the refusal of the learned trial judge to direct a verdict of acquittal.

As, however, the majority of this Court are of opinion that we have jurisdiction, I propose to deal with the matter on the assumption that, as was argued by counsel for the appellant, the sole ground of the decision of the majority of the Court of Appeal was that there was no evidence to go to the jury and that the ground of dissent was that there was such evidence. It is too late to question the rule that whether or not there is any evidence (as distinguished from sufficient evidence) to support a verdict is a question of law.

On this assumption, I am of the opinion that the appeal should be dismissed.

The learned counsel for the Crown at the trial made it clear in his opening address that he was proceeding on the theory that there was evidence from which the jury could properly find that, shortly after the robbery, the respondent was, jointly with Woods, in possession of certain articles of a highly incriminating nature (the most important being a key taken from the bank during the robbery) which were found by the Police in "a hide" reached through a concealed

door in a closet opening off a room in the flat of which Woods was the tenant. As I read the reasons of the Court of Appeal the real difference between the view of the majority and that of Hogg J.A. was as to whether there was evidence from which the jury could infer that the respondent had joint possession of such articles.

After reviewing the relevant evidence Laidlaw J.A. says in part:—

> There was no evidence that he (the respondent) had any rights of access to that hide, and no evidence from which it could be found that he had possession or the right of possession, jointly or otherwise, to it.

After a similar review Hogg J.A. says in part:—

> The question before this Court is whether the circumstances which I have outlined, furnished any evidence from which the jury could draw an inference that the appellant had joint possession with Woods of the aforesaid articles . . .

The learned Justice of Appeal goes on to decide that there was evidence from which the jury could draw such inference.

I do not think that any useful purpose would be served by my again reviewing the evidence. After a careful consideration of all of it I find myself in agreement with the conclusions of the majority in the Court of Appeal (i) that there was no evidence from which the jury could infer that the respondent had possession of the incriminating articles in "the hide", and (ii) that, lacking the basis for such a finding of possession, the other circumstances relied upon by the Crown could not be found to be inconsistent with any other rational conclusion than that the accused was guilty.

I would dismiss the appeal.

Appeal allowed and verdict of jury restored.

Solicitor for the appellant: *W. C. Bowman.*

Solicitor for the respondent: *Murray Kamin.*

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*Dec. 18

HER MAJESTY THE QUEEN and D. N. McDONELL ..... APPELLANTS;

AND

LEONG BA CHAI ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Immigration Regulations—"Child", meaning of—Entry refused—Mandamus—Crown, Servant of—Child's status as to legitimacy governed by law of father's domicile—Immigration Act, R.S.C. 1927, c. 93—P.C. 2115, Sept. 16, 1930, P.C. 6229, Dec. 28, 1950.

If it be established that a child has been legitimated in China, while his father has his domicile there, the law of Canada will recognize such child as legitimate within the meaning of the regulation (Order in Council P.C. 2115 of Sept. 16, 1930 as amended by P.C. 6229 of Dec. 28, 1950) passed under the authority of s. 38 of the *Immigration Act*, R.S.C. 1927, c. 93, because the personal status of such child as to his legitimacy is governed by the domicile of his father. Dicey's *Conflict of Laws*, 6th Ed. p. 86; *Wahl* v. *Attorney General*, 147 L.T. 382; *In re Goodman's Trust*, 17 Ch. D. 266; *Shedden* v. *Patrick*, 1 Macq. 535, at 538, 568; *Khoo Leong* v. *Khoo Hean Kwee*, [1926] A.C. 543; *Trottier* v. *Rajotte*, [1940] S.C.R. 203, at 208; *Stephens* v. *Falchi* [1938] S.C.R. 354.

The Courts do not issue commands to the Crown, (*The Queen* v. *Lords Commissioners of the Treasury* 7 Q.B. 387 at 394) but the admission of the child having been refused because of an error in law, and legitimacy having been established, mandamus will lie directing the Immigration Officer, appointed to fulfil a particular act, to carry out his statutory duty to determine whether the child otherwise complies with the provisions of the *Immigration Act*. *Drysdale* v. *Dominion Coal Co.*, 34 Can. S.C.R. 328; *Minister of Finance* v. *the King*, [1935] S.C.R. 278 at 285; *Joy Oil* v. *the King*, [1951] S.C.R. 624 at 642.

Judgment of the Court of Appeal of British Columbia, affirmed.

APPEAL from a judgment of the Court of Appeal of British Columbia (1), dismissing appellant's appeal from a judgment of Clyne J. (2), who in mandamus proceedings directed the Immigration Officer-in-Charge at Vancouver to consider the application of Leong Hung Hing, a native of China who acquired Canadian citizenship in 1951, for the admission to Canada as an immigrant of his son, the respondent.

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

(1) [1953] 2 D.L.R. 766; 105 Can. C.C. 136.

(2) [1952] 4 D.L.R. 715; 103 Can. C.C. 350.

F. P. Varcoe Q.C. and *L. A. Couture* for the appellants.

R. P. Anderson for the respondent.

The judgment of the Court was delivered by:—

TASCHEREAU J.:—The relevant facts of this appeal are the following:—On the 5th of March, 1952, the respondent, a Chinese temporarily living at Hong Kong, made an application through his father, Leong Hung Hing, for an order directing D. N. McDonell, Acting District Superintendent for the Pacific District of the Immigration Branch of the Department of Citizenship and Immigration, to show cause why he has refused and continues to refuse to consider the application of the respondent for his admission to Canada, and why an order should not be made ordering him, the said D. N. McDonell, to consider the application. Mr. Justice Clyne before whom the application was made, directed the issue of a writ of mandamus ordering the Immigration Officer forthwith to consider the said application, and the Court of Appeal of British Columbia unanimously confirmed this decree.

Under the authority of s. 38 of the *Immigration Act* (c. 93, R.S.C. 1927) which allows the Governor-in-Council, by proclamation or order, to prohibit or limit in number, for a stated period or permanently, the landing in Canada of immigrants belonging to any nationality or race, the Governor-in-Council made the following regulation:—

> From and after the 16th August, 1930, and until otherwise ordered, the landing in Canada of any immigrant of any Asiatic race is hereby prohibited, except as hereinafter provided:
>
> The Immigration Officer-in-Charge may admit any immigrant who otherwise complies with the provisions of the Immigration Act, if it is shown to his satisfaction that such immigrant is,—
>
> The wife, the husband, or the unmarried child under twenty-one years of age, of any Canadian citizen legally admitted to and resident in Canada, who is in a position to receive and care for his dependents.

It will therefore be seen that, if the immigrant *otherwise complies with the provisions of the Immigration Act,* he may be admitted if he is the unmarried child, under twenty-one years of age of any Canadian citizen, legally admitted and resident in Canada.

The father Leong Hung Hing was born in China in 1884 and he married his first wife Fong Shee in June, 1911, in China, and she died in 1936. Hung Hing came to Canada

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and was admitted in September, 1911, and visited China in 1926 and also in 1932. Having had no children of his union with Fong Shee, he contracted in 1926, on his first visit to China, an alleged second marriage with a Chinese woman in accordance with local custom. To Hung Hing and this woman, two children were born, one of whom was the applicant respondent in the present case, and whose admission to Canada is now applied for.

Hung Hing maintained not only his wife but the children and their mother, by forwarding annually from $500 to $600, while he was here employed as a cook in Vancouver. In fact, he lived some two years with them in the one establishment from 1932 to 1934. Hung Hing was granted a certificate of Canadian citizenship in February, 1951, and it was during the following month that he applied to the Immigration Officer-in-Charge in Vancouver for the admission to Canada of Ba Chai. In April of the same year, he was advised by the Immigration Officer that his application had been rejected since Ba Chai was, in the view of the Officer, an illegitimate child.

Many important questions have been raised by the Attorney General on behalf of Her Majesty the Queen, but I have come to the conclusion that they need not all be considered and that, if it be established that the respondent has been legitimated in China, while the father had his domicile in China, the law of Canada will recognize this child as legitimate within the meaning of the regulation, because the personal status of the respondent as to his legitimacy, is governed by the law of the domicile of his father. (*Vide Dicey's Conflict of Laws*, 6th ed. page 86; *Wahl* v. *Attorney General* (1); *In Re Goodman's Trust* (2); *Shedden* v. *Patrick* (3); *Khoo Leong* v. *Khoo Hean Kwee* (4); *Rajotte* v. *Trottier* (5); *Stephens* v. *Falchi* (6). In that case, it will be unnecessary to consider if the word "child" found in the regulation includes an illegitimate child.

In order to prove the Chinese law, the respondent called Mr. Harry Fan who lives in Vancouver, and who is a graduate of the University of British Columbia and also a

(1) (1932) 147 L.T. 382.
(2) (1881) 17 Ch.D. 266.
(3) (1854) 1 Macq. 535, 538, 568.
(4) [1926] A.C. 529 at 543.
(5) [1940] S.C.R. 203 at 208.
(6) [1938] S.C.R. 354.

graduate of Chutow University Law School, where he studied during a period of three years, and he is therefore qualified to practise law in Shanghai, China. Mr. Fan explained that in China, where the civil law was codified in 1930, a child born out of wedlock is an illegitimate child, but the law provides for legitimation. This legitimation may take place by the subsequent marriage of the natural parents, and secondly, by acknowledgment. He stated that there are three ways of acknowledgment, but it is necessary to refer to the third only which is by the maintenance by the father of the natural child. Article 1065 of the Civil Code of China reads as follows:—

> A child born out of wedlock who has been acknowledged by the natural father is deemed to be legitimate; where he has been maintained by the natural father, acknowledgment is deemed to have been established.

During the argument, Mr. Anderson acting on behalf of the applicant, was informed by the Court that he did not need to elaborate any further the questions of domicile of the father, of the validity of the second marriage, of the proof of the foreign law, and of the illegitimacy of the child. The Court was of opinion, as the courts below found, that if the father changed his domicile in 1951 when he became a Canadian citizen, he nevertheless had not abandoned his Chinese domicile at the time his child was born in 1933. The Court also thought that whether the second marriage was valid or not, the child had become from the time of his birth a legitimate child, since the law, which was sufficiently proven, had a retroactive effect owing to the fact that the child was legitimated by acknowledgment. It was therefore found unnecessary to discuss the question as to whether the word "child" included an illegitimate child.

It naturally follows that the applicant being the legitimate son, under twenty-one years of age, of a Chinese citizen, legally admitted to and resident in Canada, does not fall within the ban of the regulation, but may be admitted to the country, if he otherwise complies with the provisions of the Immigration Act.

It is claimed by the appellants that a writ of mandamus does not lie, and that no order may be issued directing the Immigration Officer to consider the application for admission of Ba Chai into Canada as an immigrant. With this,

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I disagree. What is asked is not the admission of Ba Chai into Canada, but the consideration of his application which must be examined in the light of the *Immigration Act*. This has been illegally denied.

As the result of an error in law, because he believed that the applicant was not the child of Hung Hing, within the meaning of the regulation, the Immigration Officer refused to exercise his jurisdiction. It was conceded by the Attorney General that there was no right of appeal from this decision in the present case. The more convenient, beneficial and effective mode of redress, is by way of mandamus, as there is no other legal specific remedy for enforcing the applicant's right to a hearing before the Board and the Minister. Now that it is established that Ba Chai is the legitimate child of Hung Hing, the Immigration Officer should determine whether he *otherwise complies with the provisions of the Immigration Act.*

A quite similar case was heard by this Court in 1904 (*Drysdale* v. *Dominion Coal Co.* (1)). The Commissioner of Mines for Nova Scotia had refused to take into consideration an application of the Dominion Coal Company, concerning a dispute between that company and one John Murray, as to their respective rights to certain leases of Crown lands. It was held that the company was entitled to a determination of those rights, and that the remedy was by way of mandamus. It may also be useful to consider what was said by Locke J. in *Joy Oil* v. *The King* (2), where the record, on a petition of right, was returned to the Commodity Prices Stabilization Corporation, so that it could deal with the claims for subsidies advanced in the action.

It has been held several times that when a duty has to be performed by the Crown, the courts cannot claim any power to command the Crown (*The Queen* v. *Lords Commissioners of the Treasury* (3); Short & Mellor, *The Practice of the Crown Office,* 2nd ed. 1908, page 202). This is not the case in the present instance.

Other considerations would have to be taken into account if the Immigration Officer were a servant of the Crown, acting in his capacity of servant and liable to answer only

(1) (1904) 34 Can. S.C.R. 328. (2) [1951] S.C.R. 624 at 642.
(3) (1872) 7 Q.B. 387 at 394.

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to the Crown (*The Queen* v. *Secretary of State for War* (1)). But, the Immigration Officer has been designated by statute to fulfil a particular act. He is charged with a public duty which runs in favour of the respondent in whom it created a civil right (*The Minister of Finance* v. *The King* (2)). If he refuses to act and discharge that duty, he is amenable to the ordinary process of the Courts.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitor for the appellants: *W. H. Campbell.*

Solicitor for the respondent: *R. P. Anderson.*

GEORGES PAUZE (*Defendant*) .....APPELLANT;

AND

HERVÉ A. GAUVIN (*Plaintiff*) .....RESPONDENT.

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*Sept. 25

*Dec. 18

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

Architects—Civil Engineers—Whether Architects Act of Quebec a statute of public order—Whether contract by engineer to prepare plans and supervise erection of store is enforceable—Architects Act, R.S.Q. 1941, c. 272—Professional Engineers Act, R.S.Q. 1941, c. 270.

The respondent, a civil engineer, undertook to prepare the plans and specifications and to supervise the erection of a store building for the appellant. The respondent's claim for fees and disbursements in respect of the undertaking was maintained by the trial judge and a majority in the Court of Appeal as both Courts came to the conclusion that such claim was not prohibited by the *Architects Act,* R.S.Q. 1941, c. 272.

Held: (Rand and Kellock JJ. dissenting), that the appeal should be allowed in part.

Per Curiam: The *Architects Act* is a statute of public order voiding all contracts made in breach of it; consequently, the respondent cannot recover the fees in respect of the plans and specifications since the contract to prepare them was null by virtue of s. 12 of the Statute.

Per Taschereau, Cartwright and Fauteux JJ.: The contract to supervise the works was not in breach of the Statute; it was, in this case, a separate agreement and was severable from the agreement to prepare the plans and specifications. It was, therefore, enforceable.

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

(1) [1891] 2 Q.B. 326 at 338. (2) [1935] S.C.R. 278 at 285.

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Per Rand and Kellock JJ. (dissenting): The promise to pay for supervision was not enforceable since, being dependent upon the carrying out of the promise to prepare the plans and specifications, it was not severable.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), maintaining the respondent's action to recover fees for professional services.

W. S. Johnson Q.C. and R. Daveluy for the appellant.

J. Turgeon Q.C. and J. Marineau for the respondent.

The judgment of Taschereau and Fauteux JJ. was delivered by:—

TASCHEREAU, J.:—Il s'agit d'un appel d'un jugement de la Cour du Banc de la Reine (1) qui a condamné le défendeur-appelant à payer au demandeur-intimé la somme de $4,176.95 avec intérêts et dépens. Ce jugement confirmait un jugement rendu par l'honorable Juge Wilfrid Edge de la Cour Supérieure siégeant à Montmagny.

Gauvin l'intimé, est un ingénieur civil et membre en règle de la Corporation des Ingénieurs Professionnels de Québec, et ayant droit d'exercer sa profession. Il réclame la valeur et le prix de services professionnels rendus et déboursés faits à la demande du défendeur Pauzé.

Par écrit en date du 9 juillet 1948, Gauvin accepta de préparer les plans et les devis et de surveiller les travaux pour la construction d'un immeuble devant être situé sur la rue de la Gare à Montmagny, et son honoraire fut fixé à 5 pour cent du coût total des travaux, soit 2½ pour cent pour les plans et devis, payables lors de leur livraison, et 2½ pour cent pour la surveillance des dits travaux, payable mensuellement sur estimés. Le demandeur allègue que le prix et la valeur des services rendus sont conformes au tarif de la Corporation des Ingénieurs Professionnels de Québec, approuvé par arrêté ministériel le 12 mai 1932. Le défendeur soutient que le contrat intervenu entre les parties est nul parce qu'il est contraire à la loi et à l'ordre public, que le travail accompli est exclusivement réservé par la loi à un architecte qui doit être membre de l'Association des Architectes de la province de Québec, et qu'en sa seule qualité

(1) Q.R. [1953] Q.B. 57.

d'ingénieur le demandeur n'a pas le droit d'exécuter de semblables travaux, et que s'il le fait il ne peut en réclamer les honoraires.

Le demandeur ne s'est pas représenté comme architecte, n'en a jamais employé le nom, mais a fourni des plans et devis rémunérés et a surveillé l'exécution des travaux. C'est seulement en sa qualité d'ingénieur qu'il a agi. Il importe donc de déterminer s'il y a eu violation de la *loi des Architectes,* qui réserve à ceux-ci certains privilèges exclusifs. Cette loi se trouve au chapitre 272 des Statuts Revisés de Québec 1941, et l'article qui nous intéresse est l'article 12 qui se lit ainsi:—

12. Nulle personne, sauf si elle est architecte-paysagiste, *ne peut prendre ou employer le nom ou le titre d'architecte,* soit seul ou joint à quelque autre mot, nom, titre ou désignation, *ni agir comme tel,* soit directement ou indirectement, à moins *qu'elle ne soit enregistrée comme membre de la dite association.*

Toute personne qui n'étant pas enregistrée comme membre de la dite association, *prend. ou emploie tel nom,* titre ou désignation *ou agit comme architecte* ou *fournit des plans ou devis rémunérés* pour la construction ou la reconstruction d'édifices, soit directement ou indirectement, est passible d'une amende d'au moins cent dollars et d'au plus deux cents dollars pour la première infraction, et d'au moins trois cents dollars et d'au plus cinq cents dollars pour toute infraction subséquente, et, à défaut de paiement immédiat de l'amende et des frais, d'un emprisonnement durant un terme n'excédant pas quatre-vingt-dix jours, à moins que cette amende et les frais ne soient plus tôt payés.

Le dernier article de la même loi qui vise à protéger les intérêts des membres de la Corporation des Ingénieurs Professionnels de Québec, stipule que:

Rien dans la présente loi ne devra être interprété comme affectant de quelque façon que ce soit les droits conférés par la loi, aux membres de la Corporation des Ingénieurs Professionnels de Québec.

La loi de la Corporation des Ingénieurs Professionnels de Québec (Chap. 270 S.R.Q. 1941), ne définit pas les mots "ingénieur civil", mais d'une façon vague et imprécise, tente d'énumérer les attributions de la profession. L'article 2 est ainsi formulé:—

4°. L'expression 'ingénieur civil' signifie quiconque exerce les fonctions d'ingénieur, en donnant des conseils sur, en faisant des mesurages, tracés ou dessins pour, ou en surveillant la construction de chemin de fer, ponts métalliques, ponts en bois dont le coût excède six cents dollars, voies publiques requérant les connaissances et l'expérience d'un ingénieur, routes, canaux, havres, améliorations de rivières, phares, et travaux hydrauliques, électriques, mécaniques, municipaux et autres travaux d'ingénieur, non compris les chemins de colonisation du gouvernement et les chemins ordinaires dans les municipalités rurales; mais elle n'est pas censée s'appliquer à un artisan ou à un ouvrier expert. S.R. 1925, c. 218, s. 2.

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Je suis porté à croire, malgré que je réserve mon opinion sur ce point, que le mot "signifie" employé dans cet article 2, limite d'une façon restrictive les privilèges exclusifs des ingénieurs professionnels. L'expression "comprend" que l'on trouve dans certains statuts a beaucoup plus d'extension, et n'a pas de caractère limitatif. Mais même, si dans le cas qui nous occupe, l'expression employée ne permet pas d'étendre les privilèges exclusivement réservés aux ingénieurs, et ne couvre que les privilèges qui sont mentionnés, il résulte tout de même que là ne résident pas leurs seuls pouvoirs. La loi en effet énumère les privilèges des ingénieurs mais ne limite pas leurs pouvoirs. Ils peuvent certes faire ce qui n'est pas défendu par d'autres lois. Ils peuvent par exemple poser des actes qui ne contreviennent pas à la loi des Architectes. Les statuts créant ces monopoles professionnels sanctionnés par la loi, dont l'accès est contrôlé, et qui protègent leurs membres agréés qui remplissent des conditions déterminées, contre toute concurrence, doivent cependant être strictement appliqués. Tout ce qui n'est pas clairement défendu peut être fait impunément par tous ceux qui ne font pas partie de ces associations fermées.

On ne peut, je crois, entretenir aucun doute sur le fait que l'intimé a préparé des plans et devis pour le compte de l'appelant, et qu'il réclame maintenant le prix des services rendus. Cette préparation des plans est clairement contraire au texte de la loi qui dit que seuls les architectes peuvent *"fournir des plans ou devis rémunérés pour la construction d'édifices"* et que toute violation de la loi entraîne une pénalité. D'un autre côté, la loi des Ingénieurs ne confère pas ce privilège aux membres de la Corporation des Ingénieurs, de sorte que la loi des Architectes n'affecte en rien les droits conférés par la loi aux ingénieurs professionnels.

C'est la prétention de la demande que la loi des Architectes est d'un caractère privé, qu'elle n'existe que pour la régie de la Corporation et de ses membres, qu'elle ne frappe pas le contrat de nullité, et qu'en conséquence elle ne prive pas le demandeur qui aurait illégalement exercé la profession d'architecte, de réclamer ses honoraires. Il ne serait tout au plus passible que d'une amende payable à la Corporation des Architectes.

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Ce n'est pas la première fois que les tribunaux sont saisis d'un semblable litige et qu'on ait eu à décider que cette loi des Architectes était une loi d'ordre public. Je suis entièrement d'accord avec cette jurisprudence, de même qu'avec les opinions émises par les juges dissidents dans la présente cause. Le préambule de la loi créant la Corporation, invoque comme justification de son adoption par la Législature, précisément l'intérêt public. On a évidemment avec raison voulu procurer des hommes de l'art réellement compétents au public, qui à juste titre requiert que les édifices soient convenablement construits. Le préambule qui fait partie d'un acte sert à l'expliquer (12 C.C.).

Dans une cause de *L'Association des Architectes de la province de Québec* v. *Gariépy* (1), M. le Juge McDougall dit à la page 143:—

As this is a matter of *public order, rather than of private law,* affecting as it does the whole province of Quebec and its inhabitants regarding the right to the practice of the profession of architects, etc., etc.

Dans *L'Association des Architectes de la province de Québec* v. *Ruddick* (2), M. le Juge Rivard dit à la page 80:

On ne peut pas douter que la loi des Architectes est une loi *d'ordre public,* et que l'action qui a pour objet d'appliquer aux contrevenants la peine prévue pour infraction à cette loi, soit une action pénale.

Ce dictum de M. le Juge Rivard dans la cause ci-dessus a été approuvé par la Cour d'Appel dans une autre cause de *L'Association des Architectes de la province de Québec* v. *Perry* (3).

Citant Halsbury, 2ème éd. tome 7, No. 236, M. le Juge Pratte dans la présente cause peut donc avec raison dire ce qui suit:—

Sur le premier point, deux raisons m'empêchent de me rendre à l'opinion du premier juge. Je dirais d'abord qu'une loi qui défend un acte, et qui décrète une peine pour assurer le respect de sa prohibition, doit être tenue pour être une loi d'ordre public.

Cette loi est non seulement une loi d'ordre public, mais elle est aussi une loi prohibitive comportant une pénalité. Il n'est pas nécessaire, je crois, de faire une longue dissertation pour démontrer qu'en principe les lois de ce genre emportent nullité quoiqu'elle n'y soit pas prononcée. (C.C. 14) (Mignault, Vol. 1, p. 123). Le défendeur pouvait évidemment invoquer cette nullité et la faire constater

(1) Q.R. (1916) 50 S.C. 134.
(2) Q.R. (1935) 59 K.B. 72.
(3) Q.R. [1947] K.B. 378.

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par les tribunaux. Le contrat était fondé sur une considération illégale et contraire à l'ordre public. Il ne peut lier les parties. (C.C. 989-990) (Vide *Morel* v. *Morel* (1), *Verdun Auto Exchange* v. *Sauvé* (2); *Patenaude, Carignan & Cie Ltée* v. *Dover* (3); *Association St-Jean-Baptiste* v. *Brault* (4); *Brown* v. *Moore* (5)).

Ce que je viens de dire ne doit s'appliquer qu'à la confection des plans et devis rémunérés, ce qui est la seule prohibition qui nous intéresse dans la présente cause. Le demandeur en effet ne réclame pas seulement pour la préparation des plans mais également pour la surveillance des travaux, et cette réclamation se présente sous un aspect différent. Dans le premier cas, je suis d'opinion qu'il ne peut réussir et que l'appel devrait être maintenu en partie, mais sur le second point, je crois qu'il est justifiable de réclamer.

Le privilège accordé à l'architecte par la loi et dont ne jouit pas l'ingénieur, est de préparer et fournir des plans rémunérés pour la construction d'un édifice. Mais la préparation des plans ne comprend pas nécessairement la surveillance des travaux pour laquelle l'exclusivité n'est pas réservée aux architectes. Il est en effet toujours loisible, après avoir fait préparer des plans par un architecte, de requérir les services d'un tiers, qu'il soit architecte ou non, pour surveiller les travaux moyennant rémunération. Ce sont deux fonctions indépendantes et différentes l'une de l'autre.

L'appelant soutient au contraire que la surveillance des travaux est ancillaire au contrat de la préparation des plans, et que la nullité attachée à ce dernier vicie également le premier. Je ne puis accepter cette prétention. Il ne fait pas de doute qu'en certains cas, la nullité du contrat principal, qui existe à l'état isolé et par lui-même, entraîne la nullité du contrat accessoire, qui ne peut exister qu'en se rattachant à ce même contrat principal. Ainsi en est-il du contrat de gage, de cautionnement ou d'hypothèque, greffé à un contrat de prêt: *accessorium sequitur principale.* (Planiol et Ripert, Vol. 6, No. 44; Mignault, Vol. 5, pages 187 et 188; Pothier, No. 14).

(1) Q.R. (1901) 19 S.C. 123.
(2) Q.R. (1925) 63 S.C. 143.
(3) Q.R. (1920) 59 S.C. 386.
(4) (1900) 30 Can. S.C.R. 598.
(5) (1902) 32 Can. S.C.R. 93.

La décision de cette Cour dans *l'Association St. Jean-Baptiste de Montréal* v. *Brault* (1) ne peut servir de précédent. Dans cette cause, les deux contrats étaient intimement liés l'un à l'autre, avaient été signés pour servir une fin commune illégale, et l'un ne pouvait exister sans l'autre. Mais le cas qui nous occupe est entièrement différent. Il n'y a ni contrat principal ni contrat accessoire. L'intimé a accepté de remplir deux obligations entre lesquelles il n'y a pas de relation. En réalité il existe un contrat pour la confection des plans dont la rémunération est interdite et un autre pour la surveillance des travaux pour laquelle la loi ne défend pas de recevoir des honoraires.

Dans ces conditions, la réclamation est justifiée en partie seulement. Comme le dit Larombière, (Théorie des Obligations, Vol. 1, page 285):—

> Souvent plusieurs causes, dont l'une est licite et dont l'autre ne l'est pas, concourent dans la formation d'un engagement. Au lieu de le maintenir ou de l'annuler pour le tout, les tribunaux doivent alors le restreindre à la proportion correspondante à la cause licite.

Dalloz, (Jurisprudence Générale) 1890, 2è partie, page 189:—

> Lorsqu'une vente valable et une vente nulle ont été faites par le même acte, mais sans lien nécessaire entre elles, l'acte est valable pour une partie et nulle pour l'autre.

Ces autorités françaises sont semblables sur ce point à la doctrine anglaise. En effet, la Cour de Division d'Angleterre dans *Putsman* v. *Taylor* (2) a approuvé le jugement de Willes J. dans *Pickering* v. *Ilfracombe Railway Co.* (3), où il avait été décidé:—

> Where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good.

Au même volume, la Cour d'Appel d'Angleterre a rejeté l'appel dans *Putsman* v. *Taylor* (4) mais n'a pas discuté la question de séparation des deux contrats. Vide également *The Bank of Australasia* v. *Breillat* (5):

> From Pigot's case (6 Cokes' Rep. 26), to the latest authorities, it has always been held that, when there are contained in the same instrument distinct engagements by which a party binds himself to do certain acts,

(1) (1900) 30 Can. S.C.R. 598 at 606.
(2) [1927] 1 K.B. 637 at 643.
(3) (1868) L.R. 3 C.P. 235.
(4) [1927] 1 K.B. 741.
(5) (1847) 6 Moore's P.C. 152 at 201.

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some of which are legal, and some illegal, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot.

Il faut donc se garder de voir trop de dépendance entre les clauses licites et les clauses illicites d'un contrat, quand entre elles il n'y a pas de liaison essentielle. Seules les clauses illicites s'effacent. *Vitiantur et non vitiant.* Les clauses licites demeurent et l'obligation indépendante ne s'éteint pas.

Le compte total du demandeur-intimé s'élève à $5,226.45, soit $2,508.05 pour la préparation des plans et devis, $1,589 pour la surveillance des travaux, $1,100 pour la modification aux plans et devis, et $29.40 pour déboursés et copies de plans. L'intimé a reçu en acompte $1,050 qui doivent être imputés sur la préparation des plans étant la dette la plus ancienne (C.C. 1161). Etant donné la conclusion à laquelle je suis arrivé, il faut nécessairement retrancher les item de $2,508.05 et $1,100 qui se rapportent à la préparation et à la modification des plans, laissant un crédit en faveur de l'intimé au montant de $1,618.40 qu'il a droit de réclamer.

L'appel doit donc être accueilli en conséquence, jugement devrait être enregistré en faveur du demandeur-intimé pour la somme de $1,618.40 plus les intérêts et les dépens d'une action de cette classe en Cour Supérieure. Quant aux dépens en Cour d'Appel et en cette Cour, à cause des succès dévisés, j'accorderais au défendeur-appelant la moitié de ses frais taxés.

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

KELLOCK J.:—This appeal is from a judgment of the Court of Appeal for the Province of Quebec (1) dismissing by a majority, an appeal from the judgment at trial in favour of the respondent, the plaintiff, in an action to recover certain fees and disbursements in respect of the preparation of plans and specifications and the supervision of the erection of a store building for the appellant. The defence, which the learned trial judge and the majority in the court below rejected, is based upon the contention that

(1) Q.R. [1953] Q.B. 57.

the respondent, a professional engineer, was precluded by virtue of *The Architects Act,* R.S.Q., 1941, c. 272, from recovery.

The view which has so far prevailed is that *The Architects Act* is a statute passed purely in the interests of architects and, therefore, not one upon which the respondent can rely. Galipeault C.J., and Pratte J., who dissented, were, however, of opinion that the statute is one of public order, but both of the learned dissenting judges considered, notwithstanding, that the respondent was not barred in respect of his claim for supervision and for such part of the plans as related to foundations, structural steel, as well as the heating, electrical and plumbing systems.

The *Architects Act* was first enacted by 54 Vict., c. 59, the preamble to which reads as follows:

> Whereas it is deemed expedient for the better protection of the public interests in the erection of public and private buildings in the Province of Quebec, and in order to enable persons requiring professional aid in architecture, to distinguish between qualified and unqualified architects, and to ensure a standard of efficiency in the persons practising the profession of architecture in the Province, and for the furtherance and advancement of the art of architecture;

It cannot be contended, in my opinion, in the face of this preamble that the statute is other than one of public order. I do not think that the character of the statute can be affected by the fact that the preamble was dropped in later revisions. I therefore agree with the learned dissenting judges in their view of the statute, which was also the view of Rivard J., in *Association des Architectes de la Province de Québec* v. *Ruddick* (1).

I would in any event be of opinion that a statute of the character here in question is one of public order importing nullity into all contracts made in breach of it; Art. 14, 984, 990; *Brown* v. *Moore* (2); *Major* v. *C.P.R.* (3).

It is provided by s. 12 that

> No person, unless he be a landscape architect, shall take or make use of the name or title of architect, either singly or in connection with any other word, name, title or designation, nor act as such either directly or indirectly, unless he be registered as a member of the Association.

(1) Q.R. (1935) 59 K.B. 72 at 80. (2) (1902) 32 Can. S.C.R. 93.
(3) (1922) 64 Can. S.C.R. 367.

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Any person who, although not being registered as a member of the said Association, takes or makes use of any such name, title or designation, or acts as an architect or furnishes, for remuneration, plans or specifications to construct or remodel buildings, either directly or indirectly, shall be liable to a fine . . .

This is subject to the proviso that

Nothing in this section shall be interpreted as affecting in any manner whatsoever the rights and privileges conferred by law upon the members of the Corporation of Professional Engineers of Quebec.

The reference is to c. 270 of the Revised Statutes, s. 2, s-s. (4) of which provides that

The expression 'civil engineer' means any one who acts or practises as an engineer in advising on, in making measurements for, or in laying out, designing or supervising the construction of railways, metallic bridges, wooden bridges the cost of which exceeds six hundred dollars, public highways requiring engineering knowledge and experience, roads, canals, harbors, river improvements, lighthouses, and hydraulic, electrical, mechanical, municipal or other engineering works, not including government colonization roads or ordinary roads in rural municipalities; but does not apply to a mere skilled artisan or workman.

R.S. 1925, c. 218, s. 2.

Section 6 further provides that

No person shall be entitled, within the Province, to use the title of civil engineer, or any abbreviation thereof, or any name, title or description implying that he is a corporate member of the said Corporation, or to act or practise as civil engineer within the meaning of section 2, unless he is a corporate member of the Corporation or becomes such under the provisions of this act.

R.S. 1925, c. 218, s. 6.

It is apparent from the character of the building here in question that the rights of the parties to this appeal are unaffected by the provisions of c. 270. I cannot accept the contention that the absence of a section in c. 272 similar to s. 16 of c. 270, expressly prohibiting an action for professional fees by anyone not entitled under the statute, affects the construction which, in my opinion, as already stated, should be given to c. 272: *Patenaude* v. *Dover* (1); *Bourque* v. *Timmis* (2).

I am unable, with respect, to concur in the view of the minority in the court below that, notwithstanding the plain language of s. 12 of c. 272, with respect to the furnishing of "plans or specifications to construct or remodel buildings", nevertheless if such plans and specifications cover such things as foundations, steel work, heating, electrical and

(1) Q.R. (1920) 59 S.C. 386. (2) Q.R. (1922) 60 S.C. 575.

plumbing systems, recovery may, nonetheless, be had with respect to these matters on the basis of quantum meruit. Such a view would reduce the effect of the statute to very small proportions but, in any event, in my opinion, with respect, there is nothing in either statute which lends support to such a construction.

As to the claim for supervision, while the appellant does not contend that no one but an architect is entitled to supervise the erection of a building according to plans and specifications which have been prepared by an architect, he does contend that the illegality with which the contract here in question is tainted operates to preclude any recovery under it at all. Stated another way, the contention is that to permit recovery by a person in respect of supervision according to plans and specifications made by him in direct violation of the law would be, in fact, to give such plans and specifications an efficacy which the law prohibits. In my view this contention is sound.

In *L'Association St. Jean-Baptiste* v. *Brault* (1), a subsequent agreement was declared invalid on the ground that the invalidity of a prior agreement "vitiates the other collateral or auxiliary agreement springing from it;" per Taschereau J., in delivering the judgment of the majority at p. 606. Among the authorities to which reference is made is a judgment of the Supreme Court of the United States, in *Armstrong* v. *Toler* (2), per Marshall C.J. approving of an instruction by the trial judge to the jury as follows, at p. 261:

> I understand the rule, as now clearly settled, to be, that where the contract grows *immediately* out of, and is connected with, an illegal or immoral act, a Court of Justice will not lend its aid to enforce it.

The learned judge went on to say:

> And if the contract be in part only connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it.

At p. 260 he had previously said:

> So far as the rule operates to discourage the perpetration of an immoral or illegal act, it is founded in the strongest reason.

It is, of course, clear, for example, in the case of contracts in restraint of trade, which do not differ in this respect from other contracts, that if there be in an agreement a number

(1) (1900) 30 Can. S.C.R. 598. (2) (1826) 11 Wheat. 258.

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of covenants, some legal and others illegal, the former are enforceable provided they are severable from the latter. The question is, however, as to what covenants are severable.

As stated by Salter J., in *Putsman* v. *Taylor* (1):

> The promise to be enforceable must be on the face of the document a separate promise, a separate compact, the subject of separate consideration and accord, the performance of which is *independent of the performance of any other promises which the promisor may have made.*

The learned judge cites from the judgment of Lord Sterndale, M.R., in *Attwood* v. *Lamont* (2) as follows:

> . . . a contract can be severed if the severed parts are independent of one another *and* can be severed without the severance affecting the meaning of the part remaining.

It was accordingly held in *Putsman's* case that the covenant in the agreement before the court that the defendant would not "take service with any tailor in Snow Hill" was independent of the other restrictive covenants and therefore severable.

In the case at bar the agreement is to pay 2½ per cent for the preparation of the plans and another 2½ per cent for the supervision of the erection of the building according to those plans. The latter promise is, therefore, dependent upon the carrying out of the first as it is obvious that the remuneration for supervising cannot be earned apart from the preparation of the plans. Had the respondent, after entering into the agreement here in question, refused to carry it out and been sued by the appellant for damages for breach, I think it clear that the appellant could have recovered neither with respect to plans nor supervision. With respect to his failure to prepare the plans, the respondent would have replied that he was prohibited from making them by law and could not, therefore, be liable in damages for his failure to carry out the agreement in that respect. With respect to the claim for breach of the agreement to supervise, the respondent's answer would have been that his only undertaking was to supervise the erection of a building according to plans to be prepared by him which, as already stated, he was prohibited from doing. It

(1) [1927] 1 K.B. 637 at 640. (2) [1920] 3 K.B. 571 at 577.

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is obvious, therefore, that the agreement to supervise was not "independent of the performance of any other promises" which the respondent had made, to employ the language of Salter J. above, but was dependent on the performance of his promise with respect to the preparation of the plans.

The law is not differently stated in Dalloz J.D., 1890, deuxième partie, p. 189, as follows:

> La vente d'une licence de tolérance et du mobilier servant à son exploitation est nulle (c. civ. 1128, 1131, 1133, 1598) (1);
>
> Mais, au contraire, la vente de l'immeuble où la licence est exploitée est valable, si l'usage de cet immeuble n'est pas, d'après la convention des parties, indissolublement *lié* à l'emploi de la licence vendue (c. civ. 1598 (2)).
>
> Lorsqu'une vente valable et une vente nulle ont été faites par le même acte, mais sans *lien* nécessaire entre elles, l'acte est valable pour une partie et nul pour l'autre (c. civ. 1131(3)).

I would therefore allow the appeal with costs throughout.

CARTWRIGHT J.:—I agree with the reasons and the conclusion of my brother Taschereau and desire to add only a few words.

When in one document a party binds himself to do more acts than one, some of which are legal and some illegal, the question whether the agreement to do the legal acts is severable and so enforceable is one of construction of the document. Severance, as was said by Salter J. in *Putsman* v. *Taylor,* referred to by my brother Taschereau, is the act of the parties not of the Court. The language of the document in the case at bar appears to me to express two separate agreements; and I am unable to accept the view that, since the agreement to prepare the plans of the building for remuneration was one which the statute forbad the respondent to make and was therefore rendered null, a separate agreement, the performance of which involved making use of such plans with knowledge of their origin, would be rendered invalid also.

The evidence makes it clear that at least $1,000 of the $1,050 paid by the appellant to the respondent was paid before the work of supervision was commenced. This circumstance indicates that the payment was made for the

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preparation of the plans as there was at the date of payment no other debt owing by the appellant to the respondent.

Cartwright J.

I would dispose of the appeal as proposed by my brother Taschereau.

Appeal allowed in part.

Solicitors for the appellant: *Paré & Daveluy.*

Solicitor for the respondent: *Joseph Marineau.*

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*Oct. 15, 16

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*Jan. 26

GEORGE WILLIAM ELLIS (*Plaintiff*) ..... APPELLANT;

AND

LONDON-CANADA INSURANCE COMPANY (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Surrender of policy by insured at request of insurer and acceptance of return of full amount of premium—Whether cancellation by mutual agreement or by uni-lateral action of insurer—Application of statutory condition 12(2), The Insurance Act, R.S.O. 1950, c. 183, s. 197.

Where an insured at the request of an insurer surrenders a policy of insurance issued to him by the latter and accepts the return of the full premium, the insured must be taken to have voluntarily agreed to the recission of the contract by mutual agreement. In such a case the insured cannot claim the benefit of Statutory Condition 12(2) (*The Insurance Act,* R.S.O. 1950, s. 197) which applies only to cancellation of a policy by unilateral action on the part of an insurer.

Decision of the Court of Appeal for Ontario, [1953] O.R. 141, affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of McRuer C.J.H.C. (2) in favour of the plaintiff-appellant.

R. R. McMurty, Q.C. and *O. F. Howe, Q.C.* for the appellant.

T. N. Phelan, Q.C. and *A. T. Hewitt* for the respondent.

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*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey and Locke JJ.

(1) [1953] O.R. 141; [1953] 1 D.L.R. 607.

(2) [1952] O.R. 644; [1952] 4 D.L.R. 316.

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

RAND J.:—At the outset of this appeal a simple question of fact is raised: did the insured, a man named Gillan, prior to the accident, surrender the insurance policy with the intention that it should thereupon cease to be in force; and on that I entertain no doubt whatever.

The relevant facts are few. Desiring insurance, he requested a soliciting agent, Marshall, to obtain it for him. The first application made was declined; a second, to another company, the respondent, signed for him by Marshall, was accepted and on or about September 6 the policy was issued by an inspector, Alexander, in Ottawa. A few days later, following inquiries, the head office in Toronto through Carmichael intimated to the inspector that the insured was not a desirable risk and that it was felt the policy should be picked up as soon as possible and returned for cancellation. The inspector, on September 14, thereupon wrote to Marshall:—

> I would appreciate if you would please return the above policy for cancellation.

On September 15, Marshall wrote to the insured:—

> I very much regret to inform you that the above company has requested me to return the above policy for cancellation. Kindly forward same to me, and upon receipt of same, I will immediately forward my cheque for the original premium, namely $50.10.

The policy was at once returned as requested, and on the 19th of September it was forwarded to the head office. On September 20, Marshall wrote the insured, acknowledging receipt of the policy and enclosing his cheque for $50.10. The letter concluded with this sentence:—

> Again regretting being unable to place the business for reasons unknown to me.

On the 23rd of September, the insured was involved in a serious motor collision in which the wife of the appellant was killed and the appellant himself injured. In an action against the insured, which the Attorney General defended, judgment was recovered in May, 1951, and in December of that year this action was brought under s. 214 of *The Insurance Act*, R.S.O. 1950, c. 183.

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Rand J.

The contention urged before us is that the word "cancellation" used in the letter of September 15 to Gillan must be taken to refer to Condition 12 which enables the company, on certain terms, to cancel the policy at any time by a 15-days' notice in writing to the insured; that we must conceive the insured as being fully aware of the meaning and significance of the conditions, and that what he meant by "returning the policy" for cancellation was either that it would enable the company in some way, through its possession of the policy, to give the notice, or that he accepted the letter of the 15th as a notice; and that until the expiration of the 15 days the policy was to be deemed, as it was thought by the insured, to be continuing in force.

Apart from the fact that the letter does not either purport to be such a notice or to conform to the requirements of the condition, there are on this point further circumstances that throw some light on the insured's view of what he had done. In June, 1951, he was examined on discovery, and being asked "Have you any contract of insurance at all by the terms of which the insured (insurer?) is liable to pay in whole or part the amount of the judgment" and having answered "no", this followed:—

> No insurance at all of any kind, personal liability, property damage or anything like that?—A. No. It went off Wednesday night and I smashed up Saturday night.
>
> * * *
>
> You say your insurance went off a few days before the date of the accident?—A. Yes: that is right.

The insured, in a subsequent question, made this significant remark: "No, I don't know why the policy was not accepted. It was smart business, on their hand, as it turned out, but I have no idea why it was not accepted."

It is argued that these answers were the result of advice the insured had received from a solicitor. When asked about that, he had answered: "That is right. I don't remember what he exactly said, whether he was in touch with Marshall or not, but he said he was going to look into it and he did apparently." It is admitted that no notice was given either of the accident or of the claim by the insured to the company; and the first intimation by the insured that he "believed" himself to be insured at the time of the accident was in his evidence when called in February, 1952, as a witness at the trial in the present

action. If he had in fact believed the insurance to be continuing, what reason could there have been for raising the question with his solicitor at all or in doing anything else than to give notice to the company? Apparently criminal proceedings were taken against him but that did not prevent him from giving the insurance his attention.

In these circumstances I think it would be simply closing our eyes to the facts to find anything other than that the request was for the surrender of the policy which was complied with, and that, on both sides, it was agreed that the insurance should thereby be ended. There is nothing in *The Insurance Act* to prevent the parties from so agreeing. The condition for cancellation is, as the Chief Justice of Ontario stated, a power given to the insurer to act without regard to the consent of the insured. It may be that the insured did not fully appreciate his rights under the policy, but with that we are not concerned: no attempt was made to set the surrender aside.

I would, therefore, dismiss the appeal with costs.

The judgment of Taschereau, Estey and Locke, JJ. was delivered by:—

TASCHEREAU, J.:—The plaintiff, as administrator and in his personal capacity, recovered judgment in the Supreme Court of Ontario for an amount of $20,962.50, against one Charles Gillan in consequence of a motor-car collision. As this judgment was not satisfied, the plaintiff brought action under *The Insurance Act* (R.S.O. 1950, c. 183, s. 214) against the defendant company which was Gillan's insurer by virtue of a Standard Automobile policy, issued on August 31, 1950, for a period of one year.

The accident happened on the 23rd day of September, 1950, so it would seem that the policy, at the time of the accident, was still in force, but the respondent resisted the claim on the grounds that the policy was void because of fraudulent misrepresentation of the insured, and alternatively that if not void, the policy had been cancelled by the defendant previous to the occurrence of the accident in question.

Chief Justice McRuer of the High Court of Ontario maintained the action for $21,406.86 with interest from the 27th of November, 1951, but the Court of Appeal unanimously reversed this judgment and dismissed the action with costs.

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Taschereau J.

I find it unnecessary to deal with the question of misrepresentation in view of the conclusion to which I have come on the second point, on which, I think, the respondent must succeed. I have no doubt that the appellant voluntarily surrendered his policy and that the insurance contract between the parties was not in force on the date of the accident.

Certain undisputed documents which were produced in the record are sufficient to dispose of this case. On the 13th of September, thirteen days after the policy was issued, and ten days prior to the accident, the head office wrote to its inspector Mr. Alexander of the Ottawa office, asking him, in view of the information they had obtained about Gillan to "pick up" the policy as soon as possible and return it for cancellation. On the 14th of the same month, the Ottawa office wrote to Mr. Marshall, the agent who had obtained the policy for Gillan, to return the policy for cancellation, and the next day Mr. Marshall informed Mr. Gillan that the head office had requested him to return the policy. He also told him that upon receipt of the policy he would remit the amount of the premium paid, namely, $50.10. Gillan then returned the policy to Mr. Marshall who, on the 20th of September, forwarded a cheque in the sum of $50.10, the original amount paid, which was cashed on the 21st. All this correspondence took place before the date of the accident, which was September 23, 1950.

It is the contention of the appellant that, from the wording of *The Insurance Act*, the Legislature as a matter of public policy, when an insurer desires to cancel an insurance contract, imposes an obligation on the insurer to allow the insured fifteen days grace within which to place his insurance elsewhere, if he so desires. It is also contended that the insurer in his policy made express provision for such an agreement, by which the insured would agree to the cancellation of the policy. The provisions of *The Insurance Act* dealing with cancellation by the insurer, are found in s. 197, Statutory Condition (12(2)). These conditions provide in effect that on notice by registered mail to the insured, together with rebate of *pro rata* premium, the policy terminates at the end of fifteen days. If this is so, the policy would have been in force on the date of the accident.

I do not agree with this contention. The Statutory Condition applies in case of unilateral cancellation, but does not prohibit a cancellation of a policy by mutual agreement, and here, this agreement was completed prior to the accident. As the Court of Appeal stated, the respondent was not seeking to cancel the insurance by a unilateral action, but was endeavouring to bring the insurance to an end by an agreement with the insured, returning the full premium, without any compensation for the period during which the policy was in force, subsequent to the 31st day of August, 1950. This was also the interpretation given to the effect of the correspondence exchanged between the parties, as the appellant himself stated that on the night of the accident, which was a Saturday, he was not insured, as the policy had ceased to be in force, on Wednesday the 21st.

If Gillan had refused to comply with the request of the company, which was his indisputable right, the company then could have invoked s. 197, Statutory Condition 12(2), and the policy would have remained in force for fifteen days. But such is not the case. By surrendering the policy and accepting the full premium, Gillan voluntarily agreed to the rescission of the contract, and he cannot claim the benefit of the Statutory Condition. The bilateral agreement entered into dispensed the respondent from taking advantage of the compulsory clause of the statute.

I agree with the conclusions of the Court of Appeal and I would dismiss this appeal with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Howe, McKenna & Howe.*

Solicitors for the respondent: *Gowling, MacTavish, Osborne & Henderson.*

1953
*Sept. 23, 24
*Dec. 18.

INDUSTRIAL ACCEPTANCE CORPORATION (*Plaintiff*) ..... APPELLANT;

AND

LUCIEN COUTURE (*Defendant*) .....RESPONDENT.

AND

HENRI A. MARTIN .....MIS-EN-CAUSE.

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

Automobile—Sale—Truck sold without knowledge of owner by non licenced dealer—Whether sale valid—Whether theft—Effect of s. 21 of Motor Vehicles Act, R.S.Q. 1941, c. 142 on Articles 1488 and 1489 of the Civil Code.

The appellant acquired title to a motor truck by assignment of a conditional sale agreement. Before the unpaid balance had become due, G., the conditional purchaser, sold the truck as a used car to the respondent without the knowledge of the appellant. G. was a garage operator, and although a trader in similar articles he was not a licenced dealer within the meaning of s. 21 of the *Motor Vehicles Act,* R.S.Q. 1941, c. 142.

The trial judge held the sale invalid because it had been made in contravention of s. 21. The Court of Appeal, by a majority judgment, held the sale valid because s. 21 applied only to the sale of stolen vehicles and it had not been established that the truck had been stolen.

Held: The appeal should be allowed and the action maintained.

Per Taschereau, Cartwright and Fauteux JJ.: It was sufficiently alleged and established that at the moment of its sale to the respondent the truck was stolen from the appellant. Consequently, since the person from whom the respondent purchased it was not a licenced dealer, the respondent was deprived, by virtue of s. 21, of the protection given by Art. 1489 of the *Civil Code.*

Per Taschereau and Fauteux JJ.: S. 21 does not deprive the purchaser in the case of the sale of a thing belonging to another in a commercial matter of the protection given by Art. 1488 of the *Code,* but only precludes the application of Art. 1489 of the *Code* in the case of the sale of a stolen vehicle by a dealer.

Per Rand and Estey JJ.: S. 21 effects a modification of both Arts. 1488 and 1489 of the *Civil Code* in respect to motor vehicles.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), reversing, St. Jacques and Marchand JJ.A. dissenting, the trial judgment which had held that the sale of the truck was invalid.

*PRESENT: Taschereau, Rand, Estey, Cartwright and Fauteux JJ.

(1) Q.R. [1953] Q.B. 84.

John L. O'Brien Q.C., Paul Miquelon Q.C. and E. E. Saunders for the appellant.

Louis A. Pouliot Q.C. and Albert Dumontier Q.C. for the respondent.

The judgment of Taschereau and Fauteux JJ. was delivered by:—

FAUTEUX J.:—L'appelante revendique de l'intimé un camion dont elle est devenue propriétaire le 15 septembre 1949, en vertu d'une convention aux termes de laquelle P.-E. Bouffard Limitée lui cédait, avec l'assentiment de Robert-G. Gagnon, tous droits lui résultant d'un contrat de vente conditionnel intervenu le même jour et suivant lequel elle vendait ce camion à Gagnon. La preuve a révélé que, moins d'un mois après ces conventions, Gagnon se départit de ce camion pour le vendre à l'intimé alors que, manifestement, il n'avait aucun droit de ce faire,—se rendant ainsi coupable de vol, suivant la prétention de l'appelante,—et alors aussi que, bien qu'en fait, commerçant en semblables matières, il n'était pas muni d'une licence pour faire ce commerce, tel que requis par l'article 21 de la *Loi des véhicules moteurs*, S.R.Q. (1941) ch. 142. Bref, l'appelante invoque son titre de propriété, les dispositions de l'article 1487 (C.C.) posant le principe de la nullité de la vente de la chose d'autrui, et prétend que l'intimé, à raison du fait qu'il acheta ce camion d'une personne non licenciée, a perdu et la protection de l'article 1488 et celle de l'article 1489.

D'autre part, l'intimé soumet (i) que les dispositions de l'article 21 n'affectent pas l'opération de l'article 1488 et (ii) que, s'il faut reconnaître qu'elles affectent celles de l'article 1489,—ainsi qu'il a été décidé par cette Cour dans *Home Fire and Marine Insurance Co. v. Baptist* (1)— le vol du camion n'a pas été soulevé aux plaidoiries et n'est pas établi par la preuve au dossier. Telles sont véritablement les deux questions à considérer dans cet appel.

La décision à rendre sur la première requiert donc l'appréciation de la mesure dans laquelle cette loi d'exception—l'article 21—affecte la théorie de la loi générale sur la vente de la chose d'autrui. A ces fins, il convient d'abord de

(1) [1933] S.C.R. 382.

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INDUSTRIAL ACCEPTANCE CORP. v. COUTURE

Fauteux J.

préciser celle-ci en en reproduisant les articles pertinents et en y ajoutant certains commentaires sur leur portée véritable:—

Article 1487. La vente de la chose qui n'appartient pas au vendeur est nulle, sauf les exceptions contenues dans les trois articles qui suivent. L'acheteur peut recouvrer des dommages-intérêts du vendeur, s'il ignorait que la chose n'appartenait pas à ce dernier.

1488. La vente est valide s'il s'agit d'une affaire commerciale, ou si le vendeur devient ensuite propriétaire de la chose.

1489. Si une chose perdue ou volée est achetée de bonne foi, dans une foire, marché ou à une vente publique, ou d'un commerçant trafiquant en semblables matières, le propriétaire ne peut la revendiquer sans rembourser à l'acheteur le prix qu'il en a payé.

1490. Si la chose perdue ou volée a été vendue sous l'autorité de la loi, elle ne peut être revendiquée.

L'article 1487 ne demande pas d'explication; et l'article 1490 n'a ici aucune application.

Aux articles 1488 et 1489, il faut apporter le complément que le premier reçoit du paragraphe 3 et, le second, des paragraphes 3 et 4 de l'article 2268:—

2268. La possession actuelle d'un meuble corporel à titre de propriétaire fait présumer le juste titre. C'est au réclamant à prouver, outre son droit, les vices de la possession et du titre du possesseur qui invoque la prescription ou qui en est dispensé d'après les dispositions du présent article.

La prescription des meubles corporels a lieu par trois ans à compter de la dépossession en faveur du possesseur de bonne foi, même si cette dépossession a eu lieu par vol.

Cette prescription n'est cependant pas nécessaire pour empêcher la revendication si la chose a été achetée de bonne foi dans une foire, marché, ou à une vente publique, ou d'un commerçant trafiquant en semblables matières, (ni en affaire de commerce en général); sauf l'exception contenue au paragraphe qui suit.

Néanmoins la chose perdue ou volée peut être revendiquée tant que la prescription n'est pas acquise, quoiqu'elle ait été achetée de bonne foi dans les cas du paragraphe qui précède; mais dans ces cas la revendication ne peut avoir lieu qu'en remboursant à l'acheteur le prix qu'il a payé.

La revendication n'a lieu dans aucun cas si la chose a été vendue sous l'autorité de la loi. P. 668.

Le voleur ou autre possesseur violent ou clandestin, et leurs successeurs à titre universel sont empêchés de prescrire par les articles 2197 et 2198.

Les articles 1488 et 1489 couvrent—entre autres cas—tous les deux, le cas de la vente de la chose d'autrui, en matière commerciale, par un trafiquant en semblables matières. Sans une distinction sur la portée respective de ces deux articles, il y aurait là, non seulement une répétition inutile, mais contradiction, puisque le premier, validant la vente de la chose d'autrui, n'autorise pas, comme le second, la

revendication de cette chose par le propriétaire dépossédé par la vente. Manifeste à la lecture même de ces deux dispositions, cette distinction est ainsi marquée à l'extrait suivant du Traité de droit commercial de Perrault, tome 2, page 84, No. 631:—

631. Cas d'une chose (n'appartenant pas au vendeur, mais qui n'a été ni perdue, ni volée): D'après 1488 et 2268 (parag. 3) est valide l'aliénation de la chose d'autrui, si cette chose constitue l'objet (*a*) d'une vente faite par un commerçant à un autre commerçant, (*b*) d'une vente par un commerçant à un non-commerçant, (*c*) d'une vente par un non-commerçant à un commerçant. Et si l'objet n'à été ni perdu, ni volé, l'acquéreur n'en peut être dépossédé même sur remboursement du prix.

Cas d'une chose perdue ou volée:

D'après les arts. 1489 et 2268 (parags. 3 et 4) sera valide la vente d'une chose perdue ou volée faite dans une foire, un marché, à une vente publique ou par un commerçant trafiquant en semblables matières ou en affaires de commerce en général, mais le propriétaire qui avait perdu cette chose ou auquel on l'avait volée pourra en recouvrer la possession en remboursant à l'acheteur le prix qu'il en a payé.

Ainsi donc, de bonne foi et dans le cours normal de son commerce, un marchand vend une chose, dont il n'est pas propriétaire pour l'unique raison que son droit de propriétaire est assujetti à une condition suspensive non encore satisfaite. Il vend la chose d'autrui et le cas est réglé par l'article 1488. Mais si cette chose ne lui appartient pas parce que volée ou si, quoique légalement en possession d'icelle, mais sachant qu'elle appartient à autrui, qu'il n'a pas le droit de s'en départir et de la vendre, et la vole en ce faisant, le cas est réglé par l'article 1489. Dans le cas de vente d'une chose volée, c'est l'article 1489 qui s'applique à l'exclusion de la disposition précédente.

Somme toute, assumant en l'espèce la bonne foi de l'intimé, le sort de la vente à lui faite par Gagnon devrait, sous le droit commun, être réglé par les dispositions de l'article 1488 ou celles de l'article 1489 suivant que le camion ainsi acheté par l'intimé était un camion non volé ou qu'il était un camion volé.

Cette distinction entre l'application propre à chacun de ces deux articles de la loi générale, le Législateur, en édictant, dans la *Loi des véhicules moteurs,* des dispositions d'exception relatives à ce commerce, est présumé en avoir tenu compte.

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A la vérité et comme nous allons le voir, le texte même de ces dispositions d'exception manifeste qu'en les édictant, le Législateur avait en vue les dispositions de l'article 1489 et non celles de l'article précédent.

Cet article 21 de la *Loi des véhicules moteurs* est divisé en trois paragraphes. Les parties pertinentes du premier sont les suivantes:—

21. 1. Il est défendu à toute personne de faire le commerce de véhicules automobiles, à moins d'avoir obtenu du bureau une licence à cet effet, sur paiement au bureau de l'honoraire suivant:—

.....

.....

Cette licence ne peut être émise avant que la personne qui la demande ait fourni au bureau un cautionnement à l'effet de garantir au propriétaire d'un véhicule automobile *volé*, vendu par elle, le remboursement du prix que ce propriétaire a payé à tout acheteur de ce véhicule automobile pour en recouvrer la possession sur revendication *comme chose volée*. Dans ce cas, le propriétaire a le droit de réclamer en son nom, du commerçant et de sa caution, le prix qu'il a payé à l'acheteur.

.....

N'est pas censé avoir été faite par un commerçant trafiquant en véhicules automobiles toute vente d'un véhicule automobile faite par une personne qui n'est pas licenciée sous l'autorité du présent paragraphe.

Les dispositions du paragraphe 2, qu'il est utile de reproduire pour l'interprétation de tout l'article, prescrivent:—

2. Il est défendu à toute personne d'offrir en vente ou de vendre un véhicule automobile dans une foire, un marché, à l'encan ou à une vente publique autre que celle faite sous l'autorité de la loi, à moins que cette personne n'ait: *a*) Fourni au bureau un cautionnement à l'effet de garantir à son acheteur qu'il est le propriétaire de ce véhicule automobile, *et aussi* à l'effet de garantir au propriétaire d'un véhicule automobile *volé*, vendu par elle, le remboursement du prix que ce propriétaire a payé à tout acheteur de ce véhicule automobile pour en recouvrer la possession sur revendication *comme chose volée*. Dans ce cas, le propriétaire a le droit de réclamer en son nom, du commerçant et de sa caution, le prix qu'il a payé à l'acheteur; et *b*) Obtenu du bureau un permis de vendre publiquement ce véhicule automobile suivant l'une des manières susindiquées; et *c*) Livré ce permis à son acheteur.

Écartant, pour l'instant, la considération de la disposition générale, apparaissant au début du paragraphe 1 de l'article 21, laquelle défend à toute personne de faire le commerce de véhicules automobiles sans être munie d'un permis, l'examen des autres dispositions précitées établit ce qui suit:— (i) Les ventes couvertes, tant par le cautionnement requis au paragraphe 1 (vente, par un commerçant, d'un véhicule volé) que par celui exigé sous le paragraphe 2 (vente dans une foire, un marché, à l'encan, ou vente pub-

lique autre que celle faite sous l'autorité de la loi), sont exactement et exclusivement les ventes spécifiées à l'article 1489. (ii) Au paragraphe 1, le Législateur n'a pas dit "N'est pas censée être une vente en matière commerciale . . .",—ce qui aurait affecté les cas couverts par l'article 1488—, mais "N'est pas censée avoir été faite par un commerçant trafiquant en véhicules automobiles . . .", enlevant par là une des conditions nécessaires, en l'espèce, au jeu de l'article 1489. (iii) Enfin, alors que le cautionnement exigé pour l'obtention d'une licence autorisant à faire le commerce de véhicules automobiles est suffisant s'il garantit au propriétainre dépossédé par vol le remboursement de ce que ce dernier doit débourser pour revendiquer son véhicule "comme volé", le cautionnement conditionnant l'émission d'un permis pour faire l'une des ventes publiques mentionnées au paragraphe 2, doit, en plus de cette garantie donnée au propriétaire dépossédé par le vol, assurer à l'acheteur du véhicule alors vendu, que le vendeur en est le propriétaire.

En somme, en adoptant les dispositions du paragraphe 1, le Législateur—et c'est là la substance véritable de toute la disposition—a, d'une part, ajouté au droit commun en pourvoyant une protection additionnelle au bénéfice du propriétaire dépossédé par le vol et, d'autre part, a soustrait au droit commun en enlevant à celui qui achète, d'un commerçant non licencié, une voiture volée, le droit d'exiger du propriétaire la revendiquant "comme volée, le remboursement du prix qu'il a payé. Mais, ni expressément, ni implicitement, le Législateur a-t-il, par ces dispositions du paragraphe 1 de l'article 21, touché le cas de vente, en matière commerciale, d'une automobile non volée. Sur ce point, la loi générale n'est pas changée; cette vente étant validée par le Législateur sous l'article 1488, l'acheteur n'a pas besoin de garantie de son vendeur; et quant au propriétaire dépossédé en pareil cas, le paragraphe 1 de l'article 21 n'ajoute rien au recours que lui donne le droit commun contre ce commerçant de bonne foi.

Comment assurer que ces dispositions de substance du paragraphe 1 de l'article 21 soient effectivement observées, que le cautionnement soit fourni, à moins que ce commerce particulier ne soit placé sous contrôle par une prohibition générale empêchant toute personne de le faire sans être

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préalablement munie d'une licence, et en assujettissant l'émission de cette licence à l'existence d'un cautionnement actuellement donné. C'est là, je crois, l'esprit véritable et l'unique raison de la prohibition générale apparaissant au début du paragraphe 1.

Mais, dit l'appelante, cette prohibition défend à toute personne "de faire le commerce de véhicules automobiles . . ." et non pas "de faire le commerce de véhicules automobiles volées . . .". Le commerce des véhicules volés n'avait pas à être défendu, il l'était déjà; et l'on s'imagine mal le Législateur accordant des licences pour l'autoriser. Sans doute, la prohibition couvre le commerce de tout véhicule automobile; mais il lui fallait cette généralité pour assurer le contrôle nécessaire à l'opération de ces dispositions substantives de la loi.

Mais l'appelante, invoquant le paragraphe 14 de l'article 2 du *Code Civil,* a prétendu que toute vente faite en violation de la prohibition générale, est absolument nulle. Si le Législateur entendait, par cette prohibition, frapper de nullité toutes les ventes faites par un commerçant non licencié, il ne lui était pas nécessaire de dire, dans le même paragraphe, que "telle vente n'était pas censée avoir été faite par un commerçant trafiquant en véhicules automobiles . . ."

Les principes d'interprétation formulés dans Maxwell, On Interpretation of Statutes, 9e édition, page 84, sont ici pertinents:—

> Presumption against Implicit Alteration of law.
>
> One of these presumptions is that the Legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because they have a meaning that would lead thereto when used in either their widest, their usual, or their natural sense, would be to give them a meaning other than that which was actually intended. General words and *phrases,* therefore, however wide and comprehensive they may be in their literal sense, must, usually, be construed as being limited to the actual objects of the Act.

Enfin, et en toute déférence, il faut ajouter que la cause de *Home Fire and Marine Insurance Co. v. Baptist* (*supra*) ne décide pas que celui qui achète un véhicule non volé,

d'un commerçant non licencié, perd la protection de l'article 1488. Cette question n'a pas été considérée et n'avait pas à l'être dans cette cause où il s'agissait d'une automobile volée. Cette Cour, appréciant l'effet du paragraphe 1 de l'article 21, a déclaré:—

> Le but évident est d'empêcher l'application de l'article 1489 du Code et, en pareil cas, d'éliminer l'obligation du propriétaire, en revendiquant la machine qui lui a été volée, de "rembourser à l'acheteur le prix qu'il en a payé".

Il faut donc conclure au bien-fondé de la première proposition de l'intimé et dire que le paragraphe 1 de l'article 21 n'enlève pas la protection que l'article 1488 donne à l'acheteur dans le cas de la vente de la chose d'autrui en matière commerciale.

Reconnaissant que l'article 21 affecte, cependant, les dispositions de l'article 1489, l'intimé soumet, comme deuxième proposition, que dans la présente cause, le vol de l'automobile n'a pas été soulevé aux plaidoiries et n'est pas établi par la preuve.

Les plaidoiries. Au paragraphe 7 de sa déclaration, l'appelante a allégué:—

> 7. Subséquemment, à une date qu'il est impossible à la demanderesse de préciser, Robert-G. Gagnon a vendu ou s'est départi dudit camion International, propriété de la demanderesse sans payer la balance due sur ledit contrat, illégalement et sans droit; la demanderesse en était la seule et unique propriétaire;

En défense, l'intimé a spécifiquement plaidé les dispositions de l'article 1488 et celles de l'article 1489 et, ce, respectivement aux paragraphe 17 et 18:—

> 17. La vente du dit camion par Robert-G. Gagnon à la défenderesse est commerciale et en conséquence valide même si à ce moment la demanderesse était encore propriétaire dudit camion en vertu du contrat ci-dessus produit comme pièce P-1 de la demanderesse, par suite de la balance impayée du prix de vente;
>
> 18. Au surplus, comme la défenderesse a acheté le dit camion du commerçant trafiquant en semblable matière, savoir le dit Robert-G. Gagnon, la demanderesse, qui se prétend propriétaire dudit camion, ne pouvait le revendiquer sans rembourser au préalable à la défenderesse le prix de $1,200 qu'elle a payé de bonne foi au dit Robert-G Gagnon lors de la vente du 10 octobre 1949 dont le contrat a été produit ci-dessus comme pièce D-1 de la défenderesse et auquel celle-ci réfère pour valoir comme si au long récité;

Il se peut que, considéré isolément, le paragraphe 7 de la déclaration ait été rédigé avec trop de prudence et soit ainsi trop vague pour suggérer qu'en vendant ou se départissant

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du camion illégalement et sans droit, Gagnon le volait nécessairement. Mais, appréciant ce paragraphe et les autres de la déclaration, l'intimé, à tort ou à raison, a jugé à propos d'invoquer comme moyen de défense que la saisie-revendication ne pouvait être maintenue vu le défaut par l'appelante de lui rembourser le montant qu'il a payé à Gagnon; ce qui ne pouvait être plaidé qu'en envisageant le vol du camion. L'intimé a donc lui-même soulevé clairement la question du vol. Dans *Brook v. Booker* (1), le Juge en chef Taschereau, examinant une question similaire, disait, à la page 196:—

> L'appelant prétend et son argument est, à première vue, spécieux, que la fraude et la collusion n'étaient pas alléguées dans la déclaration du demandeur, en termes assez formels et précis pour en admettre la preuve. Il est vrai que les mots "fraude et collusion" n'y sont pas écrits, mais les circonstances qui y sont développées font suffisamment ressortir le dol dont se plaint l'intimé. Nous ne sommes plus au temps des formes sacramentelles en matière de procédure; il suffit, depuis le nouveau code, d'énoncer les faits sur lesquels repose une demande judiciaire: les conclusions s'imposent d'elles-mêmes.

La preuve. Gagnon avait acheté ce camion, soi-disant pour faire du transport, au prix de $1,800, dont $659 comptant et la balance, $1,141, plus prime d'assurance $112, et frais de finances $107, soit au total $1,360, était payable par versements mensuels, égaux et consécutifs, de $114, le premier devenant dû le 15 octobre, 1949. Jusqu'à parfait paiement, l'appelante demeurait propriétaire et Gagnon devait "garder" et "maintenir" ce camion en bon état et "libre de tous liens ou charges", et "permettre au vendeur de l'examiner, sur demande". Avant même que ne vienne dû le premier versement, Gagnon, le 10 octobre 1949, est allé vendre ce camion à Québec, soit à plus de 400 milles de sa place d'affaires, pour $1,200, payé comptant, conséquemment à un prix inférieur à celui pour lequel il l'avait acheté, et aussi inférieur au solde que lui-même devait alors à l'appelante. Rappelons, incidemment, qu'il n'avait, à ce temps, aucune licence de commerçant, celle-ci lui ayant été refusée parce qu'il n'avait pas soumis son bilan; et ajoutons que, quelques mois après cette vente, il faisait faillite. Il a encaissé et gardé pour lui les $1,200 reçus de l'intimé; il n'a fait que deux versements, ne payant celui du 15 octobre que le 21 novembre et celui du 15 novembre que le 30 décembre. Cette vente, il l'a cachée à l'appelante. Lorsque

(1) Q.R. (1908) 17 K.B. 193.

le représentant d'icelle lui demanda, tel qu'elle en avait le droit suivant le contrat, de voir le camion, il a, en deux circonstances, fait de fausses déclarations représentant, en la première, que le camion "était en dehors du village pour faire le transport du bois" et, en la seconde, qu'il "était en panne dans un petit village ou une colonie en arrière de Cap-Chat." Plusieurs autres tentatives furent vainement faites par le représentant de l'appelante pour voir le camion. De guerre lasse, on décida de faire enquête pour, éventuellement, découvrir qu'il était à Québec. En face de la preuve, le Juge de première instance a conclu:—

It can be doubted if the sale on 10th October can be considered as having been effected in good faith; it was certainly in bad faith on the part of the seller Gagnon, . . .

Ce qui, je crois, équivaut, en l'espèce, à dire que Gagnon s'est approprié le camion, l'a converti à son usage, frauduleusement et sans apparence de droit, dans l'intention d'en priver, temporairement ou absolument, l'appelante qui avait, sur le camion, un droit de propriété et un intérêt spécial. Tels sont les éléments du vol, suivant l'article 347 du *Code Criminel,* lequel ajoute au paragraphe 4:—

Il est indifférent que la chose ainsi convertie soit, lors de sa conversion, en la possession légitime de la personne qui la convertit.

Il se peut qu'accusé devant les tribunaux criminels d'avoir volé ce camion, Gagnon ait une défense ou des explications à offrir et qu'un jury ne soit pas, par la preuve ci-dessus, convaincu hors de tout doute de sa culpabilité. Mais, dans une cause civile où la preuve d'un crime est matérielle au succès de l'action, la règle de preuve applicable n'est pas celle prévalant dans une cause criminelle où les sanctions de la loi pénale sont recherchées, mais celle régissant la détermination de l'action au civil. Cette question a déjà été considérée par cette Cour, particulièrement dans les causes suivantes:— *Clark v. His Majesty the King* (1); *London Life Ins. Co. v. Trustee of the Property of Lang Shirt Co. Ltd.* (2); *The New York Life Insurance Company v. Henry Peter Schlitt* (3).

Dans *Clark* v. *The King* (*supra*), le Juge Duff, subséquemment Juge en chef de cette Cour, réfère, à la page 616, à la décision du Comité judiciaire du Conseil Privé dans

(1) (1921) 61 Can. S.C.R. 608. (2) [1929] S.C.R. 117.
(3) [1945] S.C.R. 289.

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Doe d. Devine v. *Wilson* (1) dont il cite l'extrait suivant mettant dans toute sa lumière le véritable principe:—

> The jury must weight the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities.

Cette décision du Comité judiciaire a été encore récemment citée avec approbation de cette Cour dans *Smith v. Smith and Smedman* (2).

En conséquence, je maintiendrais l'appel; rétablirais les dispositifs du jugement de première instance; le tout avec dépens de toutes les Cours.

RAND J.:—In this case a motor truck, the title to which became vested in the appellant corporation by assignment of a conditional sale agreement, was sold as a used car to the respondent. The seller, a garage operator, although in fact engaged in the purchase and sale of motor vehicles, was not a licensed dealer within the meaning of *The Motor Vehicle Act* of Quebec; the respondent had no personal knowledge of the business carried on by him some 400 miles from the City of Quebec where the sale took place; and the narrow question is whether that sale is effective as against the corporation.

The sale of motor vehicles is dealt with in detail by *The Motor Vehicle Act*. S. 21 provides that:—

> No person may deal in motor vehicles without having obtained from the Bureau a license to that effect, upon payment to the Bureau of the following fees:

The issue of the license is subject to the furnishing of security:—

> No such license may be issued before the person applying therefor shall have furnished the Bureau with security for the purpose of guaranteeing to the owner of a stolen motor vehicle, sold by such person, the reimbursement of the price which such owner has paid to any buyer of such motor vehicle, in order to recover the possession by way of revendication as stolen property. In such a case, the owner shall be entitled to claim in his own name, from the dealer and from his surety, the price which he has paid to the buyer.

Publication of the license is required:—

> The dealer who is the holder of a license, under the authority of this subdivision, must keep such license posted up in a conspicuous place in his establishment, and must mention the number of such license and the date when it will expire, in every document establishing the sale of a motor vehicle which he effects while his license remains in force.

(1) 10 Moore P.C. 502. (2) [1952] 2 S.C.R. 312.

and the last paragraph of s. 21 declares that:—

No sale of a motor vehicle effected by a person who is not licensed under the authority of this subdivision, shall be deemed to have been made by a dealer in motor vehicles.

These are to be interpreted in the background of arts. 1487, 1488 and 1489 of the *Civil Code* which read:—

1487. The sale of a thing which does not belong to the seller is null, subject to the exceptions declared in the three next following articles. The buyer may recover damages of the seller, if he were ignorant that the thing did not belong to the latter.

1488. The sale is valid if it be a commercial matter, or if the seller afterwards become owner of the thing.

1489. If a thing lost or stolen be bought in a good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it.

and art. 14:—

Prohibitive laws import nullity, although such nullity be not therein expressed.

The Court of Queen's Bench (1), St. Jacques and Marchand, JJ. dissenting, in reversing the judgment of Gibsone J. at trial, held that the provisions of s. 21 modified the articles quoted only in the case of a vehicle stolen, and since the truck had not been stolen, the purchaser in good faith in a "commercial matter" had become the owner of the property.

I am unable to agree with that view of the effect of the statute. The subject of purchase, sale and other dealings, in motor vehicles has been accorded a special code and the reasons behind that action, taken in the interest of public order, are not far to seek. The legislature was bringing under control a business of huge dimensions involving property of high value but exposed in a special manner to all sorts of fraudulent trafficking. To meet that state of things, and having in mind the provisions of the *Code,* it placed each individual business under a special license, required security to be furnished, and declared that the sale by an unlicensed person should not be deemed to have been made by a dealer in such articles.

Can, then, a sale made in the face of the statute be treated as a "commercial matter" within art. 1488? The contention advanced by the respondent gives to those words

(1) Q.R. [1953] Q.B. 84.

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a broader scope than embraced within dealings in goods of like kind, a distinction other than that between sales and transactions analogous to them. Commerce consists essentially of the business of buying and selling goods and in relation to a dealer it is necessarily of goods of a class or classes, of "semblables matières." This is clearly indicated by Mignault, Vol. 7 at p. 56, where he says:—

> Mais toute vente commerciale de la chose d'autrui n'est pas valide mais seulement celles qui portent sur des objets individuels que le commerçant a l'habitude de vendre. Ainsi la vente d'un fonds de commerce faite par un non-propriétaire serait nulle. Il faut, cependant, assimiler aux ventes commerciales qui peuvent se faire validement de la chose d'autrui, celles qui se font dans une foire, dans un marché, ou à une vente publique (art. 1489). Le code ne dit pas ce qu'il faut entendre par vente publique. Je crois qu'il ne s'agit pas de la vente faite sous l'autorité de la loi, dont il est question à l'article 1490, mais de la vente volontaire aux enchères que mentionnent les articles 1564 et suivants.

Pratte J., in his reasons in this case, speaks always of "un trafiquant en semblables matières." It is confirmed by c. 18, statutes of Quebec, 1879, which dealt with the contract of nantissement:—

> Attendu que des doutes se sont élevés sur le droit que possède un créancier qui a reçu un gage en cette province, d'être maintenu dans la possession du gage, à l'encontre du propriétaire, lorsque le gage a été reçu de bonne foi, d'un commerçant trafiquant en semblables matières et qu'il est important de faire disparaître ces doutes. En conséquence, Sa Majesté, etc., décrète ce qui suit: 1. Les articles 1488, 1489 et 2268 du Code civil, s'appliquent au contrat de nantissement.

But I will assume there is such a distinction. To apply it to the sale here, we must first find the commercial business or course of dealings and the sale must either lie within it or be incidental to it. The seller, Gagnon, was licensed to operate a garage, but the definition of that occupation in the statute as well as its inherent character excludes it from a commercial category. That was recognized by Gagnon: he was introduced to the respondent as a dealer in motor vehicles and in that capacity negotiated the sale. It is only, then, in relation to the business of selling motor vehicles that the case can be brought within art. 1488 as a commercial matter.

But s.s. (1) of s. 21, in prohibiting a person from dealing in such vehicles without a license and in declaring that a sale made by an unlicensed person is not to be deemed to have been made by a dealer in them necessarily denies to any such sale a commercial character if the purpose of these

provisions is not to be utterly defeated. That the license has regard to sales other than those within art. 1489, apart from the generality of the language of the section, is shown by the fact that although Gagnon had, in 1949, with his application for a license, furnished the security required by s. 21, the license was refused because he had failed to submit his balance sheet. Since the license must be exhibited on the dealer's premises and the number shown on each document of sale, means designed expressly for the protection of the public, the absence of the license is thus effectual to prevent commercial dealings and whatever sales he may be able to make, being in the face of the statute, can only be deemed to be civil. The section does not prevent a sale, but it prevents a commercial sale. There were not, within the contemplation of the statute, commercial dealings of which the sale could be a principal item, and as a consequence there was nothing commercial to which the sale could be an incidental item.

The section was considered by this Court in *Home Fire & Marine Insurance Company v. Baptist* (1), in which, at p. 385, the present Chief Justice, speaking of s. 21, used the following language:—

> Dans les cas spéciaux que cette législation prévoit, on a voulu précisément éviter l'application des articles du code.

I agree, then, with the view taken by Gibsone J., the trial judge and the dissenting judges in the Court of Queen's Bench. The appeal must be allowed and the trial judgment restored with costs in this Court and in the Court of Queen's Bench.

ESTEY, J.:—The appellant contends that under s. 21 of the *Motor Vehicles Act* of the Province of Quebec (R.S.Q. 1941, Ch. 142, s. 21) it has a right to revendicate an International truck from the respondent who purchased it from one Gagnon.

The facts are not in dispute. The International truck here in question was sold on October 10, 1949, at the City of Quebec by Gagnon, a garage proprietor at Cap Chat, to the respondent. At all times material to that sale Gagnon did not have a license to deal in motor vehicles as required by s. 21 of the *Motor Vehicles Act*. Gagnon had purchased

(1) [1933] S.C.R. 382.

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the truck on September 15, 1949, under a contract of conditional sale, whereby the ownership remained with the vendor P. E. Bouffard Ltée. On the same date (September 15) Bouffard Ltée assigned all its vendor's interests under that contract to the appellant. The appellant, as owner, seeks to revendicate this truck from the purchaser-respondent.

The learned trial judge of the Superior Court held that the respondent's contract of purchase from Gagnon was, by virtue of s. 21, invalid and allowed the appellant's action.

The relevant part of s. 21 of the *Motor Vehicles Act* reads:—

21. 1. No person may deal in motor vehicles without having obtained from the Bureau a license to that effect, upon payment to the Bureau of the following fees:

.....

No such license may be issued before the person applying therefor shall have furnished the Bureau with security for the purpose of guaranteeing to the owner of a stolen motor vehicle, sold by such person, the reimbursement of the price which such owner has paid to any buyer of such motor vehicle, in order to recover the possession by way of revendication as stolen property. In such a case, the owner shall be entitled to claim in his own name, from the dealer and from his surety, the price which he has paid to the buyer.

.....

No sale of a motor vehicle effected by a person who is not licensed under the authority of this subdivision, shall be deemed to have been made by a dealer in motor vehicles.

The majority of the learned judges in the Court of Queen's Bench (1) construed s. 21 as applying only to stolen motor vehicles and, as the record did not establish the truck was stolen, they reversed the learned trial judge and dismissed the appellant's action under the relevant articles (1487 et seq.) of the *Civil Code*. The minority of the learned judges were of the opinion that s. 21 was not to be construed in that restricted sense and would have affirmed the judgment at trial.

This Court held in *Home Fire & Marine Insurance Company* v. *Baptist* (2), that the rights of the owner, vendor and purchaser of a stolen motor vehicle must be determined under the foregoing s. 21 rather than Art. 1489 C.C. At p. 385 my Lord the Chief Justice (then Rinfret J.) stated:

Le but évident est d'empêcher l'application de l'article 1489 du code, et, en pareil cas, d'éliminer l'obligation du propriétaire, en revendiquant

(1) Q.R. [1953] Q.B. 84. (2) [1933] S.C.R. 382.

la machine qui lui a été volée, de 'rembourser à l'achteur le prix qu'il en a payé.' Donc celui qui achète une automobile d'une personne qui n'est pas licenciée perd la protection de l'article 1489 du code civil. D'autre part, si l'acheteur de l'automobile l'a acquise d'une personne licenciée, 'dans ce cas', dit l'article 21, 'le propriétaire (du véhicule automobile volé) a le droit de réclamer en son nom, du commerçant et de sa caution, le prix qu'il a payé à l'acheteur.'

It is contended, on behalf of the appellant, that s. 21 should be construed to apply only to stolen motor vehicles.

Section 21 is placed in the statute with ss. 15 and 19 in Division III entitled "Licenses and Permits" and some asistance in determining the intent of the legislature may be derived from its position and the similarity of the language used in ss. 15 and 19 of the same division. They respectively commence "No person shall drive a motor vehicle . . ." and "No person shall keep a garage," and s. 21 "No person may deal in motor vehicles . . .," without in each case obtaining the appropriate license. In these three sections the legislature enunciates an all-inclusive requirement of general application and then makes such exceptions and additions as it deems appropriate.

The word "may," as used in the English version of the first sentence, s. 21, should be read as "shall." The French version justifies this construction and it is also clear that the section, read as a whole, makes the license an imperative prerequisite to dealing in motor vehicles.

Then, and of even greater significance, is the fact that the prohibition contained in the first sentence of s. 21 is not qualified by any express provision. If the legislature had intended that a sentence so phrased should be limited or restricted in its application to motor vehicles that have been stolen, it would undoubtedly have used language indicative of that intention and not left so positive and comprehensive a provision to be so construed. Indeed, apart from an express provision or language that necessarily implies such a limitation, it would seem that such a construction would be to add words to the section and, therefore, not to construe but to legislate.

It will be observed that it is the dealing in motor vehicles that is prohibited. Gagnon was dealing in motor vehicles in a manner that his sale to the respondent here in question, in the absence of any such provision as s. 21, would appear to come within the phrase "a commercial matter

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Estey J.

(d'une affaire commerciale)" and would be valid within the provisions of Art. 1488. The positive and comprehensive language in the first sentence of s. 21 discloses a clear intention that a sale made by a dealer not licensed shall not be valid and ought not to be construed as "a commercial matter (d'une affaire commerciale)" within the meaning of Art. 1488. This conclusion, it would seem, is made very clear by the definition of the word "dealer" in s. 2(13), where it is defined as "any person who deals in motor vehicles." Gagnon was in the business of selling motor vehicles, but he was not a dealer in motor vehicles within the meaning of the *Motor Vehicles Act* because he was not licensed as required thereby and, therefore, the sale was invalid.

It is contended, however, that the support for the view that s. 21 should be construed as applicable to stolen motor vehicles only is found in the requirement in sub-s. (1) that as a condition precedent to obtaining a license the applicant must furnish the Bureau with security "for the purpose of guaranteeing to the owner of a stolen motor vehicle, sold by such person, the reimbursement of the price which such owner has paid to any buyer of such motor vehicle, in order to recover the possession by way of revendication as stolen property." This provision, with the greatest possible respect to the learned judges who hold a contrary opinion, is an addition dealing specifically with stolen motor vehicles and not a restriction or limitation upon the prohibition in the first sentence.

That the legislature did not intend s. 21 should be limited is apparent from the express provision in sub-s. (2). There it is provided that a dealer or any other person who "may offer for sale or sell a motor vehicle in a fair or market, or at auction or at a public sale other than that effected according to law," is required to furnish security not only to guarantee the owner of a stolen motor vehicle, as under sub-s. (1), but also to give security guaranteeing to the buyer of a motor vehicle at such a sale that he, the permit holder, is the owner thereof. Under this provision issues as to title may arise quite independent of any question as to whether the motor vehicle was stolen or not. This provision, together with what has already been said, distin-

guishes this from those cases discussed in *Hirsch* v. *Protestant Board of School Commissioners* (1), where general words are used and followed by language dealing with specific situations in a manner that shows an intent on the part of the legislature that the general words were not to be given their ordinary, literal effect.

The legislature, by the language used in this section, discloses an intention to deal with sales of motor vehicles generally, with the exception of those isolated and private transactions between citizens. The phrase "a dealer in motor vehicles (un commerçant trafiquant en véhicules automobiles)" in the last sentence of s. 21 appears sufficiently wide to cover both the phrase "a trader in dealing in similar article (d'un commerçant trafiquant en semblables matières)" in Art. 1489 C.C. and "a commercial matter (d'une affaire commerciale)" in Art. 1488. Even if, however, that be not the correct view, when, as already stated, the general provisions of the opening sentence of s. 21 are given their ordinary and grammatical meaning, the legislature cannot have intended that a sale of a motor vehicle by an unlicensed dealer should be construed as "a commercial matter (d'une affaire commerciale)" and, therefore, valid within the meaning of Art. 1488. This s. 21 makes a clear distinction between motor vehicles sold by a licensed dealer and those sold by one who is not licensed.

The legislature appears, by the enactment of s. 21, to have intended to effect a modification of both Arts. 1488 and 1489 of the *Civil Code* in respect to motor vehicles.

The judgment at trial should be restored and this appeal allowed with costs to the appellant throughout.

CARTWRIGHT J.:—The facts out of which this appeal arises are fully stated in the reasons of other members of the Court.

It appears from their reasons for judgment that all the learned judges in the Courts below would have maintained the appellant's action if they had reached the conclusion that the automobile purchased by the respondent from Gagnon had been stolen, and I understand that the same view is held by all the members of this Court.

(1) [1926] S.C.R. 246.

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Cartwright J.

After considering the whole record I agree with the conclusion of my brother Fauteux that the question, whether at the moment of its sale to the respondent the automobile was stolen from the appellant, is sufficiently raised in the pleadings and should be answered in the affirmative. This is sufficient to dispose of the appeal and renders it unecessary for me to deal with the other questions which were argued before us.

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Miquelon & Perron.*

Solicitor for the respondent: *A. Dumontier.*

1953

*Sept. 21
*Dec. 18

CLERMONT BINET .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Criminal Law—Evidence—Failure to charge jury of danger of accepting evidence of perjured accomplice on a vital issue.

Where a judge fails to properly instruct a jury on the great danger of accepting the evidence of an admittedly perjured accomplice on a vital issue, a conviction cannot stand. The rule in *Moreau* v. *the King* [1944] 1 D.L.R. 462; 80 Can. C.C. 290 cited in *Rex* v. *Stack and Pytell* [1947] 3 D.L.R. 747 at 762; 88 Can. C.C. 320 at 327, approved.

Per: Rinfret C.J. and Taschereau and Fauteux JJ. It appears from the evidence in the record that a verdict of guilty by a jury properly instructed and acting judicially would not be open to review as unreasonable and unsupported by the evidence. Therefore a new trial should be ordered.

Per: Rand and Cartwright JJ., (dissenting in part). On the evidence a properly instructed jury should have acquitted the accused and therefore this court should direct that a judgment of acquittal be entered.

Judgment of the Court of Queen's Bench, Appeal Side, Q.R. [1953] Q.B. 234, reversed. Rand and Cartwright JJ. dissenting in part.

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*PRESENT: Rinfret C.J., and Taschereau, Rand, Cartwright and Fauteux JJ.

1953

BINET v. THE QUEEN

APPEAL from the judgment of the Court of Queen's Bench, Appeal Side, Province of Quebec (1) affirming (Barclay and Hyde JJ. dissenting) the conviction of the appellant before Girouard J. and a jury on a charge of assault with intent to do bodily harm.

Remi Taschereau for the appellant.

Antoine Lacourcière, Q.C. for the respondent.

The judgment of Rinfret C.J. and Taschereau and Fauteux JJ. was delivered by:—

TASCHEREAU J.:—I agree with my brother Cartwright that the learned trial Judge failed to properly instruct the jury on the great danger of accepting the evidence of an admittedly perjured accomplice on a vital issue, and that as a result of that omission, the conviction cannot stand.

However, I would not direct a judgment of acquittal. I am not satisfied that a verdict of guilty rendered on the evidence in the record, by a jury properly instructed and acting judicially, would be open to review as unreasonable and unsupported by the evidence. There is I think some evidence that must be left for the sole consideration of the jury, and I would therefore order a new trial.

The judgment of Rand and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Queen's Bench (Appeal Side) pronounced on the 13th of February, 1953, affirming by a majority the conviction of the appellant, before Girouard J. and a jury, on a charge that he, on the night of the 21st to the 22nd of July, 1951, with intent to maim or disable Raoul Fortin or to do some other grievous bodily harm to him, did unlawfully wound and cause grievous bodily harm to the said Raoul Fortin by striking him on the head with a blunt instrument and causing a fracture of his skull.

Barclay and Hyde, JJ. dissenting, would have quashed the conviction and directed a new trial. The appeal is based, pursuant to section 1023(1) of the *Criminal Code*, on their dissent on the point of law stated in the following words in the formal judgment:—

> the trial judge failed to instruct the jury on the great danger of accepting the evidence of an admittedly perjured accomplice on a vital issue . . .

(1) Q.R. [1953] Q.B. 234.

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BINET
v.
THE QUEEN

Cartwright J.

Two questions arise for our consideration, first whether the verdict can stand, and secondly, if it must be set aside, whether we should order a new trial or direct that a judgment of acquittal be entered.

The learned trial judge warned the jury in terms to which no exception is taken of the danger of convicting on the uncorroborated evidence of an accomplice but he failed to give them any direction in regard to the fact that Giroux had on two previous occasions made statements on oath which were in direct conflict with the evidence which he had given at the trial on a vital point.

I respectfully agree with Barclay and Hyde JJ. that, in the circumstances of this case, the omission to direct the jury in this regard was an error in law so serious as to require that the conviction be quashed. I do not find it necessary to refer to all the authorities which were discussed by counsel. I am in respectful agreement with Hyde J. that the applicable rule is correctly stated by Errol McDougall J. who gave the judgment of the majority in *Rex* v. *Stack and Pytell* (1) in the following words:—

> Where the testimony of a principal Crown witness is in direct conflict with a prior sworn statement made by him the trial Judge must caution the jury in the strongest terms with respect to the danger of accepting his evidence, and the failure to do so will necessitate a new trial, notwithstanding that the trial Judge properly instructed the jury with respect to the evidence of such witness in the event that they concluded that he was an accomplice.

With the greatest respect for the contrary view entertained by the majority in the Court of Queen's Bench I do not think that the circumstance that counsel for the defence stressed the fact of the conflicting statements having been made in any way absolved the learned trial judge from the duty of dealing with them.

It remains to consider whether or not a new trial should be directed. After an anxious perusal of the whole record I had prepared somewhat lengthy reasons dealing with this question, referring to the evidence in considerable detail and reaching the conclusion that we ought to direct an acquittal. However, as the majority of the Court are of opinion that a new trial should be ordered and it is not usual to discuss the details of the evidence when that course is to be followed, I propose simply to state the result at

(1) [1947] 3 D.L.R. 747 at 762; 88 Can. C.C. 310 at 327.

which I arrived. I am of opinion that on the evidence in this record a properly instructed jury should have acquitted the appellant and that therefore we should not direct a new trial.

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BINET
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Cartwright J.

I would allow the appeal, quash the conviction and direct a judgment and verdict of acquittal to be entered.

Appeal allowed; new trial ordered.

Solicitors for the appellant: *Taschereau & Cliche.*

Solicitor for the respondent: *Antoine Lacourcière.*

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

AND

GOLDSMITH BROS. SMELTING AND REFINING COMPANY LIMITED ..... RESPONDENT.

1953
*Oct. 8, 9
1954
*Jan. 26

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

AND

THE L. D. CAULK COMPANY OF CANADA LIMITED ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Whether legal expenses incurred in making representations to the Commisisoner under the Combines Investigation Act and in *successfully defending charge under Criminal Code* regarding operation *of alleged illegal combine, are deductible under s. 6(1)(a) of the Income War Tax Act, R.S.C. 1927, c. 97 as amended.*

The legal expenses incurred by the respondent companies in connection with an investigation into an alleged illegal combine and in successfully defending a charge under s. 498 of the *Criminal Code* regarding the operation of such alleged illegal combine, were deductible in ascertaining taxable income as they were "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning of s. 6(1)(*a*) of the *Income War Tax Act,* R.S.C. 1927, c. 97. (*Minister of National Revenue v. The Kellogg Company of Canada Ltd.* [1943] S.C.R. 58 followed).

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

1954

MINISTER OF NATIONAL REVENUE v. GOLDSMITH BROS. SMELTING & REFINING CO. LTD.

MINISTER OF NATIONAL REVENUE v. L. D. CAULK CO. OF CAN. LTD.

APPEALS from the judgment of the Exchequer Court of Canada (1), Cameron J., affirming the decision of the Income Tax Appeal Board and holding that certain legal expenses incurred by the respondents were deductible under the *Income War Tax Act* in ascertaining their taxable income.

F. P. Varcoe Q.C. and K. E. Eaton for the appellant.

J. Sedgwick Q.C. and Stuart Thom for the respondent Goldsmith Bros. Smelting and Refining Co. Ltd.

J. D. Pickup Q.C. for the respondent L. D. Caulk Company of Canada Limited.

The judgment of the Chief Justice and Rand, J. was delivered by:—

RAND J.:—The question here is whether expenses incurred by the respondent company in defending itself against charges of violating the criminal law by combining with others to prevent or lessen unduly competition in the commercial distribution of dental supplies, are deductible in ascertaining taxable income. The agreement or arrangement alleged to have been unlawful purported to regulate day to day practices in the conduct of the respondent's business. It formed no part of the permanent establishment of the business; it was a scheme to govern operations rather than to create a capital asset; and the payment to defend the usages under it was a beneficial outlay to preserve what helped to produce the income. These expenses included legal fees both for appearing before the Commissioner under the *Combines Investigation Act* and at the trial which resulted in acquittal.

The provisions of the *Income Tax Act* are imposed on the settled practices of commercial accounting, but they create in effect a statutory mode of determining taxable income. Deductions from revenue must have been "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income". Each word of this requirement is significant, and decisions based on different statutory language are strictly of limited assistance.

(1) [1952] Ex. C.R. 49.

The payment arose from what were considered the necessity of the practices to the earning of the income. The case is then governed by *The Minister v. Kellogg* (1). Proceedings there had been brought against the company to restrain it from using certain ordinary descriptive words in connection with the sale of its products and the expenses had been incurred in successfully resisting them. That use was likewise part of the day to day usage in marketing the company's products and the expenses were held to be deductible.

The word "necessarily" was urged by Mr. Varcoe as being unsatisfied by the facts. This term is not found in the English Act and it cannot be taken in a literal or absolute sense. Fire insurance, for instance, is admittedly a deductible expense, and yet how can it be said to be necessary when thousands of business houses have gone through generations of trade without loss from fire? The word must be taken as it was in *Kellogg* in the commercial sense of necessity.

The judgment of this Court in *The Minister v. Dominion Natural Gas* (2), is clearly distinguishable as having been a case of expenses to preserve a capital asset in a capital aspect.

I would therefore dismiss the appeal with costs.

The judgment of Kerwin and Fauteux, JJ. was delivered by:—

KERWIN J.:—The facts are set forth in the reasons for judgment of Mr. Justice Cameron (3) and, on those facts, as to which there is no contradiction, these appeals are covered by the decision of this Court in *Minister of National Revenue* v. *The Kellogg Company of Canada Ltd.* (1). There the previous decision in *Minister of National Revenue* v. *Dominion Natural Gas Co. Ltd.* (2), was distinguished, as it is distinguishable here, since in that case the Court was concerned with money paid to preserve a capital asset. The legal fees paid by each of the respondents were necessary in a commercial sense and were wholly and exclusively laid out or expended for the purpose of earning

(1) [1943] S.C.R. 58. (2) [1941] S.C.R. 19.
(3) [1952] Ex. C.R. 49.

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Kerwin J.

the income (*Riedle Brewery Ltd.* v. *Minister of National Revenue* (1) and, therefore, do not fall within the prohibition contained in section 6(1)(*a*) of the *Income War Tax Act,* 1927, c. 97, as amended.

The appeals should be dismissed with costs.

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

KELLOCK J.:—The question involved in these appeals, which were argued together, arises under section 6(1)(*a*) of the *Income War Tax Act.* In 1947, the respondents, both of whom carry on the business of manufacturing dental supplies, were, along with others, invited by the Commissioner under the *Combines Investigation Act,* R.S.C., 1927, c. 26, then conducting an investigation into an alleged combine in Canada in the manufacture and sale of the above materials, to make representations before him. The respondents did so and for this purpose employed solicitors. Subsequently, in 1948, a charge was laid against the respondents and others under the provisions of section 498(1)(*d*) of the *Criminal Code.* The respondents were acquitted and their acquittal was affirmed on appeal. In making their returns of taxable income, the respondents sought to deduct from gross profits the legal expenses thus incurred in the respective years. The Minister refused to admit the deductions but his ruling was reversed by the Income Tax Appeal Board, whose decision was, in turn, affirmed by Cameron J., in the Exchequer Court (2). These appeals now result.

The proper construction of the statute has already been considered by this court more than once. In *Minister of National Revenue* v. *The Dominion Natural Gas Company Limited* (3), Duff C.J.C., in delivering the judgment of himself and Davis J., said at page 22:

> First, in order to fall within the category "disbursements or expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the income", expenses must, I think, be working expenses; that is to say, expenses incurred in the process of earning "the income".

The judgments of the other members of the court are to the same effect. It was held that the legal expenses of the then respondent in defending an action brought against it

(1) [1939] S.C.R. 253. (2) [1952] Ex. C.R. 49.
(3) [1941] S.C.R. 19.

to restrain it from selling gas in a certain portion of the City of Hamilton, alleged by the appellant to be the subject of an exclusive franchise held by the latter, were not deductible.

In *Minister of National Revenue* v. *The Kellogg Company of Canada, Limited* (1), the respondent company had incurred legal expenses in defending a suit brought against it for an injunction to restrain the alleged infringement of certain registered trade marks of the appellant by the respondent in the use by the latter of certain words in connection with the sale of some of its products. These trade marks were, however, held invalid. The respondent subsequently sought to deduct the expense of these proceedings in ascertaining its taxable income, and it was held it was entitled so to do. In delivering the judgment of this court, the Chief Justice pointed out that, in the ordinary course, legal expenses are simply current expenditures and deductible as such and, in referring to the decision in the *Dominion Natural Gas Company,* said at p. 60:

> 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.

In the case then before the court it was held that the respondents were not relying upon "a right of property or an exclusive right of any description" as in the *Natural Gas* case, 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."

In my view the principle of these decisions has been correctly applied by the learned trial judge in the circumstances here present. In *Kellogg*'s case the taxpayer was challenged as to his right to use a certain trade description in the selling of his goods, while in the case at bar the taxpayer was challenged as to his right to employ a certain trade practice. In each case the expense incurred in defending the challenge was, in my view, "working expenses", that is to say "expenses incurred in the process of earning the income". The income was earned in the one case by the employment of the trade description and in the other, by

(1) [1943] S.C.R. 58.

1954

MINISTER OF NATIONAL REVENUE v. GOLDSMITH BROS. SMELTING & REFINING CO. LTD.

MINISTER OF NATIONAL REVENUE v. L. D. CAULK CO. OF CAN. LTD.

Kellock J.

the employment of the trade practice. In my opinion it makes no difference that in the one case the challenge was by a private party, while in the other it was by the Crown.

It must be assumed in the case at bar, by reason of the acquittal, that the trade practices involved were not illegal, and, as pointed out by Cameron J., it is not necessary to consider the situation had the contrary been the case. The difference for present purposes is substantial.

On the argument we were referred to a number of other authorities but I do not find it necessary to refer to any of them. They are but applications of the principle in other circumstances. In my view the expenses with which we are here concerned were not merely indirectly related to earning the income in question but were "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning of section 6(1)(*a*).

I would dismiss the appeals with costs.

ESTEY J.:—I concur in the dismissal of the appeals with costs.

Appeals dismissed with costs.

Solicitor for the appellant: *A. L. DeWolf.*

Solicitors for the respondent: Goldsmith Bros. Smelting and Refining Co.: *Smith, Rae, Greer, Sedgwick, Watson & Thom.*

Solicitors for the respondent: The L. D. Caulk Co.: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

TORONTO-ST. CATHARINES TRANSPORT LIMITED (*Plaintiff*) ..... APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO and CANADIAN NATIONAL RAILWAY COMPANY (*Defendants*) ..... RESPONDENTS.

1953
*Oct. 7,
1954
*Jan. 26.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Railways—Municipal Corporations—Highways—Limitation of Actions—Whether failure by municipality to maintain overhead clearance imposed by Railway Act creates separate cause of action from that available under Municipal Act—The Railway Act, R.S.C. 1927, c. 170, ss. 263, 392—The Municipal Act, R.S.O. 1937, c. 266, ss. 480, 481.

Section 263 of the *Railway Act*, R.S.C. 1927, c. 170, provides that unless otherwise directed by the Board of Railway Commissioners, the clear headway above the surface of the highway at the central part of any overhead structure shall be not less than 14 feet. By order of the Board, the Parkway Drive Subway in the City of Toronto, over which passed the tracks of the C.N.R., was constructed by the railway company, the City of Toronto being charged with the maintenance of the pavement on the floor of the subway. In the course of such maintenance the City caused the surface of the highway to be raised thereby reducing the overhead clearance to less than the statutory minimum. In consequence of damages suffered as a result of such reduction the appellant sued the railway company and the City. The trial judge, McRuer C.J.H.C., dismissed the action against the railway but gave judgment against the City. No appeal was taken as to the dismissal as against the railway company, but on an appeal by the City to the Court of Appeal for Ontario, the judgment against the City was set aside.

Held: (Rinfret C.J. and Kerwin J. dissenting), that nothing in the *Railway Act* conferred upon individuals suffering damage by reason of a breach by a municipal corporation of s. 263 a separate or new cause of action. The appellant had a right of action under the *Municipal Act*, R.S.O. 1937, c. 266, but the action not having been brought within three months from the time the damages were sustained, such action was barred by the limitation provisions thereof.

Per: (Rinfret C.J. and Kerwin J. dissenting):—The appellant did not allege non-repair or nuisance but brought its action under s. 263 of the *Railway Act*. The action of the city in improving the pavement did not by itself place the highway out of repair or create a nuisance; it was only by reason of the lessening of the clearance that s. 263 was infringed. No remedy by way of a penalty is imposed specifically for a breach of s. 263 but the summary of the existing law by Lord Simonds in *Cutler* v. *Wandsworth* Stadium [1949] A.C. 398 at 407, indicates that what must be considered is the object and purpose of

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

1954

TORONTO-ST. CATHARINES TRANSPORT LTD. v. CITY OF TORONTO AND C.N.R.

the enactment. The object of Parliament in providing for the clearance was not the protection of railway companies and municipalities but the benefit of all users of the highway, and when the appellant as one of that class suffered a particular damage as a result of a breach of the section, it is entitled to compensation.

Decision of the Court of Appeal for Ontario [1952] O.R. 29, affirmed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing the appeal of the Defendant (Respondent) from the judgment of McRuer C.J.H.C. (2) in favour of the appellant.

B. J. Thomson, Q.C. for the appellant.

F. A. A. Campbell, Q.C. and *A. P. G. Joy* for the respondent.

The judgment of the Chief Justice and Kerwin JJ. (dissenting) was delivered by:—

KERWIN J.:—The plaintiff in this action, Toronto-St. Catharines Transport Ltd., appeals from a decision of the Court of Appeal for Ontario setting aside the judgment at the trial, of the Chief Justice of the High Court, which had adjudged that the appellant recover against the respondent, the City of Toronto, the sum of $2,035 and costs. Originally Canadian National Railway was also a defendant but there was no appeal from the dismissal of the action as against it.

On November 25, 1946, the appellant, which operates a trucking service was transporting on a tractor-trailer what is known as a low pressure firebox type heating boiler. While in the course of so doing, on Parkside Drive, in the City of Toronto, the boiler was damaged when it came in contact with the ceiling of a subway over which were laid the tracks of Canadian National Railway. This subway was constructed pursuant to an order of the Board of Railway Commissioners for Canada of December 8, 1909, made under ss. 59 and 238 of the *Railway Act* of Canada, R.S.C. 1906, c. 37 (as amended by s. 5 of c. 32 of the 1909 statutes), and later appearing as ss. 39 and 257 of R.S.C. 1927, c. 170. By the Board's order the subway was constructed by the Railway Company (then the Grand Trunk Railway Company of Canada) and a contribution to the cost thereof was

(1) [1952] O.R. 29; [1952] 1 D.L.R. 602.

(2) [1951] O.R. 333; [1951] 3 D.L.R. 613.

made by the City. It is unnecessary to refer further to the terms of the Board's order in view of s. 263 of R.S.C. 1927, c. 170:—

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.

Since it was not "otherwise directed or permitted by the Board" the clear headway in the Parkside Drive subway should not be less than fourteen feet at any time.

In the original construction the required headway was provided but subsequently the City made repairs to the pavement on Parkside Drive thereby raising its level and diminishing the statutory clearance. The damage to the boiler was caused by reason of this diminution and I agree with the two Courts below that there was no negligence on the part of the driver of the appellant's tractor-trailer which caused or contributed to the damage.

The important question is whether the appellant has a separate cause of action because of the infringement by the City of s. 263 of the *Railway Act*, or whether it had only an action under ss. 480 and 481 of the Ontario *Municipal Act*, R.S.O. 1937, c. 266:—

480. (1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall subject to the provisions of *The Negligence Act* be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

(7) Nothing in this section shall impose upon a corporation any obligation or liability in respect of any act or omission of any person acting in the exercise of any power or authority conferred upon him by law, and over which the corporation had no control, unless the corporation was a party to the act or omission, or the authority under which such person acted was a by-law, resolution or license of its council.

481. The provisions of subsections 2 to 8 of section 480 shall apply to an action brought against a corporation for damages occasioned by the presence of any nuisance on a highway.

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The City contends that, although by raising the level of the pavement it created a nuisance or a condition of non-repair within the meaning of these sections, for which the appellants had a right to bring an action, as the action was not brought until after the expiration of three months from the time that the damages were sustained, s-s. 2 of s. 480 is a complete bar.

However, the appellant did not allege that Parkside Drive was out of repair or that there was a nuisance thereon but brought its action under s. 263 of the *Railway Act*. It should be emphasized that what is complained of is an infraction of this section and not of an Order of the Board and, therefore s. 392, referred to in the reasons for judgment in both Courts below, has no bearing upon the matter. This section imposes a penalty upon every company and every municipality or other corporation which neglects or refuses to obey an order of the Board.

Since the City intentionally raised the level of Parkside Drive, we may at once put aside the question which has been considered in some cases as to whether negligence must exist. The question is whether the breach of a statutory obligation affords a right of action to a person injured as a result of that breach. In *Cutler* v. *Wandsworth Stadium Ld.* (1), the House of Lords decided that no action lies at the suit of an individual bookmaker against the occupier of a licensed dog-racing track on which a totalisator is lawfully in operation for failure to provide him with "space on the track where he can conveniently carry on bookmaking," in accordance with s. 11, s-s. 2(*b*) of the Betting and Lotteries Act, 1934. The obligation imposed by that section was enforceable only by criminal proceedings for the penalties specified in s. 30, s-s. 1 of the Act. At page 407, Lord Simonds states that the answer to such a question as the one before us depends "on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted." The remainder of the paragraph contains a clear statement of the problem:—

> But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or

(1) [1949] A.C. 398.

otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But "where an Act" (I cite now from the judgment of Lord Tenterden C.J. in *Doe* v. *Bridges* (1), "creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." This passage was cited with approval by the Earl of Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban District Council* (2). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in *Black* v. *Fife Coal Co. Ltd.* (3): "If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson* v. *Newcastle Waterworks Co.* (4), and by Lord Herschell in *Cowley* v. *Newmarket Local Board* (5), solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention." An earlier and a later example of the application of this principle will be found in *Groves* v. *Wimborne (Lord)* (6) and *Monk* v. *Warbey* (7), in the former of which cases the Act in question was described by A. L. Smith L.J. (8), as "a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit."

O'Connor v. *Bray* (9), is a decision of the High Court of Australia. Regulation 31(*b*) of the *Scaffolding and Lifts Act*, 1912, N.S.W., prescribed that safety gear must be provided for all lifts except direct acting lifts and service lifts in which no person travels. It was held by Dixon, Evatt and McTiernan JJ. that a person injured as a result of the non-observance of the statutory duty thus imposed has a cause of action against the person responsible under the regulations for the care, control and improvement of the lift. At page 478 Dixon J. states:—

> Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under

(1) 1 B. & Ad. 847, 859.
(2) [1898] A.C. 387, 394.
(3) [1912] A.C. 149, 165.
(4) (1877) 2 Ex.D. 441, 448.
(5) [1892] A.C. 345, 352.
(6) [1898] 2 Q.B. 402.
(7) [1935] 1 K.B. 75.
(8) [1898] 2 Q.B. 402, 406.
(9) (1937) 56 C.L.R. 464.

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the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on.

With this statement I agree.

In *Salt* v. *Town of Cardston* (1), the appellant was injured by his horse running into an unguarded guy wire supporting an electric light pole erected by the Town of Cardston within a road allowance. It was held that the accident was a case of failure to construct a public work "so as not to endanger the public health or safety" within the meaning of s. 20 of c. 37 of the 1907 Alberta Statutes, being "An Act to Amend the Cardston Incorporating Ordinance of the North-west Territories", and not a case of non-repair within s. 87 of "The Municipal Ordinance" of the North-west Territories, and that, therefore, the appellant's claim was not barred by the limitation of six months provided by the latter. It was pointed out by Duff J., as he then was, at page 617, that the subject-matters of the two sections might in some slight degree overlap. There the Court was faced with the provisions of two Ordinances as amended. Here we have, on the one hand, the Legislature of the Province of Ontario, legislating in relation to municipal institutions, creating a new duty upon municipalities with respect to highways and both as to it and the common law liability for misfeasance prescribing a limitation of action. On the other hand, we have Parliament legislating in relation to railways and prescribing a duty so that it and the Legislature were dealing with entirely different matters. In my view, not only does that circumstance not take the case out of the decision in *Salt* v. *Town of Cardston* but in fact it weighs in favour of the contention that Parliament was creating a new right when one bears in mind another matter now to be mentioned.

It may be assumed that a municipality would not perform its duty under ss. 480 and 481 of the *Municipal Act* if there be something above the highway, although not on it, and that were it not for the *Railway Act* and the Board's order, the structure above the pavement on Parkside Drive

(1) (1920) 60 Can. S.C.R. 612.

might constitute a nuisance or lack of repair. It had been held in Ontario that notwithstanding any liability which might be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway was carried over a railway, such highway was still a public highway, and the municipality was, therefore, bound to keep it in repair and was not absolved from liability for default merely because the railway company might also be liable. *Mead* v. *Township of Etobicoke and Grand Trunk Railway Company* (1); *Fairbanks* v. *The Township of Yarmouth et al* (2). This was in the absence of a provision relieving the municipality from liability where the duty was cast upon a railway company. It was subsequently held in *Holden* v. *Township of Yarmouth et al* (3), that by a provision first introduced into the *Municipal Act* in 1896, no liability is now imposed on a municipal corporation for want of repair of a railway crossing by reason of its being of too high a grade and the omission to fence, the obligation being placed solely on the railway company by a section of the *Railway Act*. This provision of the *Municipal Act* appears in s-s. 7 of s. 480 of the *Municipal Act* quoted above. The action of the City in improving the pavement on Parkside Drive did not, by itself, place the highway out of repair or create a nuisance; it was only by reason of the lessening of the clearance between the pavement and the ceiling of the subway that s. 263 of the *Railway Act* was infringed.

No remedy by way of penalty or otherwise is imposed specifically for a breach of s. 263. We were referred to s. 444 whereby, if no other penalty is provided in the statute for anything done contrary to the provisions of the Act, certain named parties shall be liable to a penalty; and to s. 448 prescribing the procedure for the imposition and recovery of any penalty and setting out the procedure whereby the Board, if it has reasonable ground for belief that any company, person or corporation is violating the provisions of the Act, may request the Attorney General of Canada to institute proceedings on behalf of His Majesty. Even if it be assumed that either of these sections, or both of them, could apply to the City, the fact that penalties are

(1) (1889) 18 O.R. 438. (2) (1897) 24 A.R. 273.
(3) (1903) 5 O.L.R. 579.

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imposed thereby does not necessarily deprive the appellant of a right of action under s. 263. The summary of the existing law contained in the speech of Lord Simonds in *Cutler* v. *Wandsworth Stadium Ld., supra,* indicates that we must consider the object and purpose of the enactment. The object of Parliament in providing for the clearance was surely not for the protection of railway companies and municipalities. The fixing of the clear headway was for the benefit of all users of the highway and when the appellant as one of that class suffered a particular damage as a result of a breach of the section, it is entitled to compensation. It may be necessary at some time in the future to consider the decision of the Court of Appeal in *Phillips* v. *Britannia Hygenic Laundry Co. Ltd.* (1), referred to in the reasons for judgment in both Courts below but at the moment it is sufficient to state that in my opinion the judgment proposed in the present appeal is not at variance with any of the authorities referred to therein.

The appeal should be allowed and the judgment of the Court of Appeal set aside with costs throughout and the judgment at the trial restored.

TASCHEREAU J.:—In the City of Toronto, on the 25th of November, 1946, the plaintiff's tractor-trailer unit loaded with a low pressure fire box type heating boiler, was being driven in a southerly direction on Parkside Drive which passes under a subway, on top of which are the tracks of the Canadian National Railway. While proceeding under, the boiler came into collision with the subway, by reason of the clearance being less than fourteen feet in height, as required by s. 263 of the *Railway Act.*

This subway had been built by the Canadian National Railway Company, pursuant to Order No. 10169 of The Board of Railway Commissioners, which directed the City of Toronto to maintain all necessary pavement and sidewalks on the floor of the subway. The City respondent fulfilled this obligation, but in so doing raised the level of the highway, so that the clear headway above the surface at the central part, was less than fourteen feet. There can be no doubt that this was the cause of the accident.

(1) [1923] 2 K.B. 832.

The Chief Justice of the High Court maintained the action against the City of Toronto, but the Court of Appeal unanimously reversed this decision.

The question that has to be determined is whether this case should be governed by the *Railway Act* or by the *Municipal Act*. The relevant sections of the *Railway Act* are the following:—

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.

392. Every company and every municipal or other corporation which neglects or refuses to obey any order of the Board made under the provisions of this Act, or any other Act of the Parliament of Canada, shall for every such offence, be liable to a penalty of not less than twenty dollars nor more than five thousand dollars.

I have come to the conclusion that the combined effect of these two sections is not to give a right of action to the plaintiff against the City. As the learned Chief Justice of the Court of Appeal said in his reasons for judgment, s. 392 provides the means of enforcement of orders of the Board, but does not create any new right of action for damages.

I have no doubt that the City, by raising the surface of the level of the highway, created a nuisance which is actionable at common law. This right is specifically reserved by s-s. 4 of s. 392. But unfortunately for the appellant, its action is barred by s. 453, s-s. 2 of the *Municipal Act* (R.S.O. 1950, c. 243) which says that no action shall be brought for the recovery of damages occasioned by the default of a corporation to keep a highway in proper repair, after the expiration of three months from the time when the damages were sustained. In the present case, the action was brought one year and a half after the accident.

I would dismiss the appeal with costs.

RAND J.:—This appeal raises a question of some importance under s. 263 of the *Railway Act* which reads:—

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.

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The overhead crossing involved was built in 1909 under an order of the Board of Railway Commissioners, now called Transport Commissioners, directing what is known as a "grade separation" of an existing level crossing, with the structure at the required clearance. The order by clause 11(*a*) provided:—

> *Subways.*—Where the railway is carried over a highway by means of a subway towards the construction of a portion of which the City is by this Order directed to contribute, the Railway Company shall, at its own expense, maintain the abutments and girders necessary to carry its tracks; and the City shall, at its own expense, maintain all necessary sewers, pavements, and sidewalks on the floor of the subway and the approaches thereto.

In the course of years, through work done on the highway, its surface became so far raised as to reduce the clearance to thirteen feet, six inches. A boiler being carried on a truck owned by the appellant, the top of which was slightly under fourteen feet above the pavement, struck the bottom of the structure and was damaged and these proceedings followed. The action against the Railway Company was dismissed on the authority of *Canadian National Railways* v. *Guérard* (1), in which this Court held the railway not responsible for the reduction of the clearance under circumstances similar to those here, and from that judgment no appeal was taken; but the claim against the Municipality was maintained. This was reversed by the Court of Appeal on the ground that the action was barred by the three months limitation of s. 480(2) of the *Municipal Act,* c. 266, R.S.O. 1937 which applies to liability for default in repair of the highway and arising from nuisance.

The narrow question is whether s. 263 imposes on the Municipality a statutory duty to maintain the prescribed clearance that runs to the benefit of every individual using the highway, for a breach of which an action will lie. If it does, the limitation provision does not apply; if not, it does.

The *Railway Act* deals primarily with railways and their impact on the conditions existing when constructed. They must cross highways, and the several provisions of the statute, ss. 255, 256 and 257, giving the Board authority to require works and measures for the "safety, protection and convenience of the public" at highway crossings are

(1) [1943] 1 S.C.R. 152.

directed at the risks so created. The obligations to maintain and to bear the cost of these works or measures is determined by the Board and is embodied in orders made by it.

But the field into which municipalities are drawn by the necessities of public safety and convenience extends no further than is reasonably necessary to carry out the purposes of the statute; and although its provisions are to be given a broad and liberal interpretation, there is obviously a line at which it stops: *B.C. Electric Railway Co.* v. *Van. Vic. & East. Railway Co.* (1).

Admittedly the province has primary jurisdiction over and responsibility for the ordinary administration of highways. Is s. 263 to be interpreted as imposing new duties on municipal bodies in matters within that administration? When a highway is lowered to pass under a railway, prima facie, in its new level and contour, it is in the same jurisdictional position as before: it is a highway with all the ordinary attributes and, except as to the relationship to the railway so established, subject to the same law as before the change: *Carson* v. *Weston* (2). That the Board may make special provision for the safety and convenience of the public arising from the risks attributable to the works ordered or the fact of the crossing is undoubted; but the mere lowering of the highway level will not ordinarily come within that scope. The province, and the municipality as its delegate, can, for example, close the highway; it can restrict the highway to traffic in one direction and reduce the width of the travelled portion; it can limit the height of vehicles and loads on a particular highway or through the subway; the municipality can decide against pavement and revert to earth or gravel where no question of injurious effect on the railway structure is involved. I will assume that there might be situations where the Board could order a municipality to maintain a certain clearance or a specified ascent or descent of the highway at a crossing. But there is no such order here and the ordinary provision in an order for the maintenance of the pavement and other works such as sewers, is directed really to their cost, not their continuance, and is made under s. 39 of the Act.

(1) [1914] A.C. 1067. (2) (1901) 1 O.L.R. 15.

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It is of some significance that s. 385 gives a right of action for damages for any breach of duty committed by a railway company or any person acting on its behalf for violation of any provision of the Act or the special act incorporating the company, but the section does not extend to municipalities or other persons who may be within duties imposed by the Act.

S. 392 provides for penalties for disobedience to an order of the Board and s-s. (4) declares that

> Nothing in or under this section shall lessen or affect any other liability of any such company, corporation or person, or prevent or prejudice the enforcement of such order in any other way.

But I find no provision either specific or general, and we have been referred to none, which imposes a penalty upon any person other than a railway company, or a person acting for or in connection with it, for a breach of s. 263.

There is a clear distinction between the maintenance of the clearance as a requirement of the statute and the creation beneath the structure of such a reduced clearance as to amount to a nuisance or to constitute negligent repair. In the latter case, all the surrounding circumstances would be pertinent, but in the former the only question would be whether the clearance had not been maintained and whether the breach of the statute has caused the damage.

I am therefore unable to interpret s. 263 as evidencing an intention on the part of Parliament to impose a duty on the municipal authority extending in benefit to each member of the public using the highway through the subway, to maintain, in relation to the conditions of the highway, the clearance specified by the statute; and the appeal should be dismissed with costs.

KELLOCK J.:—Robertson C.J.O., in delivering the reasons for judgment of the Court of Appeal said:

> By order of the Railway Board the subway was so constructed that it provided a clearance of 14 feet above the surface of the highway. Further by order of the Board, the Municipal Corporation was required to maintain all necessary pavements and sidewalks on the floor of the subway and on the approaches to the subway.

The appellant contends that clearance is not a subject of the order at all but that it is a matter regulated entirely by

the provisions of s. 263 of the *Railway Act*. From this it is argued that s. 392 has no application in the present instance. I do not agree with this contention.

It is provided by s. 257, the relevant section, that where a railway is already constructed across a highway, the Board may order the company to submit a plan and profile and may order that the railway be carried over the highway or that the highway be carried under the railway. S. 39 provides that when the Board, by any order, directs any works to be constructed, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, the same shall be constructed and maintained, and s. 259 authorizes the Board to apportion the cost.

Had the Board by its order directed that the clearance should have been 15 feet, for example, any failure to maintain this height would, clearly, have been a breach of the order. Merely because the 14 feet mentioned in s. 263 was not departed from but insisted upon by the order, does not, in my opinion, render the requirement as to height any the less a part of the order. In my view, therefore, the situation does not differ from what it would have been had the accident occurred by reason, for example, of a hole in the floor of the subway, occasioned by neglect on the part of the respondent.

In such a case I do not think that, on the proper construction of the *Railway Act*, a right of action under that statute is given against the respondent. In my view, the inclusion of s-s. (4) in s. 392 and the lack of any mention of a municipal corporation in s. 385, indicate only too clearly that it was not the intention of Parliament to give any remedy apart from what is expressly provided for by the statute.

In my view, the duty which is envisioned by the statute as resting upon the municipality is well expressed in the language of the present order by which the respondent is required to maintain all "necessary" pavements and sidewalks. The necessity for these, in the present case, is left to provincial law. The necessity for any pavement at all

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might be non-existent should the traffic carried by the highway not warrant it, but in so far as pavements and sidewalks are necessary under provincial law, the respondent is directed by the order to bear the expense.

Such decisions as *Fairbanks* v. *Yarmouth* (1), and *Mead* v. *Etobicoke* (2), as well as *Carson* v. *Weston* (3), are in accord with this view. Want of repair of a highway exists not only with respect to what is underfoot but also with respect to overhead obstructions; *Ferguson* v. *Southwold* (4). In the case at bar the overhead structure remained as originally constructed. The highway, however, was as much out of repair by reason of the pavement having been built too high as it would have been had its surface been allowed to disintegrate. The obligation to maintain the highway imposed by the *Municipal Act* remained upon the respondent with the consequence that the limitation provisions of that statute apply.

I would therefore dismiss the appeal with costs.

ESTEY J.:—The appellant suffered the damages here claimed when a low pressure type heating boiler, being transported on one of its tractor-trailers, was damaged passing through a subway on Parkside Drive, one of the streets in the respondent city.

This subway, as constructed by the Grand Trunk Railway Company (now Canadian National Railways) under order of the Board of Railway Commissioners numbered 10,169 and dated December 8, 1909, provided a clearance of fourteen feet. This order was made under the provisions of ss. 59 and 238 of the *Railway Act* (S. of C. 1909, c. 32, in R.S.C. 1927, c. 170, ss. 39 and 256). The relevant portions of the order provide for an apportionment of the cost and direct that the respondent "shall, at its own expense, maintain all necessary sewers, pavements, and sidewalks on the floor of subway and the approaches thereto." This order did not specify the height of the subway and, therefore, the provisions of s. 263 apply, which require a "clear headway above the surface of the highway at the central part of any overhead structure" be not less than fourteen feet.

(1) (1897) 24 O.A.R. 273.
(2) (1889) 18 O.R. 438.
(3) (1901) 1 O.L.R. 15.
(4) (1895) 27 O.R. 66.

The appellant in this action claimed damages against both the C.N.R. and the respondent city. The learned Chief Justice presiding at trial found "the overall height of the load was less than fourteen feet" and "that the damages were sustained by reason of the fact that there was not a clearance of fourteen feet at the centre of the exit of the subway for vehicles passing from north to south." The obligation to maintain this clearance rested upon the respondent and he, therefore, dismissed the claim against the C.N.R. and awarded damages in the sum of $2,035 against the respondent. No appeal was taken by the appellant against the dismissal of the C.N.R. claim, but upon an appeal taken by the respondent the learned judges in the Court of Appeal reversed the learned trial judge and directed that the action be dismissed as against the respondent. In this further appeal we are, therefore, not concerned with the C.N.R., but only with what, if any, liability, in the circumstances, rests upon the respondent city.

It is not disputed either that the clearance of fourteen feet required by law was originally provided nor that subsequently, in repairing the pavement, the city, in breach of its duty, raised the latter, thereby reducing the headway to less than fourteen feet and justifying the finding of the learned Chief Justice.

This damage was suffered November 25, 1946, and the action commenced by writ issued July 18, 1947. The respondent, therefore, contends that the action, not having been commenced within the period specified by s. 480 of the *Municipal Act* (R.S.O. 1937, c. 266, now R.S.O. 1950, c. 243, s. 453), cannot be maintained.

480. (1) Every highway and every bridge shall be kept in repair by the corporation the council of which has jurisdiction over it, or upon which the duty of repairing it is imposed by this Act, and in case of default the corporation shall subject to the provision of *The Negligence Act* be liable for all damages sustained by any person by reason of such default.

(2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.

Section 481 reads:

481. The provisions of s-s. 2 to 8 of s. 480 shall apply to an action brought against a corporation for damages occasioned by the presence of any nuisance on a highway.

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The Legislature, in enacting s. 480, not only set forth the common law liability of municipal corporations, but imposed a further and more general liability to repair highways which would include certain types of nonfeasance and the words "such default" in s. 480(2) refer to and apply to the entire liability under s. 480(1). In s. 481 the Legislature made the statutory period of three months in s. 480(2) applicable to actions for nuisance. It follows, therefore, that whatever liability under the common law or the *Municipal Act* may have rested upon the respondent for its failure to maintain the fourteen-foot clearance, a claim therefor was barred at the time this action was commenced by virtue of the three-month limitation specified in s. 480(2).

If, therefore, the appellant can succeed, it must be by virtue of a claim founded upon liability for damages imposed by the provisions of the *Railway Act*. The only section relied upon as imposing a relevant duty in s. 263:

> 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.

The appellant contends that as this statute imposes a duty not existing at common law, for which it creates no remedy in the event of a breach, an injured party may proceed by action to recover the damage suffered. Willes J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1); *31 Hals.*, 2nd Ed., p. 550, para. 737; *Comyn's Digest* (Action upon Statute (F)); *Addison on Torts*, 8th Ed., p. 104. Whether such a liability exists must depend upon the intention of Parliament as expressed in the statute, and the rules discussed under the above citations are but aids in construing a statute for the purpose of ascertaining that intention. Sir Lyman Duff, after discussing certain of these aids, stated:

> But the object and provisions of the statute as a whole must be examined with a view to determining whether it is a part of the scheme of the legislation to create, for the benefit of individuals, rights enforceable by action; or whether the remedies provided by the statute are intended to be the sole remedies available by way of guarantees to the

(1) (1859) 6 C.B. (NS) 336 at 356.

public for the observance of the statutory duty, or by way of compensation to individuals who have suffered by reason of the non-performance of that duty. *Orpen* v. *Roberts* (1).

and Atkin L.J. (later Lord Atkin) stated:

> In my opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act. *Phillips* v. *Britannia Hygienic Laundry Co.* (2).

Parliament does not, in this section, expressly provide that in the event of a breach the municipality may be liable either in damages or penalty. Our attention was directed to s. 392, which provides a penalty upon a municipality "which neglects or refuses to obey any order of the Board made under the provisions of this Act." The duty to maintain the fourteen-foot clearance is imposed, in this case, by s. 263 of the Act and, therefore, s. 392, being referable only to orders of the Board, has no application.

The *Railway Act* contains many provisions dealing with the construction and maintenance of railways, the equipment to be used thereon as well as the management and operation thereof. Under the heading "Action for Damages" Parliament enacted ss. 385 to 390 inclusive. Section 385 is a very wide and comprehensive section which reads in part:

> Any company which or any person who . . . does, causes, or permits to be done any matter, act or thing contrary to the provisions of this or the Special Act, or to the orders . . . of the Board made under this act, omits to do any matter, act, or thing thereby required to be done . . . shall, in addition to being liable to any penalty elsewhere provided, be liable to any person injured by any such act or omission . . .

The word "company", as used in this section, must be construed as defined in s. 2(4), which does not include a municipal body such as the respondent. In other words, in this general provision, imposing liability for damages even where a penalty is provided, Parliament has not imposed such liability upon municipal corporations. The subsequent sections under this heading deal specifically with cattle upon the railway, fires caused by locomotives, failure to equip trains and other matters which are not relevant hereto, except to observe that nowhere under this heading is liability for damages imposed upon a municipal body such as the respondent.

(1) [1925] S.C.R. 364 at 370. (2) [1923] 2 K.B. 832 at 840.

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Estey J.

Immediately following the foregoing sections, and under the heading "Offences, Penalties and Other Liability," a number of sections are set forth, including s. 392.

Parliament, in this statute, has in some cases expressly provided, in the event of a breach, for both the imposition of a penalty and liability in damages. In other cases it has provided for a penalty and preserved other rights which may exist against the party committing the breach; and further, in certain cases for a penalty only. Then in s. 444 it provides for a penalty upon the company or the officers thereof in the event of a breach where no other penalty is provided, but here again this section has no relevance, as the word "company" does not include a municipal corporation such as the respondent.

Our attention was not directed to, nor have I found any section which, in the event of a breach on the part of a municipality for failure to maintain the clearance of fourteen feet as required by s. 263, expressly imposes liability upon a municipal corporation. That s. 263 imposes a new duty upon the municipality must be conceded, but to construe this section, in the event of a breach, as giving a remedy in damages to the injured party would appear to be contrary to the intention of Parliament. Section 263 gives the Board power to alter or change the fourteen-foot clearance and where that power is exercised and a breach thereof is committed s. 392 provides that a penalty may be imposed upon the municipality, and then provides in s-s. (4):

(4) Nothing in or done under this section shall lessen or affect any other liability of such company, corporation or person, or prevent or prejudice the enforcement of such order in any other way.

Parliament, in this sub-section, shows an intention not to impose a new liability, but rather to preserve "any other liability." It is not suggested that "any other liability" exists under the *Railway Act*. Parliament, in enacting this sub-section, would have in mind common law liability and the possibility of relevant provincial legislation, and to preserve any liability that might exist by virtue of either of them. The imposition of a penalty and this preservation indicate, in the event of a breach of an order of the Board, that Parliament did not intend to create a remedy in damages in favour of an injured party. It would not appear

reasonable to conclude that Parliament intended to create a new remedy in damages in favour of an injured party for a breach of the fourteen-foot clearance required by s. 263 but if that clearance was altered by the Board as that section contemplates then there would be only such liability as is preserved under s-s. (4). Moreover, the fact that Parliament has, in other sections, adopted express language to indicate its intention with respect to liability in damage in favour of an injured party rather supports the view that s. 263, without express language, should be construed as not creating such a remedy.

The possibility that ultimately it may be found that no penalty for a breach of s. 263 is provided would not affect the intention of Parliament in respect to liability for damages to an injured party.

The appeal should be dismissed with costs.

CARTWRIGHT J.:—The facts out of which this appeal arises and the relevant statutory provisions are set out in the reasons of my brothers Kerwin and Rand. At the hearing, it was decided that we should not interfere with the concurrent findings of fact absolving the appellant from contributory negligence and the situation with which we have to deal may therefore be summarized as follows. While the appellant's motor vehicle was being lawfully driven along a highway in the City of Toronto, the boiler which it was carrying was damaged by striking a bridge carrying a railway across the highway. The clearance between the surface of the highway and the under-surface of the bridge was thirteen feet six inches. The height of the top of the boiler from the surface of the highway was greater than this clearance but less than fourteen feet, the clearance prescribed by s. 263 of the *Railway Act*. The Railway Company had constructed the bridge the required distance above the surface of the highway but the Respondent City had at some time thereafter raised the surface of the highway so that the clearance was reduced to thirteen feet six inches. There is no suggestion that the surface of the highway was otherwise out of repair. It is common ground that the duty of keeping the highway in repair rested upon the Respondent City.

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Cartwright J.

Under these circumstances, in my opinion, apart altogether from the provisions of the *Railway Act*, the appellant had a right of action against the City for damages caused by a nuisance on the highway. Any obstruction on a highway which to a substantial degree renders the reasonable exercise of the right of passage unsafe or inconvenient is a public nuisance at common law; and a member of the public who has sustained a substantial injury, beyond that suffered by the rest of the public, resulting directly from such nuisance may maintain an action for damages. This right, as is pointed out by Meredith J. in *Ferguson* v. *Township of Southwold* (1), exists equally whether the nuisance is overhead or underfoot.

It cannot, I think, be doubted that the placing of a solid structure over a highway at a height of fourteen feet constitutes a nuisance at common law unless it is so placed under statutory authority. The effect of the relevant provisions of the *Railway Act* is to give such statutory authority but on the condition that a clearance of not less than fourteen feet be maintained between the surface of the highway and the overhead structure.

The Railway Company having complied with the Act in this regard has rightly been absolved from liability by the learned Chief Justice of the High Court following the decision of this Court in *Canadian National Railways* v. *Guérard* (2), and against this part of his judgment no appeal was taken.

So long as the City maintained its pavement in such a manner that the clearance between its surface and the bridge was not less than fourteen feet it had statutory authority to permit and maintain a condition which would otherwise have been an actionable nuisance. When it raised the pavement it lost that protection. In my opinion the effect of s. 263 of the *Railway Act* is not to create any right of action against the City but rather to relieve the City conditionally from a liability to action which would otherwise have existed. The City, having failed to observe the condition upon which immunity depends, remains liable in the same manner as if the *Railway Act* had given no statutory authority for the construction and maintenance of the

(1) (1895) 27 O.R. 66 at 74. (2) [1943] S.C.R. 152.

bridge, that is to say, it remains liable to an action for damages for creating or maintaining a nuisance at common law. This right of action is however barred by the combined effect of ss. 480(2) and 481 of the *Municipal Act*, as the action was not commenced until after the expiration of three months from the time when the damages were sustained.

The same result is reached if, instead of regarding the situation resulting from the raising of the pavement by the City as a nuisance, the City's action is regarded as an act of misfeasance. As was said by the learned Chief Justice of Ontario:— "The Act of the appellant in raising the level of the pavement was no doubt an act of misfeasance, and, therefore, actionable at common law." Such right of action is equally barred by s. 480(2) of the *Municipal Act*.

For the reasons set out above and for those given by the learned Chief Justice of Ontario, I am of opinion that, to use the words of Lord Simonds quoted by my brother Kerwin, "on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted" the proper conclusion is that it was not the intention of Parliament to confer upon individuals who might suffer damage by reason of the failure of a municipal corporation to comply with s. 263 of the *Railway Act* any new right of action against such municipal corporation. It was quite unnecessary to create any fresh cause of action as ample remedies were already available to the appellant both under the *Municipal Act* and at common law.

In my view, s-s 4 of s. 392 of the *Railway Act* was inserted *ex abundanti cautela* to prevent any suggestion that the rights of action existing under the common law and the provincial statutes were superseded by the sanctions of a penal nature provided for the enforcement of obedience to the provisions of the Act and the orders of the Board.

It was said by Riddell J.A. in *Howe* v. *Howe* (1), that "the maxim '*expressio unius est exclusio alterius*' was never more applicable than when applied to the interpretation of a statute"; and the fact, that when, by s. 385 of the *Railway Act*, Parliament confers on any person injured by an act or omission in contravention of the Act or the orders of the

(1) [1937] O.R. 57 at 61.

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Cartwright J.

Board a right of action against certain companies and persons it uses to describe those against whom such right of action is given words quite inapt to include a municipal corporation, furnishes an indication that Parliament did not intend to create any new right of action against municipal corporations but rather to leave an injured person to exercise his existing remedies.

In the case at bar the rights of action which the appellant possessed against the City were ample to enable it to obtain satisfaction for the damage caused by the latter's wrongdoing but unfortunately it has lost these rights through failure to commence its action within the statutory period of limitation.

For the above reason I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Haines, Thomson & Rogers.*

Solicitor for the respondent: *W. G. Angus.*

1953

*Dec. 14

1954

*Feb. 15

DOMINION TAXICAB ASSOCIATION APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Taxation—Income—Contracts between taxicab association and taxicab owners—Whether moneys paid to association as admission fees pursuant to contract, taxable—The Income Tax Act, S. of C. 1948, c. 52, ss. 2, 3, 4—Companies Act, R.S.Q. 1941, c. 276.

The appellant, a taxicab association incorporated in 1949 under Part III of the *Quebec Companies Act* (R.S.Q. 1941, c. 276) without share capital, received moneys during 1949 from taxicab owners pursuant to contracts under which the taxicab owner became a member of the Association and the latter was to render certain services. The contracts read as follows:

Par les présentes, il est entendu et convenu ce qui suit:

Le membre dépose la somme de $500 comme droit d'entrée pour obtenir le privilège de mettre un taxi en service dans ladite Association.

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

Le membre consent à ce que ledit droit d'entrée devienne la propriété absolue de la Dominion Taxicab Association lors de son départ, à moins que les deux signataires des présentes consentent mutuellement au transfert dudit dépôt à un nouvel acquéreur.

La Dominion Taxicab Association s'engage à considérer ce droit d'entrée comme un dépôt sur lequel un intérêt pourra être payé quand le Bureau de Direction le jugera à propos.

The Minister included these moneys when computing the Association's income. The appellant contended that the contracts were contracts of deposit and that each member remained the owner of the moneys so deposited. The assessment was maintained by the Income Tax Appeal Board and by the Exchequer Court.

Held: The appeal should be allowed and the assessment set aside.

Per Kerwin, Locke, Cartwright and Fauteux J J.: On the true construction of the contract and on the evidence, none of the moneys became the absolute property of the Association in the year 1949; as each deposit was received by the Association and became part of its assets there arose a corresponding contingent liability equal in amount. Such deposit could not, therefore, be regarded as a profit from the appellant's business.

Per Rand J.: The payments, both in the intention of the subscribers and of the Association, were to enable capital assets to be acquired and were limited in their application to that purpose. They cannot, therefore, be held to be income.

(*Diamond Taxicab Association* v. *Minister of National Revenue* [1952] Ex. C.R. 331; [1953] C.T.C. 104, distinguished).

APPEAL from the judgment of the Exchequer Court of Canada (1), Archibald J., affirming the decision of the Income Tax Appeal Board and maintaining the assessment for income tax.

T. P. Slattery, Q.C. and *E. B. Fairbanks* for the appellant.

D. H. W. Henry and *R. G. Decary* for the respondent.

The judgment of Kerwin, Locke, Cartwright and Fauteux JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of Archibald J. (1) dismissing an appeal from a decision of the Income Tax Appeal Board which had in turn dismissed an appeal from the assessment of the appellant to income tax for the taxation year 1949.

The appellant was incorporated in July 1949, under Part III of the *Quebec Companies Act*, R.S.Q. 1941, c. 276, without share capital. By the terms of its Letters Patent it was to be composed of the three applicants for incorporation "as well as other persons who are or may become members of the corporation."

(1) [1953] Ex. C.R. 164.

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DOMINION TAXICAB ASSOCIATION v. MINISTER OF NATIONAL REVENUE

Cartwright J.

Among the purposes for which it was incorporated were the following:—

1. To purchase, assume, take over or otherwise acquire, all or part of the assets, rights, franchises, concessions, privileges, and to succeed to the business known under the name "DOMINION TAXICAB ASSOCIATION" by acquiring all or any part of the assets, with the goodwill and all rights and contracts passed with the said "DOMINION TAXICAB ASSOCIATION."

* * *

3. To found, maintain, establish, services likely to benefit members of the Association.

* * *

8. To purchase, rent or otherwise acquire, all or any part of the property, franchise, goodwill, rights and privileges held or enjoyed by any person, firm or corporation, the purchase, rental or the acquisition of which may be to the Association's advantage.

* * *

14. To acquire, purchase, sell, rent, exchange, all immovable property necessary for the purposes of the Association.

During the year 1949 the appellant entered into contracts with the owners of 81 taxicabs and received $500 in respect of each taxicab making a total of $40,500. The respondent ruled that this sum was income of the appellant liable to tax and the question in this appeal is whether or not this ruling is correct.

All of the sums of $500 making up the total amount in question were paid under the terms of contracts in writing entered into between the appellant and its individual members in the following form:—

Association de Taxis

DOMINION Taxi Association
1250 rue St-Georges Street
MONTREAL, P.Q.

CONTRAT

Contrat intervenue entre DOMINION TAXICAB ASSOCIATION et M. ..... demeurant à Montréal, au numéro ..... de la rue..... le ..... 19.....

Par les présentes, il est entendu et convenu ce qui suit:

Le membre dépose la somme de $500 comme droit d'entrée pour obtenir le privilège de mettre un taxi en service dans ladite Association.

Le membre consent à ce que ledit droit d'entrée devienne la propriété absolue de la Dominion Taxicab Association lors de son départ, à moins que les deux signataires des présentes consentent mutuellement au transfert dudit dépôt à un nouvel acquéreur.

La Dominion Taxicab Association s'engage à considérer ce droit d'entrée comme un dépôt sur lequel un intérêt pourra être payé quand le Bureau de Direction le jugera à propos.

Je, soussigné, déclare avoir lu et bien compris les termes des présentes.

.....
Membre

It is the submission of the respondent that the sum of $40,500 is profit derived from the appellant's business during the taxation year and so is liable to tax under the combined effect of sections 2(1), 3(*a*) and 4 of the *Income Tax Act*. The expression "profit" is not defined in the *Act*. It has not a technical meaning and whether or not the sum in question constitutes profit must be determined on ordinary commercial principles unless the provisions of the *Income Tax Act* require a departure from such principles. In the case at bar the main question is as to the respective rights of the appellant and its members in regard to the deposits of $500 made in pursuance of the contracts in the form quoted above. It is well settled that in considering whether a particular transaction brings a party within the terms of the *Income Tax Acts* its substance rather than its form is to be regarded.

Counsel for the appellant argues that the substantial transaction in the case of each contract was a loan of $500 made by the member to the Association repayable on demand; while for the respondent it is submitted that the $500 immediately on being paid over became the absolute property of the Association being a part of the consideration for its agreement to supply services, the remainder of the consideration being the monthly payments to be made by the member.

I have reached the conclusion that, on the true construction of the contract and on the evidence, none of the payments of $500 became the absolute property of the Association in the year 1949; but that as each deposit was received by the Association and became a part of its assets there arose a corresponding contingent liability equal in amount. The consideration moving from the member to the Association was not the outright payment to it of $500 but the deposit with it of that sum. While the contract fails to indicate with any precision the respective rights of the parties in regard to the sum deposited and particularly fails to make clear the circumstances, if any, under which the member may require the return of such sum, all its terms appear to me to be inconsistent with the view that the Association acquired any absolute property in such sum. The second paragraph of the contract shews that two conditions had to be fulfilled before the absolute

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Cartwright J.

ownership of the deposited sum could pass to the Association, (i) the member must have left the Association, and (ii) the parties must have failed to agree on a satisfactory successor to the retiring member. If such a successor were agreed upon the deposit would be transferred to him, and, presumably, although this is not of importance, the successor would reimburse the retiring member. It is in evidence that not only up to the end of 1949 but up to the date of the trial, in December 1952, no member had retired without a satisfactory substitute being found.

Paragraph 3 of the contract is also inconsistent with the view that the sum deposited had become the property of the Association.

I do not find it necessary to decide under what circumstances a member might require the return of his deposit as I think it clear that the moneys deposited did not become the absolute property of the Association. While the method of book-keeping adopted by the parties is not conclusive either for or against the party sought to be charged with tax, I am of opinion that in the case at bar the appellant rightly treated the $40,500 as a deferred liability to its members, and that unless and until the necessary conditions were fulfilled to give absolute ownership of a deposit to the appellant and to extinguish its liability therefor to the depositing member, such deposit could not properly be regarded as a profit from the appellant's business.

The case at bar is distinguishable from *Diamond Taxicab Association Ltd.* v. *Minister of National Revenue* (1), affirmed in this Court without written reasons. In the circumstances of that case it was held that the sums there in question had been paid outright to the Association as part of the consideration for the services it rendered; no question of a deposit arose.

For the above reasons I would allow the appeal with costs throughout and declare that no part of the said sum of $40,500 was assessable as income of the appellant in the taxation year in question.

(1) [1952] Ex. C.R. 331; [1953] C.T.C. 104.

RAND J.:—The appellant was incorporated by letters patent of the province of Quebec and among the objects were:—

1. To purchase, assume, take over or otherwise acquire, all or part of the assets, rights, franchises, concessions, privileges, and to succeed to the business known under the name "DOMINION TAXICAB ASSOCIATION" by acquiring all or any part of the assets, with the goodwill and all rights and contracts passed with the said "DOMINION TAXICAB ASSOCIATION".

* * *

4. For the furtherance of the purposes of the Association, to keep, maintain, operate, direct, offices, garages, stores, gasoline depots or other similar premises for keeping, cleaning, repairing and generally taking care of, automobiles and motor-vehicles of all kinds and descriptions, as well as all accessories connected therewith or relating thereto, and to purchase, sell, exchange, or otherwise dispose of, automobile-vehicles of all kinds and descriptions as well as all parts and accessories and generally all articles or items which may be useful, with a view to permitting full and complete realization of the purposes of the Association.

* * *

14. To acquire, purchase, sell, rent, exchange, all immovable property necessary for the purposes of the Association.

Subsidiary powers were expressly and impliedly conferred enabling it generally to do all such acts and things as might be necessary or become incumbent upon the Association to achieve those objects, including the obtaining of capital funds.

The contributions of $500 made by the members on the terms of the application set forth in the reasons of my brother Cartwright, both in the intention of the subscribers and of the corporation, furnished those funds. They were obviously to enable capital assets to be acquired and were limited in their application to that purpose. I am quite unable, therefore, to see how they can be held to be income.

The case of *Diamond Taxicab Association Limited* v. *M.N.R.* (1), affirmed without reasons by this Court was decided on the facts there presented. It was held that the interpretation given them by the Exchequer Court, that the monies had been paid as commuted compensation for future services, had not been shown to be erroneous.

I would therefore allow the appeal and set aside the assessment of the Minister with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Slattery, Bélanger & Fairbanks.*

Solicitor for the respondent: *R. G. Decary.*

(1) [1952] Ex. C.R. 331; [1953] C.T.C. 104.

1954

*Feb. 5, 8, 9
*Feb. 9

IN THE MATTER OF THE ESTATE OF F. H. MORDEN NEILSON, DECEASED

GRAHAM MORDEN NEILSON, AUDREY SHIELDS and SHIRLEY E. PELLOWE ..... APPELLANTS;

AND

NATIONAL TRUST COMPANY LIMITED, Executor of the Estate of F. H. Morden Neilson, and THE OFFICIAL GUARDIAN ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Executors—Compensation on passing of accounts—Where neither breach of trust by executor, nor error in principle followed by surrogate court judge established, award maintained.

APPEAL by three of the adult beneficiaries of the Estate of the late F. H. Morden Neilson from an order of the Court of Appeal for Ontario (Henderson, Hogg, Hope, Aylesworth JJ.A.; Laidlaw JJ.A., dissenting) (1) dismissing an appeal from an order of Barton, Surrogate Court Judge, (2) made on the passing of accounts of the respondent, National Trust Co. Ltd., executor and trustee of the Estate, and trustee of a trust for each of the appellants.

R. N. Starr, Q.C. (*R. D. Hill* with him) for the appellants: The Court of Appeal erred: (1) In not holding that the Trust company had disentitled itself to compensation and costs in whole or in part because of its actions, both in the administration of the Estate and in its conduct upon the passing of the accounts. (2) In not holding that there were errors in principle in the method adopted and in the result arrived at by the Surrogate Court Judge in fixing the amount of compensation and costs to be paid the Trust company. (3) In holding that the sum of $140,000 was a fair and reasonable allowance of such compensation. (The estate was valued for probate purposes at $4,383,000 and the period of administration in question was four years.)

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

(1) [1953] O.R. 153.

(2) [1953] 1 D.L.R. 302.

H. P. Hill, Q.C. for The Official Guardian: The sale of the William Neilson Co. Ltd. stock was decided without submitting the matter to the respondent's Board of Directors, and the non-exercise of a discretion by the Board is a factor to be considered in fixing compensation where an executor does an act in which he does not exercise a discretion. *Re Wilson* [1937] O.R. 769.

Following the arguments advanced on behalf of the appellants and of The Official Guardian, the Court without calling on *D. J. Walker, Q.C.* (*C. M. Milton* with him) for the respondent, retired. On its return to the bench, Kerwin J., speaking for the Court, delivered judgment orally:

KERWIN J.:—We will not have to call on you Mr. Walker. We have considered all the arguments of Mr. Starr and are of opinion that in none of the circumstances mentioned by him was there any breach of trust by the Trust Company during its administration of the estate and including the passing of accounts. We can find nothing to indicate any lack of fairness, or frankness on the part of the Trust Company towards the Court or the beneficiaries, notwithstanding our agreement with the comments of Mr. Justice Aylesworth (1) on the statement filed by the Trust Company and entitled "Summary of Benefits or Savings by the Estate."

We can find no reason to interfere with the amount of compensation fixed by the Court of Appeal.

Before I proceed to dispose of the point raised on behalf of The Official Guardian, the Court would like to know if that point was raised before. Mr. Hill, or Mr. Starr, could you tell us that?

Mr. HILL: "It was not raised before, my Lord."

Mr. JUSTICE KERWIN: "We understood so, but we wanted to make sure. In the absence of any evidence, and considering that the point was not raised before, we do not deal with the point raised by Mr. H. P. Hill."

In the result therefore the appeal is dismissed with costs.

(1) [1953] O.R. 153 at 166.

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NEILSON *et al* v. NATIONAL TRUST CO. *et al*

Kerwin J.

Mr. HILL: What about the Official Guardian's costs?

Mr. JUSTICE KERWIN: The appeal is dismissed with costs. You were not an appellant, were you?

Mr. HILL: No I was respondent. In view of the position that The Official Guardian took, I wanted to make that clear.

Mr. JUSTICE KERWIN: The Official Guardian will have his costs. That may be added, if necessary.

Appeal dismissed with costs.

Solicitors for the appellants: *Farrell, Gauld & Hill.*

Solicitor for the respondent, National Trust Co.: *D. J. Walker.*

Solicitor for the respondent, The Official Guardian: *F. T. Watson.*

1953

*Sept. 30
*Oct. 1

1954

*Feb. 15

IN THE MATTER OF *The Mechanics' Lien Act,* R.S.O. 1950, c. 227.

COUPLAND ACCEPTANCE LIMITED ...APPELLANT;

AND

EDWIN ALEXANDER WALSH carrying on business under the name of W. J. Walsh and Company, and others } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages—Mechanics' Lien—Priority—Lien registered after mortgage but before money advanced to pay off prior mortgage—Subrogation—Whether lender entitled to priority over liens of general contractor and subcontractors—The Mechanics Lien Act, R.S.O. 1950, c. 227, ss. 13 (1), 20—The Registry Act, R.S.O. 1950, c. 336, s. 69.

Section 13(1) of *The Mechanics Lien Act,* R.S.O. 1950, c. 227 gives priority to the lien over all payments or advances made under a mortgage after registration of the lien. The section does not apply however, where, as here, advances are made by a third party for the purpose of paying off a prior mortgage. In such case the lender is entitled in equity to stand as against the property in the shoes of the first mortgagee and need not rely upon the subsequent mortgage for priority. *Crosbie-Hill* v. *Sayer* [1908] 1 Ch. 866; *Whiteley* v. *Delaney* [1914] A.C. 132 (applied in *Gordon* v. *Snelgrove* [1932] O.R. 253) followed.

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

The appellant, incorporated under the Companies Act (Ont.) to carry on the business of automobile and insurance adjusters, was empowered to invest the moneys of the company not immediately required for the purposes of the company in such manner as from time to time might be determined. By supplementary letters patent its powers were extended to permit it to purchase and deal in property, real and personal, but not directly or indirectly to transact any business within the meaning of *The Loan and Trust Corporations Act,* R.S.O. 1950 c. 214.

By an agreement in writing made with two named individuals the appellant took in its own name a mortgage on an apartment house property as security for an advance of $28,000 made by it and an equal amount by them, and undertook to hold half of the proceeds of the mortgage in trust for them. The courts below having held that the respondents' claims for liens were registered after the appellant's mortgage but prior to the advances made under it, the respondents contended that the appellant was without capacity to accept the mortgage under the *Companies Act* and that its undertaking to act as trustee was prohibited by *The Loan and Trusts Corporations Act,* R.S.O. 1950, c. 214.

Held: further, that as to its own money the appellant must be presumed in the absence of evidence to the contrary to be investing moneys of the company not immediately required for the purposes of the company, and in agreeing to hold the proceeds of the mortgage in trust for its co-investors, to be acting under the express powers given by s. 23 (1) (*p*) of the *Companies Act*. *Re Mutual Investments Ltd.* 56 O.L.R. 29; *Re York Land Co. Ltd.* [1939] O.W.N. 229, distinguished.

Decision of the Court of Appeal for Ontario [1952] O.W.N. 665, reversed in part.

APPEAL by Coupland Acceptance Limited, sued as second mortgagee, from a judgment of the Court of Appeal for Ontario (1) which allowed in part its appeal from a judgment of Schwenger J., County Court Judge, (sub-nom *Walsh* v. *the King et al; Bowser et al* v. *Dyer et al*) in consolidated actions under *The Mechanics' Lien Act.*

J. J. Robinette, Q.C. and *P. B. C. Pepper* for the appellant.

G. D. Watson, Q.C., J. A. Sweet, Q.C. and *Walter Fraser* for the respondents.

The judgment of the Court was delivered by

KELLOCK J.:—The finding in the courts below that no advance was in fact made under the appellant's mortgage until after registration of the claim for lien disposes of the appeal except as to the contention that the appellant is entitled to stand in the place of the mortgagees under the

(1) [1952] O.W.N. 665.

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COUPLAND ACCEPTANCE LTD. v. WALSH et al.

Kellock J.

Kerbel mortgage with respect to the sum of $46,782.50 paid by the appellant to the said mortgagees, which, with other moneys paid by the mortgagor, effected the retirement of that mortgage.

The evidence is clear that it was agreed that the moneys obtained from the appellant were to be used, as they were in fact used, to pay off the existing second mortgage held by Kerbel and that the mortgage to be given to the appellant was to be in replacement of that mortgage. While the appellant's mortgage was registered on May 4, 1951, Kerbel was not paid off until May 9th and, in the meantime, the respondents' lien had been registered on the 5th of May. A discharge of the Kerbel mortgage, although delivered to the appellant, was not registered and, consequently, had no operation beyond that of a receipt or acknowledgment. It is only when registered that such a document becomes operative as a discharge of the mortgage; s. 69 of *The Registry Act,* R.S.O. 1950, c. 336; *Ross and Colclough* (1).

The appellant claims to be subrogated to the rights of the Kerbel mortgagees. It seems plain that, apart from any provisions of *The Mechanics Lien Act,* the appellant would be so entitled. In *Crosbie-Hill* v. *Sayer* (2), Parker J., at 877, stated the law as follows:

> . . . where a third party at the request of a mortgagor pays off a first mortgage with a view of becoming himself a first mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee. Even in the case of a purchase of an equity of redemption, where the first mortgagee is at the same time paid off and joins in a conveyance of the property to the purchaser, so that questions of merger arise, it will require strong evidence of contrary intention to preclude the Court from holding that the first mortgage debt is still alive for the purpose of protecting the purchaser of the equity of redemption from mesne incumbrances, whether at the time of purchase he knows of such incumbrances or otherwise.

In that case Parker J., held that mesne incumbrancers who were not parties to the transaction under which the first mortgage was paid off were not entitled to avail themselves of that fact in order to defeat the real intention of the parties, thereby obtaining priority for themselves by a

(1) (1925) 28 O.W.N. 364. (2) [1908] 1 Ch. 366.

mere accident at the expense of other people who never intended to benefit them. Reference may also be made to *Whiteley* v. *Delaney* (1).

The law thus laid down was applied by Sedgewick J., in *Gordon* v. *Snelgrove* (2), in favour of a plaintiff who had paid off a prior mortgage with knowledge at the time of the registration of his mortgage that there was a registered second mortgage.

While s. 13(1) of *The Mechanics Lien Act*, R.S.O., 1950, c. 227, gives priority to the lien over all payments or advances made under a mortgage after registration of the lien, the section is not to be construed as affecting the right relied upon here by the appellant. The appellant does not rely upon its mortgage for priority as to the moneys here in question but upon the equitable right to stand in the place of the Kerbel mortgagees whose priority to the lien is unquestionable. The position of the lienholder remains the same as it was before the appellant intervened and it would, in my opinion, require more than is to be found in the section to bring about a result so unjust that it would, to paraphrase the language of Parker J., in the *Crosbie-Hill* case, permit the lienholder, by a mere accident, to obtain priority at the expense of people who never intended to benefit him. Had the appellant been in fact aware of the registration of the lien, it could have purchased the Kerbel mortgage, in which event no possible question could have arisen.

Nor do I think that s. 20 is relevant. The respondents refer to *Cook* v. *Koldoffsky* (3), where it was pointed out that the section (then s. 21) enables a lienholder, by registration, to secure the advantages given under the decisions upon the *Registry Act* which prevent a prior registered instrument from holding its position if the person claiming under it had actual notice of the lien before its registration. As stated by Hodgins J. A., at p. 562, the *Registry Act* "deals solely with priorities as between instruments" and s. 20 gives only the status of a purchaser *pro tanto* to a lienholder

> whose right to interfere with a prior instrument depends upon actual notice of the instrument, i.e., the lien when registered (sec. 72 of the Registry Act, R.S.O. 1914, ch. 124) or upon the absence of actual notice to him of a prior unregistered instrument.

(1) [1914] A.C. 132. (2) [1932] O.R. 253; 2 D.L.R. 300
(3) (1916) 35 O.L.R. 550; 28 D.L.R. 346.

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Once it is clear that s. 13 does not apply there is, in my view, nothing in s. 20 which interferes with a right of the nature of that here in question.

The respondents contend in any event, however, that the appellant's claim is to be reduced by the sum of $2,126.25, representing interest at the rate of 2 per cent per month for the two months following the maturity of the Kerbel mortgage to the time of its payment off, as recovery of any amount beyond the rate of 5 per cent payable before maturity is prohibited by s. 8 of the *Interest Act,* R.S.C. 1927, c. 102. To this the appellant objects that the payment of this amount is not to be ascribed to any moneys advanced by it but that the mortgagor, who provided the sum of $8,500 over and above the amount advanced by the appellant, must be taken to have made this payment. I think this objection is well taken but nonetheless, following the terms of s. 8, the appellant may not rely upon the provisions of the Kerbel mortgage with respect to interest beyond a rate of 5 per cent from May 9, 1951.

It is further contended by the respondents that, by virtue of certain statutory provisions to be referred to, the appellant was without capacity to accept a mortgage of real estate. The appellant was incorporated in 1927 under *The Companies Act,* R.S.O. 1927, c. 218, *inter alia,* for the purpose

(*a*) of carrying on the business of automobile and insurance adjusters, etc., and "to conduct the general business of a holding, investment, promoting, brokerage and trading corporation and real estate agency", and

(*b*) "to invest and deal with the moneys of the company's *not immediately required* for the purposes of the company *in such manner* as from time to time may be determined.

By supplementary letters patent issued in 1949, the powers and objects of the company were extended "subject to the provisions of any statute or regulations passed thereunder in that behalf" so as to permit the company to purchase or otherwise acquire and to deal in property, real and personal, but not directly or indirectly to transact or undertake any "business" within the meaning of *The Loan and Trust Corporations Act.* This prohibition recognized the restriction on the authority to incorporate contained in s. 2(1) of *The Companies Act* which provides that the

Lieutenant-Governor in Council may incorporate by letters patent for any of the purposes to which the authority of the legislature extends except, *inter alia*, those of "corporations within the meaning of *The Loan and Trust Corporations Act*." It would, however, appear that to the Lieutenant-Governor in Council, at least there was no conflict inhering between the prohibition in the charter and the express power "to invest and deal with the moneys of the company not immediately required . . . in such manner as may be from time to time determined".

Under the provisions of s. 1(*c*) of *The Loan and Trust Corporations Act* (and it will be convenient to refer to R.S.O. 1950, c. 214) "corporation" is defined to mean

> a loan corporation, a loaning land corporation, or a trust company.

A "loan corporation" is defined by clause (*h*) as every incorporated company, association or society, constituted, authorized or operated "for the purpose of" loaning money on the security of real estate or for that and any other purpose. A "loaning land corporation" is defined by clause (*i*) to mean a corporation incorporated "for the purpose of" lending money on the security of real estate and of carrying on the business of buying and selling land. "Trust company" is defined by clause (*r*) as a company constituted or operated "for the purpose of" acting as trustee, bailee, agent, executor, administrator, etc. Section 129, s-s (1), provides that no corporation, unless registered under the Act or a person duly authorized by it, shall undertake or transact in Ontario the "business" of a loan corporation or a loaning land corporation or a trust company.

In my opinion the appellant did not, by reason of the mortgage here in question, carry on the "business" of any of the corporations mentioned in *The Loan and Trust Corporations Act*. What it did do was, upon the terms of an agreement in writing between it and two named individuals, to take in its own name a mortgage in respect of which it had advanced $28,000 of its own moneys and the two individuals an equal amount, the appellant agreeing to hold half of the "proceeds" of the mortgage in trust for the individuals. In thus investing its own money it is to be presumed, in the absence of evidence to the contrary,

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that the appellant was investing moneys "not immediately required for the purposes of the company". In agreeing to hold the proceeds of the mortgage in trust for its co-investors, the company was acting under the express power given by s. 23(1)(*p*) of *The Companies Act*. There is no evidence that the company was in the "business" of investing in mortgages on real estate. The fact that the mortgage in question was for a short term only, four months, would rather indicate that the appellant was "turning to account", to employ the language of paragraph (*o*) of s. 23, moneys it did not need immediately. It was for the respondents to show, if it were the fact, that the character of the transaction was other than as above.

The respondents also rely upon s. 2(2) of *The Companies Act*, which authorizes, notwithstanding anything in s-s (1), the incorporation of a private company with power to lend and invest money "on mortgage of real estate or otherwise". By so doing, such a company "shall not by reason thereof be deemed a corporation within the meaning of *The Loan and Trust Corporations Act*." It will be observed that this provision authorizes not an isolated act but a practice or "business". It is thus in keeping with the provisions of *The Loan and Trust Corporations Act* already referred to, under which corporations incorporated "for the purposes of" that statute are authorized to carry on "the business" described by the statute, while others are prohibited therefrom.

Reliance is also placed by the respondents upon s-s (2) of s. 129 of *The Loan and Trust Corporations Act*, by which it is provided that "any collecting or taking of money on account of . . . loans or advances" shall be deemed "undertaking the business" of the corporations with which that statute deals.

In the case at bar, however, while the $28,000 of the two individuals was paid over by them to the appellant and by it disbursed to the mortgagor, I think it clear that what is struck at by the statute is the collecting or taking of money by a corporation to be by it, in turn, lent out to borrowers, the "collecting or taking" constituting the corporation a debtor of the person or persons advancing the money. It was not intended in the present instance that the appellant

should become a debtor of these moneys. Under the agreement already referred to, that of which the appellant was to become trustee was half of the "proceeds" of the mortgage. If, after receiving from the named individuals their $28,000, the appellant had misappropriated them, no doubt it would thereby become a debtor, but apart from such an eventuality, the appellant was merely an agent to pay over the moneys and accept the mortgage. I do not think, therefore, that the appellant has invaded the prohibited area. It therefore seems to me that it was competent for the appellant to take the mortgage for its own behoof and to agree to become trustee for the individuals concerned of one half of the proceeds as and when received.

In *Re Mutual Investments Limited* (1), to which we were referred by counsel for the respondents, the company there concerned was authorized by its charter to act as agent for the investment of funds, *inter alia,* on mortgages of real estate but apart from the holding of mortgages on its own behalf for unpaid purchase money of real property it had sold, it was prohibited from transacting or undertaking any business within the meaning of *The Loan and Trust Corporations Act.* It was held by a single judge, Riddell J., that the only power given to the company by its charter was to "negotiate" investments, not to make them in its own name, and that in doing what it did, it was violating the provision of what is now s. 129, s-s (1) of the statute. It would appear that the company was purporting to carry on "business" in this manner and accordingly was in breach of the statute.

In *Re York Land Company Limited* (2), it was held by Middleton J. A., that a company, incorporated under the Ontario Companies Act with power to deal in real estate and to take mortgages for any unpaid balance of purchase money, did not lack capacity to accept as purchase moneys for lands sold, a transfer of a charge upon lands it had not owned. Middleton J. A., relied upon s. 24(1)(*q*) of the statute, now s. 23(1)(*q*), which authorizes the company to do all such things as are conducive to the objects set forth in the section and in the letters patent. The learned

(1) (1924) 56 O.L.R. 29; [1924] 4 D.L.R. 1070.

(2) [1939] O.W.N. 229; 2 D.L.R. 775.

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judge evidently did not regard s. 2(2) of *The Companies Act* nor any of the provisions of *The Loan and Trust Corporations Act* as in any way operating to the contrary. I would therefore allow the appeal to the extent indicated, with costs throughout.

Appeal allowed in part.

Solicitor for the appellant: *H. J. Waldman.*

Solicitor for the respondent, E. A. Walsh: *J. A. Sweet.*

Solicitor for the respondent, H.M. the Queen in Right of Canada represented by Central Mortgage & Housing Corporation: *Christilaw, Gage & Wigle.*

Solicitor for the respondents, Charles Bowser *et al: S. R. Jefferess.*

Solicitor for the respondent, Lawson Lumber Co.: *Walter Fraser.*

1953

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*Mar. 31

REGENT VENDING MACHINES LIMITED (*Plaintiff*) ..... APPELLANT;

AND

ALBERTA VENDING MACHINES LIMITED (*Defedendant*) ..... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Whether certain coin machines, "slot machines", as defined by s. 2(b) of The Slot Machine Act, R.S.A. 1942, c. 333.

The appellant sued to recover the balance of the purchase price owing on eighteen coin machines. The respondent pleaded the machines were "slot machines" within the meaning of *The Slot Machine Act,* R.S.A. 1942, c. 333 and that under it there could be no property in them and no money owing in respect to them.

By s. 2(*b*) of the Act "slot machine" is defined to mean:

(i) any machine which under the provisions of s. 986(4) of the *Cr. Code* is deemed to be a means or contrivance for playing a game of chance.

(ii) any slot machine and any other machine of a similar nature, the result of one of any number of operations of which is, as regards the operator, a matter of chance and uncertainty or which as a

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

consequence of any given number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

(iii) any machine or device the result of one or any number of operations of which is, as regards the operator, a matter of chance or uncertainty or which as a consequence of any given number of successive operations yields different results to the operator notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

The machines in question were operated by placing a coin in a slot whereupon discs, balls or other projectiles were released to be thereafter set in motion by means of a plunger, trigger or the like and the score made was automatically recorded. No free plays or prizes were awarded regardless of the score obtained and nothing was furnished, beyond entertainment through the test of skill, the score depending upon the proficiency in the handling or manipulation of the total operation.

Held: (Kerwin and Estey JJ. dissenting) that the machines were not "slot machines" within the definition of s. 2(*b*) of *The Slot Machine Act*. *Laphkas* v. *The King* [1942] S.C.R. 84, followed.

Decision of the Appellate Division of the Supreme Court of Alberta (1952-53) 7 W.W.R. (N.S.) 433 reversed and judgment at trial restored.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (Clinton J. Ford J.A. dissenting) (1) reversing a judgment of Egbert J. in favour of the appellant.

H. J. MacDonald for the appellant.

No one appeared for the respondent.

KERWIN J. (dissenting):—The appellant, Regent Vending Machines Limited, claims from the respondent, Alberta Vending Machines Limited, a sum of money alleged to be owing under a conditional sale contract covering eighteen machines. The defence is that each is a slot machine within the definition of that expression as contained in s. 2 of the Alberta Slot Machine Act, R.S.A. 1942, c. 333, and that, therefore, by virtue of s. 3 thereof, no recovery may be had. The trial judge directed judgment to be entered for the appellant but his decision was reversed by the Appellate Division, Clinton J. Ford J.A. dissenting, and the action dismissed.

(1) (1952-53) 7 W.W.R. (N.S.) 433.

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Kerwin J.

Sections 2 and 3 of the Act appear in the report of the judgment of this Court in *D. Johnson* v. *Attorney General of Alberta* (1). By the terms of s. 3, if the machines fall within any part of the definition of "slot machine" in s. 2, the appeal fails and it is therefore necessary to describe them. The appellant designates them as coin machines. Each is put in operation by the insertion of a coin in a slot. The ensuing classification and description taken from the appellant's factum are accepted as correct.

1. Miniature Bowling Games, viz:

6 United Five Player Shuffle Alleys

2 Six Foot Express Alleys

1 Gottlieb Bowlette Machine.

Miniature bowling pins are set up automatically, and the player is provided with projectiles with which he manually attempts to knock down the pins. The projectile does not strike the pins, but does strike electrical controls set in the same position underneath the pins so that the same result is obtained as if the pins were actually struck. The score made by the player is automatically recorded and displayed by the machine. A player does not know what score he will obtain. Successive operations will yield different results. The obtaining of a high score depends on the skill of the operator, and a skilful player will almost invariably obtain much better results than an unskilful one.

2. A Hoop Game, viz: 3 United Shufflecade

Those operate in the same manner as the miniature bowling games except that the player's object is to project the ball or puck over a hurdle into hoops of varying values. A machine returns the puck to the player after each shot.

3. A Miniature Hockey Game, viz: 1 United Hockey Machine.

This game is played by two players. On the board within the machine are miniature hockey players which are manipulated by levers by human players. The insertion of the coin releases 10 balls which are played one at a time. The object of the game is to score on the opponent's goal by the manipulation of the miniature players. The machine in no way controls the movements of the miniature players and does not record the score.

4. A pistol and Target Game, viz: 2 Exhibit Gun Patrol Machines.

Each of these consists of a pistol, mounted on a swivel, and a target. After the insertion of a coin, the player aims the pistol at the moving target and shoots. No bullet is actually fired, but an arm at the bottom of the gun electrically records a hit by the falling of the target and the ringing of a bell if the player has aimed and shot properly—in other words, the same result is shown as if a bullet had actually been fired. The accuracy of the player's aim and the proper pressing of the trigger determines the result. The machine does not record the total score made by the player.

(1) [1954] S.C.R. 127.

None of the machines emits any merchandise, slugs or tokens. A prize or award is not received by any player, and he does not obtain any right to play an additional game or games free of charge. The only thing received by the player in exchange for his coin is the right to use the machine to play a game and the amusement derived therefrom. The player has no chance of winning anything; the owner of the machine has no chance of losing anything or of receiving anything other than the fee paid by the player for the use of the machine.

It is contended that there is no difference in the meaning of paragraphs (i), (ii) and (iii) of s. 2 of the Act and that, therefore, since the machines in question are forms of amusement only and do not emit slugs or tokens, and no prize or reward is given, they are of the type dealt with in *Laphkas* v. *Rex* (1), where such a machine was declared to be a machine for vending services. I agree that in view of this decision the machines are not covered by (i) since they are not games of chance. However, the Legislature was not satisfied to adopt as a definition of a slot machine one which is deemed to be a means or contrivance for playing a game of chance under s-s. 4 of s. 986 of the *Criminal Code* but added its own definitions by (ii) and (iii). Even if it could be said that they do not fall within (ii) because the result of one of any number of operations of a machine is not, as regards the operator, a matter of chance *and* uncertainty, the machines are caught by (iii) in which the conjunction "or" is used in "chance or uncertainty". While there may be no chance, there is an uncertainty. This conclusion is arrived at without considering the succeeding phrase "or which as a consequence of any given number of successive operations awards different results to the operator."

The appeal should be dismissed but as the respondent was not represented, there will be no costs.

TASCHEREAU J.:—The appellant and the respondent entered into a conditional sale agreement on the eighth day of March, 1951, by which the former sold to the latter, for the total consideration of $7,921, eighteen coin machines described as:

6 United Five Player Shuffle Alleys
3 United Shufflecades
2 Six Foot Express Alleys
1 United Hockey Machine

(1) [1942] S.C.R. 84.

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Taschereau J.

2 Exhibit Gun Patrol Machines
1 Gottlieb Bowlette Machine
1 Silver-King Target (gun) Vendor
1 Silver-King Hunter (gun) Vendor
1 Silver-King Hot Nut Vendor

The respondent paid $6,186.28, but refused to pay the balance of $1,734.72, alleging that the coin machines which were the subject of the contract, are slot machines within the meaning of *The Slot Machine Act* (c. 333, R.S.A. 1942), and that the appellant cannot recover.

The relevant sections of the Alberta Act as it stood in 1952 prior to the amendments are the following:

2. In this Act, unless the context otherwise requires,—

(*b*) "Slot machine" means,—

(i) any machine which under the provisions of section 986, subsection (4), of *The Criminal Code,* is deemed to be a means or contrivance for playing a game of chance;

(ii) any slot machine and any other machine of a similar nature, the result of one of any number of operations of which is, as regards the operator, a matter of *chance and uncertainty,* or which as a consequence of any number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations shall be known to the operator in advance; and

(iii) any machine or device the result of one or any number of operations of which is, as regards the operator, a matter of *chance or uncertainty* or which as a consequence of any given number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

3. No slot machine shall be capable of ownership, nor shall the same be the subject of property rights within the Province, and no court of civil jurisdiction shall recognize or give effect to any property rights in any slot machine.

Mr. Justice Egbert before whom the case was tried, found that none of the machines in question were "Slot Machines" within the definitions contained in *The Slot Machine Act,* and gave judgment against the respondent for the amount claimed, but the Court of Appeal reversed this decision and dismissed the action (Mr. Justice C. J. Ford dissenting).

With this decision of the Court of Appeal, I respectfully disagree. I do not think that the machines sold by the appellant to the respondent, are machines which under the

provisions of s. 986, s-s. (4) of the *Criminal Code,* are deemed to be means or contrivances for playing a game of chance. It is the skill of the operator that will determine the score and not the machine itself, and it is obvious that a skilful player will obtain far better results. The hitting of the pins in the "Bowling Game", the placing of the ball or puck over a hurdle into hoops in the "Hoop Game", the scoring in the opponent's goal by the manipulation of the players in the "Hockey Game", as well as the hitting of the target in the "Pistol and Target Game", are not games of chance and merely furnish, I believe, quite innocent recreation to the player. (*Laphkas* v. *The King* (1)).

As to the contention that the Legislature has covered a wider field than the *Criminal Code* in enacting paragraphs (2) and (3) of s. 2(*b*), and that as regards the operator, the result is a matter of *chance and uncertainty,* or of *chance or uncertainty,* I fully agree with what has been said by Mr. Justice Ford, who dissented in the Court of Appeal.

I would allow the appeal with costs throughout.

RAND J.:—This is another appeal arising out of the question of slot machines. Those in controversy here were sold by the plaintiff to the defendant under a conditional sale agreement, for the balance of the price of which the action was brought and the question is whether it can be maintained.

The contrivances consist of miniature bowling games in three forms called shuffle alleys, express alleys and bowlette machines; a hoop game called a shufflecade; a miniature hockey machine; and a pistol and target game. Upon placing a coin in a slot, disks, balls or other projectiles are released to be thereafter set in motion by means of a plunger, trigger or the like, and the score made is automatically recorded. Nothing is furnished beyond entertainment through the test of skill; and the score made will depend upon the proficiency in the handling or manipulation of the total operation.

(1) [1942] S.C.R. 84.

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Rand J.

Since they are for entertainment only, they do not come within s. 986(4) of the *Criminal Code: Laphkas* v. *The King* (1), and are consequently beyond the scope of s. 2(*b*) para. (i) which defines "slot machine" in terms co-extensive with s. 986(4).

Are they, then, such machines as in the language of s. 2(*b*) para. (ii) or para. (iii). [see *ante* p. 102].

At the conclusion of the argument I was disposed to the view that they were not and after the best consideration I can give the question I have concluded that in the circumstances there is so much doubt about the scope of the language of these paragraphs that it must be held not to extend to them. Two considerations weigh strongly in favour of this interpretation. The machines are designed solely for entertainment and what they furnish is the pleasure resulting from the degree of skill the operator is able to bring to their manipulation; but from the three paragraphs of the definition, which have been taken virtually verbatim from the *Code,* as well as the context of the statute as a whole, it is reasonably clear that the purpose of the legislation was to strike at instruments of a gambling nature. The second consideration is the fact of the confiscation of this property of substantial value which the statute makes absolute upon the machine acquiring in some form a local situs in the province. If a provincial legislature, for a proper purpose, decides to work such an exceptional exercise of legislative power upon them, it must clearly and beyond any reasonable doubt, by the language it uses, make that intention evident. This, in my opinion, it has not done here.

I would therefore allow the appeal and direct judgment for the appellant for the amount found due it with costs throughout.

KELLOCK J.:—Paragraphs (i) and (ii) of s. 2(*b*) of *The Slot Machine Act,* 1942, R.S.A., c. 333, are derived from s. 2 of c. 14 of the Statutes of 1935, and paragraph (iii), from s. 2 of c. 25 of the 1936 Statutes. Paragraph (i) reads:

> any machine which under the provisions of section 986, subsection (4), of *The Criminal Code,* is deemed to be a means or contrivance for playing a game of chance;

(1) [1942] S.C.R. 84.

At the time of the enactment of paragraph (i), s. 986(4) of the *Criminal Code* was to be found in s. 27 of c. 11 of the Statutes of 1930, which, in turn, was derived from s. 1 of c. 35 of the Statutes of 1924. The machine with which the said section dealt was

> any automatic machine . . . the result of one or any number of operations of which is as regards the operator a matter of chance or uncertainty, or which as a consequence of any given number of successive operations yields different results to the operator . . . notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

It was decided in *Roberts* v. *The King* (1), that the above language applied only to machines capable of producing results to the operator of a material value, and that the legislation was not concerned with machines or devices whose operation furnished the operator with amusement only and involved him in no loss. *Rex* v. *Freedman* (2), which had decided in the contrary sense, was expressly disapproved.

By reason of s. 20 of the *Interpretation Act,* R.S.A., 1942, c. 1, paragraph (i) of *The Slot Machine Act* must now be taken to refer to s. 986(4) of the *Criminal Code* as amended in 1938 by c. 44, s. 46. It was, however, held in *Laphkas* v. *The King* (3), that a machine of the type here in question is not one involving any element of chance or mixed elements of chance or skill, within the meaning of the section, as "the skill of the operator in aiming at the pins is the determining factor".

For this reason the machines here in question do not come within the terms of paragraph (i), as well as for the reason that they involve no loss to the operator other than the spending of his money in return for the amusement he derives from their operation, the type of result not contemplated by the legislation. The addition in the 1938 amendment of the words "or if on any operation it discharges or emits any slug or token other than merchandise", emphasizes the view that the word "results" in the subsection means results not merely subjective on the part of the operator. Otherwise, the amendment was unnecessary.

(1) [1931] S.C.R. 417. (2) (1931) 39 Man. R. 407.
(3) [1942] S.C.R. 84.

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Kellock J.

Coming to paragraphs (ii) and (iii), it is to be observed that while s. 986(4) of the *Code*, as amended in 1938, deals with "any automatic or slot machine" used or intended to be used for any purpose other than vending "services", paragraph (ii) of the provincial Act includes

> any slot machine and any other machine of a similar nature,

and paragraph (iii) extends to "any machine or device". Both paragraphs, however, like paragraph (i), contain the descriptive language taken from the Dominion statute of 1924, already set out. In my view the extension of the language in these two paragraphs, as above indicated, was all that was in the contemplation of the legislature, and the construction placed on the language of s. 986(4), which is common to the three paragraphs, should govern.

I agree, therefore, in the result arrived at by both the learned trial judge and the learned dissenting judge in the Appellate Division, and would allow the appeal with costs here and below.

I have not considered the effect, if any, of the 1952 amendments to the provincial Act. They have no application to these proceedings, not having come into effect until July 1, 1952.

ESTEY J. (dissenting):—The appellant (plaintiff) brought this action to recover the balance of the purchase price owing under a conditional agreement covering eighteen machines, all but three of which the respondent (defendant) claimed are slot machines within the meaning of *The Slot Machine Act* (R.S.A. 1942, c. 333) and, therefore, because of the provisions of that statute, a judgment ought not to be directed in favour of the appellant. The learned trial judge's judgment in favour of the appellant was reversed by a majority of the learned judges in the Appellate Division of the Supreme Court of Alberta.

The sole question, the facts being admitted, is are these fifteen slot machines within the meaning of that statute. These fifteen are placed in four groups: miniature bowling games, hoop game, miniature hockey game, pistol and target game. No goods, money or slugs are received as prizes or otherwise through these machines which are operated by the insertion of a coin in a slot. When this is done,

the player apparently seeks to make a high score or whatever may evidence success in that particular machine. They are operated for amusement only.

"Slot machine" is defined in the Act as follows:

[see *ante* p. 102]

The first sub-clause includes what, by the provisions of s. 986(4) of the *Criminal Code,* is "deemed to be a means or contrivance for playing a game of chance." In this s. 986(4) Parliament defines the value or effect of a certain machine as evidence in a prosecution of a keeper or inmates of a common gaming house under ss. 226 and 229 of the *Criminal Code.* Section 986(4) expressly excepts any automatic or slot machine "vending . . . services." As amusement was held in *Laphkas* v. *Rex* (1), to be a service, it follows that the machines here in question do not come within sub-clause (i).

The legislature, however, was not content to restrict the effect and scope of *The Slot Machine Act* to those machines so deemed under s. 986(4) when it went further and added other machines under sub-clauses (ii) and (iii). It, therefore, remains to be determined whether the machines here in question come under these sub-clauses (ii) and (iii). Sub-clause (ii) was first enacted in 1935 and applies to "any slot machine and any other machine of a similar nature." Then in 1936 sub-clause (iii) was added to include "any machine or device." Sub-clauses (ii) and (iii), after the naming of the machines, are identical in language, apart from two changes not material hereto, which language is taken from s. 986(4). It is contended that because the legislature has so adopted a part of the language of s. 986(4), therefore these sub-clauses should be construed as dealing with exactly the "same kind of machines," which, as I understand the submission, means that the legislature was legislating in relation to machines or devices which might be deemed to be means or contrivances for playing games of chance and that these sub-clauses should be construed to that effect.

The history of this legislation discloses that in 1924 (S. of A., c. 36) the legislature for the first time provided

(1) [1942] S.C.R. 84.

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Estey J.

that slot machines could not be owned nor made the subject of property rights. The definition of a slot machine in that statute was entirely different and aimed at machines which offered premiums, prizes or rewards. In 1935 (S. of A., c. 14) the legislature enacted a new statute, retaining the provision under which these machines could neither be owned nor made the subject of property rights, but entirely rewriting the definition of a slot machine. The definition as then enacted read as sub-clauses (i) and (ii) in the present statute. Then in 1936 (S. of A., c. 25) the present sub-clause (iii) was added. These sub-clauses were obviously intended to include machines not included in sub-clause (i) and, though the language which follows the machines or devices specified in these sub-clauses is taken from s. 986(4), there are significant omissions. There is no reference to gaming, no exception of machines vending merchandise or services and the words "or if on any operation it discharges or emits any slug or token, other than merchandise" are omitted. The adoption of the language with these omissions, in relation to those additional machines specified in sub-clauses (ii) and (iii), supports the view that the language of these sub-clauses ought not to be construed in the restricted sense the appellant submits. Moreover, in so far as the history of this legislation may be of assistance, it leads to the conclusion that the legislature is not, in this statute, concerned with gaming, which is legislation in relation to criminal law and, therefore, beyond its competence, but rather with the presence within the province of slot machines, machines of a similar nature and devices that come within the language of sub-clauses (ii) and (iii) construed as it would ordinarily be read and understood.

While these machines would attract one who might play merely to see how high a score he could make, as well as those who would enter into competition, it would rather appear that the latter would be the more usual or likely. In either event, the primary object in the operation of these machines is the attainment of the highest possible score or its equivalent in a particular machine. It is this that primarily makes the machine attractive and provides the amusement. It may be that a degree of skill could be acquired by persistent practice, but the definition is not

concerned with that feature. The language of the definition in both (ii) and (iii) is explicit and includes those machines or devices where the "consequence of any number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations shall be known to the operator in advance." This language is directed to the results of successive operations and not to whatever amusement or entertainment the operator may realize from the operation of the machine.

The appeal should be dismissed.

LOCKE J.:—While the learned trial Judge considered the application of *The Slot Machine Act,* R.S.A. 1942, c. 333, as amended by c. 86 of the Statutes of Alberta of 1952, to the issues raised by the pleadings, the rights of the parties are to be determined as of the date the action was commenced. The relevant date is May 15, 1952, while the amendment did not come into force until July 1 of that year and, therefore, it is the Act as it stood prior to that date which is to be considered.

The appeal has been argued upon the footing that to pass the statute was within the legislative powers of the Province and, in view of my conclusion, I may deal with the matter on this basis.

In my opinion, the machines defined in clause (*b*) of s. 2 of the Act are of the same nature as those described in s-s. 4 of s. 986 of the *Criminal Code.*

The manner of operation of the machines in respect of which this action has been brought is described in the evidence, and that contrivances of this nature do not fall within the section of the *Code* was decided by the judgment of this Court in *Laphkas* v. *The King* (1).

I would allow the appeal with costs throughout and direct that the judgment at the trial be restored.

CARTWRIGHT J.:—This case has been dealt with throughout on the assumption that s. 3 of The Alberta Slot Machine Act R.S.A. 1942, c. 333 is *intra vires* of the Legislature and that the only question for determination is

(1) [1942] S.C.R. 84.

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whether the machines sold by the appellant to the respondent are "slot machines" within the meanings given to that term by s. 2(*b*) of the Act.

The machines in question are described in the reasons of my brother Kerwin. Clause (*b*) of s. 2 of the Act reads as follows:—[see *ante* p. 102].

The decisions of this Court in *Rex* v. *Roberts* (1) and *Laphkas* v. *The King* (2), make it clear that the machines in question do not fall within sub-clause (i). A more difficult question is whether they fall within sub-clauses (ii) or (iii). I propose to discuss only sub-clause (iii) as its wording appears to me to be so wide as of necessity to include any machine which would fall within sub-clause (ii).

There is no doubt that the machines in question fall within the opening words of the clause "any machine or device". Can it be said that the result of any operation thereof is "as regards the operator a matter of chance or uncertainty"? In my view in the case of all these machines what the operator receives in exchange for the coin which he deposits is the privilege of playing a game of skill. There is no chance of his obtaining more or less than this privilege. However skilfully he plays he can not hope to gain a prize as was the case in *Peers* v. *Caldwell* (3). There is no uncertainty as to what he will get in return for his money. On the other hand it can not be doubted that the score which the individual operator will obtain in the case of the machines other than the "Miniature Hockey Game" is uncertain or that in the case of the last mentioned machine the questions which of the two players will win and by what score are matters of like uncertainty. The solution of the question before us appears to me to depend on whether the word "result" as used in the clause is intended to refer to the final score obtained by the operator or to the consideration which he receives in exchange for his coin. If it refers to the former I would say these machines fall within the clause but not if it refers to the latter.

(1) [1931] S.C.R. 417. (2) [1942] S.C.R. 84.
(3) [1916] 1 K.B. 371; 85 L.J.K.B. 754.

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Not without hesitation, I have reached the conclusion that in the case of the machines with which we are concerned the result of their operation is as regards the operator that he obtains the right to play a game of skill and that there is neither chance nor uncertainty in such result within the meaning of the clause. I would respectfully adopt the reasoning of Clinton J. Ford J.A. in the following passage:—

> . . . Where the controlling factor in the outcome of the game is the machine and not the operator, one might give effect to the view that as regards him there is chance and uncertainty. On the other hand, where he is free as he is when operating these machines to play a good or an indifferent game, according to his skill on the occasion, it cannot be said that the operations of the machine produce the result. It is the operator himself as it is in any game, or sport, or competition . . .

I would allow the appeal and restore the judgment of the learned trial judge with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Shouldice, Milvain & Macdonald.*

Solicitors for the respondent: *Mahaffy & Howard.*

JOHN DONALD CHRISTIE (*Plaintiff*) . . . . APPELLANT;

AND

THE BRITISH AMERICAN OIL COMPANY LIMITED (*Defendant*) . . . . . } RESPONDENT.

1953

*Nov. 24

1954

*Feb. 15

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Companies—Succession Duties—Joint owned shares transferable at Toronto or Montreal—Claim for succession duties by Ontario—Subsequent split of shares—New certificates made transferable at Winnipeg also—Refusal of transfer agent in Winnipeg to make transfer until Ontario's claim settled—Action for damages—Succession Duty Act, S. of O., 1939, 2nd Session, c. 1.

The appellant and his mother, residing in Winnipeg, were, when the latter died in 1943, joint owners of shares of the respondent company transferable at Toronto or Montreal. The transfer agent at Toronto having refused to register the shares in the sole name of the appellant unless a succession duty release was produced, the appellant brought action in Ontario for a mandatory order. This was dismissed at trial and affirmed by the Court of Appeal and by this Court. The situs of the shares however was not determined in the action.

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

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Subsequently, the respondent's shares were subdivided and new certificates were issued in the joint names of the appellant and his mother, transferable among other places, at Winnipeg. The transfer agent there, on demand, refused to issue a new certificate in the name of the appellant without a release from Ontario duty. The shares were ultimately seized by the Ontario Treasurer and the appellant paid the duty and brought these proceedings for damages in Manitoba, alleging that the respondent's refusal to transfer the shares to him was wrongful. The action was dismissed by the trial judge and by the Court of Appeal.

Held: The appeal should be dismissed.

Per Kerwin, Estey, Cartwright and Fauteux JJ.: The action was not properly constituted to determine the question of situs of the shares. The appellant should have moved against the seizure instead of paying the claim. The respondent was not estopped from denying that the shares were transferable in Winnipeg because the appellant did not change his position by reason of the making of the statement in the new certificates.

Per Kellock J.: The establishment of a transfer office in Winnipeg had no relevancy to the issue. The shares were situate and liable to duty in either Ontario or Quebec since these were the only places where they could have been effectively dealt with at the date of the death. The appellant chose to pay the duty instead of contesting liability and has, therefore, not established that he has suffered any damage for which the respondent is responsible.

APPEAL from the judgment of the Court of Appeal for Manitoba (1), affirming the trial judge's dismissal of an action for damages allegedly sustained through the refusal of the respondent to register the appellant as sole owner of certain shares in the respondent company.

J. D. Christie in person.

A. E. Johnston Q.C. for the respondent.

The judgment of Kerwin, Estey, Cartwright and Fauteux JJ. was delivered by:—

KERWIN J.:—Upon the death of the appellant's mother in 1943, the respondent could not ignore the provisions of section 8 of the *Ontario Succession Duty Act, 1939,* 2nd session, chapter 1. In January, 1947, the appellant was served with a demand by the Provincial Treasurer of Ontario under section 31 of that Act for payment of succession duties due upon the alleged passing of the property in certain shares of the respondent company held in the joint names of the appellant and his mother as joint tenants. An action was brought by the appellant in the Province of Ontario against the respondent, of which action

(1) [1953] 8 W.W.R. (N.S.) 714; [1954] 1 D.L.R. 83.

notice was given the Attorney General of Ontario pursuant to section 32 of the *Judicature Act,* R.S.O. 1937, chapter 100, since the appellant as plaintiff in that action claimed that the *Succession Duty Act,* or some part of it, was *ultra vires.* That action was dismissed by the trial judge (1). The Court of Appeal (2) for Ontario and this Court dismissed appeals without, however, in either case, passing on the question of the situs of the shares

Some of the shares were sold by arrangement between the appellant and the Provincial Treasurer of Ontario. Subsequently the respondent sub-divided its shares and issued certificates for the proper number of new shares in the joint names of the appellant and his mother. No question is raised that these are not in substance the same as the remainder of the old shares. When the Treasurer of Ontario served his demand for payment upon the appellant, the latter failed to dispute that demand, as he might have done under section 31 of the *Ontario Succession Duty Act;* and to determine the question of situs, it is at least necessary, under the circumstances of this case, to have a properly constituted action.

The only additional matter argued was that the respondent was estopped from denying that the shares were properly transferable in Winnipeg. That argument is based on the fact that while the old shares were transferable only in Montreal or Toronto, the new certificates contain the following statement:—

> The shares represented by this certificate are transferable in Halifax, N.S., Saint John, N.B., Montreal, Que., Toronto, Ont., Winnipeg, Man., Regina, Sask., Edmonton, Alta., and Vancouver, B.C., in Canada and in New York, New York, in the United States of America.

This means nothing more than that a transfer could be made in any of the named cities if the relevant law permitted it. It does not mean that the respondent was obliged to permit owners to transfer in any of these cities merely upon presentation of the certificate and a demand for such transfer. There is no basis for an estoppel because the appellant did not change his position by reason of the making of the statement quoted above in the new certificates.

(1) [1947] O.R. 455. (2) [1947] O.R. 842.

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KELLOCK J.:—The appellant and his mother, residing in the City of Winnipeg, were, at the date of the death of the latter on July 21, 1943, joint owners of certain shares in the respondent company transferable on the books of the company either at Toronto or Montreal, but not elsewhere. Following the death, the appellant took the share certificates to Toronto and left them with the transfer agents of the respondent there for transfer or re-registration in his own name. Transfer was, however, refused without production of a release from Ontario succession duty. Section 8, s-s (1) of the *Ontario Succession Duty Act,* 1939, 2nd Session, c. 1, prohibits any corporation having its head office, principal place of business or any place of transfer in Ontario from transferring "any property situate in Ontario" in which the deceased had an interest at the time of death without the written consent of the Treasurer. In this situation the appellant was served in Toronto on behalf of the Provincial Treasurer with a statement as to duty pursuant to s. 31 of the *Act.* S. 32, s-s (1), provides that, in the event of non-payment, a warrant may issue for the relevant amount, the warrant having the same force and effect as a writ of execution issued out of the Supreme Court of Ontario.

The appellant ignored the demand, having in the meantime recalled the share certificates into his own possession, and took proceeding in the Supreme Court of Ontario for a mandatory order directing the respondent to transfer or re-register the shares without the production of a succession duty release, claiming that s. 8 of the statute was *ultra vires.* This action was dismissed at trial and this was affirmed on appeal by the Court of Appeal (1) and by this court.

The question as to the situs of the shares was not determined in the action but the reasons for judgment of Roberston C.J.O. contain the following:

> A convenient and expeditious way of determining that question (situs of the shares) was made available to him by the Treasurer of Ontario in serving a demand for succession duty upon the appellant under s. 31 of The Succession Duty Act. In the meantime, while seeking to compel the respondent to register a transfer of the shares, the appellant has refrained from producing the share certificates, without which no transfer can be made, and has ignored the notice under s. 31.

(1) [1947] O.R. 842.

Following the termination of this litigation, the appellant obtained the consent of the Treasurer of Ontario to the release of some of the shares, and these he had registered in his own name. Subsequently, under authority of supplementary letters patent, the outstanding shares of the respondent company were "split" two for one and made transferable at a number of places, including Winnipeg. The appellant then applied for transfer to the transfer agents of the respondent at Winnipeg and was refused on the same ground as before. Subsequently, the Treasurer of Ontario issued his warrant, under which the sheriff seized the shares on the books of the company at Toronto. The appellant thereupon paid the amount demanded and brought these proceedings in Manitoba against the respondent. His action was dismissed at trial and his appeal (1) has also been dismissed.

The appellant's contention is that, as the new certificates, stating on their face as they do that the shares are transferable, among other places, at Winnipeg, his application to the respondent's transfer agents at Winnipeg was wrongfully refused and that the damages flowing from such wrongful refusal, for which the respondent is liable, are the amount he paid in Ontario under the warrant. No point is made by the appellant arising out of the "split" of the shares other than the change in the places of transfer. The initial question which arises is as to what, if any, relevancy to the issue is the fact of the establishment, subsequent to the death, of a transfer office in Winnipeg. In my opinion, it has none.

As pointed out by Lord Uthwatt in *Treasurer of Ontario* v. *Blonde* (2), it is now settled beyond dispute that for the purpose of death duties a local situation is to be attributed to shares in a company and that (apart from the case of "street certificates") the first matter to be ascertained in an inquiry as to the situs of registered shares is the place in which the shares can be "effectively dealt with" as between the shareholder and the company so that the transferee will

(1) [1953] 8 W.W.R. (N.S.) 714; [1954] 1 D.L.R. 83.

(2) [1947] A.C. 24 at 30.

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become legally entitled to all the rights of a member. At p. 31, his Lordship said:

> The adoption of place of transfer as the leading consideration in determining locality involves, in their Lordships' view, the corollary that, if there be, outside the jurisdiction in which it is suggested the shares are situate, several places where transfers can be effectively carried through in the ordinary course of business, and there is no place within the jurisdiction where a transfer can be carried through, the shares cannot be situate within the jurisdiction. The inquiry at the outset is 'Are the shares situate in the jurisdiction or not?' The inability of the jurisdiction to satisfy the test removes it from the arena. The circumstance that alternative places of transfer exist in what happen to be two different states outside the jurisdiction is for the purpose in hand no more relevant than the circumstance that two places of transfer exist in one state outside the jurisdiction.
>
> * * *
>
> The domicile of the testator, grant of probate in Ontario and the presence in Ontario of the share certificates, are irrelevant.

Accordingly, in the case at bar, the only place where the shares could have been effectively dealt with at the date of the death was either Ontario or Quebec, and they were, therefore, situate and liable to duty in either one or the other, but not in both. The opening of the transfer office in Manitoba some years after the death did not displace that locus or that liability. Which of the two was the proper one was a question to be determined upon the principles laid down in *Rex* v. *Williams* (1) and in *Aberdein's* case (2).

While the appellant at no time and in no way has suggested that the Province of Quebec was the locality of the shares, his whole course of action being rather the contrary, it is not necessary for present purposes to determine the point. It is enough to say that the appellant has not established that the shares were not situate in Ontario or that the respondent committed a wrong in refusing to transfer without a release from Ontario succession duty. The appellant chose to pay the amount demanded by the warrant instead of taking the proceedings open to him to contest liability. He has therefore not established that he has suffered any damage for which the respondent is responsible.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the respondent: *Johnston & Jessiman.*

(1) [1942] A.C. 541. (2) [1947] A.C. 24.

THE CITY OF MONTREAL (*Defendant*) ..... APPELLANT;

AND

SALAISON MAISONNEUVE LIMITÉE (*Plaintiff*) ..... RESPONDENT.

1953
*Dec. 10, 11
1954
*Apr. 1

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

Municipal Corporation—Sewer—Backing up of river waters in sewer—Flooding of premises—Liability—Negligence—Articles 1053, 1054 Civil Code.

Action for damages sustained by the respondent company when an ice jam in the St. Lawrence River, into which the appellant's sewers emptied, caused the contents of the sewers to back up into the respondent's premises. The action was maintained by the trial judge and by a majority in the Court of Appeal.

Held: The appeal should be dismissed.

Per Rinfret C.J. and Taschereau J.:—It is doubtful if Article 1054 C.C. has any application since the damage was caused by the waters of the St. Lawrence which are not under the City's care. But in any event, the City must be held responsible under Article 1053 C.C. for a fault of omission, having neglected to take the necessary precautions to prevent damage, the probability of which it could not ignore.

Per Kellock, Estey and Fauteux JJ.:—The damage having been caused by a thing under the care of the City, Article 1054 C.C. applies and the City must be held liable since it has failed to bring itself within its exculpatory provision. (*City of Montreal* v. *Watt and Scott* [1922] 2 A.C. 555 applied).

Per Curiam: There was no ground in contract or in law for allowing the expenses incurred by the respondent in having the damages valued by experts.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Bissonnette and Bertrand JJ.A. dissenting, the decision of the trial judge and holding the City liable to the respondent when the contents of the City sewers backed up into his premises.

A. Berthiaume Q.C. and C. Choquette Q.C. for the appellant.

A. Laurendeau Q.C. and *A. B. Hamelin Q.C.* for the respondent.

*PRESENT: Rinfret C.J. and Taschereau, Kellock, Estey and Fauteux JJ.

(1) Q.R. [1952] Q.B. 159; [1952] R.L. 33.

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CITY OF MONTREAL v. SALAISON MAISONNEUVE LTÉE

The judgment of Rinfret C.J. and Taschereau J. was delivered by:—

TASCHEREAU J.: J'entretiens des doutes sérieux sur la question de savoir si dans la cause qui nous est soumise, l'article 1054 C.C. trouve son application et, si pour arriver à une juste solution, nous devons être guidés par les principes qui ont été affirmés par cette Cour et le comité judiciaire du Conseil Privé, dans la cause de la *Ville de Montréal* v. *Watt & Scott Limited* (1).

Dans cette cause, il a été décidé que la responsabilité de la Ville de Montréal était engagée en vertu de l'article 1054 C.C., mais les faits se présentaient sous un aspect différent. Les eaux qui avaient débordé et avaient inondé le sous-sol de l'immeuble de l'intimée, étaient des eaux que la Ville avait l'obligation de conduire au fleuve, et dont par conséquent elle avait le contrôle, comme d'ailleurs, elle avait la garde de son système d'égout. Il lui appartenait de démontrer pour satisfaire aux exigences de 1054 C.C. qu'elle n'avait pu par des moyens raisonnables empêcher le fait qui avait causé le dommage. En cela il a été jugé qu'elle n'avait pas réussi à se dégager de la responsabilité que dans des cas semblables, la loi fait peser sur celui qui a la garde et le contrôle d'une chose.

Dans le cas qui nous occupe, il semble que la situation n'est pas tout à fait la même. Il est vrai que la Ville est encore propriétaire du système d'égout, mais, ce n'est pas ce système qui a causé le dommage. Comme cette Cour l'a dit dans *Canada & Gulf Terminal Railway Co.* v. *Levesque* (2), la chose par elle-même (dans l'occurrence une lampe électrique) n'a rien fait et n'aurait rien pu faire. Défectueuse ou non, sans l'électricité, à laquelle elle a servi de véhicule, cette lampe était inoffensive. Et le Juge Rinfret ajoute:

> Une société d'éclairage est propriétaire de l'énergie électrique produite par ses machines génératrices de la même façon qu'elle l'est du gaz qui circule dans ses conduites et tout autant que la compagnie d'aqueduc a la propriété de l'eau qui est dans ses tuyaux. Chacune de ces choses, du moment qu'elle est captée et rendue utilisable, devient une marchandise que la compagnie exploite commercialement et qu'elle fournit en lui mesurant le courant au moyen d'un compteur au consommateur qui en prend livraison. Les fils, les conduites, les tuyaux ne sont que les moyens

(1) (1920) 60 Can. S.C.R. 523; [1922] 2 A.C. 555.

(2) [1928] S.C.R. 340 at 362.

de livraison. Ils sont susceptibles de possession et de propriété distinctes. Leur propriétaire n'a pas nécessairement sous sa garde l'électricité, le gaz ou l'eau qu'ils contiennent.

Dans la *Ville de Montréal* v. *Watt & Scott,* la Cité avait le contrôle de l'eau qui a causé le dommage, mais dans le cas qui est soumis à la Cour, il ne me paraît pas que ce soit une chose dont la Ville avait la garde qui soit la *causa causans* du dommage. Ce sont les eaux du fleuve St-Laurent qui, refoulées par un embâcle vis-à-vis la Ville de Montréal, et dont le niveau s'est substantiellement élevé, se sont introduites dans les conduites d'égout et causé l'inondation.

Il y a me semble-t-il une grande similitude entre la présente cause et la cause du *Canada & Gulf Terminal.* Dans cette dernière, où on a refusé de donner effet aux rigoureuses dispositions de l'article 1054 C.C., la lampe et le fil qui étaient la propriété de la défenderesse, n'ont été jugés que les agents par lesquels le dommage a été causé, n'ayant servi qu'à transporter un courant non transformé de 2,200 volts, propriété d'une autre société. Ici l'égout n'est également qu'un facteur indirect. Il n'a servi qu'à transporter de l'eau dont la Ville n'avait pas la garde, et qu'une force étrangère a refoulée.

Mais ceci ne signifie pas que la Ville doive être absoute de responsabilité pour le dommage causé. Car si elle peut se soustraire à l'application de 1054 C.C., je suis tout de même d'opinion qu'elle a commis une *faute* et qu'elle a l'obligation de la réparer en vertu de 1053 C.C. En effet, il ne s'agit pas d'un cas de force majeure. Des embâcles comme celui qui s'est produit ne sont pas imprévisibles, et ce n'est pas le premier dont sont témoins les citoyens de Montréal. La preuve révèle qu'il y en a eu d'autres antérieurement qui ont causé de substantiels dommages, et pour prévenir la répétition de ces inondations, la Ville a installé un système de valves et de pompes, ineffectives cependant à l'endroit du dernier embâcle.

Ce n'est pas une défense valable pour la Ville de soutenir que c'est la première fois qu'un embâcle de ce genre se produit à l'endroit précis où celui-ci a occasionné le refoulement des eaux. Bien des choses arrivent une première fois et n'acquièrent pas pour cela un caractère d'imprévisibilité. La Ville pouvait employer, pour éviter ces inondations, des moyens raisonnables dont d'ailleurs elle a fait usage à

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Taschereau J.

d'autres endroits. Sa faute qui doit entraîner sa responsabilité est une faute d'omission. Elle a négligé de prendre les précautions nécessaires pour prévenir un dommage dont elle ne pouvait ignorer l'éventualité possible. Son abstention d'agir a été fautive.

Par ses procureurs elle a soutenu que le coût d'installation de valves et de pompes serait exorbitant et disproportionné à ses moyens financiers. Mais aucune preuve ne le démontre et aucun chiffre n'a été fourni pour établir cette prétention.

En ce qui concerne le montant de 10 p. 100 du capital accordé pour payer les honoraires des témoins experts, dont les services ont été retenus par l'intimée, je suis d'opinion de retrancher cet item, et je m'accorde sur ce point avec les raisons de mon collègue M. le Juge Kellock. Également, je disposerais de cet appel en capital et frais, tel qu'il le propose.

KELLOCK J.:—The judgment at trial in favour of the respondent was affirmed by the Court of Appeal (1) on the ground that the action, tried with a number of others of a similar character, was one to which Art. 1054 C.C. applied and that the appellant had failed to bring itself within its exculpatory provision. In *Vandry's* case (2), Lord Sumner said at p. 676:

> . . . proof that damage has been caused by things under the defendant's care . . . establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms.

The words "unable to prevent the damage complained of" in the Article mean "unable by reasonable means"; per Lord Dunedin, in *Montreal* v. *Watt and Scott* (3). In that case, which was an action for damage sustained by the plaintiff by reason of the backing up of a city sewer with the consequent flooding of his premises through a private drain connecting with the sewer, it was held that if the rainstorm which had overloaded the sewer could have been described as a cas fortuit or force majeure, and if the appellants had been able to show that they had constructed the sewer of a size sufficient to meet "all reasonable expectations", they would have brought themselves within the

(1) Q.R. [1952] Q.B. 159; [1952] R.L. 33.
(2) [1920] A.C. 662.
(3) [1922] 2 A.C. 555 at 563.

terms of the relieving clause. The standard of what was reasonably to be anticipated which the Board adopted was that laid down by Lord Chelmsford in *Great Western Railway Company* v. *Braid* (1), namely:

> . . . works must be constructed in such a manner as to be capable of resisting all the violence of weather which in the climate of Canada might be expected, though perhaps rarely, to occur.

Their Lordships agreed with the view of Migneault and Anglin JJ. in this court, that the liability of the appellant depended upon Art. 1054 inasmuch as the damage was caused by "a thing, to wit, the sewer, which was under the control of the appellants."

In my view, although the backing up of the sewer in the case at bar was not due to precipitation but to a rise in the level of the St. Lawrence River, into which the sewer emptied, caused by an ice jam, this fact constitutes no basis upon which the principle upon which the case of *Watt and Scott* was decided can be said to be inapplicable to the case at bar. Liability could, therefore, be discharged by the appellant only by establishing that the occurrence which caused the backing up of the sewer, was not, on its part, reasonably avoidable.

Not only the majority in the Court of Appeal but the trial judge also, found against the appellant's contention that it had discharged the onus resting upon it. Pratte J., with whom Marchand and Casey JJ. agree, said:

> Or, comme chacun le sait, la formation d'embâcles sur le fleuve est une chose à laquelle il faut s'attendre, à Montréal, même s'il n'est pas possible de savoir d'avance l'endroit exact où l'accident se produira, non plus que de prévoir son importance. Et comme ces embâcles sont toujours susceptibles de faire monter l'eau du fleuve dans les égouts, il ne fait pas de doute que la Cité devait prendre des mesures destinées à empêcher que la survenance du fait ne devienne cause de dommage.

The appellant did not call any evidence to establish, for example, that the physical features of the river in the relevant area were such as to indicate that ice jams were not reasonably to be expected there, but contented itself with relying upon the evidence of two of its employees that no ice jam had, in their experience, occurred in that area until that of 1945. Nor was it shown how much above normal high water mark it was necessary for the river to rise to cause flooding in the cellar of the respondent. While a

(1) 1 Moore's P.C. (N.S.) 101 at 121.

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cursory glance at the map indicates that those portions of the river in the vicinity of St. Helen's Island and between Longue Pointe and Boucherville Island, where these witnesses stated the river had been blocked by ice on earlier occasions, are somewhat narrower than where the 1945 ice jam occurred, and this is particularly true in the case of the first mentioned location, the fact that the jam of 1945 also occurred in the neighborhood of islands (les Iles Vertes) is not without significance. In my opinion the situation called upon the appellant to do more than merely say that no trouble had previously occurred in the area in question. That was evidently the view of the courts below. In these circumstances, I agree that the appellant has failed to avoid the liability placed upon it by the Article in question.

The appellant also contended that the cost of installing proper means of preventing an occurrence of the kind here in question, such as the installation of valves for shutting off the sewer from the river during a flood and the diversion of the contents into a basin or basins from which they could be pumped directly into the river (a means to which the city had resorted at Delorimier Street after one or more similar experiences in that vicinity), was so excessive as to be outside what should reasonably be demanded of it, particularly as the same means might well have to be installed in connection with other sewers. This does not seem, however, to have been a very serious part of the appellant's defense as no figure of cost was given in evidence. A figure which included the cost not only of a pump and basin but of a whole new system of sewers in the area affected was given but this evidence is quite valueless for the purpose of the question with which we are here concerned.

With respect to the appellant's contention that the private drain of the respondent should have been fitted by it with a valve which would have automatically operated to prevent the backing up of the contents of the sewer into his premises, it was necessary for the appellant to show that the respondent was guilty of faute in failing to foresee that flooding from such a cause was likely. I do not think this has been made out on the evidence. It is one thing for the city, the sewers being "under its care", to be expected to have regard to the probability of their being rendered inoperative by a rise in the level of the river, but quite

another thing for a householder to expect that the instrumentality which carries away waste from his property will suddenly become the means of introducing thereto the river, the nature of the connection of the sewers with which he may, and probably does not, know anything about. On this aspect of the case the facts are different from those in *Watt and Scott's* case in which, moreover, certain by-laws of the city were put in evidence. This was not done in the case at bar and we were told that the former by-laws had been substantially changed.

With respect, however, to the allowance made in the courts below for the expense incurred by the respondent in qualifying certain witnesses to give evidence as to the damage suffered, I think the appeal should succeed. This item was allowed below on the ground that although not normally recoverable as damages, nevertheless, because of an admission by the appellant and as stated by Pratte J.

> . . . la nécessité de recourir à une évaluation a été réaffirmée par les réclamants et par l'évaluateur lui-même, et ces affirmations n'ont pas été contredites. De plus, il ne fait pas de doute que cette expertise a profité à la Cité en ce qu'elle a abrégé l'enquête des poursuivants et dispensé la Cité de faire elle-même une preuve sur l'étendue des dommages.

As to the admission above referred to, however, it was to operate only

> Si tels honoraires et déboursés d'experts sont accordés par la cour, la défenderesse, sans admettre le droit de la demanderesse de les réclamer, . . .

Moreover, however convenient it was for the respondent to be able to prove its damages in this way, it was no doubt of some convenience to the appellant also, or it would not have agreed to this procedure. To both parties there resulted a saving in expense by reason of the shortening of the trial. However this may be, no ground in law has, in my opinion, been established upon which the respondent is entitled to recover this item of expense.

I would vary the judgment by reducing the amount recoverable to $6,876. Otherwise the appeal should be dismissed. The respondent should have four-fifths of its costs in this court and in the Court of Appeal. In the Superior Court the respondent should have full costs of an action of the appropriate class.

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ESTEY J.:—I am in agreement with my brothers Kellock and Fauteux in the disposition of this appeal.

FAUTEUX J.:—Il est avéré que l'inondation, endommageant la propriété de l'intimée, résulte d'un renversement du cours des eaux dans les égouts de la cité, occasionné par une hausse subite du niveau du fleuve, conséquence d'un embâcle à un point affectant la sortie de l'égout de la rue Lasalle.

De tous les Juges ayant eu, jusqu'à ce stage, à considérer cette cause, tous, sauf un, en sont venus à la conclusion que les dispositions de l'article 1054, telles qu'interprétées par le Comité Judiciaire du Conseil Privé dans *City of Montreal* v. *Watt and Scott, Limited* (1), s'appliquent à l'espèce. Partant de ce principe, la majorité de la Cour d'Appel (2) confirma le jugement de première instance condamnant la cité, alors que, d'autre part, les Juges de la minorité, MM. les Juges Bissonnette et Bertrand, auraient infirmé; étant d'opinion, le premier, que la cité ne pouvait par l'emploi de moyens raisonnables, résister au fait causant le dommage, et, le second, que le Juge de première instance avait mal interprété les dispositions des articles 1053 et 1054.

A l'audition devant cette Cour, l'appelante a plaidé principalement (i) que l'article 1054 n'a pas d'application en l'espèce et (ii) que si l'article s'applique, la cité a prouvé l'imprévisibilité du fait causant le dommage, aussi bien que l'impossibilité à l'empêcher par l'emploi de moyens raisonnables.

Sur le premier point. L'appelante soumet que cette cause se distingue de celle de *City of Montreal* v. *Watt and Scott, Limited* (*supra*) et se compare plutôt à celle de *Canada and Gulf Terminal Ry. Co.* v. *Lévesque* (3). Précisée, la position prise par la cité est exprimée comme suit en son factum:—

> The whole jurisprudence up to the present time has limited the responsibility as established by article 1054 C.C. to such cases where damages have been caused by what we could call an autonomous act of the thing, that is, when the thing has been the immediate agent of the damage suffered.

(1) [1922] 2 A.C. 555. (2) Q.R. [1952] K.B. 159; [1952] R.L. 33.
(3) [1928] S.C.R. 340.

In this case, it is evidently not the sewer system, a thing under the control of the city, which has caused the damage. It is not either the water which the sewer should normally receive and evacuate. The sewer is built for the purpose of taking care of service waters accumulating in the streets and also in order to assure proper drainage of buildings which are connected to it.

Such water once normally introduced into the sewer may become a thing which the sewer has under its care, which it has accepted to take care of and of which it must keep proper control. If such water so normally coming into the sewer regurgitates from the sewer to cause damage, it might be well conceived that article 1054 should then receive its application .....

We only emphasize for the moment that the waters of the St. Lawrence river are not a thing under the care of the city and that neither the sewer nor the waters which normally may be found in the sewer have been the cause of the damage. On this point, we submit that we may rely on a decision given by this honourable Court in 1928 in re *Canada and Gulf Terminal Ry. Co.* v. *Lévesque* (*supra*).

Comme la grande majorité des Juges des Cours inférieures, il m'est impossible de distinguer cette cause de celle de *City of Montreal* v. *Watt and Scott, Limited.* En cette affaire, et à la suite de pluies torrentielles et successives, les eaux captées aux entrées de surface des égouts de la cité pénétrèrent dans les caves et y endommagèrent la propriété. L'égout fut trouvé de dimension insuffisante. Sur la cause du dommage, Lord Dunedin déclara, ainsi qu'il appert à la page 563:—

Their Lordships agree with the majority of the Court in considering that *the damage was done by the sewer* which was obviously under the control of the appellants.

En l'espèce, par suite d'un embâcle sur le fleuve, les eaux du Saint-Laurent s'étant élevées à un niveau supérieur à celui de la sortie de l'égout, y ont pénétré, en empêchant ainsi le fonctionnement, i.e. l'évacuation des eaux qui normalement devaient s'y trouver, pour refouler avec elles dans l'établissement de l'intimée. Dans *City of Montreal* v. *Watt and Scott, Limited,* l'insuffisance du diamètre de l'égout constituait le vice de la chose; dans la présente cause, c'est l'absence de dispositifs susceptibles d'empêcher l'entrée des eaux du fleuve à la sortie de l'égout et le renversement du cours normal des eaux dans icelui.

Je ne puis, d'autre part, soit dit en toute déférence, voir, au point de vue juridique, de similitude entre la présente cause et celle de *Canada and Gulf Terminal Ry. Co.* v. *Lévesque.* Je crois que c'est dans la dernière phrase de

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l'extrait des raisons de jugement qu'en cite mon collègue, M. le Juge Taschereau, qu'apparaît la raison véritable de la décision. Ainsi, référant aux fils, conduites et tuyaux au moyen desquels l'électricité, le gaz et l'eau sont respectivement livrés, M. le Juge Rinfret, tel qu'il était alors, déclare:—

> Leur propriétaire n'a pas *nécessairement* sous sa garde l'électricité, le gaz ou l'eau qu'ils contiennent.

Et à la question posée à la détermination de l'affaire, savoir "qui avait ce courant sous sa garde au moment de l'accident", le savant Juge répond: "Nous devons donc ici appliquer de la même façon la règle de l'article 1054 C.C. en concluant que la chose qui a causé la mort de Claveau (à savoir le courant électrique de 2,200 volts) était sous la garde de la Compagnie de Pouvoir du Bas Saint-Laurent, et non pas sous la garde de la défenderesse". C'est que la preuve révéla que la Canada and Gulf Terminal Ry. Co. n'avait assumé, en sa propre usine, que la garde juridique de son propre système de distribution et d'un courant électrique mesuré et limité à 110 volts et susceptible d'y être distribué sans danger, qu'elle n'eut pas à répondre de l'accident causé par un courant de 2,200 volts qui, suivant son contrat avec la Compagnie de Pouvoir du Bas Saint-Laurent, n'était pas celui qui devait lui être livré et n'était pas celui dont elle avait assumé la garde. Mais en la présente cause, et suivant la preuve faite, seule la cité a la propriété, le contrôle absolu et la garde de cet égout dont elle impose, par ailleurs, aux contribuables, l'utilisation; seule, elle a la garde des eaux qui normalement doivent s'y trouver; et, permettant elle-même, par l'installation de cette conduite reliant les immeubles au fleuve, l'entrée des eaux du fleuve en ce système d'égout et, partant, le renversement fatal du cours normal des eaux dans icelui, elle demeure gardienne de l'égout et des eaux qui s'y trouvent.

Sur le deuxième point. Je ne crois pas que la cité ait prouvé, comme elle y était obligée, l'imprévisibilité du fait dommageable et l'impossibilité à l'empêcher par l'emploi de moyens raisonnables.

Sur ces moyens, comme d'ailleurs sur les autres invoqués par la cité aux fins d'être libérée, en tout ou en partie, de sa responsabilité, je concours dans l'opinion qu'ils sont mal fondés.

Les parties sont d'accord quant à la mesure du dommage causé. La cité se plaint, cependant, de cette partie du jugement la condamnant à payer, en plus des frais d'experts susceptibles d'être taxés suivant la loi, un honoraire représentant 10 pour cent du montant des dommages accordés à l'intimée. Ce grief est bien fondé. A ce sujet, les parties ont fait une entente manifestée par une lettre produite au dossier par l'intimée, aux termes de laquelle la cité admet "que les frais d'experts, s'ils sont accordés, seront de 10 pour cent du montant des dommages accordés, sans admettre que l'expertise était nécessaire, ni que le demandeur ait le droit d'en réclamer le coût." Bref, on s'est entendu sur la mesure mais non sur le principe de la réclamation. Cette lettre écarte positivement le fait d'un contrat comme source possible d'obligation et aucune loi n'a été citée par l'intimée pour justifier le bien-fondé de cette réclamation.

Sous toutes les circonstances, je disposerais de la cause de la façon suggérée par mon collègue le Juge Kellock.

Appeal dismissed.

Solicitors for the appellant: *Choquette, Berthiaume & Co.*

Solicitors for the respondent: *Lanctot & Hamelin.*

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ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Constitutional Law—Property and Civil Rights—Criminal Law—Confiscatory Legislation—Validity of The Slot Machine Act, R.S.A. 1935, c. 333.

The Slot Machine Act, R.S.A. 1935, c. 333, provided that no slot machine should be capable of ownership nor be the subject of property rights within the Province and that no court of civil jurisdiction should recognize or give effect to any property rights therein. It authorized the seizure under warrant of any machine believed to be a slot machine and provided that following an inquiry before a justice of

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

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the peace the latter, unless satisfied that the machine was not a slot machine within the meaning of the Act, should order its confiscation to the Crown in the right of the Province.

The appellant, required to show cause why certain machines seized under the Act should not be confiscated, secured an order of Prohibition in the Supreme Court of Alberta which was set aside by a majority judgment of the Appellate Division. On appeal the sole question raised before this Court was whether the Act as it stood before an amendment which came into force on July 1, 1952, was intra vires the Alberta Legislature.

Held: (Kerwin, Taschereau and Estey JJ. dissenting) that *The Slot Machine Act,* R.S.A. 1942, c. 333 is ultra vires, since it is legislation in relation to criminal law, (Kellock, Locke and Cartwright JJ.); it is in relation to matters covered by the *Criminal Code,* (Rand J.)

Per: Rand J. Since the machines or devices struck at by the Statute are those dealt with in a similar manner by the *Code,* it is sufficient to say that the statute is inoperative.

Per: Kellock and Cartwright JJ. The Statute appears to be inseverable, to relate only to the prohibition and punishment of keeping contrivances for playing games of chance, that is to criminal law and to be ultra vires of the Legislature *in toto.* *Rex.* v. *Karminos* [1936] 1 W.W.R. 433 approved. *Industrial Acceptance Corporation* v. *the Queen* [1953] 2 S.C.R. 273 referred to. *Re Race Tracks and Betting* 49 O.L.R. 339 at 348 *et seq.* applied. *Provincial Secretary of P.E.I.* v. *Egan* [1941] S.C.R. 396, *Bédard* v. *Dawson* [1923] S.C.R. 681 and *Regina* v. *Wason* 17 O.R. 58 and 17 O.A.R. 221, distinguished.

Per: Locke J. In essence the Act was directed against gambling and nothing else, the exclusive jurisdiction to legislate in regard to which lies with Parliament under head 27 of s. 91 of the *B.N.A.* Act. *Russell* v. *the Queen* 7 App. Cas 829; *A.G. for Ont.* v. *Hamilton Street Ry. Co.* [1903] A.C. 425; *Proprietary Articles Trade Assoc.* v. *A.G. for Canada* [1931] A.C. 310; *R.* v. *Karminos* [1936] 1 W.W.R 433. *R.* v. *Nat Bell* [1922] A.C. 128, *Bédard* v. *Dawson* [1923] S.C.R. 681 and *Provincial Secretary of P.E.I.* v. *Egan* [1941] S.C.R. 396, distinguished.

Per: Kerwin and Taschereau JJ. (dissenting): The legislation impugned is neither criminal law nor incidental thereto. The Legislature was not attempting to create an offence and provide a penalty but was acting within its powers under s. 92 of the *B.N.A. Act* head 13, "Property and Civil Rights in the Province" and head 16, "Generally all Matters of a merely local or private nature in the Province". The Act was not aimed at gambling and, therefore, does not cover the same ground as the provisions of the *Criminal Code.* *Bédard* v. *Dawson* [1923] S.C.R. 681 at 684, 685, 687; *Lymburn* v. *Mayland* [1932] A.C. 318 at 323; *Provincial Secty. of P.E.I.* v. *Egan* [1941] S.C.R. 396 at 416. The jurisdiction exerciseable by a justice of the peace under the Alberta Act does not broadly conform to the type exercised by superior, district or county courts under s. 96 of the *B.N.A. Act.* *Re Adoption Act of Ontario* [1938] S.C.R. 398, approved and adopted in, *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ltd.* [1949] A.C. 134.

Per: Estey J. (dissenting) The effect of the legislation is to prevent rather than punish. It is, therefore, quite different from that which is classified as criminal law under s. 91 (27), or that of creating offences

and penalties under s. 92 (15) of the *B.N.A. Act*. The language used by the legislature expressly prevents the use of the machines and devices and a construction to that effect should be adopted rather than one which attributes to the legislature an effort to indirectly legislate in relation to criminal law. *A.G. for Manitoba* v. *A.G. for Canada* [1929] A.C. 260; *A.G. for Ontario* v. *Reciprocal Insurers* [1924] A.C. 328 at 345; *A.G. of Manitoba* v. *Liquor License Holders Association* [1902] A.C. 73 at 79; *Lymburn* v. *Mayland* [1932] A.C. 318.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) (Frank Ford and Clinton J. Ford JJ. A. dissenting) reversing the judgment of the trial judge Egbert J. and setting aside the order prohibiting the magistrate from conducting any hearing, and from giving any judgment or order under *The Slot Machine Act* relative to the machines in question in these proceedings.

H. J. MacDonald for the appellant.

H. J. Wilson, Q.C. and *J. J. Frawley, Q.C.* for the Attorney General of Alberta, respondent.

KERWIN J. (dissenting):—On January 8, 1952, Egbert J. in the Supreme Court of Alberta granted an order that G. H. Ross, Q.C., Police Magistrate, sitting in the City of Calgary, and any other police magistrate or justice of the peace in the Province of Alberta be prohibited from taking further steps under *The Alberta Slot Machine Act* in proceedings wherein Dale Johnson (the present appellant) had been notified to appear and show cause why certain machines or devices seized by Acting Detective R. D. Pitman of the Calgary Police Department should not be confiscated. This order was set aside by a majority judgment of the Appellate Division on January 20, 1953 (1). By leave of the Appellate Division Dale Johnson appealed to this Court and the sole question is whether *The Slot Machine Act*, as it stood before an amendment which came into force on July 1, 1952, was intra vires the Provincial Legislature. The Attorney General of Canada was notified of the appeal but was not represented.

The Slot Machine Act which requires our attention is R.S.A. 1942, c. 333. S. 3 provides:—

3. No slot machine shall be capable of ownership, nor shall the same be the subject of property rights within the Province, and no court of civil jurisdiction shall recognize or give effect to any property rights in any slot machine.

(1) (1952-53) 7 W.W.R. (N.S.) 193.

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By s. 2(*b*) "Slot machine" means,—

(i) any machine which under the provisions of section 986, subsection (4), of The Criminal Code, is deemed to be a means or contrivance for playing a game of chance;

(ii) any slot machine and any other machine of a similar nature, the result of one of any number of operations of which is, as regards the operator, a matter of chance and uncertainty, or which as a consequence of any number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations shall be known to the operator in advance; and

(iii) any machine or device the result of one of any number of operations of which is, as regards the operator, a matter of chance or uncertainty or which as a consequence of any given number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

Section 4 provides in part that upon information on oath by any peace officer that there is reasonable grounds for believing that any slot machine is kept in any building or premises, it shall be lawful for any justice of the peace by warrant under his hand to authorize and empower the peace officer to enter and search the building or premises and every part thereof. By s. 5, every peace officer executing or assisting in the execution of any such warrant who finds upon the premises mentioned therein any machine or device which he believes to be a slot machine shall forthwith seize and remove it and bring it before a justice of the peace; and shall immediately thereafter serve upon the occupant of the premises or the person in whose possession the slot machine was at the time of the seizure a notice requiring the person so served to appear before any justice and which person shall then be there to show cause why the slot machine so seized should not be confiscated. S. 7 enacts:—

7. At the time and place mentioned in the notice any justice who shall then be there shall hear anything that may be alleged as a cause why the machine should not be confiscated and unless he is by reason of what is so alleged satisfied that the machine is not a slot machine within the meaning of this Act, he shall proceed to make an order declaring the machine to be confiscated to His Majesty to be disposed of as the Attorney General may direct and shall have power to make such order whether or not the person served with the notice is the owner, bailee or licensee of or otherwise entitled to the possession of the machine.

The necessary steps under ss. 4 and 5 were taken in connection with a number of coin machines or devices but proceedings under s. 7 were prohibited by the order of Egbert J. It is pointed out in the reasons for judgment of W. A. MacDonald J.A., speaking on behalf of the majority of the Appellate Division that, apart from the fact that the machines were placed under seizure, there is no evidence that they are of a type which under valid legislation were liable to confiscation. However, on the argument it was assumed that the machines fall within the definition of "slot machine" in the Act, and on this assumption the first contention was that the subject matter of the legislation falls under head 27 of s. 91 of the *British North America Act, 1867*:—"The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

In *Bédard* v. *Dawson* (1), this Court held that a statute authorizing a judge to order the closing of a disorderly house was intra vires the Quebec Legislature as it dealt with matters of property and civil rights by providing for the suppression of a nuisance and not with criminal law by aiming at the punishment of a crime. At page 684, Mr. Justice Duff, as he then was, states:—

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

and at page 685, Mr. Justice Anglin (as he then was) states:—

> I am of the opinion that this statute in nowise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right. In my opinion in enacting the statute now under consideration the legislature exercised the power which it undoubtedly possesses to provide for the suppression of a nuisance and the prevention of its recurrence by civil process.

Mr. Justice Mignault, at page 687, puts it thus:—

> La législature veut empêcher qu'on ne se serve d'un immeuble pour des fins immorales; elle ne punit pas l'offense elle-même par l'amende ou l'emprisonnement, mais elle ne fait que statuer sur la possession et l'usage d'un immeuble. Cela rentre pleinement dans le droit civil.

(1) [1923] S.C.R. 681.

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The mere fact that s. 2(*b*)(i) of *The Slot Machine Act* refers to a section of the *Criminal Code* is not by itself of any importance. In *Lymburn* v. *Mayland* (1), Lord Atkin, speaking on behalf of the Judicial Committee, with reference to a bond required to be entered into under the Alberta Security Frauds Prevention Act, 1930, states at 323:—

> Registered persons must enter into a personal bond, and may be required to enter into a surety bond each in the sum of $500, conditioned for payment if the registered person, amongst other events, is (in the former bond) "charged with," (in the later bond) "convicted of," a criminal offence, or found to have committed an offence against the Act or the regulations made thereunder. It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise intra vires, the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.

The extracts from the judgment of Mr. Justice Duff in the *Bédard* case and from that of the Judicial Committee in *Lymburn* v. *Mayland* are mentioned by the present Chief Justice of this Court, speaking on behalf of himself and two associates, in *Provincial Secretary of Prince Edward Island* v. *Egan* (2). What was there in question was a provincial enactment providing that if a person were convicted of driving a motor vehicle while under the influence of intoxicating liquor his provincial licence to operate a motor vehicle should forthwith and automatically be suspended for certain periods, or cancelled, depending upon whether it was a first, second or third conviction and providing that the Provincial Secretary should not issue a licence to any person during the period for which his licence had been so cancelled or suspended. A section of the *Criminal Code* provided that where a person was convicted of driving a motor vehicle while intoxicated, the Court might in addition to any other punishment provided, prohibit him from driving a motor vehicle anywhere in Canada during any period not exceeding three years. The present Chief Justice at page 414 pointed out that the field of the two enactments was not co-extensive, and, at page 415, that the legislation had to do with the civil regulation of the use of

(1) [1932] A.C. 318.

(2) [1941] S.C.R. 396 at 416.

highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. Sir Lyman Duff stated at page 402 that the legislation was concerned with the subject of licensing drivers and motor vehicles of which it was essential that the province should primarily have control and at page 403 that he could find no adequate ground for the conclusion that the legislation in its true character attempted to prescribe penalties for the offences mentioned rather than enactments in regulation of licenses. Similar views were expressed by Mr. Justice Hudson and Mr. Justice Taschereau.

In the present case the Legislature has declared that there is no property in a slot machine. All that the tribunal before which the matter comes has to do is to hear representations that any particular machine is not a slot machine and, unless it is satisfied that such is the case, make an order confiscating it to His Majesty in right of the Province. The legislation impugned is neither criminal law nor incidental thereto. The Legislature was not attempting to create an offence and provide a penalty but was acting within its powers under s. 92 of the *British North America Act,* head 13, "Property and Civil Rights in the Province" and head 16 "Generally all Matters of a merely local or private Nature in the Province." It is not necessary under the Alberta Act that the slot machine be found in a gaming house. I do not read that Act as aimed at gambling and, therefore, in my opinion it does not cover the same ground as the provisions of the *Criminal Code.*

It was next argued that in any event the jurisdiction conferred upon a justice of the peace by the Act infringes the provisions of s. 96 of the *British North America Act, 1867:* —"The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." The landmark upon this topic is the judgment of this Court delivered by Sir Lyman Duff in *Re Adoption Act of Ontario* (1). In *Labour Relations Board of Saskatchewan* v. *John East Iron Works Ld.* (2), Lord Simonds, at 152, describes it as "so exhaustive and

(1) [1938] S.C.R. 398. (2) [1949] A.C. 134; [1948] 2 W.W.R. 1055.

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penetrating both in historical retrospect and in analysis of this topic, that their Lordships would respectfully adopt it as their own, so far as it is relevant to the present appeal." Later it was pointed out that it had been sufficient for the purpose of that case for Sir Lyman Duff to pose the question: "Does the jurisdiction conferred upon magistrates under these statutes broadly conform to a type of jurisdiction generally exercisable by courts of summary jurisdiction rather than the jurisdiction exercised by courts within the purview of s. 96?" Their Lordships preferred to put the question in this way which they thought might be more helpful in the decision of similar issues:— "Does the jurisdiction conferred by the Act on the appellant board broadly conform to the type of jurisdiction exercised by the superior, district or county courts?"

When one's attention is fixed upon what the justice of the peace may do under the Alberta Act, it matters not in my opinion in which form the question is put. If he is not satisfied that the machine is not a slot mcahine within the Act, his function is merely to make an order of confiscation. This jurisdiction broadly conforms to a type generally exercisable by Courts of summary jurisdiction. Provisions authorizing confiscation by a justice of the peace may be found in the *Criminal Code* and, while these examples indicate that Parliament was legislating with reference to criminal law, they also show that the jurisdiction exercisable by a justice of the peace under the Alberta Act does not broadly conform to the type exercised by the superior, district or county courts. One example is s. 543 of the *Criminal Code* providing for the confiscation and destruction of cocks found in a cock pit. Another is s-s. 3 of s. 641 of the *Code* dealing with the forfeiture of moneys or securities seized under a warrant in gaming houses, and yet another is s-s. 1 of s. 632 under which a justice of the peace may cause to be defaced or destroyed any forged banknote, bank note-paper, instrument or other things.

Counsel referred to several decisions of provincial courts in which the validity of various Provincial Slot Machine Acts was in issue. All of these statutes contained sections similar to some of those in the legislation before us but

nothing is said about such decisions as in the particular branches of constitutional law with which we are concerned, the line between validity and invalidity is very narrow.

The appeal should be dismissed with costs.

TASCHEREAU J. (dissenting):—For the reasons given by my brother Kerwin, I am of the opinion that *The Slot Machine Act* (R.S.A. 1942, c. 333) is intra vires the powers of the Legislature of Alberta, and I would dismiss the appeal with costs.

RAND J.:—In this appeal the validity of *The Slot Machine Act, 1935,* as amended, of Alberta, is challenged on three grounds: that the true nature of the legislation, directed against a public evil, is criminal law and within the exclusive jurisdiction of Parliament; that the provision for a declaration of confiscation by a justice of the peace is in conflict with s. 96 of the Confederation Act, and as that adjudication is essential to the administration of the Act the whole enactment must fall; and that in any event the field covered by the statute is already occupied by the *Criminal Code.* In view of the conclusion to which I have come it is unnecessary to deal with more than the last ground.

The definition of "slot machine" in s. 2 of the Act is as follows:—[see *ante* p. 130].

S. 3 declares that the machines shall not be capable of ownership nor be the subject of property rights within the province, and that no court of civil jurisdiction shall recognize or give effect to any rights in them. Ss. 4, 5, 6 and 7 provide that, upon information on oath by a peace officer that there are reasonable grounds for believing that any slot machine "is kept in any building or premises", a warrant may issue to search and seize and to bring the machine before a justice of the peace, and for notice to be served upon the person in possession to show cause why it should not be declared to be confiscated; and unless the justice is satisfied that the machine is not one within the meaning of the Act, he is to make an order of confiscation to Her Majesty.

In 1938, s. 986(4) of the *Criminal Code* was amended to its present form which, embracing slot machines for any purpose except vending services, declares that "if any house,

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room or place is found fitted or provided with any such machine, there shall be an irrebutable presumption that such house, room or place is a common gaming house." That presumption arises in any prosecution under s. 229 for keeping a disorderly house, which, by s. 226, includes a common gaming house. The prosecution, preceded by an information made under oath, charges the person with being the keeper of a house to which, by the definition in s. 226, persons resort "for the purpose of playing at any game of chance." Once, then, that basis is established and the presence of such a machine is shown, the conviction for keeping a common gaming house necessarily follows.

We have no facts before us showing the nature of the machines involved in the proceeding taken and we are left, therefore, with the language of the statute and of the *Code* from which to deduce the limits of inclusion to which the definition can be taken to extend.

It has been decided that slot machines for amusement or entertainment purposes come within the exception to s. 986(4) as vending services: *Laphkas* v. *The King* (1); they are therefore excluded from para. (i) of the definition. In *Regent Vending Machines* v. *Alberta Vending Machines Ltd.* (2) the judgment in which is being delivered with that in this appeal, for the reasons given I was of opinion that the machines in that case which were games or means of entertainment into which skill entered were not within the language of paras. (ii) or (iii): and the question which is raised at this stage is whether there can be any machine coming within the scope of paras. (ii) and (iii) to which the provisions of the *Code* do not extend.

That the object of the statute is to eliminate what is considered to be a local evil is quite apparent but what evil? I can quite imagine an object of concern to be the waste of time and money, particularly of young persons, in the operation of such machines as were dealt with in *Regent Vending Machines Ltd.* (*supra*). Their operation may even be taken to tend to breed a gambling propensity, although that tendency, if it exist at all, must be admitted to be extremely tenuous. But that the legislative purpose is aimed primarily at the evil of gambling is patent from almost the opening words of the statute. There is the

(1) [1942] S.C.R. 84. (2) [1954] S.C.R.

incorporation of the instruments falling within s. 986(4) of the *Code* in para. (i); paras. (ii) and (iii) are couched in language which in its technical description of the functional result of the machines is identical with what is contained in that section. The only differences between paras. (ii) and (iii) are in the opening words of application in (ii) "any slot machine and any other machine of a similar nature" against in (iii) "any machine or device"; in line 6 of (ii), "any number" against, in line 5 of (iii), "any given number"; and in line 9 of (ii) "shall be known" against "may be known" in the last line of (iii). If significant differences in the interpretation of the two paragraphs exist, they have not been suggested to us. It is therefore, in my opinion, reasonably clear that if the scope of the statute in this respect does go beyond that of s. 986(4), it must be in relation to machines or devices that are of or are used for a gambling nature or purpose.

That being so, what is the scope of the provisions of the *Code* dealing with gaming and gambling instruments? It should be remarked at the outset that, generally, gambling devices are aimed at as the apparatus of gaming houses. In certain forms they may be found in homes and used if at all in purely private activities beyond the reach of the criminal law. I do not interpret the words of s. 4 of the statute "that any slot machine is *kept* in any building or premises" to extend to an instrument of any kind to be found in a home for family and social entertainment. To be "kept" in the text carries the implication both of keeping in use and for other than purely social purposes. What is intended to be struck at is a public or community evil, not what would involve in its enforcement the invasion of domestic privacy.

In addition to s. 986(4) the provisions of ss. 235 and 641 bear directly on the question. The former makes it an indictable offence to keep in any premises, "any gambling, wagering, or betting machine or device". No definition is given of these machines or devices, and we are left in each case to a determination of fact. Then s. 641 authorizes the seizure within any house, room or place which a peace officer believes to be a place kept as a gaming house, of all instruments of gaming found therein, to be brought before a justice who, by s-s. (3) is empowered in a proper

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case to make an order of confiscation. Taken with s. 642 it furnishes the means and the occasion for initiating a prosecution under s. 229.

From this it is seen that the *Code* has dealt comprehensively with the subject matter of the provincial statute. An additional process of forfeiture by the province would both duplicate the sanctions of the *Code* and introduce an interference with the administration of its provisions. Criminality is primarily personal and sanctions are intended not only to serve as deterrents but to mark a personal delinquency. The enforcement of criminal law is vital to the peace and order of the community. The obvious conflict of administrative action in prosecutions under the *Code* and proceedings under the statute, considering the more direct and less complicated action of the latter, could lend itself to a virtual nullification of enforcement under the *Code* and in effect displace the *Code* so far by the statute. But the criminal law has been enacted to be carried into effect against violations, and any local legislation of a supplementary nature that would tend to weaken or confuse that enforcement would be an interference with the exclusive power of Parliament.

The penalty of the Act, in duplicating forfeiture, is supplementing punishment. That is not legislating either "in relation to" property or to a local object. Every valid enactment made under the authority conferred by means of that phrase is for an object or purpose which is within the power of the enacting jurisdiction, and legislation "in relation to" property is as much subject to that canon as any other head of ss. 91 or 92. Legislation from caprice or perverseness or arbitrary will affecting, say, property, cannot be brought within those words; when of such a nature it passes into another category. That law is reason is in such a sense as applicable to statutes as to the unwritten law. I am unable to agree, therefore, that under its authority to legislate in relation to property the province can in reality supplement punishment; that it may deal with conditions that conduce to the development of crime where what is proposed is in fact legislation of that character and infringes no legislative field beyond its jurisdiction though undoubted is not in question here.

The result is that since the machines or devices struck at by the statute are the same as those dealt with in similar manner by the Code, it is sufficient to say that the statute is inoperative.

The appeal must therefore be allowed and judgment go directing the issue of a writ of prohibition.

KELLOCK J.:—This appeal involves the constitutional validity of *The Slot Machine Act,* R.S.A., 1942, c. 333. Although the circumstances giving rise to these proceedings did not arise under s. 3, the entire statute was questioned on the argument.

As to s. 3, I think it is sufficient to say that in my opinion even if that section could be regarded as otherwise valid, as to which I offer no opinion, it is not severable. Apart from this, I concur in the reasoning and conclusion of my brother Cartwright. I would allow the appeal.

ESTEY J. (dissenting):—The first question in this appeal is relative to the competency of the legislature of Alberta to enact *The Slot Machine Act* (R.S.A. 1942, c. 333).

The appellant contends *The Slot Machine Act* is legislation in relation to criminal law and, therefore, by virtue of s. 91(27) of the B.N.A. Act, can be competently enacted only by the Parliament of Canada.

A slot machine is defined in s. 2(*b*) to mean: [see *ante* p. 130].

In sub-para. (iii) substantially the same language is used as in sub-para. (ii), but made applicable to "any machine or device." The legislature, by the addition of these sub-paras. (ii) and (iii), has included machines other than those which would be subject to the provisions of the *Criminal Code* and, in particular, would include a machine which otherwise comes within this provision if it be played for amusement only.

Then s. 3 provides:

> 3. No slot machine shall be capable of ownership, nor shall the same be the subject of property rights within the Province, and no court of civil jurisdiction shall recognize or give effect to any property rights in any slot machine.

In subsequent sections provision is made for the seizure and confiscation of these machines or devices.

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S. 3, under which slot machines, as defined, can neither be owned nor the subject of property rights within the province, sets forth the basic principle underlying the statute and, as such, is legislation in relation to property and civil rights.

It is, however, the contention of the appellant that when read as a whole the statute makes the possession of these machines and devices an offence and confiscation thereof a penalty; that in reality it is an attempt on the part of the province to legislate "for the promotion of public order, safety, or morals" and is, therefore, legislation in relation to criminal law.

Leaving aside, for the moment, the provisions for seizure and forfeiture, it may be observed that the phrase just quoted appears in the judgment of the Judicial Committee in *Russell* v. *The Queen* (1), which, at p. 839, reads:

> Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law.

The submission of the appellant would appear not to give sufficient weight to the words that immediately follow the phrase "public order, safety, or morals," from which it is evident that, in order to give such legislation the quality and character of criminal law, there must be an offence defined and a penalty provided therefor.

Lord Atkin gives expression to the same view when, after stating that the phrase "criminal law" in s. 91(27) of the *B.N.A. Act* is used in its widest sense and is not confined to what was criminal law in 1867, he continues:

> The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. *Combines Investigation Act* case (2).

(1) (1882) 7 App. Cas. 829. (2) [1931] A.C. 310 at 324.

The absence of any express provision in *The Slot Machine Act* making possession of these machines or devices an offence and providing a penalty therefor distinguishes it from the legislation of Saskatchewan which expressly included both and as a consequence was declared to be ultra vires the province in *Rex* v. *Karminos* (1). Even in that case Mr. Justice Turgeon would have held the provision, similar to the above-quoted s. 3, competent provincial legislation and severable from that which was criminal in character. In *Rex* v. *Stanley* (2), the Alberta Court of Appeal held that legislation in that province, prior to that here under consideration, was intra vires. It contained a direct prohibition against keeping and operating these machines, but did not provide a penalty therefor. The Appellate Division of the Supreme Court of New Brunswick in *Rex.* v. *Lane* (3), held similar slot machine legislation within the legislative competence of the province.

The appellant cited *Ouimet* v. *Bazin* (4). That case and *A.-G. for Ontario* v. *Hamilton Street Ry. Co.* (5), upon which it was mainly decided, further emphasize the distinction between legislation in relation to criminal law and the slot machine legislation here in question. In the *Hamilton Street Railway* case the Privy Council held an act to prevent the profanation of the Lord's Day legislation in relation to criminal law and, therefore, beyond the competence of the province to enact. The profanation of the Sabbath was a crime at common law (Encyc. of the Laws of Eng., Vol. 13, p. 707) and a statutory offence in Upper Canada prior to Confederation (Cons. S. of U.C. 1859, 22 Vict., c. 104). See also *In re Legislation Respecting Abstention from Labour on Sunday* (6). This feature was emphasized by their Lordships of the Privy Council at p. 589, where it is stated "that an infraction of the Act which in its original form . . . was in operation at the time of Confederation is an offence against the criminal law." In the *Ouimet* case the Quebec statute was similar to that in Ontario. It was entitled "An Act Respecting the Observance of Sunday" and it was held to be ultra vires.

(1) [1936] 1 W.W.R. 433.
(2) [1935] 3 W.W.R. 517.
(3) (1936) 67 Can. C.C. 273.
(4) (1912) 46 Can. S.C.R. 502.
(5) (1903) A.C. 524.
(6) (1905) 35 Can. S.C.R. 581.

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The slot machine legislation would appear to be more appropriately classified under that type discussed in *Bédard* v. *Dawson* (1). In that case this Court held intra vires a Quebec statute providing for the closing of any building which continued to be used as a disorderly house after a conviction had been registered against the owner or occupant thereof. Duff J. (later C.J.) at p. 684, stated:

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

and Anglin J. (later C.J.) at p. 685:

> . . . I am of the opinion that this statute in no wise impinges on the domain of criminal law but is concerned exclusively with the control and enjoyment of property and the safeguarding of the community from the consequences of an illegal and injurious use being made of it—a pure matter of civil right.

These quotations distinguish between legislation which, in effect, prevents the use of property which the legislature has decided is undesirable in the interests of the community from that under which one who commits an offence may be prosecuted and punished therefor.

The legislature in *The Slot Machine Act,* in effect, prevents the use of these machines or devices. That it may prevent the commission of criminal offences may be conceded. That was the precise effect of the legislation in the *Bédard* case. *The Slot Machine Act* goes further and prevents the use of machines and devices which, in the judgment of the legislature, tend to foster criminal or other tendencies detrimental to the community.

In determining the nature and character of legislation one examines the effect thereof and not its purpose. Viscount Sumner in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (Provincial Sale of Shares Act) (2). It is here neither the purpose nor the effect of the legislation that offences and penalties are provided with respect to the possession or use of slot machines and devices. The legislature is not concerned with how and in what manner these machines and devices have been used, but rather that they shall not be used at all within the province.

(1) [1923] S.C.R. 681. (2) [1929] A.C. 260 at 268.

With that end in view it has defined those it deems undesirable and whether they be slot machines within the language of the *Criminal Code* is not in issue. The only issue under this legislation is whether these machines are within the definition in s. 2. If so, they cannot be owned or made the subject of property rights, but will be confiscated to Her Majesty. The effect of the legislation is to prevent rather than punish. It is, therefore, quite different from that which is classified as criminal law under s. 91(27), or that of creating offences and penalties under s. 92(15). The language used by the legislature expressly prevents the use of these machines and devices and a construction to that effect should be adopted, rather than one which attributes to the legislature an effort to indirectly legislate in relation to criminal law. The position is comparable to that described by Sir Lyman Duff, writing on behalf of the Privy Council, where he stated:

> . . . the terms of the statute as a whole are, in their Lordships' judgment, capable of receiving a meaning according to which its provisions, whether enabling or prohibitive, 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. *Attorney-General for Ontario* v. *Reciprocal Insurers*. (1).

It is emphasized, in support of the invalidity of the legislation here in question, that the language of the definition in s. 2(*b*)(ii) and (iii) is almost identical with a portion of s. 986(4) of the *Criminal Code*. Before any conclusion should be drawn from this circumstance it should be observed that s. 986(4), as enacted in the *Criminal Code,* is designed to serve two purposes: first, that the automatic or slot machine there defined is "deemed to be a means or contrivance for playing a game of chance" within the meaning of ss. 226 and 229 of the *Criminal Code;* second, that any house, room or place fitted or provided with such automatic or slot machines raises an irrebuttable presumption that such is a common gaming house within the meaning of ss. 226 and 229 of the *Criminal Code*. The *Slot Machine Act* contains no such provisions. Moreover, s. 986(4) is restricted to automatic or slot machines, while s. 2(*b*)(ii) applies to "any slot machine and any other

(1) [1924] A.C. 328 at 345.

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machine of a similar nature" and (iii) applies to "any machine or device." This being so, the language of s. 2(*b*)(ii) and (iii) must be construed in its context and in relation to the purposes for which it is there used, rather than the context of s. 986(4).

When regard is had for the true nature and character of this legislation, it is the machine or device, and not the owner or party in possession thereof, against which the legislation is directed. The essential difficulty, therefore, in describing the confiscation here provided for as a penalty is that there is no offence to which it can be attached. "Confiscation" is not a word of art and, while it may be used in association with an offence as constituting part of the penalty, it does not follow that confiscation is always a penalty. In *Rex* v. *Lane, supra,* Chief Justice Baxter, after stating that "Property can be taken from one person and given to another, or, as by the Act in question, it can be vested in the Crown," goes on to cite *Levin* v. *Allnutt* (1), and *Re Barnett's Trusts* (2), where the word "confiscation" is used not in the sense of a penalty. The essential feature of the legislation here is that slot machines cannot be owned or subject to property rights and, if the legislation stopped there, the property in these machines would pass, *bona vacantia,* to the Crown. However, the legislature here provides an opportunity for those who contend that their machines are not within the definition to have that issue judicially determined and, if determined adversely to the party so contending, the magistrate, under the statute, has no alternative but to direct their confiscation, not as a penalty for an offence, but under the authority of a province to declare that in respect of property subject to its legislative jurisdiction it may be neither owned nor the subject of property rights and to take possesion thereof.

The slot machine legislation, directed as it is to the prevention of the use of these machines and devices within the province, may be classified under either s. 92(14) or (16). In this connection it is not unimportant to observe that the province has a right to legislate, as Lord Macnaghten states in *A.-G. of Manitoba* v. *Liquor Licence Holders Assoc.* (3), upon "matters which are 'substantially of local or of private

(1) 15 East 267.

(2) (1902) 71 L.J.Ch. 408.

(3) [1902] A.C. 73 at 79.

interest' in a province—matters which are of a local or private nature " from a provincial point of view," . . ." At p. 78 Lord Macnaghten states:

> In legislating for the suppression of the liquor traffic the object in view is the abatement or prevention of a local evil, rather than the regulation of property and civil rights—though, of course, no such legislation can be carried into effect without interfering more or less with "property and civil rights in the province."

In *Lymburn* v. *Mayland* (1), it was held that the Alberta Security Frauds Prevention Act (S. of A. 1930, Ch. 8) was intra vires. It was there contended before the Judicial Committee that "the Act was invalid because under the colour of dealing with the prevention of fraud in share transaction sit was assuming to legislate as to criminal law." This contention was not accepted and in the course of their reasons it was stated at p. 324:

> There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded.

and at p. 326:

> The provisions of this part of the Act may appear to be far-reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the legislature of the Province, sovereign in this respect, has the sole power and responsibility of determining what degree of protection it will afford to the public.

These cases are illustrations of the jurisdiction a province possesses to legislate in respect to morality, order and general welfare, under the appropriate headings of s. 92, and the imposition of penalties for infractions thereof, as provided in s. 92(15).

The fact that Parliament has, in legislating in relation to criminal law, dealt with slot machines does not militate against the jurisdiction of the province to prohibit their use. That was expressly decided in the *Bédard* case. The principle underlying that case would appear to support the view that in respect to property such as slot machines a provincial legislature may, if it deems them undesirable, legislate to prohibit their use, irrespective of whether Parliament has included provisions in regard to them in its legislation in relation to criminal law. A conclusion to the contrary would leave the province without legislative capa-

(1) [1932] A.C. 318.

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city to prevent the use of such chattels, however objectionable or undesirable, in the opinion of the legislature, they may be. That the legislature possesses such a jurisdiction appears to be established by the authorities mentioned and in my view the slot machine legislation here in question should be held to be competently enacted.

The appellant's second contention is that the legislature of Alberta cannot require a magistrate to "hear anything that may be alleged as a cause why the machine should not be confiscated and unless he is by reason of what is so alleged satisfied that the machine is not a slot machine within the meaning of the Act, he shall proceed to make an order declaring the machine to be confiscated . . ." (s. 7); or, as otherwise stated, that a police magistrate cannot decide such, as his decision would constitute "a judgment *in rem* concerning *'bona vacantia'* as the subject matter." In effect, his contention is that such a matter can only be decided by a judge appointed under s. 96 of the B.N.A. Act. S. 96 reads as follows:

96. The Governor General shall appoint the judges of the Superior, District and County Courts in each Province except those of the Courts of Probate in Nova Scotia and New Brunswick.

Section 92(14) of the *B.N.A. Act* provides that the administration of justice, including the constitution, maintenance and organization of provincial courts, vests in the province. These ss. 96 and 92(14) were considered in a Reference Concerning, *inter alia,* the Authority of Police Magistrates and Justices of the Peace to Perform the Functions Vested in Them by Provincial Legislatures (1). It was there pointed out that prior to Confederation courts presided over by magistrates and justices of the peace exercised a jurisdiction both in civil and criminal matters. After referring to s. 129 of the *B.N.A. Act,* under which all laws in force in Canada, Nova Scotia and New Brunswick were continued until amended by the appropriate legislative body, Sir Lyman Duff stated at p. 413:

The effect of this section, of course, was that the authority of magistrates and justices of the peace in these civil matters, as well as of all judicial officers not within section 96 continued after Confederation in the provinces mentioned, subject to alteration by the legislature.

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

. . . The *B.N.A. Act,* therefore, by its express terms provided for the continuance of courts possesing civil jurisdiction which were not within the scope of section 96 and concerning the powers of which the provinces had exclusive authority in virtue of section 92(14).

It was also pointed out at p. 418 that the provinces possess a jurisdiction to change or vary the jurisdiction of inferior courts "whether within or without the ambit of s. 96." The problem, therefore, appears in each case to be a question of whether, by its legislation, a province has constituted "a court of a class within the intendment of s. 96."

The magistrate, under *The Slot Machine Act,* exercises a judicial function in arriving at his decision as to whether "he is by reason of what is so alleged satisfied that the machine is not a slot machine within the meaning of this Act." That does not appear to be different in character from that which justices of the peace were called upon to decide both prior to and since Confederation. In my opinion the legislature of Alberta has not endeavoured to constitute, nor has it constituted by this legislation, a court of a class within the scope of s. 96.

The forfeiture provided under this legislation is a statutory consequence which, of necessity, results unless the magistrate is "satisfied that the machine is not a slot machine . . ." Even if, however, it be said that, in reality, the magistrate decides that question, it should be noted that prior to Confederation similar matters were decided under the fish and game laws in Upper Canada, 23 Vict., c. 55, s. 12; Cons. S. of C., c. 62, s. 37; also in Nova Scotia, 10 Geo. IV, c. 33, ss. 21 and 22.

Under this legislation slot machines can neither be owned by, nor can individuals obtain a property right or interest therein. As found they are seized and, upon an order by a magistrate, confiscated to the Crown. They come to the Crown, therefore, not because of property in which there may be diverse claims, but by virtue of these statutory provisions.

The appeal should be dismissed.

LOCKE J.:—The nature of these proceedings and the language of the sections of the Slot Machine Act of Alberta (R.S.A. 1942, c. 333) are described in other reasons to be delivered in this matter. While we were informed upon

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the argument that ss. 4 to 7 inclusive alone were dealt with on the argument addressed to the courts in Alberta and a decision upon the constitutional validity of those sections is sufficient to dispose of the matter, I think s. 3 should also be dealt with.

In *Rex* v. *Stanley* (1), the Appellate Division of the Supreme Court found that the Slot Machine Act of 1935 (c. 14), which contained a provision similar to s. 3 of the present Act was intra vires and the accuracy of that decision is brought into question in this appeal.

The objection to the power of the Province to pass this legislation is based upon the contention that it is an infringement upon the powers of Parliament under head 27 of s. 91 of the *British North America Act* by which the exclusive legislative authority, in relation to the criminal law, was vested in Parliament, except the constitution of courts of criminal jurisdiction but including the procedure in criminal matters.

It is of assistance in determining the matter to consider the history of the provisions of the *Criminal Code* dealing with the devices which may be generally described as slot machines. In the *Code* as it appeared as c. 146, R.S.C. 1906, under a sub-heading entitled "Evidence on the Trial", it was provided by s. 986 that in any prosecution under s. 228 for keeping a common gaming house, or under s. 229 for playing or looking on while any other person is playing in a common gaming house, it should be prima facie evidence that the place was used as a common gaming house if it was found fitted or provided, *inter alia,* "with any means or contrivance for unlawful gaming." By c. 13 of the Statutes of 1913, that section was repealed and there was substituted a section providing that if the place was provided, *inter alia,* with any means or contrivance for unlawful gaming or betting, it should be prima facie evidence that it was a common gaming house. By s. 5 of c. 16 of the Statutes of 1918, the section was further amended by striking out the words "unlawful gaming" and substituting the words: "playing any game of chance or any mixed game of chance or skill."

(1) (1935) 3 W.W.R. 517.

By c. 35 of the Statutes of 1924, s. 986 was further amended by adding as s-s. 3 thereof the following:—

In any prosecution under section two hundred and twenty-eight any automatic machine intended to be used for vending merchandise or for any other purpose, the result of one or any number of operations of which is as regards the operator a matter of chance or uncertainty, or which as a consequence of any given number of successive operations yields different results to the operator, shall be deemed to be a means or contrivance for playing a game of chance, within the meaning of subsection (1) of this section, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

While it is not questioned that this legislation was within the powers of Parliament, I think it is of some assistance to consider certain of the cases decided by the Judicial Committee and by this Court in which the extent of its jurisdiction under head 27 has been defined. In *Russell* v. *The Queen* (1), where the validity of the Canada Temperance Act, 1878, was upheld on the ground that the objects and scope of the Act were general, that is, to promote temperance by means of a uniform law throughout the Dominion and so related to the peace, order and good government of Canada and not to the class of subjects "property and civil rights", Sir Montague Smith, in delivering the judgment of the Court, said in part (p. 839):—

Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects asisgned exclusively to the Parliament of Canada.

In *Attorney-General for Ontario* v. *Hamilton Street Railway* (2), where the Judicial Committee found that the *Lord's Day Act* passed by the Province of Ontario was ultra vires, the Lord Chancellor, in delivering the judgment of the Court, said that the reservation of the criminal law to the Dominion of Canada was given in clear and intelligible words which must be construed according to their natural and ordinary signification and (p. 529):—

The fact that from the criminal law generally there is one exception, namely, "the constitution of Courts of criminal jurisdiction," renders it more clear, if anything were necessary to render it more clear, that with that exception . . . the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament.

(1) (1882) 7 App. Cas. 829. (2) [1903] A.C. 524.

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The language employed in expressing the opinion of the Board gave effect to the argument of counsel who sought to uphold the judgment which had held the Act beyond the powers of the Legislature, that the primary object of the Act under consideration was the promotion of public order, safety and morals and not the regulation of civil rights as between subject and subject.

In *Proprietary Articles Trade Association* v. *Attorney General for Canada* (1), where the Judicial Committee upheld the validity of the Combines Investigation Act, Lord Atkin, after referring to what had been said in the *Hamilton Street Railway* case, said (p. 324):—

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

The provision introduced in s. 986 by the amendment of 1924 was further amended by s. 24 of c. 38 of the Statutes of 1925 but in a manner which is immaterial to the matter we are considering.

In 1924 the Legislature of Alberta enacted *"The Slot Machine Act"*, this apparently being the first of such statutes adopted by any legislature in Canada. By that Act, "slot machine" was defined as follows:—

> any automatically or mechanically operated contrivance or device which delivers or purports to deliver to any person upon or subsequently to the insertion therein of any money or any substance representing money, any premium, prize or reward consisting either of money or money's worth or anything which is intended to be exchanged for money or money's worth, and whether such contrivance or device also delivers or causes to be delivered any goods to, or performs or causes to be performed any service for any person or not.

(1) [1931] A.C. 310.

By s. 3 it was declared that no slot machine should be capable of ownership or be the subject of property rights within the province.

In the revision of the Statutes of Canada of 1927, s-s. 3 of s. 986 as enacted in 1924 and amended in 1925 appears as s-s. 4.

By s. 27 of c. 11 of the Statutes of 1930, s-s. 4 was repealed and reenacted in the following terms:—

(4) In any prosecution under section two hundred and twenty-nine any automatic machine intended to be used for vending merchandise or for any other purpose, the result of one of any number of operations of which is, as regards the operator, a matter of chance or uncertainty, or which as a consequence of any given number of successive operations yields different results to the operator, shall be deemed to be a means or contrivance for playing a game of chance, within the meaning of subsection two of this section, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

The Federal legislation was in this form when in the years 1935 and 1936 some of the other provinces of Canada, apparently acting in concert, adopted legislation dealing with slot machines, an expression which, up to that time, had not appeared in the *Criminal Code*. In 1935 the Legislature of Saskatchewan passed the Slot Machine Act (c. 72, S.S. 1935) and in the same year a Slot Machine Act was enacted in Manitoba (c. 43, S.M. 1935). In the same year the Legislature of Alberta repealed c. 36 of its Statutes of 1924 and enacted the Slot Machine Act 1935. In 1936 the Provinces of Nova Scotia, New Brunswick and Prince Edward Island dealt with the subject by legislation. The Statute of Nova Scotia appeared as c. 2 of its Statutes of that year: in New Brunswick as c. 48 and in Prince Edward Island as c. 25. The Province of British Columbia did not enter this legislative field, apparently being satisfied to leave matters of this nature to be dealt with under the provisions of the *Criminal Code*.

The Statutes thus adopted by six of the provinces of Canada, while differing in some respects in the language employed in defining what was a slot machine and in dealing with the matter of penalties, had one provision in common, namely, that such machines were declared to be incapable of ownership or of giving rise to property rights. The Province of Ontario enacted a Slot Machine Act in 1944. (c. 57) and the Province of Quebec in 1946 (c. 19).

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To complete the history of the legislation upon the subject, so far as it is necessary that it should be considered, it should be said that by s. 46 of c. 44 of the Statutes of Canada of 1938, s-s. 4 of s. 986 was again repealed and a new subsection enacted. For the first time, the expression "slot machine" appeared in the *Criminal Code* in this amendment.

While the Appellate Division of the Supreme Court of Alberta had upheld the validity of the Act of 1935 passed by that province, the legislation in Saskatchewan was attacked and in *Rex.* v. *Karminos* (1), Haultain, C.J.S., Martin, Mackenzie and Gordon JJ.A. held the Act to be ultra vires. Turgeon J.A. differed from the other members of the Court in this respect only that he considered that s. 3 which declared that no one could claim any property in a slot machine was within the Provincial powers.

In Manitoba, where the Act was challenged in *Rex* v. *Magid* (2), the Court of Appeal came to a different conclusion, specifically holding the provision that there could be no property in such a machine to be within the powers of the province.

In Russell on Crime, 10th Ed. p. 1744, the learned author says:—

> Common gambling houses are a public nuisance at common law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property persons whose time might otherwise be employed for the good of the community.

The keeping of such a gaming house was held indictable at common law (*R.* v. *Rogier* (3)). When the *Criminal Code* was first enacted in Canada by c. 28 of the Statutes of 1892, s. 198 declared that any person who kept, *inter alia,* a common gaming house was guilty of an indictable offence. By s. 703 it was provided that it should be prima facie evidence in any prosecution for keeping a common gaming house under s. 198 that the place was so used and that the persons found thereupon were unlawfully playing therein if, *inter alia,* such place was found fitted or provided with any means or contrivance for unlawful gaming. It was not, however, until the amendment of 1924 that the

(1) [1936] 1 W.W.R. 433. (2) [1936] 1 W.W.R. 163.
(3) 1 B. & C. 272; 2 D. & R. 431.

Code was amended to include the provision above quoted regarding automatic machines deemed to be a contrivance for playing a game of chance.

The Alberta Act was assented to on April 12 while the amendment to the *Criminal Code* did not come into force until the 1st of October in that year. S-s. (*b*) of s. 2 of the Alberta Act, which used and defined the expression "slot machine" was clearly directed against automatic or mechanically operated contrivances which delivered or purported to deliver money prizes or rewards and I think it to be clear that these might exceed in value any money inserted in the machine to cause it to operate. In essence, the Act was directed against gambling and, in my opinion, nothing else, and, in addition to declaring that no slot machines should be capable of ownership, prohibited any person from keeping or operating such a machine and permitted its seizure and confiscation.

In 1935, however, when the Slot Machine Act was re-enacted, its purpose was made even more abundantly clear. In the interval since the passing of the 1924 Act, s-s. 4 had been added to s. 986 of the *Code* in the revision of the Statutes of 1927 and the new s-s. (*b*) of s. 2 of the Alberta Act substituted for the definition of a slot machine, as it appeared in the Act of 1924, a definition declaring the expression to mean any machine which under the provisions of s. 986, s-s. 4 of the *Criminal Code* was deemed to be a means or contrivance for playing a game of chance. In addition to other penalties, the *Code,* by s. 641, had provided that automatic machines of the nature referred to in s. 986(4) might be seized and brought before a magistrate or justice who might direct that they shoud be destroyed or otherwise disposed of. The Legislature substituted for this penalty its own provisions declaring that such a machine should not be capable of ownership and might be seized and declared forfeited in the manner provided. I think it would be difficult to find a more direct encroachment upon the exclusive jurisdiction of Parliament than this.

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The definition in the Alberta Act, however, went farther and adopted as its description of a slot machine a large part of the language of s-s. 4 of s. 986. Thus, s-s. (*b*)(ii) in describing the machine read:—

> the result of one of any number of operations of which is, as regards the operator, a matter of chance and uncertainty or which as a consequence of any number of successive operations yields different results to the operator notwithstanding that the result of some one or more of such operations shall be known to the operator in advance.

In subsection 4 the word before the word "uncertainty" read "or": before the word "results" there appeared the word "given" and after the word "more" the words "or all": otherwise the language was identical. The only material difference between the Alberta enactment and that in the Code was that the words:—

> shall be deemed to be a means or contrivance for playing a game of chance within the meaning of subsection 2 of this section.

which appeared in the latter statute were omitted for what I think were obvious reasons.

In the following year, the Alberta Legislature amended the Act of 1935 by adding to its definition of a slot machine a new clause as subsection (*b*)(*iii*), which again followed the above quoted language of s-s. 4 of s. 986 of the *Code* but substituted for the words:—

> any slot machine and any other machine of a similar nature.

which appeared in subsection (*b*)(*iii*) the words:—

> any machine or device.

The Alberta Act of 1942 is in the same terms as that of 1935 as it was amended by the Act of 1936. We are spared the necessity of attempting to interpret the involved language of subsections 2 and 3 of the Alberta Act by the fact that automatic or slot machines falling within that description also fall within s-s. 4 of s. 986 of the *Criminal Code,* and that statute declares that if such a machine is found in any house, room or place, there shall be an irrebuttable presumption that such place is a common gaming house. This, in turn, has the consequences provided for by s. 229 and s. 641 of the *Criminal Code* and the keeping of such a gambling device is an indictable offence under s. 235(*b*). As was said by Lord Atkin in the *Proprietary Articles* case to which I have referred, it is for Parliament to define what is a crime, to which may be added that it is for the like

authority to declare what is evidence of a crime. The whole argument of the present case proceeds upon the basis that the machines in respect of the possession of which Johnson was prosecuted fell within the definition contained in the Slot Machine Act. That being so, they fall equally within the definition of s-s. 4 of s. 986 of the *Criminal Code*.

The determination of this matter does not, in my opinion, depend alone upon the fact that if the provincial legislation was lawfully enacted there would be a direct clash with the terms of the *Criminal Code:* rather is it my opinion that the main reason is that the exclusive jurisdiction to legislate in relation to gaming lies with Parliament under head 27 of s. 91. It may, however, be noted that if the contention of those who seek to uphold this statute were correct, the person keeping a place in Alberta in which a machine falling within the definition were found might be convicted of an indictable offence under s. 229 of the Code and sentenced to one year's imprisonment and the machine brought before a justice and destroyed or disposed of under the provisions of s. 641(3) and also indicted under s. 235(*b*), while the machine might be seized under the provisions of s. 5 of the Slot Machine Act and confiscated to Her Majesty in right of the Province of Alberta.

In delivering the judgment of the Appellate Division in *Rex* v. *Stanley* (1), the late Mr. Justice McGillivray said that it had never been thought that confiscatory provisions in provincial legal enactments were not within the legislative authority of the province and referred to *Rex* v. *Nat Bell* (2), saying that if such legislation was valid he could not understand why the legislation in question was not also valid. With great respect, I do not think the decision of the Judicial Committee in the *Bell* case touches the matter. It is to be remembered that in *Russell* v. *The Queen* (3), the enactment of the Canada Temperance Act of 1878 had been held to be within the powers of Parliament and that in *Attorney for Manitoba* v. *Manitoba Licence Holders Assoc.* (4), the validity of the Manitoba Liquor Act had been upheld as a matter of a merely local nature in the province, within the meaning of head 16 of s. 92. Under

(1) (1935) 3 W.W.R. 517.
(2) [1922] 2 A.C. 128; [1922] 2 W.W.R. 30.
(3) (1882) 7 App. Cas. 829.
(4) [1902] A.C. 73.

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head 15 the province was empowered to impose punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in s. 92. In the *Bell* case, Lord Sumner in delivering the judgment of the Board held that the power to forfeit was covered by the word "penalty." However, it must be realized that this was a penalty imposed for the breach of a statute, the validity of which could not be questioned unless it came into conflict with Dominion legislation validly enacted. In *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), where the validity of an Ontario Liquor Act was questioned, Lord Watson, in delivering the judgment of the Board and after discussing the decision in *Russell's* case and in *Hodge* v. *Reg.* (2), said in part:—(p. 369)

> If the prohibitions of the Canada Temperance Act had been made imperative throughout the Dominion, their Lordships might have been constrained by previous authority to hold that the jurisdiction of the Legislature of Ontario to pass s. 18 or any similar law had been superseded. In that case no provincial prohibitions such as are sanctioned by s. 18 could have been enforced by a municipality without coming into conflict with the paramount law of Canada. For the same reason, provincial prohibitions in force within a particular district will necessarily become inoperative whenever the prohibitory clauses of the Act of 1886 have been adopted by that district.

Had the Canada Temperance Act been in force in the District of Alberta where the seizure in the *Nat Bell* case arose, it seems clear that the forfeiture provisions of the Provincial Liquor Act could not have been invoked or the Act been of any validity. There was, however, no such conflict or invasion of an exclusive Federal field as in the present case.

The learned Judge further referred to *Bédard* v. *Dawson* (3), as authority for the proposition that the jurisdiction vested in Parliament under head 27 did not exclude the power of the province to suppress the use of slot machines

(1) [1896] A.C. 348. (2) (1883) 9 App. Cas. 117.
(3) [1923] S.C.R. 681.

as instruments calculated to favour the development of crime or as provincial evils or nuisances under its legislative authority to deal with property and civil rights. That decision has been frequently invoked in an attempt to support provincial encroachments in the field of criminal law. In that case a statute of the Quebec Legislature was considered, which provided, *inter alia,* that it should be illegal for any person who owns or occupies any house or building to use or allow any person to use the same as a disorderly house. The reasons for judgment make it clear that it was the opinion of all the members of the Court that the real purpose of the statute was the control and enjoyment of property and that it was not directed to the punishment of a crime. It is the judgment of Duff J., as he then was, in which it was said that the legislation impugned seemed to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime, which has so often been quoted in support of provincial legislation questioned as an invasion of the jurisdiction of Parliament. I do not think that this language has the meaning sought to be attributed to it. Municipal legislation authorizing the clearing out of slums is, no doubt, of a nature which tends to prevent the existence of conditions which may foster crime, but no one would suggest that on that account it was legislation *relating* to crime, within the meaning of head 27 of s. 91, and the legislation impeached in *Bédard's* case seems to me no more capable of being classified as trenching upon the Dominion powers. The point to be determined is, of course, just what is the true nature of the legislation which is impugned, and in that case the members of the Court were all of the opinion that its true nature was municipal government. I am unable, with respect for other opinions, to see how this touches the question to be decided in the present case.

When *Rex* v. *Stanley* (1) was decided in 1935 the definition in the Slot Machine Act was that above referred to,

(1) [1935] 3 W.W.R. 517.

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which was enacted in that year. The reasons delivered in the Appellate Division do not mention the fact that that definition merely repeated the definition in s-s. 4 of s. 986 of the *Criminal Code,* with the exceptions above pointed out, and that the Act as it stood was in this respect merely a provincial reenactment of the *Code,* with an added penalty. The learned Judge who delivered the judgment of the Court attached importance to the fact that the *Code* at that time made the possession of such a machine merely prima facie evidence that the place where it was found was a common gaming house and said that nowhere in the *Code* was there to be found a prohibition against the keeping or using of a slot machine of any kind. Apparently, s. 235(*b*) of the *Code* was overlooked. It may also be noted that since the decision in that case s. 988(4) was amended in 1938, so that the mere presence of such a machine created an irrebuttable presumption that the place is a common gaming house.

It was in the following year that *Rex* v. *Karminos* (1) was decided in the Court of Appeal of Saskatchewan. The language of the Slot Machine Act of that province was not, as in the case of the Alberta legislation, taken practically verbatim from the *Criminal Code* but contained a definition of a slot machine closely resembling the definition adopted that year in other provinces. One of the contentions made in support of the legislation was that, while admitting that gambling machines or devices fell within the definition, it also included machines which were not gambling machines or devices such as the machines which had been considered in *Rex* v. *Wilkes* (2), and by this Court in *Roberts* v. *Rex* (3). After pointing out that the possession of a machine such as that defined was made indictable by s. 235(*b*) of the *Criminal Code,* the Chief Justice of Saskatchewan said that the main purpose of the Act was to prevent the keeping of gambling machines, which was already

(1) [1936] 1 W.W.R. 433. (2) (1930) 66 O.L.R. 319.
(3) [1931] S.C.R. 417.

an offence under the *Criminal Code* and to punish that offence in the interests of public morality. In his opinion, the penalties including confiscation were not directed to the enforcement of a provincial law relating to property and civil rights but rather to punish a public wrong. The learned Chief Justice quoted with approval a passage from a judgment of Street J. in *Reg.* v. *Wason* (1), which reads:—

> There are good reasons for holding that the Provincial Legislatures could not, by the mere act of passing a statute forbidding the doing of some thing, already an offence, but affecting property and civil rights in the Province, confer upon themselves jurisdiction to inflict a new punishment for the offence, and justify it upon the ground that they were merely enforcing their own statute. The foundation for the jurisdiction claimed would be defective because of its dealing with matters of criminal law.

Turgeon J.A., who considered that the section which authorized confiscation was within provincial powers but that the other provisions of the Act which provided for penalties were ultra vires, said that the Act purported to create an offence and that this in relation to the matter under consideration was ultra vires. That learned Judge said that it was one thing for the Legislature to create the civil effects pertaining to the possession of property and another thing to set up the criminal effects of such possession and referred to *Bédard* v. *Dawson* as illustrating the point. In his opinion, the real object and true nature of the enactment was to create an offence in the interests of public morals and referred to the passage from *Russell* v. *Reg.*, of which I have made mention above. An argument had been made in support of the legislation on the ground that it did not cover any specific provision of the *Criminal Code* as it then stood but, as to this, Turgeon J.A. pointed out that it being found that the subject matter was of a criminal nature the fact that Parliament had not dealt with it could not confer any jurisdiction on the province and referred to what had been said in the Judicial Committee in *Union Colliery* v. *Bryden* (2), at p. 588.

(1) (1889) 17 O.L.R. 58.

(2) [1899] A.C. 580; 68 L.J.P.C. 118.

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Martin J.A. (now C.J.S.) considered that the Act was an attempt to extend the provisions of the *Code* by including some machines which did not fall within its provisions and that in pith and substance it had been enacted in the interests of public morality with respect to a subject already dealt with in the *Criminal Code* and was accordingly invalid. As to the section providing for confiscation, he considered that it could not be severed from the rest of the Act.

Mackenzie J.A., in an exhaustive review of the authorities, commented upon the various arguments made in support of the legislation. In considering what was the true nature of the legislation, he said that there was nothing to suggest that the prohibition of slot machines was because they were physically harmful but that, since it was the keeping or operating of them which was forbidden, the conclusion necessarily followed that it was in their use that the evil lay. As to the nature of the evil, it had obviously been considered such as should be dealt with under the provisions of the *Code* and he referred to a number of cases in which there had been convictions of keeping a common gaming house by invoking s. 986(4), and of keeping or operating slot machines under s. 235(*b*), in several of the Provinces of Canada. As in all the many cases to which he referred the slot machines fell within the definition contained in the Saskatchewan Statutes, he concluded that the real purpose of the Act was to suppress gambling. As to the argument that some of the machines in question were not gambling devices, a contention advanced on behalf of the Attorney General, he said that he considered the main object of the legislation was to try to stiffen the existing criminal law against gambling by slot machines. Speaking of the section which declared that no slot machine was capable of ownership, he said (p. 451):—

> Under the circumstances, it seems to me that sec. 3 must be treated merely as a sanction, in which event it adds little, if anything, to the other sanctions contained in the Act, and that, since on its face it has to do with a matter of property and civil rights, its real function is to give the Act a provincial complexion, and so to mask its criminal quality . . .

Conversely, I do not see how it can be competent to the provincial Legislature to attempt to justify, as in the present case, an interference with the exclusive authority of the Dominion Parliament in the matter of criminal law, by enacting, in aid thereof, such a provision as sec. 3, founded upon its power to legislate in matters relating to property and civil rights. Such legislation may doubtless be conceived to be in the interests of public morality, but for that very reason it constitutes an attempt to encroach upon a forbidden field.

The learned Judge referred, amongst others, to the following cases: *Reg.* v. *Keefe* (1); *Reg.* v. *Wason* (2), the *Hamilton Street Railway* case (3) and *In re Race Tracks and Betting* (4), all of which, in my opinion, support his view. Mackenzie J.A. distinguished *Bédard* v. *Dawson* upon the same ground as that adopted by Turgeon J.A.

Gordon J.A., in a short judgment, agreed that the Act in its entirety was ultra vires as being an infringement upon head 27 of s. 91 or within a field already occupied by Dominion legislation.

The amendment effected by s. 46 of c. 44 of the Statute which amended the *Criminal Code* in 1938 reads:—

46. Subsection four of section nine hundred and eighty-six of the said Act, as enacted by section twenty-seven of chapter eleven of the statutes of 1930, is repealed and the following substituted therefor:—

(4) In any prosecution under section two hundred and twenty-nine any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services shall, and any such machine used or intended to be used for vending merchandise shall, if the result of one of any number of operations of it is, as regards the operator, a matter of chance or uncertainty or if as a consequence of any given number of successive operations it yields different results to the operator or if on any operation it discharges or emits any slug or token, other than merchandise, be deemed to be a means or contrivance for playing a game of chance notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance and if any house, room or place is found fitted or provided with any such machine there shall be an irrebuttable presumption that such house, room or place is a common gaming house.

While the nature of the machines referred to is defined in more detail and the words "or if on any operation it dis-

(1) (1890) 1 Terr. L. R. 280.
(2) 17 O.L.R. 58; 17 O.A.R. 221.
(3 [1903] A.C. 524.
(4) (1921) 41 O.L.R. 389.

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charges or emits any slug or token, other than merchandise" were added, the language:—

> the result of one of any number of operations of it is, as regards the operator, a matter of chance or uncertainty or if as a consequence of any given number of successive operations it yields different results to the operator . . . notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

which, as I have pointed out, had been adopted practically verbatim in the Alberta Statute of 1935 and the amendment of 1936, remains.

It is true that the present subsection in the *Code* and the language of the Alberta Act differ in this respect that the *Code* refers to any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services and any such machine used or intended to be used for vending merchandise, while paragraphs (ii) and (iii) of s. 2(*b*) of the Alberta Act respectively refer to "any slot machine and any other machine of a similar nature" and "any machine or device", but I think it to be perfectly clear that no machines other than those which it was attempted to describe in the section of the *Criminal Code* are included in the language of the Slot Machine Act. It is true that the word "device" is capable of a more general meaning than the words "slot machine or machine". However, the Legislature has described the statute as a Slot Machine Act and, just as one is entitled to refer to the preamble of a statute to assist in determining its meaning when there is ambiguity in its language (*Powell* v. *Kempton Park* (1)), so, in my opinion, one may refer to the title and this indicates that it is machines of the nature of automatic or slot machines or of the nature described in the *Code* which the statute is intended to reach. If, however, it should be the case that machines of some other nature are included in the definition in the Provincial statute, I would, for the reasons assigned by Haultain C.J.S. and Turgeon and Mackenzie JJ.A. in *Rex.* v. *Karminos* (*supra*), consider the legislation an invasion of a field exclusively assigned to Parliament.

(1) [1899] A.C. 143.

When the New Brunswick Legislature passed the Act of 1936, it was entitled "An Act for the Suppression of Slot Machines and other Gambling Devices": the Quebec Statute was entitled "An Act respecting Gaming Apparatus" and adopted the definition in the *Criminal Code*. The nature and purpose of the legislation was thus made manifest. The Alberta Legislature, by its virtual adoption of the language of the *Code*, has, in my opinion, made the matter equally clear.

We have been referred to the judgment of this Court in *Provincial Secretary of Prince Edward Island* v. *Egan* (1), in support of this legislation but, when the reasons delivered in that case are examined, the real basis of the decision is shown to be that the legislation had to do with the regulation of highway traffic and did not invade the jurisdiction of Parliament under head 27 of s. 91. Sir Lyman Duff, it may be noted, in expressing his agreement with the judgment of the Court, added (p. 403):—

> It is, of course, beyond dispute that where an offence is created by competent Dominion legislation in exercise of the authority under s. 91(27), *the penalty or penalties attached to that offence, as well as the offence itself*, becomes matters within that paragraph of s. 91 which are excluded from provincial jurisdiction.

In my opinion, the judgment of the Court of Appeal of Saskatchewan in *Rex* v. *Karminos* was right and, despite the difference in the language of the statute there considered, the reasons delivered by the majority of the Court, and in particular those of the late Mr. Justice Mackenzie, with which I respectfully agree, are applicable to the present case.

I would allow this appeal with costs throughout and declare that *The Slot Machine Act*, R.S.A. 1942, c. 333, is ultra vires of the Legislature of Alberta.

CARTWRIGHT J.:—The relevant provisions of the Slot Machine Act of Alberta and of the *Criminal Code* are set out in the reasons of other members of the Court.

(1) [1941] S.C.R. 396.

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It will be observed that the Alberta Act contains three definitions of "slot machine". The first adopts the definition of a means or contrivance for playing a game of chance contained in s. 986(4) of the *Criminal Code*. The second and third differ in minor matters of wording but the essential requirement in each is that to fall within the definition a machine must be such that the result of one of any number of its operations shall be, as regards the operator, a matter of chance or uncertainty. The words in which this requirement is expressed are taken directly from s. 986(4) of the *Criminal Code*.

On a consideration of the Act in its entirety, and even without such assistance as is to be derived from its history which is dealt with in the reasons of my brother Locke, the conclusion appears to me to be inescapable that the main object of the Act is to forbid the keeping of gambling machines in the interest of public morality and to punish any breach of such prohibition by confiscation. I think this appears particularly from the insistence in each item of the definition section on the existence of the element of chance or uncertainty in the result of the operations of the machines with which the Act deals.

I agree with the reasoning that led the majority of the Court of Appeal in Saskatchewan to hold, in *Rex* v. *Karminos* (1), that the Slot Machine Act there under consideration was *ultra vires in toto*. The following passages in that judgment appear to me to be applicable to the case at bar:—

Haultain C.J.S. at pages 438 and 439:—

> The main object and purpose of the Act is to prevent the keeping of gambling machines, which is already an offence under the *Criminal Code*, and to punish that offence in the interest of public morality. The penalties imposed, including confiscation, are not directed to the enforcement of a provincial law relating to property and civil rights but rather to punish a public wrong. I include "confiscation" because the real character of the Act makes it, in my opinion, an additional sanction or penalty enacted to enforce obedience to the Act.

(1) [1936] 1 W.W.R. 433.

Martin J.A. at page 443:—

The Legislature, in its attempt to improve upon the Act of Parliament—and for the same reason as must have prompted the Parliament of Canada to enact the provisions of the *Criminal Code*, namely, in the interests of public morality and to prevent gambling—has enacted provisions in conflict with those of the *Criminal Code* and these provisions are, therefore, *ultra vires: In re Race-Tracks and Betting* (1921) 49 O.L.R. 339; *Rex* v. *Lichtman* (1923) 54 O.L.R. 502.

Section 3 of the Act under consideration in *Rex* v. *Karminos* was substantially identical with s. 3 of the Alberta Act and I agree with Mackenzie J.A. when he says at page 451:—

Under the circumstances, it seems to me that sec. 3 must be treated merely as a sanction, in which event it adds little, if anything, to the other sanctions contained in the Act, and that, since on its face it has to do with a matter of property and civil rights, its real function is to give the Act a provincial complexion, and so to mask its criminal quality. This is to violate the principle which was laid down by the Privy Council in *In re Board of Commerce Act and Combines and Fair Prices Act, 1922, supra,* and was reiterated by it in *In re Reciprocal Insurance Legislation, supra,* at p. 407 [1924] 2 W.W.R.) where it is said, that it was not competent to the Dominion Parliament to interfere with the class of subject committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary provisions designated as new phases of Dominion criminal law, which require a title to so interfere as the basis of their application.

Conversely, I do not see how it can be competent, to the provincial Legislature to attempt to justify, as in the present case, an interference with the exclusive authority of the Dominion Parliament in the matter of criminal law, by enacting, in aid thereof, such a provision as sec. 3, founded upon its power to legislate in matters relating to property and civil rights. Such legislation may doubtless be conceived to be in the interests of public morality, but for that very reason it constitutes an attempt to encroach upon a forbidden field.

I also agree with the conclusion of Mackenzie J.A. that the main object of the Legislature was "to try and stiffen the existing criminal law against gambling by means of slot machines."

I have not overlooked the fact that the Alberta Statute provides no penalty by way of fine or imprisonment, while the Saskatchewan Act did so provide; but I am driven to the conclusion that under the form of denying the exis-

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tence of ownership in the defined machines and providing procedure for their seizure and confiscation the substance of the enactment is to forbid their use under penalty of forfeiture. As was pointed out in *Industrial Acceptance Corporation* v. *The Queen* (1), legislation providing for the forfeiture of property used in the commisison of a criminal offence is legislation in relation to and forms an integral part of criminal law. In Canada, the keeping of a gambling device was a crime and such device was liable to forfeiture before the earliest Alberta Slot Machine Act was passed.

It appears to me that the action of the legislature in passing this statute is similar to that described by Middleton J. in *re Race-Tracks and Betting* (2), at pages 348 and 349 where he said in part:—

> To the Dominion has been given exclusive jurisdiction over "criminal law". It alone can define crime and enumerate the acts which are to be prohibited and punished in the interests of public morality. The Province may prohibit many things when its real object is the regulation of and dealing with property and civil rights, or any of the subjects assigned to its jurisdiction. Parliament may deal with the same things from the standpoint of public morality, so there may be in many cases room for discussion as to the apparent conflict between the two legislative fields.
>
> In the case in hand the proposed legislation is not in any way within the ambit of the provincial jurisdiction, but it is an attempt by the Province to deal with the question of public morals. Gambling is regarded as an evil. Parliament has undertaken, in the exercise of its powers, to lay down rules in the interest of public morals to regulate it. It has considered the question of gambling in connection with horse-races, and has declared that on certain race-tracks betting by means of pari-mutuel machines shall not be unlawful. The Province, thinking this does not sufficiently guard public morals, seeks, in an indirect way, to accomplish that which it thinks the Dominion should have done, and so proposes to prohibit racing on all tracks upon which it is lawful under the Dominion Act to operate pari-mutuel machines.
>
> This is in no sense a conflict between the two jurisdictions by reason of the overlapping of the fields, but it is a deliberate attempt to trespass upon a forbidden field.
>
> The case is governed by the Lord's Day case, *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.* (3).

(1) [1953] 2 S.C.R. 273. (2) (1921) 49 O.L.R. 339.
(3) [1903] A.C. 524.

Adapting this language to the statute with which we are concerned, it may be said, that gambling is regarded as an evil, that Parliament has undertaken in the exercise of its powers to lay down rules in the interest of public morals to regulate it, that it has considered the question of gambling by the use of gambling devices of the sort commonly described as slot machines, that it has made it an offence (by s. 235) to buy, sell, keep or employ any gambling device, that (by s. 986(4)) it has defined the kinds of slot machines which shall be deemed contrivances for playing a game of chance, that it has provided machinery (by s. 641) for the seizing and confiscation of such devices; that the Province thinking that the provisions of the *Code* do not sufficiently guard public morals seeks to accomplish that which it thinks Parliament should have done by widening the definition of slot machines to include not only the devices covered by the *Criminal Code* but also all other devices the result of any operations of which is, as regards the operator, a matter of chance or uncertainty and by providing for the confiscation of all such machines by a procedure somewhat different from that provided in the *Criminal Code.*

The fact that the proceedings to bring about confiscation under the Alberta Statute may properly be described as proceedings *in rem* dealing with items of property in the province does not appear to me to assist the respondent, for s. 641 of the *Criminal Code* has already provided for such proceedings. In *Rex* v. *Greenfield* (1), Harvey C.J.A. delivering the unanimous judgment of the Court of Appeal said at page 339, referring to s. 641:—

> It is to be noted that under s-s. 1, though the searchers may find no one on the premises searched they may take before the magistrate money and securities, instruments of gaming, etc., and s-s. 3 gives authority to forfeit or destroy them regardless of whether any one is convicted or even charged. In other words as far as they are concerned the proceedings are *in rem.*

This view was approved by the Court of Appeal for Manitoba in *Rex* v. *Denaburg* (2), particularly at page 218, and by the Court of Appeal for Ontario in *Rex* v. *Martin* (3), particularly at page 35.

(1) (1934) 62 Can. C.C. 334. (2) (1935) 64 Can. C.C. 216.
(3) (1943) 81 Can. C.C. 33.

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I am unable to relate the Statute in the case at bar to any provincial purpose falling within heads 13 or 16 of s. 92 of the *British North America Act* as the courts have been able to do in other cases in which the validity of provincial legislation was called in question on the allegation that it infringed upon the field of criminal law, as, for example, in the cases of *Provincial Secretary of Prince Edward Island* v. *Egan* (1), (the civil regulation of the use of highways), *Bédard* v. *Dawson* (2), (the suppression of a nuisance and the prevention of its recurrence by civil process) and *Regina* v. *Wason* (3), (the regulation of the dealings of cheese-makers and their patrons). The Statute here in question appears to me to be inseverable, to relate only to the prohibition and punishment of keeping contrivances for playing games of chance, that is to criminal law, and to be *ultra vires* of the Legislature *in toto*.

I would allow the appeal and restore the judgment of Egbert J. with costs throughout.

Appeal allowed with costs throughout.

Solicitors for the appellant: *Milvain & MacDonald.*

Solicitor for the respondent: *The Attorney General for Alberta.*

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(1) [1941] S.C.R. 396.
(2) [1923] S.C.R. 681.
(3) (1889) 17 O.L.R. 58; 17 O.A.R. 221.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA (*Defendant*) ..... APPELLANT;

AND

EXCEL CLEANING SERVICE (*Plaintiff*) ..... RESPONDENT.

1953
*Oct. 15
1954
*April 12

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Contractors Liability Policy issued "on location" cleaning service—Property in care, custody and control of insured excluded from risk—Whether damage to rug fastened to floor within exclusion.

The appellant by a "Contractors Liability Policy" agreed by "Coverage B" to indemnify the respondent in respect of all sums it should be obligated to pay because of injury to property arising out of the respondent's work caused by accident. Exclusion clause (*g*) provided that the policy did not apply "to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured." The respondent operated an "on location" cleaning service and due to a defective cleaning machine, caused damage to a rug it was cleaning in the home of its owner. The rug, which extended from wall to wall, was tacked down all the way round the edges by a quarter round. The rug's owner obtained judgment against the respondent and the latter sought to recover under its policy. The appellant contended that it was relieved of liability under the exclusion clause (*g*).

Held: (Kerwin and Cartwright JJ. dissenting) that the exclusion clause (*g*) did not apply to relieve the appellant of its liability.

Per: Rand J. The rug, attached as it was to the floor, was for the purposes of the service in the same relation to "care, custody or control" of the respondent as the surface of the floor itself. The obligation to do the work upon the property was in contemplation of law to do it while the property remained within the exclusive care and control of the owner. Clearly custody was not transferred; the only care called for was in the execution of the service, not toward the property as such; and no control, in a proprietory sense was intended.

Per: Estey J. The exclusion clauses were general in character and not directed to any special undertaking such as that of the respondent. In this context the words "care, custody and control" as cited in clause (*g*) might be variously construed and therefore should be construed in a manner favourable to the insured. *Cornish* v. *The Accident Ins. Co.* 23 Q.B.D. 453 at 456; *Woolfall & Rimmer Ltd.* v. *Moyle* [1942] 1 K.B. 66 at 73.

Locke J. would dismiss the appeal for the reasons stated by Laidlaw J. in delivering the unanimous judgment of the Court of Appeal, [1953] O.R. 9.

Per: Kerwin J. (dissenting).—Exclusion (*g*) must be read with coverage B as the agreement of the appellant to pay was made subject to the exclusions. "Property" included real and personal property and the clause must be read disjunctively. The rug was in the respondent's

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

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safekeeping in the sense that the respondent was not to damage it and, to that extent at least, it had "authority" over the rug. With the consent of the owner the respondent had taken such possession as was possible. *Hardware Mut. Cas. Co.* v. *Mason-Moore-Tracey Inc.* 194 F. 2d. 173 referred to.

Per: Cartwright J. (dissenting)—It is not necessary to determine whether there was technically a bailment of the rug. The words "care", "custody" and "control" are used disjunctively in clause (*g*) and interpreting them in their plain, ordinary and popular sense the respondent, at the time the damage was done, had both the care and control of the rug and had the owner taken it out of his control before the work was finished he would thereby have committed a breach of the contract.

Judgment of the Court for Ontario [1953] O.R. 9, affirmed, Kerwin and Cartwright JJ. dissenting.

APPEAL by the defendant by special leave of the Court of Appeal for Ontario from a judgment of that Court (1) affirming a decision of the County Court of the County of York in favour of the plaintiff.

G. N. Shaver, Q.C. for the appellant.

J. H. Osler for the respondent.

KERWIN J. (dissenting):—By special leave of the Court of Appeal for Ontario, Indemnity Insurance Company of North America appeals from a judgment of that Court (1) affirming a decision of the County Court of the County of York. The question is whether under a contractors' liability policy of insurance issued by the appellant to the respondent, Excel Cleaning Service, the former is liable to indemnify the latter against a judgment by which the respondent became obligated to pay John H. King the sum of $500 for damages and costs. Counsel for the appellant contended that, assuming it would be so liable by virtue of the provisions of "Coverage B" of the insuring agreements in the policy, Exclusion (*g*) in the policy relieved it of that liability. This is the sole point to be determined.

As stated in the Declarations in the policy, the respondent carried on, in Toronto and the surrounding territory, the business of "General Household Cleaning Service (including cleaning of walls, floors, furniture, etc.)." According to the evidence it was an "on location cleaning service", that is, the cleaning at a house of everything therein, such as walls, windows, floors, rugs, upholstery and

(1) [1953] O.R. 9.

furniture, but excepting drapes and lamp shades, the cleaning of which the respondent sublet to others who did the necessary work at their own premises, or at any rate away from those of the owner. By the policy the appellant "AGREES WITH THE INSURED, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

* * *

Coverage B—Property Damage Liability

To pay on behalf of the insured, provided premium is charged under Coverage B in the declarations, all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of injury to or destruction of property, including the loss of use thereof, arising out of the work of the insured and during the prosecution thereof, caused by accident, including accidents occurring after completion or abandonment of the operations and arising out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials, or occurring elsewhere if caused by an employee of the insured while engaged in the performance of his duties for the insured in connection with the work at such locations.

Under the heading "Exclusions" appears the following:—

This policy does not apply:

* * *

(*g*) to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured.

During the currency of the policy the respondent agreed with John H. King to clean in his home some furniture and a broadloom rug. The necessary cleaning fluid and equipment were taken there by one of the members of the respondent partnership and one of its employees. At the trial an other partner agreed that the respondent's advertising circulars correctly put the position in stating:— "You (the customers) are free to stay at home and just watch, or take the day off and return to a shining clean house." On this particular occasion Mr. King was not at home and, while his wife was, the witness could not say if she was in the room containing the rug when an accident occurred. Mr. King had had the rug tacked to the floor all the way around the edges by a quarter-round. The two workmen were cleaning it with a second-hand cleaning machine

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which, as it transpired, was defective inasmuch as the detergent tank had become rusted and a trip on the tank was also faulty. During the process of cleaning and while the machine was stopped so that the tank might be refilled some of the detergent leaked out and formed a spot on the rug although the damage was not evident for some hours. It was for this damage that Mr. King sued the respondent and recovered judgment.

It appears from the evidence; (*a*) the tacks had not been removed; (*b*) Mrs. King did not touch the rug while the workmen were cleaning it; (*c*) if she had made any suggestions as to the method to be employed, they would have considered they knew more about the matter than she but, of course, if she had told them to stop, they would have done so.

Exclusion (*g*) must be read with Coverage B as the agreement on the part of the appellant to pay is made subject to the exclusions. I am unable to agree with the trial judge's conclusion that temporary care, custody or control by the respondent arising out of its work or during its duration is not covered by (*g*) as that would be inserting a limitation upon the words that is not justified. The reasons for judgment of the Court of Appeal were delivered by Laidlaw J.A. He decided that the words involved actual possession of the property that was damaged, and then proceeded:—

> Care in the sense in which it is used in the paragraph is synonymous with "safe-keeping"; "custody" imports some authority over the property; "control" supposes physical possession of property over which control may be exercised. The respondent did not assume the care, custody or control of the property or the responsibilities incidental thereto and the owner did not transfer or surrender such care, custody or control to the respondent. Indeed I think the respondent had no right, without special permission or authority from the owner, to remove any of the quarter-round strip or any nails holding the rug to the floor or to alter the position of the rug in any way or otherwise exercise control in respect of it in the course of cleaning. The respondent and its employees were simply "on location" in the house of the owner of the rug for the purpose of doing certain specific work. The mere fact that they were engaged there in the performance of that work did not give them the care, custody or control of the property on which the work was being done.

As to this it is important to note that "property" includes real and personal property and that the clause must be read disjunctively. If Mrs. King had left her home upon the arrival of the workmen, the rug would surely have been

in the care, custody or control of the respondent, and the mere fact that she was in the house does not alter the position, even though the rug was held to the floor by tacks and the quarter-round. There is nothing to indicate that the respondent's contract with Mr. King involved the removal of the rug from the floor and in fact it was being cleaned in the position it occupied; but it was in the respondent's safekeeping in the sense that the respondent was not to damage it and, to that extent at least, it had "authority" over the rug. With the consent of the owner the respondent had taken such possession of it as was possible.

None of the decisions referred to are precisely in point but some assistance is to be gained from a perusal of the judgment of the United States Court of Appeals, Second Circuit, in *Hardware Mut. Cas. Co.* v. *Mason-Moore-Tracey Inc.* (1). The Court consisted of Chief Judge Swan, Judge Learned Hand and Judge Agustus N. Hand, the judgment being delivered by the latter. The action was upon an insurance policy and the exclusion to the coverage of property damage liability was the same as Exclusion (*g*) except that the word "injury" was substituted for the word "damage". The actual decision was upon the word "used" and it was held that an insured had been using an elevator in a building not owned or rented by it and over which building it had no "control", notwithstanding that the insured's use of the elevator might have been in conjunction with others.

The appeal should be allowed, the judgments below set aside and the action dismissed. In accordance with the undertaking of the appellant to the Court of Appeal when leave was given to come to this Court, the dismissal is without costs and there will be no costs in the Court of Appeal but the appellant will pay the respondent $350 for its costs in this Court in addition to the costs of printing its factum.

RAND J.:—The respondents conduct what is known as an "on location" cleaning service of walls, floors, ceilings, furniture and rugs, on the premises of its customers, including such articles as drapes and lamp shades done by out-

(1) (1952) 194 F. 2d. 173.

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side specialists in cleaning them. In the course of servicing a rug held down by tacks and a half-round border strip, a destructive fluid escaped from the cleaning machine and the rug was ruined. Action was brought and damages recovered.

The respondents were insured by the appellants under what is called a "Contractor's Liability Policy" and a claim to be indemnified against the judgment is the matter of this appeal. The applicable obligation is in these words:—

COVERAGE B—PROPERTY DAMAGE LIABILITY

To pay on behalf of the insured, provided premium is charged under Coverage B in the declarations, all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of injury to or destruction of property, including the loss of use thereof, arising out of the work of the insured and during the prosecution thereof, caused by accident, including accidents occurring after completion or abandonment of the operations and arising out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials, or occurring elsewhere if caused by an employee of the insured while engaged in the performance of his duties for the insured in connection with the work at such locations.

From the scope of this there are certain exclusions, and that with which we are here concerned is:—

This policy does not apply:

* * *

(*g*) To damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured.

The sole ground taken is that no claim arises because the rug at the time of being damaged was "in the care, custody or control of the insured"; and it is not contended that in the absence of the exclusion, liability would not have arisen.

I am unable to accept Mr. Shaver's argument that the case is within the exclusion. The rug, attached as it was, to the floor, was, for the purposes of the service, in the same relation to "care, custody or control" of the respondents as the surface of the floor itself. The owner, continuing in the ordinary relation to his property, engages for work to be done to or upon it as it is *in situ*. Obviously while the respondents are in the process of cleaning any article, a *de facto* impact on the dominion over it is involved; but it is only of the nature of something imposed upon that dominion, not derogating from it; or, to put it in another form, the obligation to do work upon the property is in

contemplation of law to do it while the property remains within the exclusive care and control of the owner. Clearly custody was not transferred; the only care called for was in the execution of the service, not toward the property as such; and no control, in a proprietary sense, was intended. Either care or control would have involved some degree of responsibility towards the property, apart from and in addition to that relating to the application to it of the cleaning process. The situation was one in which all proprietary relations remained in the owner and only an operating responsibility towards the property arose.

The appeal should be dismissed with costs.

ESTEY J.:—The respondent's business is cleaning the interior of homes, including furniture and rugs. On November 5, 1951, two of the respondent's employees attended at the home of J. H. King and, while in the course of cleaning a rug, damaged it, for which J. H. King obtained judgment against respondent in the sum of $450 and costs.

The respondent was, at all times material hereto, insured by appellant under a policy of insurance styled "Contractors Liability Policy" and in this action sought to be indemnified for the said amounts under the terms of that policy.

The relevant provisions of the policy read:

Coverage B—Property Damage Liability

To pay on behalf of the insured, provided premium is charged under Coverage B in the declarations, all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of injury to or destruction of property, including the loss of use thereof, arising out of the work of the insured and during the prosecution thereof, caused by accident, including accidents occurring after completion or abandonment of the operations and arising out of pick-up or delivery operations or the existence of tools, uninstalled equipment and abandoned or unused materials, or occurring elsewhere if caused by an employee of the insured while engaged in the performance of his duties for the insured in connection with the work at such locations.

The rug here in question was damaged by the presence of rust in the equipment used by the insured in the process of cleaning it. There would appear to be no doubt that if the foregoing provision was alone relevant the respondent should recover. The appellant, however, contends that its liability thereunder is excluded by the last of a number of

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exclusion clauses lettered (*a*) to (*g*), and particularly because of the words "care, custody or control" in the latter. The clause reads:

> (*g*) to damage to or destruction of property owned, rented, occupied or used by or in the care, custody or control of the insured.

In support of its contention that the rug, while being cleaned, was in the care, custody or control of respondent, reliance was placed upon the evidence that respondent, while following its usual practice at King's home, was in "complete charge or control of the furniture and rug in order to clean them" and that upon this occasion, though Mrs. King was at home, she did not in any way interfere with the work. In the course of the evidence the following questions and answers appear:

> Q. And you and your associate took complete charge of the front room and did the furniture and the rug in the room?—A. That is correct.
>
> Q. And of course Mrs. King was the lady of the house, and, if she told you that she did not want you there any more—"Go out about your business", you would have stopped and gone away?—A. Absolutely.

It was a wall-to-wall rug "tacked down all around by the quarter-round." Neither of the parties to the cleaning contract contemplated that it would be, nor was the rug, in fact, moved throughout the process of cleaning it, which was effected by the operation of a machine thereon. It was the first time respondent had used the machine and the unknown presence of rust caused the damage, which was not discovered until the rug had dried.

The appellant relied upon a number of cases decided in the United States under exclusion clauses containing somewhat similar provisions. *Hardware Mutual Casualty Co.* v. *Mason-Moore-Tracey, Inc.*, (1) though dealing with an exclusion clause identical in language, is quite distinguishable upon its facts. There the insured, in the course of its business of moving machinery and equipment, was moving a heavy piece of machinery out of a building and, at the material time, was using the elevator to effect that end. The elevator was damaged and because it was being "used by" the insured in moving the machinery it was within the exclusion clause. It is, therefore, quite distinguishable, as there the insured was not employed in respect to the elevator which, however, he used to carry out his contract to move the heavy machinery.

(1) 194 F. 2d. 173.

In *State Automobile Mutual Insurance Co.* v. *Connable Joest* (1), the insured operated a garage. A customer left his automobile with the insured to have it greased and the oil changed some time during the day and when the work was finished he was to be notified. While the employees, in the course of their work, had the automobile elevated on a hoist it crashed to the floor. The insured carried a public garage liability insurance policy which contained an exclusion clause reading as follows:

> For damages to or destruction of property owned, rented, leased, in charge of, or transported by the assured.

The insured, while the automobile was at its own garage for the specified purpose, was held to be "in charge" thereof.

In *Guidici* v. *Pacific Automobile Insurance Co.* (2), an automobile, while at the insured's garage for repair, was destroyed by fire. It was held that while at his garage it was "in charge" of the insured.

In *Monroe County Motor Co.* v. *Tennessee Odin Ins. Co.*, (3), one driving an automobile upon a public highway was held to be "in charge" thereof, although its owner was seated beside him. It is the driver who is in actual physical control of an automobile.

The phrase "in charge," as construed in the last three mentioned cases, means that one who can be properly so described must have either physical possession or control of the chattel.

The respondent described its business as an "on location cleaning service." The cleaning equipment is taken to the home or premises of the customer and the work of cleaning completed on his premises. If the above-quoted evidence to the effect that the respondent took complete charge of the front room and did the furniture and rug therein is construed as the appellant contends it should be, then in its submission the respondent had in this case "care, custody or control" of everything in the room and, therefore, so far as this and, one would gather, the great majority of its cleaning jobs are concerned the respondent would have no coverage, notwithstanding the comprehensive character of the language used in Coverage B, and particularly the phrase "arising out of the work of the insured." Such a

(1) 125 S.W. 2d. 490. (2) (1947) 179 P. 2d. 337.
(3) (1950) 231 S.W. 2d. 386.

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construction would largely, if not completely, nullify the purpose for which the insurance was sold—a circumstance to be avoided, so far as the language used will permit. *Cornish* v. *The Accident Insurance Co.* (1), where at p. 456 Lindley L.J. stated:

> The object of the contract is to insure against accidental death and injuries, and the contract must not be construed so as to defeat that object, nor so as to render it practically illusory.

While in the construction of each exclusion clause effect must be given to the language thereof, it is of some assistance to observe the general nature of the provisions of these clauses as set out in the policy under the heading "Exclusions." Apart from those dealing with liability assumed by the insured, bodily injuries to employees and claims under the Workmen's Compensation Act, they contain certain provisions with respect to property damage. Clause (*d*) excludes liability in respect to "property damage caused by any escalator, elevator, hoist, or the appliances thereof . . . at premises owned, rented, or controlled in whole or in part by the insured . . ."; then in (*e*) "property damage caused by the ownership, maintenance or use of: (1) aircraft . . . (2) boats or dogs . . . (3) draft or saddle animals . . ." In (*f*) it is provided that "property damage resulting from work performed for the insured by any independent contractor or independent sub-contractor" shall be excluded.

These clauses are directed to damage caused by factors that are quite separate and distinct from those which would usually arise out of a contract for cleaning furniture and rugs upon the premises of their owner. In fact they emphasize what is apparent from a perusal of the policy as a whole that it was prepared as a general policy and not directed to any specific undertaking such as that of the respondent, a feature which often creates difficulties in construing the language as applied to a particular coverage.

Whether, in such a context, the parties to the contract, in the words " care, custody or control" of clause (*g*), have excluded the respondent's recovery for damages resulting

(1) (1889) 23 Q.B.D. 453.

from the cleaning of the rug here in question must be determined by construing the words upon a reading of the contract as a whole and with particular reference to the coverage purchased by the insured.

If clause (*g*), as suggested, be divided into three parts, first, "property owned, rented, occupied," second, property "used by," third, property "in the care, custody or control of the insured," support is found for the view that the clause here in question, under the third heading, will only apply where the insured has at least had the chattel in his possession.

Reference to the Oxford Dictionary discloses that these words, as commonly used, possess a variety of meanings. A study thereof does indicate that as here used "care" would include a measure of protection and preservation, "custody" of safekeeping and protection and "control" of direction or domination. Respondent and his customer King contemplated that the rug, in the process of cleaning, would not be moved. In the circumstances respondent had but a permission to go upon the rug, to move the furniture and to place thereon such equipment as might be necessary for the cleaning thereof. In the course of his work respondent would have a duty to use due care, much as any other person who might have permission to walk thereon. It does not appear that here the respondent has assumed any responsibility in respect to preservation, safekeeping, protection, direction or domination, as contemplated in the phrase "care, custody or control" as used in clause (*g*).

When regard is had to the possible meanings of the words "care," "custody" and "control" as they are here used as part of general provisions prepared without reference to the particular coverage purchased by the respondent, together with what is perhaps the more important consideration that, if construed as the appellant submits, these words would largely, if not entirely, nullify the usefulness of the insurance purchased, it is difficult to determine the precise meaning that ought to be attributed to these words.

It is, in such a case, a general rule to construe the language used in a manner favourable to the insured. The basis for such being that the insurer, by such clauses, seeks to impose exceptions and limitations to the coverage he

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has already described and, therefore, should use language that clearly expresses the extent and scope of these exceptions and limitations and, in so far as he fails to do so, the language of the coverage should obtain. Lord Justice Lindley stated:

> In a case on the line, in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. *Cornish* v. *The Accident Insurance Co., supra,* at p. 456.

See also *Blackett* v. *Royal Exchange Assurance Co.* (1); *Hawthorne and Boulter* v. *Canadian Casualty and Boiler Insurance Co.* (2). Furthermore, the language of Lord Greene in *Woolfall & Rimmer, Ltd.* v. *Moyle* (3), is appropriate. He there states:

> I cannot help thinking that, if underwriters wish to limit by some qualification a risk which, prima facie, they are undertaking in plain terms, they should make it perfectly clear what that qualification is.

In my view the respondent did not have in its care, custody or control the rug here in question within the meaning of clause (*g*) and the appellant is liable to the respondent under Coverage B.

The appeal should be dismissed with costs.

LOCKE J.:—I would dismiss this appeal with costs for the reasons stated by Mr. Justice Laidlaw in delivering the unanimous judgment of the Court of Appeal (4), with which I respectfully agree.

CARTWRIGHT J. (dissenting):—The facts and the terms of the policy of insurance so far as they are relevant to the question before us are stated in the reasons of my brother Kerwin.

The facts being undisputed, the question which we have to decide depends on the construction of the policy. We are particularly concerned with the words of "Exclusion" (*g*), as the appeal was argued on the assumption that the appellant was liable unless relieved by this clause.

No authority is required for the propositions, that the policy must be construed as a whole, and, that the words used are to be understood in their plain, ordinary and popular sense. It is stated in the policy that the trade,

(1) (1832) 2 C. & J. 244 at 250.
(2) (1907) 14 O.L.R. 166 at 174.
(3) [1942] 1 K.B. 66 at 73.
(4) [1953] O.R. 9.

business or work covered by the policy is "General Household Cleaning Service (including cleaning of walls, floors, furniture, etc)." The work being done by the respondent at the time the rug was damaged was the sort of work described in the policy and was being carried on in the usual way, that is to say, the owner, having agreed with the respondent as to the articles which it was to clean, left it to the respondent to carry out the work of cleaning in its own way. The contract between the owner of the rug and the respondent appears to fall within the description of *"locatio operis faciendi"* contained in the text books; see, for example, Halsbury, 2nd Edition, Vol. 1 at page 766:—

> "Hire of Work and Labour." This class of bailment (locatio operis faciendi) is a contract in which one of the two contracting parties undertakes to do something to a chattel, e.g., to carry it or repair it, in consideration of a price to be paid to him. It is essential to constitute a valid contract of this description that there should be some work to be performed in connection with a specified chattel, and that money should be agreed to be paid as the price of the labour.

However, I do not find it necessary to determine whether there was technically a bailment of the rug. I do not read the words of clause (*g*) as covering only cases in which the owner of the property damaged has, in contemplation of law, transferred the possession of such property to the respondent. In my opinion, in the circumstances of this case a person in the situation of the parties would have regarded the rug and the other articles of furniture which the respondent had agreed to clean as being in the care or control of the respondent so long as the cleaning operation was in progress. The words "care", "custody" and "control" are used disjunctively in clause (*g*) and it seems to me that interpreting the words in their plain, ordinary and popular sense the respondent, at the time the damage was done, had both the care and control of the rug and that had the owner taken it out of the respondent's control before the work of cleaning was finished he would have thereby committed a breach of contract.

I agree with Mr. Shaver's submission that resort can properly be had to the maxim *"Verba chartarum fortius accipiuntur contra proferentem"* only if the Court is unable

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to determine the meaning of the words it is called upon to construe after calling in aid all relevant rules of construction.

I would dispose of the appeal as proposed by my brother Kerwin.

Appeal dismissed with costs.

Solicitors for the appellant: *Shaver, Paulin & Branscombe.*

Solicitors for the respondent: *Joliffe, Lewis & Osler.*

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*Dec. 2

1954

*Mar. 31

WALTER EDWARD DeWARE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

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

Constitutional Law—Validity of Slot Machine Act, 1951, c. 215 (N.B.)—Application of definition of "slot machine"—Criminal Law—Property and Civil Rights—Confiscatory Legislation.

A "pin ball" machine, described in the reasons for judgment that follow, was seized in the possession of the appellant under the provisions of the New Brunswick Slot Machine Act, 1951, c. 215. The Act provided that no slot machine should be capable of ownership nor the subject of property rights within the Province and that no Court should give effect to any property therein and set up a procedure for seizure and confiscation. "Slot machine" was defined by s. 1(*b*) (i), (ii), (iii), quoted in full *infra*. The appellant appealed from a judgment of the Supreme Court of New Brunswick, Appeal Division, reversing the decision of a police magistrate and ordering the machine confiscated to the Crown in the right of the Province.

Held: (Kerwin and Estey JJ. dissenting), that the appeal should be allowed.

Taschereau, Rand and Kellock JJ. held that the machine did not fall within the definition of slot machine contained in the Act; Kerwin and Cartwright JJ. that it did not fall within clause (i) but did fall within clause (ii); Estey J. that it fell within clause (i). Locke J. in the view he took found it unnecessary to consider the point.

Kellock, Locke and Cartwright JJ. held that the Act was ultra vires. Kellock and Cartwright JJ. for the reasons they had given in *Johnson* v. *the A.G. for Alberta* [1954] S.C.R. . . . Locke J. regarded it as clear that the Act was aimed at the suppression of gaming which fell within the exclusive jurisdiction of Parliament under head 27 of s. 91 of the

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

B.N.A. Act. Kerwin and Estey JJ. for the reasons each had given in the *Johnson* case *supra,* and Taschereau J., for the reasons given by Kerwin J. in the latter case, were of opinion that the Act was intra vires. Rand J. reached his decision without considering this point.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division (1) reversing the decision of a police magistrate and holding a certain pin ball machine to be a "slot machine" within the definition contained in the New Brunswick Slot Machine Act, 1951, c. 215.

J. T. Carvell for the appellant.

H. W. Hickman, Q.C. for the Attorney General of New Brunswick, the respondent.

KERWIN J. (dissenting):—By leave of this Court Walter Edward DeWare appeals from a judgment of the Supreme Court of New Brunswick, Appeal Division (1), reversing the decision of a police magistrate and confiscating to Her Majesty the Queen in the right of the Province of New Brunswick a certain pin ball machine, a description of which appears in the following extract from the reasons of the magistrate:—

> It is what is commonly called a "pin-ball" machine. It stands on four legs and at the top there is an inclined plane and what may be called a back-board. There is a slot on the front of the machine into which a five cent piece is inserted. When this is done, five balls appear. These balls take their place in turn in front of a firing pin or plunger. When this plunger is operated, the ball is propelled to the top of the inclined plane and moves down the plane by gravity. On its way down, it encounters certain obstructions which are electrically operated. As the ball touches an obstruction, numbers are flashed on the back-board and are added automatically as contact is made by the ball with each obstruction that it may touch. There are two buttons, one on each side of the machine and when the balls are on their way down the inclined plane, the operator may knock the balls up towards the top of the inclined plane again by means of flippers which are controlled by these buttons. There is a card on the machine saying that if the operator gets a score of more than 580,000, he is entitled to one free replay; if he gets more than 600,000, he gets two free replays; if his score is more than 650,000, he gets three free replays. The machine does not emit slugs or counters, or anything else. The free replays are given automatically. The machine does not pay off in money, merchandise or in anything except free plays.

The machine was seized pursuant to the provisions of *The Slot Machine Act,* c. 215, of the New Brunswick Statutes of 1951. S. 2 is the same as s. 3 of the Alberta Slot Machine Act considered in *Johnson* v. *Attorney General of*

(1) (1953) 32 M.P.R. 339.

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Alberta (1), and in which case judgment is being delivered contemporaneously herewith. Under s. 3 a peace officer may without a warrant seize what he believes to be a slot machine within the meaning of the Act and carry it before a magistrate who shall thereupon issue a summons to the person in whose apparent possession the same was at the time of seizure, requiring such person to show cause why the same should not be confiscated. By s. 4, if the party showing cause fails to satisfy the magistrate that the article is not a slot machine within the meaning of the Act, the magistrate shall order it to be confiscated. By s. 1(*b*), "slot machine" means:—

(i) An automatic machine intended to be used for vending merchandise or for any other purpose, the result of one or a number of operations of which is, as regards the operator, a matter of chance or uncertainty, or which as a consequence of a number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance, and

(ii) A machine, contrivance, or device operated or designed or intended to be operated automatically or mechanically or manually with or without the aid of any instrument or automatically and mechanically, which upon the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disc, slug or any other substance, or upon the payment of money or money's worth for the right or privilege of operating the same, and which, upon or without the operation of any handle, lever, plunger or other attachment thereof, delivers or may deliver, or upon or as a result of the operation of such machine, contrivance or device there may be delivered by any person, means or agency, to the operator thereof money or money's worth, or goods in varying quantities, or tokens, counters, discs, slugs or any other substance which may be exchanged for money or money's worth or replayed in any such machine, contrivance or device to again set it in motion, and

(iii) A machine or device of a class commonly known as a punch board.

We are not concerned with (iii) but, although it is stated by Chief Justice Michaud that counsel admitted before the Appellate Division that the machine did not fall within (ii), no such admission was made before us, and counsel for the Attorney General argued that it came within (i) and (ii). A comparison of "an automatic machine" in (i) and "a machine, contrivance, or device operated or designed or intended to be operated automatically or mechanically or manually with or without the aid of any instrument or automatically and mechanically" in (ii) indicates that the machine in question is not an automatic machine as the

(1) [1954] S.C.R. 127.

above description and the evidence show a user of the machine may exercise a degree of skill in operating the buttons so as to obtain a high score. Therefore paragraph (i) does not apply.

However, in my opinion, the machine falls within (ii) since "upon or as a result of the operation of such machine, contrivance, or device there may be delivered by any person, means or agency, to the operator thereof money or money's worth". The two parts of the phrase are disjunctive as money or money's worth is entirely different from goods, tokens, counters, discs, slugs, or any other substance. In the present case there may be delivered to the operator the right to free replays. The witness Arsenault, called on behalf of the defendants, testified:—

> When Constable Fraser played the machine he got six free games coming to him; these free games are marked up from Mr. Fraser's score. Press the lever and the balls come down. You put no money in but the balls are ready to go again. There are still five free plays there.

And again:—

> Replays are on the backboard, the number of replays you have—in this case six; and then instead of putting a coin in the chute you push the chute in and as long as there are numbers showing there, he has free games to the number shown on the board.

The free plays are money's worth for which he would, if he continued to play, be obliged to pay.

While the question of the statute being ultra vires was not argued in exactly the same manner as in the case of Johnson, the reason given by me on that point in that case apply to the present. However, to them I add the following remarks. What was being considered in *Laphkas* v. *The King* (1), was s-s. 4 of s. 986 of the *Criminal Code* as enacted by s. 46 of c. 44 of the Statutes of 1938. The subsection referred to "any automatic or slot machine used or intended to be used for any purpose other than for vending merchandise or services" while paragraph (i) of s. 1 of the New Brunswick Act refers to "an automatic machine intended to be used for vending merchandise or for any other purpose." Furthermore my conclusion is not altered by the fact that the first New Brunswick enactment in 1936 was entitled "An Act for the Suppression of Slot Machines and Other Gambling Devices". The underlined words were

(1) [1942] S.C.R. 84; 77 Can. C.C. 142.

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subsequently removed. In *Attorney General for Manitoba* v. *Attorney General for Canada* (1), the Judicial Committee held the Manitoba Sale of Shares Act ultra vires but in *Lymburn* v. *Mayland* (2), it held the Security Frauds Prevention Act of Alberta, 1930, c. 8, to be intra vires although that Act had repealed the Security Frauds Prevention Act, 1929, c. 10, which in turn had repealed the Sale of Shares Act, R.S.A. 1922, c. 169.

The appeal should be dismissed.

TASCHEREAU J.:—For the reasons given by my brother Kerwin in *Johnson* v. *Attorney General of Alberta*, (*supra*) I am of opinion that *The Slot Machine Act* (c. 215, New Brunswick Statutes, 1951) is intra vires the powers of the Legislature of New Brunswick.

However, as I do not think that the Pin Ball machine which has been confiscated is a slot machine within the meaning of the Act, I would allow the appeal.

RAND J.:—The issue here is whether certain slot machines which are used only for entertainment or amusement purposes are within the language of *The Slot Machine Act* of New Brunswick and subject to forfeiture under its provisions.

The definition of the devices to which the statute applies is contained in two paragraphs of 1(*b*). Para. (i) describes an "automatic machine intended to be used for vending merchandise or for any other purpose". The machines here are not automatic; called pin ball machines, they admit of a definite element of skill in playing them through manipulation of the firing pin and of the flippers by means of which the marbles or balls can be sent back to the top of the inclined plane to roll down again into the electrical network of obstructions.

The second paragraph is in these words:—

> A machine, contrivance, or device operated or designed or intended to be operated automatically or mechanically or manually with or without the aid of any instrument or automatically and mechanically, which upon the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disc, slug or any other substance, or upon the payment of money or money's worth for the right or privilege of operating the same, and which, upon or without the operation of any handle, lever, plunger or other attachment thereof, delivers or may deliver, or upon or as a result

(1) [1929] A.C. 260. (2) [1932] A.C. 318.

of the operation of such machine, contrivance or device there may be delivered by any person, means or agency, to the operator thereof money or moneys' worth, or goods in varying quantities, or tokens, counters, discs, slugs or any other substance which may be exchanged for money or money's worth or replayed in any such machine, contrivance or device to again set it in motion;

Giving this language its full scope, I am unable to agree that the automatic returning of the balls or marbles to their place in front of the plunger is a delivery to an operator of any thing which can be replayed in the machine: the word "replay" in this text means that the machine, by the use of something so delivered, is again put in the state it was brought to, or is made ready for use by the operator as it was, by the original insertion, say, of the coin. The renewed propulsion of the marbles is not, then, a replaying of something in the machine to set it again in motion. The machine is, no doubt, continued in motion, but it is not again set in motion through something having been replayed in it.

Nor can I agree that as a result of the operation of the machine there may be delivered to the operator "money's worth". What that language contemplates is money's worth distinct and apart from the operation of the machine; it does not include an automatic setting of the machine in motion for a further operation.

I would, therefore, allow the appeal and restore the judgment of dismissal made by the magistrate.

KELLOCK J.:—The question involved in this appeal is as to whether or not a certain machine is a "slot machine" within the meaning of either paragraph (i) or paragraph (ii) of s. 1(*b*) of *The Slot Machine Act*, 15 Geo. VI, c. 215. The machine is described by the magistrate as follows:

It is what is commonly called a "pinball" machine. It stands on four legs, and at the top there is an inclined plane and what may be called a back-board. There is a slot on the front of the machine into which a five cent piece is inserted. When this is done, five balls appear. These balls take their place in turn in front of a firing pin or plunger. When this plunger is operated, the ball is propelled to the top of the inclined plane and moves down the plane by gravity. On its way down, it encounters certain obstructions which are electrically operated. As the ball, touches an obstruction, numbers are flashed on the back-board and are added automatically as contact is made by the ball with each obstruction that it may touch. There are two buttons, one on each side of the machine and when the balls are on their way down the inclined plane, the operator may knock the balls up towards the top of the inclined plane again by means

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of flippers which are controlled by these buttons. There is a card on the machine saying that if the operator gets a score of more than 580,000, he is entitled to one free replay; if he gets more than 600,000, he gets two free replays; if his score is more than 650,000, he gets three free replays. The machine does not emit slugs or counters, or anything else. The free replays are given automatically. The machine does not pay off in money, merchandise or in anything except free plays.

By paragraph (i) "slot machine" means

(i) An automatic machine intended to be used for vending merchandise or for any other purpose, the result of one or a number of operations of which is, as regards the operator, a matter of chance or uncertainty, or which as a consequence of a number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance;

It is to be observed that the machines struck at by paragraph (i) are limited to "automatic" machines, while paragraph (ii), on the other hand, includes machines operated "automatically or mechanically" or "mechanically or manually" or "automatically and mechanically". I think, therefore, that paragraph (i) is to be restricted to machines which are purely automatic in character, which is not the case with the machine here in question.

By paragraph (ii), (so far as material), "slot machine" means,

(ii) A machine, contrivance, or device . . . which upon the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disc, slug or any other substance, or upon the payment of money or money's worth for the right or privilege of operating the same, . . . delivers or may deliver, or upon or as a result of the operation of such machine, contrivance or device there may be delivered by any person, means or agency, to the operator thereof money or money's worth, or goods in varying quantities, or tokens, counters, discs, slugs, or any other substance which may be exchanged for money or money's worth or replayed in any such machine, contrivance or device to again set it in motion;

It is contended for the respondent that there is delivered by the appellant's machine "money's worth" in the form of the right of replay and that the statute is thereby satisfied. In my view the statute is not capable of this construction. From the latter part of paragraph (ii) it is clear, I think, that the right of replay is to be brought about by the employment of some physical thing capable of being inserted "in" the machine. While money's worth, in the contemplation of the statute, may be exchanged for such a

thing, it is not the right of replay in itself. In my opinion, the legislation is not so expressed as to include a machine of the characteristics here in question.

I am, in any event, for the reasons which I have given in *Johnson* v. *Attorney General of Alberta*, (*supra*) of opinion that the statute is ultra vires. I would allow the appeal.

ESTEY J. (dissenting):—This is an appeal from the Appellate Division of the Supreme Court of New Brunswick reversing the finding of the magistrate that the machine here in question was not a slot machine within the meaning of *The Slot Machine Act* (R.S.N.B. 1952, c. 212). A slot machine is defined in s. 1(*b*) and it will be necessary to set out only sub-clause (i):

1. In this Act, unless the context otherwise requires,

* * *

(*b*) "slot machine" means (See ante p. 188).

The operation of the machine may be summarized as follows: Upon the insertion of a five cent piece into a slot five balls automatically appear. These are in turn propelled by a firing pin or plunger operated by the player to the top of an inclined plane and as, because of gravity, they return or move back down the plane there are two buttons, one on each side of the machine, which, when operated by the player, may, by means of flippers, knock the balls up toward the top again. As the balls come down the plane they touch certain obstructions, causing numbers to be flashed on a back board which are added automatically. There is a card on the machine saying that if the operator gets a score of more than 580,000 he is entitled to one free play; if he gets more than 600,000 he gets two free plays and if his score is more than 650,000 he gets three free plays. The machine does not emit slugs, or counters, or anything else. The free plays are made available automatically upon the attainment of the scores already suggested.

The magistrate found "that the machine now in question yields only amusement to the operator of it." He also stated:

I conclude from these demonstrations that the result of the operation of this machine was, as regards the operators, a matter of chance or uncertainty in so far as the total alone was concerned. . . . All the witnesses, of course, admitted that there is a definite element of skill in the playing of

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this machine. In other words one who has played it often should make a higher score than a novice at the game. Again skill may be shown in the manipulation of the firing pin and of the flippers even in the case of a beginner.

It appears this machine comes within s. 1(*b*)(i) of the definition and, in particular, that portion reading as follows:

> An automatic machine . . . which as a consequence of a number of successive operations yields different results to the operator, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance . . .

A machine, to come under this portion of subclause 1(*b*)(i), must be found to contain two essentials: first, that it is automatic; second, that successive operations yield different results to the operator.

That the machine was automatic appears to have been taken for granted in the courts below. In any event, I agree that it is an automatic slot machine. The magistrate finds that there is a definite element of skill in the playing of this machine, both in the manipulation of the firing pin and of the flippers. It may well be that through practice a player would acquire some skill in manipulating the firing pin that would enable him to gauge the force with which that pin strikes the ball and also some degree of skill in the manner of operating the flippers, but the machine remains essentially automatic in its operation.

A similar contention was raised in *Rex* v. *Collins* (1), and was effectively disposed of by Chief Justice Turgeon, writing on behalf of the Court, at p. 71:

> In arguing as to the application of s. 986(4) to the case, counsel for the appellant contended in the first place that the machine is neither an "automatic" nor a "slot" machine. He referred to the second definition of the word "automatic" given in the *Oxford New English Distionary*, 1888. He submitted that a truly automatic machine is one which once started always produces the same result, a definite, consecutive, non-varying succession of movements or events. We do not think the dictionary definition bears out counsel's interpretation in all its rigidity. But however the word "automatic" may be defined in the abstract, we think we must ascertain how it is to be interpreted in the statute, having regard to the context. Now, it is clear that in enacting this subsec. (4) Parliament had in mind a machine which, while called "automatic," might nevertheless operate in some cases so that to quote the language used, "the result of one or any number of operations is, as regards the operator, a matter of chance or uncertainty," or so that "as a consequence of any given number of successive operations it yields different results to the operator." Therefore we have in the subsection itself a definition of the word used, that is, a description of the kind of machine or at least of one

(1) [1939] 1 W.W.R. 68.

of the kinds of machines at which the legislation is aimed. There is ample breadth of definition in the dictionaries to justify the use of the word "automatic" in the sense given to it by the context of the subsection.

Chief Justice Turgeon was there dealing with the provisions of s. 986(4), but the same reasoning is applicable to the definition in this case. See also *Rex* v. *MacLaughlan* (1); *Fielding* v. *Turner* (2); *Donaghy* v. *Walsh* (3).

The contention of the appellant that "the outcome of the operation of the machine is not the score flashed on the backboard, which is a part of the automatic operation of the machine, but the amusement vended" is not tenable, having regard to the language of s. 1(*b*)(i). This subclause is directed to results that the successive operations yield to the operator. The word "results" in that context refers to the score, or such indications of achievement as may be found in a particular machine. This construction is emphasized by the words that follow: "notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance". No doubt the operator plays this, as any other game, for amusement and entertainment. It is not that feature against which the legislation is directed, but rather to the nature and character of the operations and the results yielded by the machine. The legislature has here expressed its intention in wide and comprehensive language which includes the machine here in question.

The appellant contended that *The Slot Machine Act* was legislation in relation to criminal law and, therefore, its enactment was ultra vires the province. The Appellate Division in New Brunswick, in *Rex* v. *Lane* (4), held earlier and somewhat similar legislation to be intra vires the province. In *Johnson* v. *The Attorney General of Alberta*, (*supra*), this Court recently considered the validity of the slot machine legislation in Alberta. Though the latter legislation is not identical, the questions raised as to the competency of the legislature to enact it are, in effect, the same. The view which I there expressed, to the effect that

(1) 95 Can. C.C. 257.
(2) [1903] 1 K.B. 867 at 871.
(3) [1914] 2 I.R. 261.
(4) (1936) 11 M.P.R. 232; 67 Can. C.C. 273.

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the legislation was competently enacted by the province, is appropriate hereto and need not be repeated. I agree the legislation is intra vires the province.

The appeal should be dismissed.

LOCKE J.:—The appellant in this matter contends that the Act, which since the revision of the statutes of New Brunswick in 1952 is called the *Slot Machine Act* (c. 212), is beyond the powers of the Province and that, accordingly, the confiscation of his property directed by the judgment appealed from is unauthorised. A further contention is that the machine in question does not fall within the definition of a slot machine in the Act. In reasons for judgment in the case of *Johnson* v. *Attorney-General of Alberta* (1), which will be delivered with my reasons in this matter, I have referred to the history of the provincial legislation relating to slot machines in several of the provinces of Canada, indicating that the Provinces of Saskatchewan, New Brunswick, Nova Scotia and Prince Edward Island apparently acted in concert in entering this field of legislation in the years 1935 and 1936, to be followed later by the Provinces of Ontario and Quebec.

The New Brunswick Statute was enacted as c. 48 of the statutes of that province in the year 1936, being assented to on April 24th of that year. The Act is described in the statutes as being "An Act for the Suppression of Slot Machines and other Gambling Devices." The expression "slot machine" was defined in two ways: firstly, by the practical adoption of the definition in subsection 4 of s. 986 of the *Criminal Code*, and secondly in this manner:—

> A machine, contrivance, or device operated or designed or intended to be operated automatically or mechanically, or manually with or without the aid of any instrument or automatically and mechanically, which upon the insertion therein or in a slot or receptacle thereof of any money, coin, token, counter, disc, slug or any other substance, or upon the payment of money or money's worth for the right or privilege of operating the same, and which, upon or without the operation of any handle, lever, plunger or other attachment thereof, delivers or may deliver, or upon or as a result of the operation of such machine, contrivance or device there may be delivered, to the operator thereof money or money's worth, or goods in varying quantities, or tokens, counters, discs, slugs or any other substance which may be exchanged for money or money's worth or replayed in any such machine, contrivance or device to again set it in motion.

(1) [1954] S.C.R. 127.

After thus defining the nature of the machines against which the Act was directed, it was by s. 3, as in the corresponding Alberta legislation referred to in *Johnson's* case, declared that no slot machine should be capable of ownership or be the subject of property rights within the Province and that no court of civil jurisdiction should recognize or give effect to any property rights in any such machine. Further provisions authorised any peace officer to seize any machine of the nature described and carry the same before a magistrate who might thereupon issue a summons requiring the person in whose apparent possession the machine was, at the time of seizure, to show cause why the same should not be confiscated: thereafter, if the magistrate was not satisfied that the machine was not a slot machine as defined in the Act, he might order the same confiscated to His Majesty in the right of the Province, which might be disposed of as the Attorney-General might direct.

The Act was amended by c. 38 of the Statutes of 1937 but in a manner which does not affect the present consideration. In the year 1950, by c. 35, the matter was further dealt with. It was provided that from the title the words "and other Gambling Devices" were to be struck out and the sections dealing with the procedure before the magistrate and the matter of an appeal from his decision amended. It was declared that the amending Act should come into force on a day to be fixed by proclamation, but we are informed that it was never proclaimed. In the revision of the statutes, however, the Act bore the short title to which I have referred above.

The definition of slot machine thus has continued in its present form from the date the Act was passed. That it was directed against gambling devices was declared by the Legislature when it was first enacted. The language taken from the *Criminal Code* is that which was considered appropriate by Parliament to describe a means or contrivance for playing a game of chance. The second description, with certain variations which appear to me not to affect the issue, is similar to that considered by the Court of Appeal of Saskatchewan in *Rex* v. *Karminos* (1). In the Saskatchewan case the Court of Appeal came to the conclusion that the statute was ultra vires as an invasion of

(1) (1936) 1 W.W.R. 433.

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the field of criminal law exclusively assigned to Parliament by head 27 of s. 91 of the *British North America Act*.

In deciding whether legislation, either of a Provincial Legislature or of Parliament is beyond the powers vested in them respectively by ss. 92 and 91, the decisive point is as to what is the true nature and purpose of the legislation or, as it was put by Lord Watson in *Union Colliery* v. *Bryden* (1), in the words that have been so often quoted, what is the pith and substance of the enactment. The decision of that question, as pointed out by Viscount Haldane in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (2), does not turn only on the language used by the Legislature but on the provisions of the Imperial Statute of 1867. It is, however, permissible to consider the language of the title in arriving at a conclusion.

In *Fielding* v. *Morley Corporation* (3), Lindley M.R., in delivering the judgment of the Court of Appeal, in a case involving the construction of a statute, said in part:—

> I read the title advisedly, because now, and for some years past, the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament.

In *Fenton* v. *Thorley* (4), where the question was as to the proper construction of the expression "injury by accident" in the Workmen's Compensation Act 1897, Lord Macnaghten said in part (p. 447):—

> The title of the Act is, "An Act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment". It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful judge, "the title of an Act of Parliament is no part of the law, but it may tend to shew the object of the legislature." Those were the words of Wightman J. in *Johnson* v. *Upham* (5), and Chitty J. observed in *East and West India Docks* v. *Shaw, Savill and Albion Co.* (6), that the title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act.

(1) [1899] A.C. 580.
(2) [1925] 561 at 566.
(3) [1899] 1 Ch. 1 at p. 3.
(4) [1903] A.C. 443.
(5) (1859) 2 E. & E. 263.
(6) (1888) 39 Ch.D. 531.

In a more recent case, *R.* v. *Bates* (1), Donovan J., in construing the Prevention of Fraud (Investments) Act, 1939, said (p. 844):—

> I agree that the long title is a legitimate aid to the construction of s. 12(1) and I take the same view, in this case, of the cross-heading. When Parliament proclaims what the purpose of an Act is, it would be wrong to leave that out of account when construing the Act—in particular, when construing some doubtful or ambiguous expression. In many cases the long title may supply the key to the meaning. The principle, as I understand it, is that where something is doubtful or ambiguous, the long title may be looked to to resolve the doubt or ambiguity, but, in the absence of doubt or ambiguity, the passage under construction must be taken to mean what it says, so that, if its meaning be clear, that meaning is not to be narrowed or restricted by reference to the long title.

The matter is further dealt with and the effect of the cases summarized in the Tenth Edition of *Maxwell* published last year where, at page 42, the learned author says:—

> It is now settled law that the title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope, and of throwing light on its construction.

While I would regard it as clear, without the assistance of the title, that the Slot Machine Act of New Brunswick is aimed at the evil of gaming, the matter appears to me to be put beyond doubt by the title under which the statute was the law of that Province from 1936 to 1952. In an inquiry of this nature, the fact that in the revision the words "and other Gambling Devices" were stricken out cannot affect the matter when the language of the Act itself remains unchanged.

I will not repeat what I have said in *Johnson's* case as to the nature of such legislation. It is for Parliament to declare what conduct is criminal in its nature and to prescribe the penalties. The matter is, in my opinion, concluded by the judgments of the Judicial Committee in *Russell* v. *The Queen* (2), *Attorney-General for Ontario* v. *Hamilton Street Railway* (3), and *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (4). The matter of the suppression of gaming and of operating gaming houses was dealt with when the *Criminal Code* was first enacted in 1892, and the field is one which falls within the exclusive jurisdiction of Parliament under head 27 of s. 91 of the *British North America Act*.

(1) [1952] 2 All E.R. 842.
(2) (1882) 7 App. Cas. 829.
(3) [1903] A.C. 524.
(4) [1931] A.C. 310.

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The Act in question was considered by the Appellate Division of the Supreme Court of New Brunswick in *The King* v. *Lane* (1), and found to be intra vires and the Appellate Division, in considering the present case, treated the matter as being concluded by that judgment. In *Lane's* case Baxter C.J., with whom Grimmer J. agreed, was of the opinion that the Act was within the powers of the Legislature as legislation "assisting the Dominion jurisdiction." But, with respect, this overlooks the fact that, if the legislation is "in relation to criminal law" within the meaning of s. 91, the Province is excluded from the field and cannot trespass upon it under the guise of exercising the powers conferred upon it by heads 15 and 16 of s. 92. As was said by Sir Lyman Duff in *Provincial Secretary of Prince Edward Island* v. *Egan* (2):—

> It is beyond dispute that where an offence is created by competent Dominion legislation . . . under s. 91(27) the penalty . . . attached to that offence as well as the offence itself . . . are excluded from provincial jurisdiction.

With respect, I think that *The King* v. *Lane* was wrongly decided and should not be followed. It was contended, though rather faintly, on the argument before us that the second definition of a slot machine which I have quoted above was capable of being construed as describing machines which were not gaming devices. As to this, in my opinion, the interpretation of that language afforded by the title of the statute should be accepted. I am further of the opinion for the same reasons which I have given in *Johnson's* case that it would make no difference if machines other than gaming devices were intended to be described. This same argument was advanced and rejected by all of the judges of the Court of Appeal in Saskatchewan in *Rex* v. *Karminos* (3). In that case, as in this, the decision of this Court in *Bedard* v. *Dawson* (4), was relied upon in supporting the validity of the legislation and Turgeon J.A. (p. 440) pointed out that, since the real object and true nature of the Act was to create an offence in the interests of public morality and not for the protection of civil rights, the legislation could not be supported. That observation applies with full force to the statute under consideration.

(1) (1936) 11 M.P.R. 232.
(2) [1941] S.C.R. 306 at 403.
(3) [1936] 1 W.W.R. 433.
(4) [1923] S.C.R. 681.

It was attempted on the argument before us to distinguish that case on the ground that the New Brunswick statute did not declare the possession of a slot machine to be an offence or provide a penalty by fine or imprisonment, as did the Saskatchewan Act, and was thus not "in relation to criminal law." As to this, while the Act does not in terms declare the possession of such a machine to be an offence, the effect of it is to prescribe a penalty for such possession, namely, that it may be seized and forfeited to the Crown, without recompense. I can see no force in this argument.

The fallacy of the argument advanced in support of this legislation may perhaps be demonstrated by an illustration. In a case recently before this Court, *Industrial Acceptance Corporation* v. *The Queen* (1), the validity of a seizure of an automobile used for the carriage of a narcotic drug under the *Opium and Narcotic Drug Act, 1929* was considered. S. 21 of that Act provides for the seizure and forfeiture to the Crown of a motor car proved to have been used in connection with the offence charged. The argument that this provision for forfeiture was beyond the powers of Parliament was rejected, it being held that such a forfeiture was an integral part of the criminal law. Could it be said that provincial legislation, also providing for the forfeiture of motor cars used in the transport of narcotics, could be supported as legislation having to do with the control of highway traffic such as that considered in *Egan's* case? In my opinion, to ask the question is to answer it: such a contention would clearly be untenable. Parliament has under head 27 dealt with the crimes of possessing narcotic drugs and gambling devices and provided the penalties deemed by it to be appropriate. Are the provinces, under the pretence that they are exercising the powers given to them by s. 92, authorized to impose other or additional penalties? Nothing, in my opinion, could be more calculated to create confusion in the administration of justice in criminal matters.

In the view I take of this matter, it is unnecessary to consider whether the machine seized fell within the definition in the statute.

I would allow this appeal.

(1) [1953] 2 S.C.R. 273.

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CARTWRIGHT J.:—Two questions arise on this appeal, (i) whether the machine in question falls within the definition of "slot machine" contained in *The Slot Machine Act*, 1951 N.B. c. 215 and (ii) whether that Act is *intra vires* of the Legislature. If either of these questions is answered in the negative the appeal must be allowed but I think it desirable to deal with both of them.

The relevant provisions of the Statute and the description of the machine are set out in the reasons of my brother Kerwin.

On the first question, for the reasons given by my brother Kerwin, I agree with his conclusion that the machine here in question does not fall within s. 1(*b*)(i). In my opinion it does fall within the words of s. 1(*b*)(ii) as being "a machine . . . operated mechanically or manually . . . which upon the insertion therein . . . of money . . . may deliver . . . to the operator thereof . . . money's worth . . . in varying quantities." The pleasure of playing a game is the money's worth which the operator receives in exchange for the money he deposits in the machine and the quantity of such pleasure delivered in return for one coin may vary from that afforded by the playing of one game to that afforded by the playing of four games.

On the second question, while the Statute under consideration is by no means identical with the Alberta Statute dealt with in the case of *Johnson* v. *Attorney-General of Alberta*, judgment in which is being delivered contemporaneously with that in this appeal, the constitutional questions raised are, in effect, the same in both cases. I am of opinion that the main object of this Statute is the same as that of the Alberta Statute and, for reasons similar to those which I gave in *Johnson's* case, I have concluded that it is *ultra vires* of the Legislature of New Brunswick.

I would allow the appeal and restore the order of the learned magistrate. There should be no order as to costs.

Appeal allowed and order of the Police Magistrate restored, Kerwin and Estey JJ. dissenting.

Solicitor for the appellant: *J. T. Carvell.*

Solicitor for the respondent: *The Attorney General of New Brunswick.*

OREST SWYRD (*Plaintiff*) .....APPELLANT;

AND

JOSEPH TULLOCH (*Defendant*) .....RESPONDENT.

AND

OREST SWYRD (*Defendant*) .....APPELLANT;

AND

ALVIN TULLOCH AND FLORENCE THOEN (*Plaintiffs*) .....} RESPONDENTS.

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*Nov. 23
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*Apr. 12

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Automobile—Collision at intersection—Through street—Right of way—Excessive speed—Lookout—The Vehicle and Highway Traffic Act, R.S.A. 1942, c. 275, s. 53(1).

These are consolidated actions taken by both drivers and the passengers of one of the cars following a collision between two automobiles at an intersection in the City of Edmonton where the streets were icy and slippery. The appellant was on a through street. The trial judge found that both drivers had been equally negligent; that the respondent had stopped before entering the intersection but had not kept an adequate lookout after starting up again; that the respondent had entered the intersection first; that the appellant had been driving at an excessive speed; that neither driver had been as alert as he should have been. The Court of Appeal affirmed the trial judgment.

Held: (Rand and Kellock JJ. dissenting), that the appeals should be dismissed.

Per Rinfret C.J. and Taschereau J.: There were concurrent findings of fact and the invariable rule, always followed by this Court, applies.

Per Estey J.: There were concurrent findings of fact. Neither driver, for the purpose of avoiding the collision, changed his speed or direction, sounded his horn or applied his brakes. The respondent did not see the appellant until almost the moment of impact. The appellant did not see the respondent enter the intersection or failed to exercise reasonable care to avoid an apparent danger. That the appellant was driving too fast considering the condition of the street, is fully supported by the evidence. Section 53(1) of *The Vehicle and Highway Traffic Act* (R.S.A. 1942, c. 275) placed a duty upon the respondent to stop and not enter the intersection until he could do so with safety. Statutory provisions directed to the regulation of traffic on highways and public streets, as ordinarily enacted, are in adidtion to but not in lieu of the common law obligation to exercise due care. S. 53(1) contemplates that one in the position of the respondent would exercise due care in ascertaining the condition of the traffic on the highway and also as he proceeded to enter into and continued through the same. It follows that the mere fact that the respondent entered the

*PRESENT: Rinfret C.J. and Taschereau, Rand, Kellock and Estey JJ.

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intersection first did not necessarily mean that he had the right-of-way. That the trial judge had this in mind is evident when regard is had to his reasons as a whole and to his finding that the respondent did not keep an adequate lookout after he had started up again.

Per Rand and Kellock JJ. (dissenting): The trial judgment is vitiated by an initial misconception of s. 53(1) which governed these two automobiles as they approached the intersection. It found that the respondent actually entered the intersection first and that he, therefore, had the right-of-way even though the appellant was travelling on a through street. S. 53(1) imposes a clear duty upon the person who is proposing to enter upon a through street to see to it that he can do so with safety. As there is conflicting evidence as to the speed in the light of the statutory right-of-way, a new trial should be had.

APPEAL from the judgment of the Supreme Court of Alberta, Appellate Division, affirming the trial judgment in an action following a collision between two automobiles.

W. J. Shortreed Q.C. for the appellant.

C. W. Clement Q.C. for the respondents.

The judgment of Rinfret C.J. and Taschereau J. was delivered by:—

The CHIEF JUSTICE:—I would dismiss these appeals with costs.

The Appellate Division confirmed the judgment of the trial judge. There are therefore concurrent findings of facts and the invariable rule, always followed by our Court, applies.

The result is that Tulloch was found at fault because he "did not keep an adequate lookout . . . before he actually entered the intersection" and that "Swyrd was driving too fast considering the state of that particular through street and of that intersection".

The finding of the trial judge, concurred in by the Appellate Division, was also that Tulloch "entered the intersection first. He, therefore, had the right of way . . . etc."

Upon these findings it was held "that the driver of each car was negligent and the proportion of negligence was equal".

I can find no reason to modify these judgments. I have in mind our decision in *Thériault* v. *Huctwith et al* (1) and also the language of Lord Wright as quoted by Viscount Simon in *S.S. British Fame* v. *S.S. McGregor* (2): "It would require a very strong and exceptional case to induce

(1) [1948] S.C.R. 86. (2) (1943) 112 L.J.P. 6 at 7.

an Appellate Court to vary the apportionment of the different degrees of blame which the judge has made when the Appellate Court accepts the findings of the Judge".

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Rinfret C.J.

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

RAND J.:—The judgment of Wilson J. at trial, affirmed without reasons, by the Appellate Division, is, in my opinion, vitiated by an initial misconception of the statutory provision which governed these two automobiles as they approached the intersection. He says:—

I find that the DeSoto actually entered the intersection first. It therefore had the right-of-way even though the Buick was travelling on a through street.

Sec. 53 of *The Vehicle and Highway Traffic Act* reads:—

Every vehicle being about to enter upon any main or secondary Provincial Highway as defined in The Public Highways Act, or upon any other highway, which at the request of the local governing body has been designated and marked as a highway at which vehicles are required to stop, or upon any intersection at which it is required to stop by any by-law of any city, town or village, shall be brought to a stop at a point not less than ten feet nor more than fifty feet from such highway, *and shall not enter upon the highway either for the purpose of crossing it or for proceeding along it until the conditions of traffic on the highway are such that the vehicle can enter upon the highway with safety.*

I see nothing obscure in the meaning of the last clause of this section, and it imposes a clear duty upon the person who is proposing to enter upon what is known as a through street to see to it that he can do so with safety.

By-law No. 128 of Edmonton, after enacting the substance of sec. 53, adds a proviso:—

Provided that the driver or operator of any such vehicle *who has come to a full stop* as required by the provisions of this bylaw upon entering the through traffic street as well as drivers or operators of vehicles on such through traffic streets *shall be subject to the usual right of way rule prescribed by law and applicable to vehicles at intersections.*

Whatever the scope or meaning of this proviso, it is ultra vires so far as it may affect the concluding language of the section. Admittedly Avenue No. 97 is a street to which the section applies; if this is a result of the by-law, the proviso is severable: if it is effected under the statute, the by-law is superfluous.

The finding that

the driver of the Buick car, Swyrd, was driving too fast considering the state of that particular through street and of that intersection.

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evidences the influence of the misconception: there is no reference to any particular rate of speed, it is a speed too great in the circumstances; and he found that the two drivers were equally negligent. What is indicated is that the trial judge had in mind sec. 42 of the *Traffic Act* which deals with speed.

These findings and his expressed understanding of the statute make clear his view of the situation to have been that the Buick car, having regard to the iciness of the street and to the fact that any car coming from a side street which entered the intersection first had the right-of-way, was proceeding at too great a speed to be stopped when it should have been stopped, a view that was basically erroneous.

We must then either draw our own conclusions from the evidence as to the speed in the light of the statutory right-of-way or return the case for a new trial. As there is conflict in the testimony upon that fact and however undesirable it may be, I see no other course than to submit the issues again for determination.

I would, therefore, allow the appeals with costs as of one appeal in this Court and in the Court of Appeal, and direct a new trial. The costs of the first trial will be disposed of by the judge at the new trial.

ESTEY J.:—This appeal arises out of actions taken to recover damages suffered in a collision between two automobiles at the intersection of 101st Street and 97th Avenue in the City of Edmonton on January 1, 1952, between 4:30 and 5:00 o'clock in the afternoon. The appellant was driving his Buick westward on 97th Avenue and respondent Joseph Tulloch his DeSoto southward on 101st Street. The streets were covered with snow or ice and were slippery. No other traffic was present in any relevant distance.

The appellant Swyrd brought an action against respondent Joseph Tulloch for damages and Tulloch counterclaimed, asking damages against Swyrd. A second action was started, in which the passengers in the Tulloch automobile, namely, Alvin Tulloch and Florence Thoen, asked damages against appellant Swyrd. These actions were consolidated prior to trial.

The learned trial judge found both drivers negligent, equal in fault and gave judgment accordingly. He also gave judgment against appellant Swyrd in favour both of

Alvin Tulloch and Florence Thoen, giving them damages respectively of $100 and $25 and costs. Swyrd's appeal to the Appellate Division was dismissed, but the judgment as between him and respondent Joseph Tulloch was varied by apportioning the fault one-third to appellant Swyrd and two-thirds to respondent Joseph Tulloch.

Upon all material points the evidence is contradictory. That of the appellant and his passenger, apart from the fact of and the approximate place of the collison, is in complete contradiction to that of the respondent Joseph Tulloch and his passengers. The learned trial judge, who observed the witnesses as they gave their evidence, did not make an express finding as to credibility. It is, however, obvious that he did not accept the evidence of the appellant Swyrd nor that of his passenger, but did accept that of the respondent Joseph Tulloch and his passengers.

The learned judges in the Appellate Division affirmed the findings of the learned trial judge and we have, therefore, concurrent findings of fact.

The material findings of the learned trial judge may be summarized:

(*a*) that Tulloch stopped his DeSoto momentarily at the stop sign, but did not keep an adequate lookout after he started up again;

(*b*) that Tulloch entered the intersection first;

(*c*) that Swyrd was proceeding at all relevant times at an excessive rate of speed;

(*d*) that neither driver was as alert as he should have been.

Visibility was good and there was no other traffic within any relevant distance and no reason suggested why either driver's attention should be attracted away from the driving of his automobile. The collision occurred in the northwest quarter of the intersection. Neither driver, for the purpose of avoiding a collision, changed his speed or direction, sounded his horn or applied his brakes. There can be no doubt upon this record but that respondent Joseph Tulloch did not see appellant's automobile until almost the moment of impact. Appellant's evidence that he saw Tulloch's automobile north of the stop sign, proceeding at an excessive speed which was maintained in disregard of the stop sign to the point of collision, when he himself was at the western edge of the east curb of 101st Street, proceeding at fifteen to twenty miles per hour, was disbelieved by the trial

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judge. The learned judge found as a fact that he was proceeding at "an excessive rate of speed" and was not "as alert as he should have been." In these circumstances appellant Swyrd either did not see respondent Joseph Tulloch enter the intersection or, if he did see him, he failed to exercise reasonable care to avoid an apparent danger.

That Swyrd "was driving too fast considering the state of that particular through street and of that intersection," as found by the learned trial judge, is fully supported by the evidence. Swyrd himself deposes that he was driving at a speed of fifteen to twenty miles per hour when he saw Tulloch proceeding south "at such a speed it more or less froze me at the wheel and all I could do was carry on through." Moreover, notwithstanding the absence of any other traffic and the size of the intersection, he deposes that he could not have avoided the collision. If he had been proceeding at the speed of fifteen to twenty miles per hour two alternatives would probably have happened, either one of which would have avoided the collision—Tulloch would have seen him and not entered the intersection, or, if in error he concluded that he might do so with safety and did enter the intersection, Swyrd, by using due care, could have avoided the collision. However that may be, Swyrd's speed was in excess of fifteen to twenty miles per hour. His own passenger placed his speed at from thirty to forty miles per hour. One of Tulloch's passengers states that he did not see the Swyrd automobile until it appeared in front of him and, as he stated, "I didn't know it was a car, there was just a flash in front of me." Another passenger in Tulloch's automobile stated: "I couldn't estimate the speed of the car shearing across but it was a very high rate of speed as I just saw, just a blur, more or less, a streak, go right in front."

Because of what may occur in a collision, it is often unsafe to place too much reliance upon conclusions drawn from the movements of colliding automobiles immediately following the impact. It is, however, of some significance to observe that Tulloch's automobile proceeded only a few paces toward the southwest, while Swyrd's automobile proceeded a distance of seventy-five feet and came to rest, facing eastward, against a heavy Paige wire fence, which it damaged.

Moreover, the learned trial judge having refused to accept Swyrd's evidence that he was proceeding at fifteen to twenty miles per hour and having found, as a fact, that he was proceeding at an excessive rate of speed upon a public street within the City of Edmonton means, when read in relation to the other evidence with respect to his speed, that he was proceeding at a rate in excess of twenty-five miles per hour and, therefore, "shall prima facie be deemed to be driving at an unreasonable rate of speed" within the meaning of s. 42(2) of *The Vehicles and Highway Traffic Act* (R.S.A. 1948, ch. 275).

The important section, so far as respondent Joseph Tulloch is concerned, is s. 53(1) of the said statute, which reads as follows:

> 53. (1) Every vehicle being about to enter upon any main or secondary Provincial highway as defined in The Public Highways Act, or upon any other highway, which, at the request of the local governing body has been designated and marked as a highway at which vehicles are required to stop, or upon any intersection at which it is required to stop by any by-law of any city, town or village, shall be brought to a stop at a point not less than ten feet nor more than fifty feet from such highway, and shall not enter upon the highway either for the purpose of crossing it or of proceeding along it until the conditions of traffic on the highway are such that the vehicle can enter upon the highway with safety.

This section 53(1) placed a duty upon Tulloch to stop and not to enter the intersection until the conditions of traffic on the street were such that his automobile might enter with safety.

The learned trial judge, in the course of his judgment, stated:

> I find that the DeSoto actually entered the intersection first. It therefore had the right of way even though the Buick was travelling on a through street.

Statutory provisions directed to the regulation of traffic on highways and public streets, as ordinarily enacted, are in addition to but not in lieu of the common law obligation to exercise due care. Section 53(1) contemplates that one in the position of the respondent Joseph Tulloch would exercise due care in ascertaining the condition of the traffic on the highway and also as he proceeded to enter into and continued through the same. *Royal Trust Co.* v. *Toronto Transportation Commission* (1); *Theriault v. Huctwith* (2). It follows that the mere fact that Tulloch entered the

(1) [1935] S.C.R. 671. (2) [1948] S.C.R. 86.

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intersection first did not necessarily mean that he had the right-of-way. That the learned judge had this in mind and did not regard the foregoing statement as complete is evident when regard is had to his reasons when read as a whole and to his findings of fact; in particular, that Tulloch "did not keep an adequate lookout after he had started up again" and that he was not "as alert as he should have been." As a consequence, the learned judge assessed Tulloch with an equal share of the fault. The learned judge found, and the evidence supports his finding, that Tulloch stopped and, exercising due care, continued into the intersection but, as he proceeded therein, he failed to use that care which a reasonable man in the same circumstances would have used. The evidence equally supports his finding that Swyrd was proceeding at an excessive rate of speed and he also was not "as alert as he should have been." The learned judge, therefore, found both parties negligent. The learned judges in the Appellate Division accepted his conclusions of fact and affirmed his judgment.

The appeal against the judgment in favour of Alvin Tulloch and Florence Thoen should also be dismissed.

I am, therefore, of the opinion that both of the appeals should be dismissed with costs.

Appeals dismissed with costs.

Solicitors for the appellant: *Shortreed & Shortreed.*

Solicitors for the respondents: *Smith, Clement, Parlee & Whittaker.*

CAMPBELL-BENNETT LIMITED .....APPELLANT; 1953

AND *Nov. 10, 11

COMSTOCK MIDWESTERN LIMITED and TRANS MOUNTAIN OIL PIPE LINE COMPANY ..... RESPONDENT. 1954 *May 19

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional Law—Mechanics' Lien—Interprovincial and International oil pipe line company incorporated by special act of Parliament—Whether mechanics' lien applies to, or may be enforced against, property of such company—British North America Act, 1867 (30 & 31 Vict. c. 3 Imp. ss. 91 head 29, 92 head 10(a))—The Mechanics' Lien Act, R.S.B.C. 1948, c. 205.

A company incorporated by special Act of the Parliament of Canada for the purpose of transporting oil by means of interprovincial and international pipe lines is a work or undertaking within the exclusive jurisdiction of Parliament. As such it is not subject to a lien under the provisions of a provincial Mechanics Lien Act since the effect of such legislation would permit the sale of the undertaking piecemeal and nullify the purpose for which it was incorporated.

Judgment of Court of Appeal for British Columbia (1953) 8 W.W.R. (N.S.) 683, affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) dismissing an appeal from a judgment of Archibald J., Judge of the County Court of Yale answering in the negative certain questions of law set down for hearing before trial.

W. H. Campbell and *Marcel Joyal* for the appellant.

S. McK Brown for Comstock Midwestern Ltd., respondent.

D. N. Hossie, Q.C. and *W. L. N. Somerville* for Trans Mountain Oil Pipe Line Co., respondent.

W. R. Jackett, Q.C. and *T. Eaton* for Attorney General of Canada.

The judgment of Kerwin and Fauteux JJ. was delivered by:—

KERWIN J.:—This is an appeal by Campbell-Bennett Ltd. from a judgment of the Court of Appeal for British Columbia affirming an order of a judge of the County

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

(1) (1953) 8 W.W.R. (N.S.) 683; [1953] 3 D.L.R. 594.

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Court of Yale. The latter answered certain questions of law set down for hearing and disposition before the trial of an action in that Court to enforce a mechanics' lien. These questions and the answers thereto are as follows:—

Question (*a*): Can a lien claimed under the Mechanics' Lien Act, Chap. 205, R.S.B.C. 1948 and amending acts exist or be enforced against the property of the Defendant Trans Mountain Oil Pipe Line Company referred to in the Plaint and Summons in this action under the circumstances therein alleged and having regard to the matters raised by Paragraph 29 of the Dispute Note of the Defendant Trans Mountain Oil Pipe Line Company and Paragraph 27 of the Dispute Note of the Defendant Comstock Midwestern Limited.

Answer: No.

Question (*b*): If not, can the Plaintiff proceed to obtain Judgment under Section 35 of the Mechanics' Lien Act or otherwise in these proceedings.

Answer: No.

Question (*c*): Has this Honourable Court jurisdiction to entertain the matters complained of in this action.

Answer: No.

Trans Mountain Oil Pipe Line Co., hereafter called Trans Mountain, is a corporation incorporated by a Special Act of the Parliament of Canada, c. 93 of the Statutes of 1951. By s. 5 it has all the powers, privileges and immunities conferred by, and is subject to all the limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil or any liquid product or by-product thereof which is enacted by Parliament. By s. 6:—

The Company, subject to the provisions of any general legislation relating to pipe lines for the transportation of oil or any liquid product or by-product thereof which is enacted by Parliament, may

(*a*) within or outside Canada construct, purchase, lease, or otherwise acquire, and hold, develop, operate, maintain, control, lease, mortgage, *create liens* upon, sell, convey, or otherwise dispose of and turn to account any and all interprovincial and/or international pipe lines for the transportation of oil including pumping stations, . . .

Trans Mountain constructed, purchased or acquired an interprovincial pipe line. The general legislation referred to is the *Pipe Lines Act*, R.S.C. 1952, c. 211. Under s. 10 thereof a company, such as Trans Mountain, shall not

without the leave of the Board of Transport Commissioners for Canada, sell, convey or lease to any person its company pipe line in whole or in part, while s. 3 thereof enacts:—

> 3. Except as in this Act otherwise provided ,
>
> (*a*) This Act shall be construed as incorporate with a Special Act, and
>
> (*b*) where the provisions of this Act and a Special Act relate to the same subject-matter, the provisions of the Special Act shall, in so far as is necessary to give effect to the Special Act, be taken to override the provisions of this Act.

The effect of the words "subject to the provisions of any general legislation relating to pipe lines" in s. 6 of Trans Mountain's Special Act is to require Trans Mountain, in accordance with s. 10 of the *Pipe Lines Act*, to obtain the consent of the Board before selling, conveying or otherwise disposing of its interprovincial pipe line.

As alleged in the plaint in the County Court, Trans Mountain is the owner of a pipe line from Acheson, Alberta, to Burnaby, British Columbia, and the owner of all the real property, lands, tenements and hereditaments of any tenure, and any and all easements, rights, privileges or interests in land owned or held by Trans Mountain and comprised in the right-of-way or road of the said oil pipe line or enjoyed therewith. Comstock Midwestern Limited (to which I shall hereafter refer as Comstock) entered into an agreement in writing, dated January 21, 1952, with Trans Mountain to construct and complete certain sections of the latter's oil pipe line. Clause 12(*b*) of the General Conditions attached to this agreement provides for final payment and will be referred to later.

By an agreement in writing dated February 28, 1952, between Comstock and Campbell-Bennett Ltd. the latter agreed to undertake, on behalf of the former, the clearing, grubbing and grading of the construction right-of-way for certain portions of the pipe line. By clause 12 of this agreement:—

> 12. Progress payments and final payment at the unit prices set forth in Clause 1 hereof for grading, clearing and grubbing of construction right-of-way as provided for herein shall be made in compliance with the terms, conditions and times set forth in paragraph 12 appearing on pages 6 and 7 of the said specifications.

i.e. clause 12 of the General Conditions attached to the contract between Trans Mountain and Comstock.

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Under the agreement of February 28, 1952, certain work has been done by Campbell-Bennett for which it has not been paid by Comstock and part of this work was done in the County of Yale in British Columbia. By reason of the work done and services performed, Campbell-Bennett claims to be entitled to a lien under the *Mechanics' Lien Act*, R.S.B.C. 1948, c. 205, upon and against the oil pipe line in the County of Yale and real property, land tenements, hereditaments, rights, privileges, and interests in land as described. A claim for lien was filed and this action commenced to enforce it. The British Columbia Act is similar to many others dealing with mechanics' liens and, if the action were prosecuted to a conclusion, the result would be a judgment for the amount found to be owing by Comstock to Campbell-Bennett Ltd. and an order for the sale of the pipe line within the limits of the County of Yale.

Several arguments were advanced which we were told had not been made to the Courts below. The first of these,—that the main purpose of the *Mechanics' Lien Act* is to secure payment of an amount owing on a lien,—fails because the security to which Mr. Campbell referred is obtained under all the provisions of the Act, including those authorizing the sale of lands if a claim be not paid by the creditor. These are as important as the sections providing for the determination of, and judgment for, the amount of the claim.

The second is based upon the words "create liens" in s. 6(*a*) of the Act incorporating Trans Mountain. These are permissive words and have no reference to liens under the British Columbia Mechanics' Liens Act which are created by operation of law and not by action of Trans Mountain.

In connection with the third argument, Mr. Campbell relied upon clause 12(*b*) of the General Conditions of the contract between Trans Mountain and Comstock which by virtue of the agreement between Comstock and Campbell-Bennett Ltd. is applicable to that contract. This clause 12(*b*) reads as follows:—

b. Final Payment: When each Section of the line has been completed, with the exception of Final Testing, payment will be made within ten (10) days in an amount, which together with previous payments, will equal 90 per cent of the SUPERVISOR'S estimate of the total amount due the CONTRACTOR. Immediately following the Final Testing and

the Final Acceptance of each Section, the SUPERVISOR and the SUPERINTENDENT shall agree on a final certified estimate. When this final estimate has been accepted by the AGENT and the time for filing liens of any kind or character in connection with such work has expired, as provided by the laws of the Dominion of Canada and/or the Province or Provinces in which work has been performed, the AGENT shall pay to the CONTRACTOR within ten (10) days, the remaining amount due:

PROVIDED, however, the AGENT may at option and at any time after the expiration of thirty days next after the final completion of the work to be performed hereunder, make final payment to the CONTRACTOR prior to the expiration of the said lien period which shall in no way relieve the CONTRACTOR and/or the Bond furnished by the CONTRACTOR, from liability shown and for which a lien could attach to said work or structures, to pipe or equipment, or any portion of any thereunder, during the whole of said lien period, but on the contrary, CONTRACTOR and/or said Bond shall be and remain liable during the whole of said lien period.

The words "the time for filing liens of any kind or character in connection with such work has expired, as provided by the laws of the Dominion of Canada and/or the Province or Provinces in which work has been performed" do not constitute an undertaking that Trans Mountain will be bound by the provisions of the British Columbia *Mechanics' Lien Act*. So far as it is concerned, the clause is merely an enabling one.

There remains for consideration that part of Question (*a*) asking whether the lien claimed under the British Columbia *Mechanics' Lien Act* exists, or can be enforced, against the oil pipe line of Trans Mountain within the County of Yale, having regard to the matters raised by paragraph 29 of the dispute note of Trans Mountain and paragraph 27 of the dispute note of Comstock, which paragraphs are in substance the same. It is clear that the work or undertaking of Trans Mountain is a work or undertaking "connecting the Province with any other or others of the Provinces" and therefore within the exclusive authority of Parliament by virtue of s. 91, head 29, of the *British North America Act, 1867*, when read in conjunction with s. 92, head 10A,—just as much as the work or undertaking of the Telephone Company in *Corporation of the City of Toronto* v. *Bell Telephone Company* (1). It is true that this is not a case like *Madden* v. *Nelson and Fort Sheppard Railway Co.* (2), because, there, a provincial enactment specifically imposed a liability upon railway companies declared to be for the

(1) [1905] A.C. 52. (2) [1899] A.C. 626.

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general advantage of Canada. Here, the British Columbia Mechanics' Lien Act is a law of general application and no work or undertaking under Parliament's jurisdiction is singled out. On the other hand, the present case is distinguishable from *Canadian Pacific Railway Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1); "Where", according to the *Nelson* case at p. 628, "it was decided that although any direction of the provincial legislature to create new works on the railway and make a new drain and to alter its construction would be beyond the jurisdiction of the provincial legislature, the railway company were not exempted from the municipal state of the law as it then existed—that all landowners, including the railway company, should clean out their ditches so as to prevent a nuisance." The result of an order for the sale of that part of Trans Mountain's oil pipe line in the County of Yale would be to break up and sell the pipe line piecemeal, and a provincial legislature may not legally authorize such a result.

We are not called upon to deal with other circumstances that might arise in connection with such a work or undertaking and therefore nothing is said about them. Confining ourselves to the exact question before us, assistance is obtained in coming to the above conclusion from a consideration of such decisions as *Redfield* v. *Corporation of Wickham* (2); *Central Ontario Railway* v. *Trusts and Guarantee Company* (3); *Crawford* v. *Tilden* (4); *Johnson and Carey Co.* v. *Canadian Northern Ry. Co.* (5).

The *Redfield* case decided that ss. 14 and 15 of the then current Railway Act of Canada "do not suggest that according to the policy of Canadian law a statutory railway undertaking can be disintegrated by piecemeal sales at the instance of judgment creditors or encumbrancers but they clearly show that the Dominion Parliament has recognized the rule that a railway or a section of a railway may as an integer be taken in execution and sale like other immeubles in ordinary course of law." Provisions analagous to ss. 14 and 15 are found in s. 152 of the present *Railway Act*, R.S.C. 1952, c. 234. These provisions deal with the sale of a railway or any section thereof under the powers contained in a

(1) [1899] A.C. 367.
(2) (1888) 13 App. Cas. 467.
(3) [1905] A.C. 576.
(4) (1907) 14 O.L.R. 572.
(5) (1918) 44 O.L.R. 533.

deed or mortgage, and provide for an application by a purchaser to the Minister of Railways and Parliamentary sanction for the purchaser to operate the railway. By s. 30 of the *Pipe Lines Act* certain sections of the *Railway Act* apply to companies authorized by Special Act to construct or operate pipe lines for the transportation of oil or gas but s. 152 of the *Railway Act* is not one of them.

In the *Central Ontario Railway* case Lord Davey pointed out at page 582 that the Courts of Upper Canada had previously decided that the vendee under a sale in pursuance of a bond mortgage could not exercise the franchise by working and operating a railway, and their Lordships saw no reason to doubt the correctness of the law thus laid down. In the case before them, however, their Lordships held that the same result should follow as in *Redfield* because of the provisions of ss. 14, 15 and 16 of the *Railway Act*. The two Ontario cases referred to decide that a lien under the Ontario Mechanics' and Wage Earners' Act could not exist or be enforced against the property of the railway companies there in question.

The absence of any provision such as s. 152 of the present *Railway Act* therefore leaves the matter that it must be taken that the British Columbia Mechanics' Lien Act does not even purport to apply to the oil pipe line of Trans Mountain in the County of Yale. If it does, it is to that extent ultra vires. Mr. Campbell agreed that if he failed in his contentions as to Question (*a*), it was unnecessary to consider Question (*b*) and (*c*). For the above reasons the appeal should be dismissed with costs but no order should be made as to the costs of the Attorney General of Canada.

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

RAND J.:—The respondent, Trans Mountain Oil Pipe Line Company, was incorporated by Dominion statute, 15 Geo. VI, c. 93. It was invested with all the "powers, privileges and immunities conferred by" and, except as to provisions contained in the statute which conflicted with them, was made subject to all the "limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil" enacted by Parliament. Within that framework, it was empowered to construct or

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otherwise acquire, operate and maintain interprovincial and international pipe lines with all their appurtenances and accessories for the transportation of oil.

The *Pipe Lines Act*, R.S.C. 1952, c. 211, enacted originally in 1949, is general legislation regulating oil and gas pipe lines and is applicable to the company. By its provisions the company may take land or other property necessary for the construction, operation or maintenance of its pipe lines, may transport oil and may fix tolls therefor. The location of its lines must be approved by the Board of Transport Commissioners and its powers of expropriation are those provided by the *Railway Act*. By s. 38 the Board may declare a company to be a common carrier of oil and all matters relating to traffic, tolls or tariffs become subject to its regulation. S. 10 provides that a company shall not sell or otherwise dispose of any part of its company pipe line, that is, its line held subject to the authority of Parliament, nor purchase any pipe line for oil transportation purposes, nor enter into any agreement for amalgamation, nor abandon the operation of a company line, without leave of the Board; and generally the undertaking is placed under the Board's regulatory control.

Is such a company pipe line so far amenable to provincial law as to subject it to statutory mechanics' liens? The line here extends from a point in Alberta to Burnaby in British Columbia. That it is a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy: *Winner* v. *S.M.T. (Eastern) Limited* (1), affirmed, with a modification not material to this question, by the Judicial Committee but as yet unreported. The lien claimed is confined to that portion of the line within the County of Yale, British Columbia. What is proposed is that a lien attaches to that portion of the right of way on which the work is done, however small it may be, or wherever it may be situated, and that the land may be sold to realiez the claim. In other words, an interprovincial or international work of this nature can be disposed of by piecemeal sale to different persons and its undertaking thus effectually dismembered.

In the light of the statutory provisions creating and governing the company and its undertaking, it would seem to

(1) [1951] S.C.R. 887.

be sufficient to state such consequences to answer the proposition. The undertaking is one and entire and only with the approval of the Board can the whole or, I should say, a severable unit, be transferred or the operation abandoned. Apart from any question of Dominion or Provincial powers and in the absence of clear statutory authority, there could be no such destruction by means of any mode of execution or its equivalent. From the earliest appearance of such questions it has been pointed out that the creation of a public service corporation commits a public franchise only to those named and that a sale under execution of property to which the franchise is annexed, since it cannot carry with it the franchise, is incompatible with the purposes of the statute and incompetent under the general law. Statutory provisions, such as s. 152 of the *Railway Act*, R.S.C. (1952) c. 234, have modified the application of the rule, but the sale contemplated by s. 10 of the *Pipe Lines Act* is a sale by the company, not one arising under the provisions of law and in a proceeding *in invitum*. The general principle was stated by Sir Hugh M. Cairns, L.J. in *Gardner* v. *London, Chatham and Dover Railway* (1):—

> When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed and these duties discharged by the company. They cannot be delegated or transferred.

In the same judgment and speaking of the effect of an authorized mortgage of the "undertaking" he said:—

> The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say, the earnings of the undertaking—must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot; under their mortgages, or as mortgagees—by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed.

To the same effect, in the case of execution, are *Peto* v. *Welland Railway Company* (2), and *King* v. *Alford* (3),

(1) (1867) L.R. 2 Ch. 201 at 212. (2) (1862) 9 G.R. 455.
(3) (1884) 9 O.R. 643.

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(an engine house and turntable of a railway) which followed *Breeze* v. *The Midland Railway Company* (1), (a station house).

These considerations, *a fortiori,* become controlling when the question arises as between Provincial and Dominion jurisdictions. The mutilation by a province of a federal undertaking is obviously not to be tolerated in our scheme of federalism, and this from the beginning has been the view taken of provincial legislation of the nature of that before us.

In *Johnson & Carey Co.* v. *Canadian Northern Railway Co.* (2), which followed *Crawford* v. *Tilden* (3), as a binding decision, a lien claimed by a sub-contractor against a portion of the defendant's railway, under Dominion jurisdiction, was denied. The governing case had gone before both the Divisional Court and the Court of Appeal, and in both the judgment was unanimous. In *Larsen* v. *Nelson & Fort Sheppard Railway* (4), a similar ruling was made. In *Western Canada Hardware Co. Ltd.* v. *Farrelly Bros. Ltd.* (5), the Appellate Division of the Supreme Court of Alberta, speaking through Stuart J.A., found against the application of *The Mechanics' Lien Act* to an irrigation ditch constructed under the authority of Dominion legislation.

In *Bourgoin* v. *La Compagnie de Montréal du Chemin de Fer* (6), the Judicial Committee held that Quebec, even with the consent of the company, could not bring about the dissolution of the undertaking of a railway which had been declared a work for the general advantage of Canada. In *Attorney General for Alberta* v. *The Attorney General for Canada and the Canadian Pacific Railway Company* (7), Alberta was held incompetent to appropriate in any manner any part of the physical property of a Dominion railway for any purpose even though no interference with the construction or operation of the railway should result. In the case before us we have such a measure by which a physical appropriation is authorized that would completely nullify the object of the legislation of Parliament.

(1) (1879) 26 Gr. 225.
(2) (1918) 44 O.L.R. 533.
(3) (1907) 14 O.L.R. 572.
(4) (1895) 4 B.C.R. 151.
(5) (1922) 3 W.W.R. 1017.
(6) (1880) 5 App. Cas. 381.
(7) [1915] A.C. 363.

This wide concurrence of opinion, followed in the courts below, is, if I may say so, the necessary conclusion from the matters that have been accepted as pertinent to the question raised.

The appeal must therefore be dismissed with costs, but there will be no costs to the Attorney General of Canada.

ESTEY J.:—The respondent Trans Mountain Oil Pipe Line Company (hereinafter referred to as Trans Mountain) was incorporated by special act of the Parliament of Canada (S. of C. 1950-51, c. 93). In the exercise of its powers it entered into a contract for the construction of a pipe line through portions of the provinces of Alberta and British Columbia, by which, when completed, it would convey oil from a point near Edmonton, Alberta, to a point near Vancouver, British Columbia.

The respondent Trans Mountain entered into a contract with the respondent Comstock Midwestern Limited (hereinafter referred to as Comstock) under which the latter agreed to construct certain sections of this pipe line.

The respondent Comstock, in turn, entered into a subcontract with appellant Campbell-Bennett Ltd. for the clearing, grubbing and grading of construction right-of-way for sections of this line in the counties of Yale, Westminster and Cariboo in British Columbia. When the appellant was not paid it filed a mechanics' lien against the pipe line of Trans Mountain and in order to enforce the lien commenced actions, one in each of the counties named. We are here concerned only with that in the county of Yale.

Before the trial the following points of law were submitted to the learned county court judge: (See ante p. 208)

The learned county court judge answered "No" to each of these and his answers were affirmed in the Court of Appeal.

Section 5 of the act of incorporation of Trans Mountain Oil Pipe Line Company provides:

> The Company shall have all the powers, privileges and immunities conferred by, and be subject to all the limitations, liabilities and provisions of any general legislation relating to pipe lines for the transportation of oil or any liquid product or by-product thereof which is enacted by Parliament.

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Under s. 6 the company may acquire real property and may

> construct, purchase, lease, or otherwise acquire, and hold, develop, operate, maintain, control, lease, mortgage, create liens upon, sell, convey, or otherwise dispose of and turn to account any and all interprovincial and/or international pipe lines, . . .

Then s. 7 of the same act embodies s. 63 of the *Companies Act* (R.S.C. 1952, c. 53), under which Trans Mountain is empowered to borrow upon the credit of the company and to issue debentures or other securities, and, in particular, power to mortgage, hypothecate, charge or pledge all or any of its real and personal property.

Parliament, in 1949, had enacted the *Pipe Lines Act* (R.S.C. 1952, c. 211). Section 3(*a*) of that enactment provides: "this Act shall be construed as incorporate with a Special Act" and the definition of "Special Act" includes the statute incorporating the respondent Trans Mountain.

Section 4 of the *Pipe Lines Act* provides that the Board of Transport Commissioners for Canada "shall exercise and enjoy the same jurisdiction, powers and authority in matters under this Act as are vested in the Board by the *Railway Act*." Then, by s. 30, ss. 207 to 246, 248 and 251 of the *Railway Act* are incorporated into the *Pipe Lines Act* "in so far as they are reasonably applicable and not inconsistent with this Act." Under s. 11 of the *Pipe Lines Act* it is provided that Trans Mountain shall not begin the construction of a section or part of a pipe line without obtaining leave of the Board of Transport Commissioners, and s. 10(*a*) provides that Trans Mountain shall not, without leave of the Board, "sell, convey or lease to any person its company pipe line, in whole or in part."

The respondent Trans Mountain does not dispute that, though incorporated by a special act of Parliament, it is ordinarily subject to provincial laws of general application. It does contend, however, that it is not subject to the provisions of the provincial *Mechanics' Lien Act* because, when enforced, it would mean the sale of at least a portion of its pipe line and would, therefore, substantially impair, if not destroy, its powers and capacities to transport oil from near Edmonton to a point near Vancouver and, therefore, to prevent the attainment of the end for which it was incorporated.

Parliament, no doubt because a pipe line, constructed as here in question, is a means of transportation, made its operation subject to certain provisions of the *Railway Act* and to the jurisdiction of the Board of Transport Commissioners. It is, therefore, of some significance that railways, on the basis that they provide an essential public service, have been held not to be subject to mechanics' liens. The principle underlying these decisions appears to be that to permit the enforcement of such a lien would tend to destroy a public service and, therefore, as a matter of policy, such property ought not to be subject to a mechanic's lien. *King* v. *Alford et al.* (1); *Larsen* v. *Nelson & Fort Sheppard Railway* (2).

That a province cannot, by legislation, impose requirements upon a Dominion corporation that would substantially impair its powers or capacities to accomplish the purpose for which it was incorporated under Dominion legislation is well established. *John Deere Plow Co., Ltd.* v. *Wharton* (3); *Great West Saddlery Co. Ltd.* v. *The King* (4). In the latter case, in referring to Dominion corporations, it is stated that

> they cannot be interfered with by any Provincial law in such a fashion as to derogate from their status and their consequent capacities, or, as the result of this restriction, to prevent them from exercising the powers conferred on them by Dominion law.

Provincial legislation requiring the Bell Telephone Company of Canada to obtain the consent of the municipality before erecting its poles and attaching its wires thereto was held ultra vires.

> It would seem to follow that the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every province of the Dominion, and that no provincial legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada." *Toronto Corporation* v. *Bell Telephone Company of Canada,* (5).

An ordinance of the Northwest Territories imposed liability upon one in charge of a locomotive for damages from a fire caused thereby, unless it was equipped with certain appliances and the railway company maintained a

(1) (1885) 9 O.R. 643.
(2) (1895) 4 B.C.R. 151.
(3) [1915] A.C. 330.
(4) [1921] 2 A.C. 91.
(5) [1905] A.C. 52 at 57.

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specified fire guard. This legislation was held not applicable to railways subject to the legislative jurisdiction of Parliament. *C.P.R.* v. *The King* (1).

A province cannot impose upon such railways the obligation to construct fences. *Madden* v. *Nelson and Fort Sheppard Railway* (2). Nor can a province require a Dominion company to obtain a licence before offering its shares for sale. *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3).

On the other hand, a province may require that a Dominion company shall maintain ditches constructed under authority of Parliament in a manner that will not injure adjoining property. *C.P.R.* v. *Bonsecours* (4). The Security Frauds Prevention Act of Alberta (S. of A. 1930 c. 8) required that any person or corporation, before offering corporate shares for sale, must obtain a provincial licence. Such legislation was held intra vires the province. *Lymburn* v. *Mayland* (5).

The Judicial Committee has recently discussed this subject in *Attorney General for Ontario et al.* v. *Israel Winner et al.*, a decision dated February 22, 1954, and as yet unreported. There an individual operated a bus line from Boston, Massachusetts, through various states and the Province of New Brunswick, to Glace Bay, Nova Scotia. His bus service was held to be included within the phrase "works and undertakings" in s. 92(10)(*a*) of the *B.N.A. Act* and, therefore, subject to the legislative jurisdiction of Parliament (s. 92(29)). Lord Porter, delivering the reasons of the Judicial Committee, stated that provincial "legislation will be invalid if a dominion company is sterilised in all its functions and activities or its status and essential capacities are impaired in a substantial degree." Again he stated:

> It must be remembered that it is the undertaking not the roads which come within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with the prerogative of the Dominion.

In that case it was held that the restrictions upon the nature of the bus business Winner carried on in New Brunswick were ultra vires that province. The principle under-

(1) (1908) 39 Can. S.C.R. 476.
(2) [1899] A.C. 626.
(3) [1929] A.C. 260.
(4) [1899] A.C. 367.
(5) [1932] A.C. 149.

lying that case would seem to constitute an effective bar to the appellant's contentions. The mechanics' lien, when enforced, would substantially destroy the purpose for which Trans Mountain was incorporated by the Dominion.

The provisions of the *Mechanics' Lien Act* give a lien against the respondent's pipe line in favour of the appellant, a sub-contractor, as well as in favour of the labourer for his wages and those who furnish material. The Act provides certain safeguards by which a company in the position of Trans Mountain may, by withholding certain payments, in part at least protect itself. The fact remains, however, that the enforcement of a mechanics' lien would mean that at least a portion of the pipe line would be sold and thereby the powers and capacities of Trans Mountain to perform the service for which it was incorporated would be substantially impaired, if not destroyed.

The company, under s. 6 of its act of incorporation, was empowered to create liens upon its pipe lines. That provision, however, contemplates a contractual obligation which is quite different from a statutory lien, created in favour of those who supply labour or material, with all of its attendant consequences.

The contract between Trans Mountain and Comstock contained a provision (which, in effect, was carried into Comstock's contract with appellant) designed to protect Trans Mountain against a mechanics' lien, so far as contractual obligations could do so. It does not affect the nature and character, nor the ultimate effect of the legislation.

Appellant contends that the *Mechanics' Lien Act* became a part of, or was embodied in the contracts made between the parties hereto in a manner that made the position comparable to that under the *Workmen's Compensation Act,* in referring to which the Privy Council stated:

> The right conferred arises under s. 8, and is the result of a statutory condition of the contract of employment made with a workman resident in the province, for his personal benefit and for that of members of his family dependent on him. . . . This right arises, not out of tort, but out of the workman's statutory contract, . . ." *Workmen's Compensation Board* v. *Canadian Pacific Railway Company,* (1).

It is important to observe an essential difference between the workmen's compensation legislation and that of the mechanics' lien. The former not only creates a contractual

(1) [1920] A.C. 184.

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term of the contract of employment, but creates a benefit for the employees and their dependents and, in order to provide for that benefit, imposes a tax upon the employers. The *Mechanics' Lien Act* in question is quite different. It merely provides for a lien which the workmen and material men may enforce against the property, but which right ceases to exist unless the lien is registered within the time required by the statute. It is a right created by the statute and, while it arises out of the fact of employment or the furnishing of material, it is not made a provision of the contract of employment or of that under which the material is purchased.

The appellant submits that the cleaning, grubbing and grading of the construction right-of-way is but incidental to the work and undertaking of Trans Mountain and comparable to the preparation of land for the construction of dwelling houses, reservoirs and warehouses. The essential difference, however, is that the lien, if effective, here attaches to the pipe line and its enforcement would, as already stated, substantially destroy the purpose for which the company was incorporated.

It was further contended that the omission of any provision in the act of incorporation to the effect that a mechanics' lien should not attach indicates that it was contemplated these liens would attach. On the contrary, such an omission would indicate no more than that Parliament intended to leave such a question to be determined under the relevant provisions of the *B.N.A. Act* with respect to the competency of a province to enact legislation in relation to Dominion companies.

The answers as given by the learned trial judge and affirmed in the Court of Appeal should also be affirmed in this Court. The appeal should, therefore, be dismissed with costs, except that there will be no costs to the Attorney General of Canada.

Appeal dismissed with costs. No costs to the Attorney General of Canada.

Solicitor for the appellant: *W. H. Campbell.*

Solicitor for respondent, Comstock Midwestern Ltd.: *L. St. M. DuMoulin.*

Solicitors for respondent Trans Mountain Oil Pipe Co.: *D. G. Marshall.*

PROVINCIAL TRANSPORT COMPANY and GEORGES LAVIGNE (*Defendants*) ..... } APPELLANTS;

AND

PAUL DOZOIS and CLAIRE SANSFAÇON (*Plaintiffs*) ..... } RESPONDENTS.

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*Dec. 15, 16
1954
*Apr. 12

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

Automobile—Collision at intersection between passenger bus and automobile—Fog—Right of way—Speed—Anticipation of other drivers inobservance of the rules—Motor Vehicles Act, R.S.Q. 1941, c. 142, ss. 36, 41.

This was an action by one of the gratuitous passengers in an automobile which collided with a motor passenger bus. The bus, which had been proceeding east on a highway divided with one-way traffic lanes by a cross strip down the center, made a left turn off the highway in order to go north on a side road. It came to a stop before crossing the west lane and while proceeding slowly across was struck on its right rear side by the automobile which was travelling west. It was a very foggy morning and both vehicles had their lights on. The driver of the automobile admitted having reduced his speed for the intersection to 35 or 30 miles per hour. The *Motor Vehicles Act* (R.S.Q. 1941, c. 142, s. 41) forbids a speed in excess of 20 miles per hour at intersections. The trial judge held the bus driver responsible and this judgment was affirmed by a majority in the Court of Appeal.

Held: (Taschereau J. dissenting), that the appeal should be allowed.

Rinfret C.J. agreed with the dissenting judgment of the Court of Appeal that the accident was caused entirely by the fault of the driver of the automobile.

Per Estey, Cartwright and Fauteux JJ.: Applying the principle enunciated in *London Passenger Transport Board* v. *Upson* ([1949] A.C. 155) that a driver is bound to anticipate on the part of the other drivers only those follies which, according to the teachings of experience, commonly occur, the precautions taken by the bus driver were sufficient.

By stopping, looking and listening as he did with the manifest intention of giving the right of way to traffic coming on his right, the bus driver did enough to satisfy his obligations to give the right of way and to refrain, in view of the fog, from any speed or imprudent action which might endanger life or property. Having done enough, he cannot be held responsible because he could have done more.

On the other hand, by adopting a speed at an intersection in excess of the legal limit and also, in view of the fog, susceptible of endangering life and property, the driver of the automobile committed a fault which was the sole cause of the accident. His negligence was not of such a common occurrence that the bus driver was bound to anticipate it.

PRESENT: Rinfret C.J. and Taschereau, Estey, Cartwright and Fauteux JJ.

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Consequently, in view of the sufficiency of the precautions taken by the bus driver and of the gross negligence of the driver of the automobile, the omission to sound his horn, imputed to the bus driver, cannot constitute a fault.

Even assuming that the fault of the driver of the automobile was such that the bus driver should have anticipated it, it is at least questionable as to whether it has been established that there was a relation of cause and effect between the accident and the alleged failure to sound the horn.

Per Taschereau J. (dissenting): Both drivers were equally at fault: the bus driver who had the duty to protect his right, because he attempted in foggy weather to cross the highway without making sure that he could do so without danger; and the driver of the automobile, because in these circumstances he abused his right of way by exceeding the speed limit at an intersection. Both drivers are jointly and severally liable for the full amount of the damages suffered by the gratuitous passenger.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Hyde J.A. dissenting, the judgment of the Superior Court in an action by a gratuitous passenger arising out of an automobile accident.

John L. O'Brien Q.C. and *E. E. Saunders* for the appellants.

J. P. Charbonneau Q.C. for the respondents.

The CHIEF JUSTICE:—Il s'agit d'un accident résultant d'une collision entre un autobus appartenant à la compagnie appelante et une voiture conduite par un monsieur Jacques Sansfaçon.

L'autobus transportait à Saint-Paul-L'Ermite des ouvriers engagés dans des travaux militaires. La voiture était une automobile privée dans laquelle se trouvaient cinq passagers. L'endroit était à l'intersection où le chemin conduisant à Saint-Paul-l'Ermite traverse le boulevard allant de Québec à Montréal.

En tout respect, je partage l'avis exprimé par M. le juge Hyde, dissident en Cour du Banc de la Reine (1), et je concours dans les raisons qu'il donne pour appuyer les conclusions de son jugement. Cela me dispense d'écrire des notes plus élaborées.

Le juge de première instance a fait droit à la demande et a condamné les appelants conjointement et solidairement à payer à la demanderesse par reprise d'instance (intimée) la somme de $5,000.

(1) Q.R. [1952] K.B. 480.

J'ai le regret de dire que je trouve le jugement de première instance nullement satisfaisant. La preuve est surabondante que lors de l'accident, il existait un brouillard très dense et je ne puis comprendre pourquoi le jugement de la Cour Supérieure commence par déclarer: "Il convient peut-être d'éliminer d'abord la question de visibilité." Je crois, au contraire, que cette question était de très grande importance. La raison que le juge donne est "qu'il y a une divergence considérable entre les témoins de la demande et ceux de la défense". Cela ne peut pas être une raison pour ne pas trancher cette question. Mais, à tout événement, je répète que je trouve la preuve surabondante à l'effet que le brouillard était très dense. En fait, la déclaration elle-même (par. 8 (*j*)), allègue que la "visibilité était mauvaise".

Le jugement de première instance me paraît avoir une tendance à reprocher aux seuls appelants une situation qui pouvait vraiment être également reprochée aux demandeurs-intimés.

Du fait que ce brouillard empêchait le chauffeur de l'autobus de voir, le juge de première instance conclut "qu'il aurait dû prendre des précautions supplémentaires". Je cherche pourquoi cette exigence ne pourrait pas également s'appliquer au chauffeur de la voiture privée.

Le jugement fait encore remarquer que le chauffeur de l'autobus "devait pouvoir voir au moins vingt pieds en avant de lui" et que, lorsqu'il a quitté le grand chemin pour prendre le chemin de traverse "il était à cinquante pieds au moins de l'automobile". Et, il en conclut que ce chauffeur "a commis une erreur de jugement en s'aventurant, comme il l'a fait". Là, encore, je ne vois pas comment les distances qu'il mentionne ne jouent pas également à l'encontre des deux chauffeurs.

Il en résulte, qu'en définitive, il ne se trouve pas dans le jugement de première instance de véritable décision sur les faits susceptibles de justifier la conclusion à laquelle il en est arrivé.

Si je passe maintenant aux raisons données par la Cour du Banc de la Reine, l'on s'y demande si le chauffeur de l'autobus aurait klaxonné avant de franchir l'intersection. Lors de l'argumentation devant notre Cour, il a paru au moins douteux que l'absence de klaxon à ce moment-là eût

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pu être l'une des causes de l'accident. On semblait d'accord pour admettre que, dans ce brouillard et à la distance où se trouvait alors Sansfaçon, il n'aurait pas entendu les sons du klaxon. Mais, à tout événement, le témoin Villeneuve a affirmé que le conducteur de l'autobus a klaxonné avant de franchir l'intersection. Le jugement de première instance ne fait aucune allusion à ce témoignage. En Cour du Banc de la Reine, on l'élimine tout simplement sous prétexte que "cette affirmation n'est sûrement pas soutenue par la preuve" et l'on ajoute qu'il est le seul à affirmer la chose.

Je n'ai jamais compris que la déposition d'un seul témoin ne soit pas suffisante pour établir une preuve; la loi, en pareil cas, n'exige aucune corroboration. Et son témoignage n'est pas contredit. En sorte que, je ne vois aucune raison légale pour ne pas en tenir compte.

Je trouve donc plutôt surprenant qu'en l'occurrence et sous prétexte que les autres témoins n'auraient pas entendu le klaxon, on en conclut qu'il "reste donc avéré que dans les circonstances, Lavigne n'a pas utilisé son avertisseur sonore". Si le juge de première instance avait exprimé des doutes sur la crédibilité du témoin Villeneuve, je vois bien qu'on aurait quelque chose à dire sur ce point, mais, en l'absence de pareille décision de la part du premier juge, je ne vois pas sur quoi l'on peut se baser pour mettre de côté ce témoignage, et, surtout, pour déclarer qu'il resterait "avéré" que le chauffeur Lavigne n'a pas klaxonné.

Je ne comprends pas non plus pourquoi l'on a tant insisté en Cour d'appel sur ce que l'on a appelé "le risque considérable" de franchir le boulevard. Doit-on en conclure que, dans les circonstances que l'on mentionne, le chauffeur de l'autobus n'aurait pas dû entreprendre ce que l'on a qualifié de "passage dangereux"? Sûrement l'on n'ira pas jusqu'à prétendre que l'autobus qui amenait des ouvriers à l'usine de Saint-Paul-l'Ermite aurait dû tout simplement renoncer à les y conduire.

Et je comprends encore moins qu'on décrive le passage de l'autobus comme ayant pour effet de "bloquer la route". Cette expression pourrait s'adresser au cas où l'autobus se serait trouvé en panne en traverse de la route, mais elle ne me paraît pas justifiée si on l'applique à un véhicule qui traverse une route. Il ne me paraît pas possible de traverser une route sans être en travers de cette route au cours de l'opération de la traversée.

L'on a fait remarquer que tous les témoins de la demande ont intenté aux appelants un "procès similaire à celui sous débat". C'est là une remarque parfaitement justifiable, car il est généralement admis que l'on ne doit pas accorder le même crédit à un témoin qui a intérêt dans l'affaire. Si chacun d'eux avait un procès semblable, il est évident qu'il possédait cet intérêt et cela n'a jamais voulu dire "qu'un témoin ayant un intérêt direct ou indirect dans un procès doit être soupçonné de parjure".

L'honorable juge Edge, qui a rendu le jugement principal en Cour d'appel, dit que "la preuve rapportée par les passagers de l'autobus, témoins de la défense, est prépondérante quant à l'arrêt que fit le conducteur de l'autobus à l'intersection". On doit donc en conclure, comme il est d'ailleurs établi, que l'autobus venait simplement de repartir et qu'il allait très lentement.

Bref, je ne puis me défendre de l'impression que les jugements dont est appel ont interprété dans un sens défavorable aux appelants des circonstances qui devaient tout autant être interprétées dans le même sens contre le chauffeur Sansfaçon. Et, si les choses devaient en rester là, il s'ensuivrait que l'action devrait être déboutée parce que les intimés n'auraient pas réussi à prouver leur cause. Mais, il y a pour moi un fait décisif: c'est qu'en vertu de l'article 41, paragraphe 2(*d*) de la *Loi des véhicules-moteurs,* il est spécialement défendu de conduire une automobile à une vitesse excédant vingt milles à l'heure aux intersections. Cette règle s'appliquait au chauffeur Sansfaçon et il admet lui-même, dans son témoignage, qu'au moment où il allait franchir l'intersection il conduisait à trente ou trente-cinq milles à l'heure. Il déclare que, à cause de cette vitesse, lorsqu'il a aperçu l'autobus à quarante ou quarante-cinq pieds de lui, il n'a pas été capable d'arrêter la voiture qu'il conduisait. Comme l'honorable juge Hyde, je suis d'avis que cette vitesse illégale a été la cause déterminente de l'accident. En fait, même malgré cette vitesse, le chauffeur Sansfaçon a presque évité de frapper l'autobus et le choc ne s'est produit que tout à fait à l'arrière de ce véhicule. Il ne s'en est donc fallu que de quelques pieds pour que la voiture de Sansfaçon évite complètement la collision.

Je suis d'avis de maintenir l'appel et de rejeter l'action, avec dépens dans toutes les Cours.

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TASCHEREAU J. (dissenting):—Le 13 octobre 1942, l'intimée était une passagère gratuite dans une voiture automobile appartenant à un nommé Henri Sansfaçon et conduite par Jacques Sansfaçon. Alors que ce véhicule se dirigeait vers Montréal, sur la Route Nationale Québec-Montréal, près de Repentigny, il est venu en collision avec un autobus de la compagnie appelante.

A cet endroit, la Route Nationale se divise en deux allées distinctes de quarante-quatre pieds de largeur chacune, et séparées l'une de l'autre par deux plates-bandes de trois cents pieds de longueur. Le conducteur de l'autobus qui venait de Montréal, et qui voulait conduire ses passagers à Saint-Paul l'Ermite sur la route de Charlemagne, tourna à gauche pour se diriger vers le Nord, et c'est au moment où il traversait l'allée réservée à la circulation des voitures se dirigeant vers Montréal, que le véhicule de Sansfaçon est venu frapper la partie arrière de l'autobus.

L'intimée subit d'assez sérieuses blessures et réclama de l'appelante et de son préposé Georges Lavigne, la somme de $21,569.75. L'honorable Juge Surveyer a maintenu l'action jusqu'à concurrence de $5,000, et ce jugement a été confirmé par la Cour d'Appel, avec la dissidence de l'honorable Juge Hyde (1).

La circonstance la plus importante de la présente cause, est la condition de la visibilité. Sur ce point, la preuve est contradictoire, et le juge au procès a préféré éliminer cette question et ne pas la déterminer. Les témoins de la compagnie appelante furent tous unanimes à dire qu'il y avait un brouillard épais qui nuisait considérablement à la vision, tandis que ceux de l'intimée ont affirmé que la visibilité était bonne. Le conducteur Sansfaçon va jusqu'à dire qu'il pouvait voir à au delà de mille pieds, et que le brouillard ne l'ennuyait aucunement. Sur ce point, M. le Juge Hyde a analysé toute la preuve. Il a tenu compte de l'intérêt personnel des témoins, et du fait très important que le conducteur de l'autobus et un témoin Cook ont cru prudent, pour éviter un autre accident, de faire brûler, après la collision, des torches qu'ils ont déposées sur la route afin de guider les autres automobiles. Il note également que les phares des automobiles étaient allumés à 8:30 heures le matin pour signaler leur approche dans le brouillard. Je

(1) Q.R. [1952] K.B. 480.

suis entièrement d'accord avec les raisons qu'il donne, et la conclusion à laquelle il est arrivé, que la visibilité était très mauvaise.

Après avoir tourné à gauche, pour s'engager sur la route de Charlemagne, le chauffeur de l'autobus a arrêté sa voiture durant quelques secondes, a regardé vers la droite, mais évidemment à cause du brouillard, n'a rien vu venir de ce côté. Il a malgré tout, continué à une vitesse d'environ sept ou huit milles à l'heure, et alors qu'il était à traverser, obstruant ainsi la route à la circulation se dirigeant vers Montréal, la voiture de Sansfaçon a frappé l'autobus.

Je ne puis arriver à une autre conclusion que le chauffeur de l'autobus a commis une imprudence. Je ne crois pas, alors qu'il devait protéger sa droite, qu'il puisse s'exonérer en disant qu'au milieu de ce brouillard, il n'a rien vu. La mauvaise visibilité était une raison additionnelle pour qu'il prît de plus grandes précautions, et qu'il ne s'engageât pas ainsi en travers du boulevard, sans s'assurer au préalable qu'il pouvait le faire sans danger. C'est une imprudence que de conduire sans savoir où l'on va. Le conducteur de l'autobus ne peut être absout de sa part de responsabilité.

Quant au conducteur de l'autre véhicule, il ne devait pas comme il l'a fait, abuser de son droit de passage. De son propre aveu, il a vu le signal indiquant l'intersection, mais il a quand même continué sa route à une vitesse d'environ trente-cinq milles à l'heure, quand la loi lui défend à une intersection, de dépasser vingt milles à l'heure. La preuve révèle que s'il avait obéi aux prescriptions de la loi, et était allé à la vitesse réglementaire, il aurait pu éviter l'accident, en arrêtant sa voiture. Sa négligence a contribué à la collision.

Je suis d'opinion que les deux conducteurs sont en faute dans une égale proportion. Vis-à-vis l'intimée qui était passagère gratuite, les deux sont conjointement et solidairement responsables, et comme elle n'est pas partie au quasi-délit, elle ne peut être appelée à aucune contribution. Elle peut s'adresser pour obtenir le paiement de ses dommages à l'un ou l'autre de ses débiteurs. (C.C. 1107).

L'appel doit être rejeté avec dépens.

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The judgment of Estey, Cartwright and Fauteux JJ. was delivered by:—

FAUTEUX J.:—Le matin du 13 octobre 1942, l'intimée en reprise d'instance, ses parents, dont ses deux frères Bernard et Jacques, voyageaient dans une automobile conduite par ce dernier sur la route Québec-Montréal, en direction de Montréal. Le pavé était sec; le temps était beau et froid; mais, nonobstant la clarté du jour et à raison de multiples "bancs de brume" qu'on admet avoir eu à traverser, au cours de ce voyage,—le dernier de ces "banc de brume" se trouvant, suivant Bernard Sansfaçon, à quelques mille pieds de l'endroit où, à la droite de la route de Québec-Montréal, aboute celle de St-Paul-l'Ermite,—on avait dû, jusqu'au moment même des faits ci-après relatés, voyager avec les phares de la voiture allumés. Jacques Sansfaçon témoigne qu'en arrivant à cette intersection, à lui très familière, et bien annoncée d'ailleurs par la présence, à quelque 300 pieds la précédant, d'une plate-bande divisant le chemin, sur lequel il voyageait, en deux lisières, chacune à sens unique et inverse, et, en plus, par un signal placé sous la direction de l'autorité provinciale, il réduisit la vitesse de son véhicule, alors procédant de 45 ou 35 milles à l'heure, à une vitesse de 35 ou 30 milles à l'heure; pour une fraction de seconde il regarda à sa droite, i.e. du côté du chemin de St-Paul-l'Ermite; lorsque soudainement il aperçut à une distance de 50 ou 40 pieds à l'avant même de son véhicule un autobus traversant la lisière du chemin, dans laquelle lui-même se trouvait, à une vitesse de dix milles à l'heure en direction du chemin conduisant à St-Paul-l'Ermite. En raison de la vitesse de sa voiture, de la faible distance la séparant de cet obstacle, il lui fut impossible, suivant sa propre admission, de mettre son véhicule à l'arrêt en temps opportun; la collison s'averant imminente, il obvia vers la gauche puis, étant encore plus rapproché de l'obstacle, mit ses freins; mais il était trop tard, son véhicule alla, avec une vitesse admise de 15 milles à l'heure, se heurter sur l'arrière de l'autobus.

Cet autobus était l'une de ces quelques trente voitures de l'appelante, affectées au transport, entre Montréal et St-Paul-l'Ermite, des employés des usines de munitions de guerre sises en ce dernier endroit, et qui, depuis janvier 1941, suivant une cédule dont l'observation demeurait

assujettie aux conditions climatériques, se succédaient tous les jours à cette intersection, entre sept heures et huit et demie du matin. En l'occurrence, Georges Lavigne était en charge. Et voici son récit de la collision et des faits concomittants:—

En laissant le pont dans la brume, j'ai descendu le pont tranquillement, parce que la visibilité n'était pas très bonne. Rendu au point d'intersection, vu que c'était dangereux de traverser le boulevard, par mesure de prudence, j'ai arrêté, j'ai ouvert ma porte, j'ai écouté, je n'ai rien entendu, je ne voyais rien venir, alors j'ai fermé ma porte, je me suis mis en vitesse, j'ai traversé l'intersection. Rendu au milieu, j'ai entendu un cri d'une de mes passagères dans mon 'bus': "Une machine" et en disant cela, je pèse sur l'accélérateur pour essayer d'éviter l'accident et tout en entendant le cri de la jeune fille, j'ai entendu le bruit de la machine frappant le 'bus'.

Q.—Où était le devant de votre autobus quand la collision a eu lieu? R. —Le devant de l'autobus était rendu au milieu du boulevard, au moment de la collision.

Plus loin, dans ce témoignage, il continue:—

. . . après l'accident, la première intention que j'ai eue, après l'accident, c'est la première intention que j'ai eue de prendre, vu que la machine était venue me frapper dans la brume, il ne m'avait pas vu, la première intention qui m'est venue, j'ai dit à mes passagers : "S'il y a des blessés, occupez-vous-en" . . . Après cela, je suis parti en courant sur le boulevard allant vers Québec, pour voir s'il n'y avait pas d'autre trafic, parce que la brume était trop dense. J'ai dit: "S'il vient d'autre trafic, ils vont nous frapper, il va y avoir des morts". J'ai couru sur le boulevard, j'ai fait signe à une machine de ralentir. Après cela, un gros camion s'en venait, je lui ai fait signe dans le milieu du chemin, il a arrêté à peu près à 20 pieds de l'endroit de l'accident. Après cela, j'ai été posé mes torches qu'on a pour la nuit, pour quand un autobus casse ou quelque chose, j'ai été poser mes 'flares' dans la brume, ils n'étaient pas visibles, ils ont été écrasés. C'a été ma première intention.

La crédibilité de ce témoin n'est pas attaquée. La substance du témoignage est, par ailleurs, confirmée par plusieurs passagers de l'autobus, en particulier par John Cook, contremaître de "United Kingdom Inspection Board", dont il convient également de reproduire le récit circonstancié de l'accident:—

The bus was proceeding at 20 to 25 miles an hour to the intersection, and then the driver stopped and a minute or so was passed before he proceeded to cross the intersection. The front part of the bus had passed completely over the road before the other car came along.

I was sitting in the aisle of the bus, and on my right hand side I was looking up the road, and I saw lights coming towards me at an angle. I was seated in the rear of the bus, and the car came from the right hand side of the north side of the highway.

The bus driver, I think he attempted to accelerate the bus and then he put his brakes on. Then the car struck the bus and he stopped and everybody rushed out to see if they could help the people injured.

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The driver took out some flares and went up the road, and I went up afterwards to see if I could help stop the traffic which was coming along. A car came along and passed right over one of the flares.

Et un peu plus loin:—

I was in the aisle of the bus and that drew my attention. Normally they didn't stop but he did stop and naturally I looked out the window to see why he stopped. I looked out the window and couldn't see anything, and then he started to cross the road, and then that is when I saw the car coming, and after the girl screamed—it must have been simultaneous with the impact. It was almost at the same time. She sat about two seats up from me, on the right. I was sitting in the rear.

L'arrêt de l'autobus avant son entrée dans cette lisière du boulevard où voyageait Jacques Sansfaçon, aussi bien que la présence, au moment et au lieu de l'accident, d'un brouillard intense, sont des faits qui, nonobstant certains témoignages des occupants de la voiture conduite par Sansfaçon, sont péremptoirement établis au dossier. Particulièrement, et quant au brouillard, le dossier révèle ce qui suit. L'intimée elle-même, dans sa déclaration,—ainsi que le signale le Très Honorable Juge en chef dans ses raisons—, invoque l'absence de visibilité du conducteur de l'autobus pour lui reprocher d'avoir assumé de traverser dans des circonstances dangereuses; ce reproche ne peut évidemment être qu'en relation de ce brouillard intense car, à l'endroit de l'accident, le chemin est droit, large, de niveau; et rien n'empêche de voir les voitures circulant sur les deux lisières du boulevard, ou—comme ce fut le cas de l'autobus, en l'espèce—passant de l'une à l'autre à l'intersection ci-dessus. De plus, et sans l'existence de ce brouillard affectant considérablement la visibilité, comment Jacques Sansfaçon peut-il se justifier de n'avoir pas noté—comme il l'admet—la présence de cet autobus, ayant une longueur de 28 pieds, d'abord au point de l'arrêt, et, ensuite, de ne l'avoir aperçu en travers du chemin, qu'à une distance de 50 ou 40 pieds d'icelui. On ne pourrait davantage expliquer pourquoi, à cette heure du jour,—huit heures et demie a.m.—les deux voitures voyageaient encore phares allumés. Et il serait enfin inoui qu'immédiatement après l'accident, les passagers, aussi bien que le conducteur de l'autobus, ainsi qu'une preuve non contredite l'établit, se soient, si spontanément et hâtivement, appliqués à placer des torches sur le chemin et à prévenir par d'autres méthodes les autres voyageurs de la route, du danger résultant de l'obstruction y causée par la présence de l'autobus et de la voiture de

Sansfaçon. Ces circonstances confirment les témoins qui, n'ayant aucun intérêt en l'affaire, établissent qu'au plus, la visibilité était de 40 pieds. Et il n'est pas sans signification que Sansfaçon ait admis avoir vu l'autobus à peu près à cette distance.

Tous ces faits: vitesse de l'automobile de Sansfaçon, distance la séparant de l'obstacle au moment où il l'aperçut, impossibilité d'arrêter sa voiture dans cette distance, arrêt de l'autobus et autres précautions prises par son conducteur et, surtout, présence de brouillard limitant considérablement la visibilité aux temps et lieu de la collision, étaient tous autant de circonstances matérielles dont il devait nécessairement être tenu compte dans la considération judiciaire du mérite de cette cause.

Sur ces faits, cependant, pas plus d'ailleurs que sur la crédibilité des témoins, là où l'utilité de ce faire pouvait s'avérer, le Juge de première instance, soit dit en toute déférence, n'a-t-il prononcé. Dans la considération de l'affaire, il a cru devoir "éliminer d'abord la question de visibilité" et invoquant les dispositions de la loi accordant une priorité de passage au véhicule venant de la droite, a conclu que Lavigne "a commis une erreur de *jugement en s'aventurant comme il l'a fait dans le chemin de St-Paul-l'Ermite*". La généralité de cette conclusion ne révèle pas, cependant, de repoche la supportant.

La majorité des Juges de la Cour du Banc de la Reine (1)—M. le Juge Hyde étant dissident—"sans admettre tous les motifs du Juge de première instance", mais sans mettre en doute la substance des faits matériels précités, ont confirmé cette décision pour les raisons suivantes:— (i) Le conducteur de l'autobus aurait dû céder le droit de passage à Sansfaçon et (ii) il n'aurait pas fait résonner son avertisseur. D'où l'appel de ce dernier jugement devant cette Cour.

Pour établir la responsabilité de l'appelante, il suffit à l'intimée,—mais cette suffisance n'atténue en rien l'intégralité de son obligation à ce faire—de prouver que Lavigne, le préposé de l'appelante, a commis une faute, et que cette faute a contribué à la cause du dommage. Et c'est évidemment en regard, non seulement de toutes les circon-

(1) Q.R. [1952] K.B. 480.

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stances de la cause, mais également de toutes les dispositions de la loi dont ces circonstances requéraient l'application qu'il faut, pour en juger, apprécier les deux reproches faits à Lavigne par la majorité des Juges de la Cour d'Appel.

Aussi convient-il d'abord de citer les dispositions suivantes de la Loi des véhicules automobiles (S.R.Q. 1941 ch. 142) article 36, paragraphe 7:—

> Art. 36. Aux bifurcations et au croisement des chemins publics, la personne qui conduit un véhicule sur un des chemins est tenue de céder le droit de passage à la personne qui conduit un véhicule qui vient à sa droite sur l'autre chemin .....
>
> Art. 41. I. Toute vitesse et toute action imprudente susceptible de mettre en péril la vie ou la propriété, sont prohibées sur tous les chemins de la province:
>
> 2. Est spécialement interdit:
>
> *a*) .....
>
> *b*) .....
>
> *c*) .....
>
> *d*) Une vitesse excédant 20 milles à l'heure ..... aux intersections .....

De plus, et puisqu'il est reconnu que chacun des conducteurs est en droit de faire entrer dans ses prévisions une relative prudence de l'autre et une relative observation par lui du code de la route, il est aussi à-propos de préciser la véritable mesure du droit qu'un conducteur a de s'attendre à ce que la loi soit respectée par un autre conducteur.

Dans *Toronto Railway Company* v. *King* (1), Lord Atkinson disait:—

> . . . traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets.

Subséquemment, et dans *London Passenger Transport Board* v. *Upson* (2), plusieurs membres de la Chambre des Lords ont apporté des précisions à cette proposition de Lord Atkinson, précisions dont la substance apparaît à cet extrait des raisons de jugement de Lord Uthwatt, qu'on retrouve à la page 173:—

> A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

(1) [1908] A.C. 260 at 269. (2) [1949] A.C. 155.

Dans son "Traité de la responsabilité civile en droit français, (1939) tome 1, page 236, Savatier traite ainsi du point:—

> Mais une difficulté procède du point de savoir dans quelle mesure on avait le droit de se fier à la prudence d'autrui. L'appréciation de la prévisibilité et l'évitabilité du mal causé en dépendent, car on considérera comme imprévisible et inévitable, pour un agent déterminé, le mal qu'il n'a contribué à causer que parce qu'un tiers a lui-même manqué à une règle que cet agent était en droit de croire observée.
>
> .....
>
> .....
>
> Cette difficulté est particulièrement pratique dans l'hypothèse où une automobile renverse, blesse ou tue un piéton venu se jeter devant elle. Il apparaît nettement, à la lecture des arrêts, que les tribunaux ont tendance à faire une première distinction entre le piéton adulte et maître de ses facultés, et l'enfant ou l'infirme. Alors que l'automobiliste est fondé à se fier, dans une assez large mesure, au discernement du premier, dont l'inattention grossière constituera facilement un cas fortuit, au contraire, tout automobiliste prudent doit faire entrer dans ses prévisions l'imprudence possible d'un enfant ou la maladresse d'un infirme. Il n'en est pas moins vrai que cette imprudence peut être telle qu'elle dépasse les bornes de ce que pouvait et devait normalement prévoir l'automobiliste; elle constituera alors le cas fortuit. C'est, comme nous l'avons dit, une question de fait et d'appréciation.
>
> .....
>
> Il faut apprécier de même les collisions de véhicules. Chacun des conducteurs est en droit de faire entrer dans ses prévisions une relative prudence de l'autre, et une relative observation par lui du code de la route. Dès lors, la faute grave de l'un, lorsqu'elle dépasse vraiment ce que l'autre pouvait prévoir, doit être considérée comme entraînant des conséquences pour lui inévitables, et comme excluant sa faute.

Ces dispositions légales et ces commentaires sont pertinents dans la considération de la conduite de Lavigne et de Sansfaçon, dont il convient de préciser, d'abord, les droits et devoirs respectifs avant l'accident.

Deux obligations s'imposaient à Lavigne au moment où, pour atteindre la route de St-Paul-l'Ermite, il allait quitter cette lisière de la route Québec-Montréal sur laquelle il voyageait, pour traverser celle dans laquelle Sansfaçon, à son insu, s'en venait. Il devait, d'abord, être prêt à respecter la priorité de passage de tout conducteur venant à sa droite et devait, en plus,—comme ce dernier, d'ailleurs—s'abstenir, à cause du brouillard, de toute vitesse ou action imprudente susceptibles de mettre en péril la vie ou la propriété. Mais de la somme de ces obligations, il ne résulte pas que Lavigne avait le devoir d'anticiper de la part d'un conducteur venant à sa droite, des imprudences dépassant

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les bornes de ce qui pouvait et devait *normalement* être alors prévu; si tel était le cas, il faudrait écarter le principe voulant qu'on n'est tenu d'anticiper que celles qui, d'après les données de l'expérience, se produisent communément. Et s'il n'avait pas le devoir d'anticiper des imprudences non communes, comment, jusqu'au moment où en constatant ou pouvant en constater par l'exercice d'un soin raisonnable la commission actuelle, pouvait-il avoir le devoir d'adopter des précautions aptes à la prévention d'accidents susceptibles d'en résulter? Si on adoptait des vues différentes, aucune limite ne pourrait être placée à la série des précautions à prendre et dont la seule efficace, en l'instance, aurait été l'abandon de la traversée de la lisière jusqu'à la levée du brouillard. La reconnaissance de pareilles obligations, on le voit, conduirait fatalement à la négation du droit de Lavigne à la route—si subsidaire qu'en soit potentiellement l'exercice—droit que la disposition légale, décrétant l'ordre suivant lequel deux voitures conduites vers une intersection doivent y procéder, implique nécessairement. En somme, Lavigne avait donc un droit à la route, sujet à la priorité d'un conducteur venant à sa droite et il était, en plus, en droit de s'attendre à ce que les imprudences susceptibles d'être commises par ce dernier ne dépasseraient pas les bornes de ce qui pouvait et devait *normalement* être prévu dans les circonstances. C'est donc en fonction d'imprudences normalement communes que la suffisance des précautions qu'il devait prendre devait se mesurer. Et, paraphrasant, pour les fins de cette cause, le raisonnement de Lord Blackburn dans *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1), on doit dire que, si en regard de son obligation ainsi précisée et des précautions par icelle exigées, Lavigne a fait assez, il ne peut devenir responsable parce qu'il pouvait faire plus.

D'autre part, et alors qu'il s'en venait lui-même à cette intersection, Sansfaçon avait aussi deux obligations dont l'une, prévalant en toutes circonstances, lui interdisait spécialement d'en entreprendre la traversée à une vitesse excédant vingt milles à l'heure et l'autre, résultant du brouillard, lui défendait toute vitesse ou action imprudente susceptibles de mettre en péril la vie ou la propriété. Il avait, par ailleurs, sur les conducteurs venant à sa gauche,

(1) (1878) 3 A.C. 1155 at 1212.

une priorité de passage à l'intersection. Mais il ne pouvait méconnaître le droit à la route de ces conducteurs, si subsidiaire que pouvait devenir l'exercice du droit de ces derniers. La confiance qu'en des circonstances normales il était justifié d'avoir que l'exercice de sa priorité pouvait se faire sans danger devenait, dans une large mesure, sans fondement et, ce, à cause de cet épais brouillard empêchant, à sa connaissance, tout autre conducteur vigilant venant à sa gauche, de constater ou appréhender la venue de son véhicule. Ainsi donc, et assujetti qu'il était aux dispositions du paragraphe I de l'article 41, il n'était plus justifié, en droit ou en fait, de tenter l'exercice de cette priorité de la manière dont il aurait pu le faire en des circonstances normales. Il avait cependant le droit de s'attendre à ce qu'un conducteur venant à sa gauche et conscient de la possibilité de sa propre venue, procéderait à l'intersection avec la prudence imposée par les circonstances, mais il devait aussi tenir compte qu'il y procéderait avec la légitime confiance que lui-même ne se rendrait pas coupable d'imprudences dépassant les bornes de ce qui pouvait et devait alors être normalement prévu.

Les obligations et expectatives légitimes de chacun de ces conducteurs ont-elles été respectées en fait?

D'une part Lavigne, précisément pour intégralement satisfaire à ses obligations, a, au lieu de procéder sans s'y être préalablement arrêté à traverser l'intersection à vingt milles à l'heure comme—sujet à la priorité d'un conducteur venant à sa droite—il en aurait eu le droit dans des circonstances normales, pris, vu ce brouillard, des précautions extraordinaires en mettant son véhicule à l'arrêt, en en ouvrant la porte, en regardant, en écoutant, le tout avec manifestement l'intention et la volonté de céder le passage à tout véhicule dont il aurait pu constater ou appréhender la venue; et, en fait, son véhicule, dans l'intersection, n'avait atteint qu'une vitesse de sept ou huit milles à l'heure quand celui de Sansfaçon apparut dans le brouillard.

D'autre part, Sansfaçon, de son propre aveu, s'est contenté pour entreprendre la traversée de l'intersection, de réduire, a-t-il dit, sa vitesse, alors de 40 ou 35 milles à l'heure, à une vitesse de 35 ou 30 milles à l'heure, vitesse en tout temps interdite par la loi. De plus, et procédant ainsi à traverser une intersection dans un brouillard limitant la

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visibilité à 40 pieds,—sans même, par ailleurs, signaler sa venue—il adoptait clairement une vitesse susceptible de mettre la vie ou la propriété en danger. Dans *H.M.S. "Glorious"* (1), Lord Scrutton déclara:—

> There is an excellent rule that we sometimes come across in motor collision cases and which we act on—that if there is a difficulty in seeing you ought to be ready to stop within the limits of visibility;.....

Subséquemment, et dans *Morris* v. *Luton Corporation* (2), la Cour d'Appel d'Angleterre se refusait d'adopter la proposition de Lord Scrutton sur le pied d'une règle de droit et disait que la question était une question de fait dépendant des circonstances de chaque cause. Pour les fins de cette cause, il est bien suffisant de référer aux deux dispositions précitées de l'article 41 de la *Loi des véhicules moteurs* pour conclure qu'elles ont été violées par Sansfaçon.

Les expectatives légitimes de Sansfaçon, Lavigne les a respectées. La suffisance des précautions prises par ce dernier s'avère amplement du fait que, si de son côté, Sansfaçon n'avait pas agi en mépris de ses obligations, aucun accident ne se serait produit; à une vitesse de vingt milles à l'heure il pouvait, suivant la preuve, mettre son véhicule complètement à l'arrêt, précisement dans cette distance le séparant de l'autobus au moment où il dit avoir aperçu ce dernier en travers de sa route dans l'intersection.

Mais les expectatives légitimes de Lavigne ont été trompées. Ayant pris les précautions précitées avant d'entreprendre la traversée, comment pouvait-il anticiper comme une imprudence de commune occurrence qu'un conducteur susceptible de venir à sa droite, si peu soucieux que ce conducteur ait pu être, par ailleurs, de la loi et des règles ordinaires de la prudence, aurait eu, au risque de sa propre vie, celle de ses passagers, sinon celle des autres occupants de la route, la grossière témérité de procéder, sans même signaler sa venue, à traverser, dans ce brouillard, une intersection avec une vitesse de 30 à 35 milles à l'heure alors qu'à cette vitesse il parcourait, d'après un simple calcul, en une seule et à chaque seconde, plus que la distance de sa visibilité.

Si donc, comme je le crois, les précautions prises par Lavigne étaient suffisantes pour satisfaire au devoir qu'il

(1) (1933) 44 Ll. L.R. 321 at 323. (2) [1946] 1 K.B. 114.

avait d'anticiper ces imprudences que les dictées de l'expérience enseignent comme étant communes et que la faute grossière de Sansfaçon dépasse les bornes de telles imprudences, l'omission de corner—qu'on impute à Lavigne nonobstant une certaine preuve au contraire—ne peut constituer une faute. Encore une fois, s'il a fait assez, il ne peut devenir responsable parce qu'il pouvait faire plus. Et, dès lors, le devoir de faire résonner son avertisseur ne pouvait naître et l'omission d'y satisfaire ne pouvait devenir une faute qu'au moment où constatant ou pouvant constater, en exerçant un soin raisonnable, cette faute grossière de Sansfaçon, il ait eu, en faisant résonner son avertisseur, une opportunité suffisante pour empêcher l'accident. Il est bien clair qu'en aucun temps Lavigne n'a eu ou pu avoir cette opportunité.

Assumant, par ailleurs, que cette faute de Sansfaçon ne dépassait pas les bornes de ce que Lavigne pouvait anticiper et que, dès lors, ce dernier avait l'obligation de corner et qu'il aurait fait défaut de ce faire, il est pour le moins problématique de savoir si l'intimée, comme elle en avait le fardeau, a établi en preuve un lien de causalité entre cette omission et l'accident. La loi exige que les véhicules soient munis d'appareils sonores susceptibles d'être entendus à deux cents pieds de distance. Au moment où l'autobus était à l'arrêt, il est certain qu'à la vitesse avec laquelle Sansfaçon conduisait, son véhicule se trouvait à plus de deux cents pieds de l'intersection. Et même si Lavigne avait corné pendant la traversée, Sansfaçon aurait-il, dans ce brouillard, situé avec justesse l'endroit d'où serait venu cet avertissement ou en aurait-il erronément attribué la provenance à des véhicules susceptibles de voyager à l'arrière de sa propre voiture ou sur l'autre lisière de la route, ou encore sur le chemin de St-Paul-l'Ermite; et la conduite qu'il aurait alors adoptée aurait-elle alors été celle qui devait l'être en fonction de la traversée actuelle de l'intersection par l'autobus? Le mieux qu'on puisse dire, c'est que ces choses sont possibles. Mais la possibilité ne suffit pas. (*Canadian National Steamship Company* v. *Watson* (1); *Walker* v. *Brownlee and Harmon* (2).

(1) [1939] S.C.R. 11.

(2) [1952] 2 D.L.R. 450.

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Sous toutes les circonstances, et comme M. le Juge Hyde de la Cour d'Appel, je suis d'opinion que Sansfaçon doit porter l'entière responsabilité de cet accident. Et je maintiendrais l'appel avec dépens de toutes les Cours.

Appeal allowed with costs.

Solicitor for the appellants: *O'Brien, Stewart, Hall & Nolan.*

Solicitors for the respondents: *Charbonneau, Charbonneau & Charlebois.*

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*Oct. 29, 30 Nov. 2, 3, 4, 5, 6

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*Apr. 1

TRANS-CANADA FOREST PRODUCTS LIMITED (*Plaintiff*) ..... APPELLANT.

AND

HEAPS, WATEROUS LIMITED and LIPSETT ENGINE AND MANUFACTURING COMPANY LIMITED (*Defendants*) ..... RESPONDENTS.

AND

ADA FLORA HOFF, EXECUTRIX OF CHRIS BERGVIN HOFF, DECEASED (*Plaintiff*) ..... APPELLANT;

AND

HEAPS, WATEROUS LIMITED and LIPSETT ENGINE AND MANUFACTURING COMPANY LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Damages—Master and Servant—Fire started while mechanic was testing engine which he had repaired—Fire due to short circuit in cables leading from batteries to engine—Worn out insulation—Failure to make proper inspection of cables—Repair man in general employment of general distributor of engine—Repair contract given to local distributor—Repair man was servant of whom—Actions in contract and in tort—Indemnity right of local distributor from general distributor.

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*PRESENT: Rinfret C.J. and Taschereau, Estey, Locke and Cartwright JJ.

When trouble developed in a diesel engine used to operate a planer mill, the property of the appellant Hoff and occupied by the appellant Trans-Canada Forest Products Ltd. as tenant, the respondent Heaps, Waterous Ltd. as the local agent who had sold the engine was asked by Trans-Canada to have the repairs made. Pursuant to an established practice between this local agent and Lipsett Engine and Manufacturing Co. Ltd. the general agent for the Province, the latter sent Martin, an experienced mechanic, and his helper, both in its general employment, to effect the repairs.

The mechanics found the engine, which was situate in a lean-to adjoining the mill, in a dirty condition, and so were the cables running from its starting mechanism to the two batteries required to start it. The cables and the batteries had not been purchased from either dealer.

After the men had completed the repairs, they replaced the cables and the batteries which they had removed to do their work. They wiped the cables in a casual manner and seeing no defect in them except for being covered with oil and sawdust, replaced and reconnected them. As at their first try to start the engine, it would not turn, they transposed the cables. On the fourth attempt, a fire, which eventually destroyed the mill, was seen to commence on the floor near the cables.

The appellants brought actions for damages against both respondents, and Heaps, Waterous Ltd. took third party proceedings against Lipsett Engine and Manufacturing Co. Ltd. The actions were consolidated and the trial judge, who found that Martin had been negligent, gave judgment to Trans-Canada against both respondents and allowed the third party proceedings. The appellant Hoff was awarded damages against the Lipsett company. The Court of Appeal held that Martin had not been negligent and dismissed the actions.

Held: (Locke J. dissenting), that the appeals should be allowed.

Per: Rinfret C.J., Taschereau, Estey and Cartwright JJ. The trial judges' finding that the fire was caused by a short circuit due to a defective insulation of the cables was fully justified upon the evidence.

2. It would be included in Martin's duty to test his work by starting the engine, and the evidence supported the view that he was negligent in not continuing to exercise reasonable care to see that the cables remained as he had replaced them separate and apart from each other: he permitted them to become crossed and inspected them only casually.

3. Even if the evidence did not affirmatively establish the negligence, this was a proper case for the application of the *res ipsa loquitur rule*. The repair men were given complete charge and control of the engine and room.

4. The contract for repairs having been given to the Heaps Company by Trans-Canada, the negligent performance of the work under this contract constituted a breach thereof.

5. In the circumstances of this case, the repair men were the servants of the Lipsett company.

6. The evidence did not establish contributory negligence on the part of Trans-Canada in supplying the cables in the condition in which they were. Martin was an expert and the evidence showed that he was aware of the dangerous condition created by the defective cables. Moreover, the evidence did not establish that fire extinguishers would have controlled the fire.

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7. Trans-Canada was entitled to recover damages against the Heaps company in contract and against the Lipsett company in tort, and the latter should indemnify the former. The appellant Hoff was entitled to recover from the Lipsett company.

8. Damages varied. A tenant having an option to purchase in the event of a fire can recover in damages only the value of the option.

Per Locke J. (dissenting): As the purpose of the work was to produce a satisfactorily operating engine, it could not be said that to test the effectiveness of the work by starting up the motor was not within the scope of the employment of Martin.

2. That the fire was commenced by a short circuit was the only proper inference to be drawn from the evidence, but it was not possible, on the evidence, to reach a sound conclusion as to how the short circuit was caused.

3. No actionable negligence on the part of Martin was disclosed by the evidence. The fact that the batteries and the cables had been apparently in effective use until a short time before the fire and the further fact that the batteries were connected to the engine when Martin arrived to do the repairs would undoubtedly lead him to believe that they were in a safe condition to be used. It would place the duty of Martin on too high a plane to say that he should have detected that the cables were in such a defective condition and that his failure to do so was actionable negligence.

4. Assuming that the principle *res ipsa loquitur* applied in the circumstances of this case, this would not impose upon the respondents the duty of showing how the fire was caused but simply to show that Martin was not negligent. (*Woods* v. *Duncan* [1946] A.C. 401).

5. The evidence did not disclose that Martin knew that the insulation of the cables was defective or that crossing them had anything to do with the starting of the fire.

6. There was no breach of any duty imposed upon the Heaps company by the contract.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, O'Halloran J.A. dissenting, the judgment at trial in consolidated actions and proceedings for indemnity arising out of a fire.

Alfred Bull Q.C. and *C. C. I. Merritt* for the appellants.

C. W. Tysoe Q.C. for Heaps, Waterous Limited.

J. W. de B. Farris Q.C. and *F. A. Sheppard Q.C.* for Lipsett Engine and Manufacturing Co. Ltd.

The judgment of Rinfret C.J. and Taschereau and Estey JJ. was delivered by:—

ESTEY J.:—The appellant Hoff as owner and appellant Trans-Canada Forest Products Limited as lessee of a planing mill at Prince George, B.C., respectively brought the above-named actions to recover damages suffered when the

(1) [1953] 3 D.L.R. 672.

mill was largely destroyed by fire. The mill was operated by a Murphy diesel engine and, after certain repairs had been completed thereon, in the course of efforts to start and test the engine this fire occurred. The actions were brought against both respondents because Trans-Canada Forest Products Limited had requested Heaps, Waterous Limited to make the repairs which were, in fact, made by two men, Martin and Benson, while in the general employment of the respondent Lipsett Engine & Manufacturing Co. Ltd. In this action both respondents contend that these men were at the material times the servants of the other.

After the actions were commenced respondent Heaps, Waterous Limited initiated proceedings for, in the event of its being found liable, indemnity from respondent Lipsett Engine & Manufacturing Co. Ltd. These actions and the proceedings for indemnity were consolidated prior to trial.

The parties, for convenience, will be referred to hereafter as Hoff, Trans-Canada, Heaps and Lipsett.

The trial judge found the expert Martin negligent and gave judgment in favour of Trans-Canada against Heaps and Lipsett jointly and severally in the sum of $125,653.79. The trial judge dismissed Hoff's action against Heaps, but gave judgment in favour of Hoff against Lipsett in the sum of $23,180.91 and directed that Heaps was entitled to be indemnified by Lipsett in the sum of $125,653.79. In the Court of Appeal (1) the majority held that Martin was not negligent and, therefore, dismissed both actions and the proceedings for indemnity. Mr. Justice O'Halloran, dissenting, would have found both Martin and Trans-Canada negligent and varied the judgment to the extent of holding Trans-Canada 80 per cent responsible and Heaps 20 per cent responsible, with the right of Heaps to be indemnified by Lipsett.

In November, 1948, when trouble developed in the Murphy diesel engine, Trans-Canada consulted Heaps. As a consequence, new piston rings were ordered from Heaps. These Heaps obtained from Lipsett and, pursuant to the agreement between Heaps and Lipsett, the latter sent its expert Martin and his helper Benson to install same. In the course of taking the engine apart to install the piston rings Martin found a cylinder lining cracked which he

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reported to Heaps. Then, after a further consultation between Heaps and Trans-Canada, the latter ordered from Heaps a complete new set of cylinder linings. While an order had been given on December 8 for the piston rings and the installation thereof, both the piston rings and the cylinder linings were included in a new order which was dated back to December 8, the material portion of which reads:

> Supplying and installing set of piston rings and cyl. liners (6).

Martin and Benson had completed the installation of both the piston rings and the cylinder linings and, in order to test their work, were endeavouring to start the engine when the fire occurred.

The engine room, about ten feet in width and fifteen feet in length, was a lean-to adjoining the mill. Martin and Benson found the temperature very low and along two of the outer walls they placed tar paper in order to stop the wind from blowing through. They also installed a stove. This room had a dirt floor with two ten-inch planks, approximately two inches apart, placed parallel in front of the engine upon the operator's side and approximately two inches from the skids upon which the engine rested (these skids were embedded in and the tops thereof were even with the earth). There was nothing in the room except the stove, the engine and its accessories. Martin found the room and the engine in a rather dirty condition. The latter he brushed off before taking it apart, in order that dirt might not fall into the engine. The planks had a good deal of oil and grease on them. He complained of the dirt but nothing was done. He did not press his complaint as he says it was no different from other engine rooms in the area and that he concluded it was a safe place to work.

This engine started from two twelve-volt batteries, which would normally be placed in a case provided therefor in the lower part of the engine frame. However, these cables, three and one-half to four feet in length, were too short to permit of the batteries being kept in the case and they were placed, as Martin found them, on the planks with the cables running from the batteries over the planks to the starter and switch of the engine. The cables he estimated to be three quarters of an inch in diameter and he believed the copper strands to be "wrapped with rubber and some kind

of asbestos coat on the outside." Martin, in order that these cables should not be tramped on, removed them before starting to work and placed them on a shelf in the room about four feet high and the batteries he placed outside of the engine room.

In order to clean parts of the engine they used diesel oil and gasoline. While much of the work of cleaning was done in another and warmer room, Martin admits that some oil and gasoline might have been splashed upon the walls or floor.

The learned trial judge found "that the fire was caused by a short circuit due to defective insulation of the cables leading from the batteries to the starting motor." Then, specifically referring to Martin, he stated:

> I have come to the conclusion that Martin, who impressed me as being a competent workman and an honest witness, was, unfortunately, negligent:
>
> (*a*) in endeavouring to start the engine when he knew the insulation of the battery cables was defective;
>
> (*b*) in permitting the battery cables to become crossed;
>
> (*c*) in making only a casual inspection of the battery cables;
>
> (*d*) in failing to advise the plaintiff Trans-Canada that the batteries should be placed in their proper container and that new and longer cables should be procured;
>
> (*e*) in failing to warn the plaintiff Trans-Canada of the danger of continuing to use cables, the insulation of which had deteriorated.

These actions raise a number of issues: (1) Was Martin negligent? (2) If he was negligent, was he, when working upon this engine, the servant of Heaps or Lipsett? (3) If Martin was negligent, was Trans-Canada negligent? (4) Against whom can Hoff as owner of the building claim damages? and finally, if Heaps is liable, can that company recover by contribution or indemnity from Lipsett?

The learned trial judge's finding that the fire was caused by a short circuit due to defective insulation of the cables is fully justified upon the evidence and, as I followed the argument, not contested by any of the parties. Martin had been a diesel engine mechanic for thirteen years and with Lipsett since 1946. Though not an electrician, he had started many of these engines with this equipment and his evidence indicates that he had some knowledge as to composition of the cables, the effect of oil and sawdust upon the insulation and the possibility of the copper strands penetrating the weakened insulation and causing a short circuit.

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On the morning of Tuesday, December 14, when the engine had been assembled and filled with oil and anti-freeze, Martin and Benson brought in the batteries and cables and replaced them as before—the batteries on the end of the planks and the cables running along the top of them and crossing to the engine. Martin described the planks as "saturated in oil." He described the cables as "very badly soaked in oil and covered in sawdust" which, he said, "would deteriorate the insulation." He deposed:

> When we disconnected them from the engine we put them on the shelf so that they wouldn't be stepped on and when ready to use them I took them down and wiped them over with a clean rag, looking for any breaks in the insulation. I saw none. So I connected them back to the engine and the batteries.

and further:

> Q. Did you get all the sawdust and oil off them, so that you were able to examine all the insulation?—A. No sir, I just wiped, pulled the rag over the cable once.

Then again:

> Q. What examination did you make of the cable—just while you pulled the rag across and looked at them, is that all?—A. Yes.
>
> Q. It wasn't a very minute examination?—A. No.
>
> Q. A very casual one, wasn't it?—A. Yes.
>
> Q. And there might have been defects in the insulation which you didn't notice?—A. It would be a fairly small defect.
>
> Q. But my question is there might have been defects there that you didn't notice on that casual inspection?—A. There could have been.

Notwithstanding that Martin realized these cables had been saturated with oil for a long time and were covered with sawdust, he, upon this casual examination, concluded "it was safe to use them in that condition." Such an examination by one who appreciated the possibility of a short circuit cannot be accepted as that of a reasonable man with Martin's knowledge and experience in order to found such a conclusion. However, his conclusion that it was safe to use the cables, when considered in relation to the other relevant portions of his evidence, means no more than that it was safe so long as he exercised that degree of care which would prevent these cables from coming in contact one with the other or some other metallic substance which might cause a short circuit. In considering the circumstances here present, it is important to remember that not only were the cables weakened, but the presence of oil and grease made it a place where a fire might easily start and spread quickly.

Martin appreciated all this and replaced the cables, using care to see that they were at a distance of one and one-half to two inches from each other as they passed from the terminals to the switch and starter.

When attaching the cables Martin could not find any mark indicating the negative or positive terminals on the battery. He, therefore, after connecting them, tested them by endeavouring to start his generator. When it failed to start he transposed the cables on the battery terminals. This of necessity, as Martin says, would cross the cables. He, having regard to the fact that in the low temperature of twenty to thirty degrees below zero the cables were hard and stiff, concluded that they would cross on the ground beside the battery. He did not say they were, nor would it necessarily follow that they were touching.

After so transposing the cable ends Martin "released the compression of the engine and turned it over with the starter several times" and, finding everything in order, he advised Benson they were ready to start the engine. He then directed Benson to go to the manifold side and "hold the governor control," while he himself, on the operating side, handled "the throttle and starting lever." When they attempted to start the engine it turned over freely, the starter functioned properly and everything seemed to be working as it should be, but the engine would not start. There was no ignition or combustion. They then examined the fuel pump, the valves and the injectors and found them in order. They made a second attempt, but with the same result. Martin then instructed Benson to get a blow torch from the office. In a few minutes Benson returned, saying that they had not found one, but would bring it down. In another five or ten minutes the mill superintendent came in and stated it could not be found. A third attempt and then a fourth was made, but still the engine would not start. After the fourth attempt Benson, seeing smoke arising beside Martin, called to him. Martin then saw fire behind and to his right "on the planks between the battery cables . . ." approximately "eight to ten inches from the side of the engine" and ten to twelve inches from the batteries. He estimated the fire to be four inches in diameter and the flame about ten to twelve inches in height.

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The learned trial judge described Martin as a competent workman and an honest witness. He, therefore, accepted his evidence. However, upon his own evidence, Martin makes it clear that in replacing the cables he was, as already stated, careful to keep these cables one and one-half to two inches apart. Thereafter he makes no mention of the cables except to say that they were not crossed at the point of the fire. What, therefore, may have occurred with respect to these cables between the replacing thereof and the fire is not covered by the evidence. A summary of what happened within that time would include motoring the generator, transposing the cables on the battery terminals, an attempt to start the engine, an examination of the fuel, valves and injectors, a second attempt, Benson's going for a blow torch, a third and a fourth attempt. All this would cover some considerable time. The delay incident to the effort to obtain a blow torch would be, upon the record, approximately twenty to thirty minutes. It may be that, frustrated in his efforts and concentrating upon what might be the reason of his failure, he neglected the cables. In any event, apart from the fact that he says they were not crossed at the point of the fire, he makes no reference to them in all that happened after he had replaced them. Even in transposing the cables it is not that he saw but that he surmised he had crossed them. Then as a short circuit did not develop until after the fourth attempt there was no contact as the cables were originally placed and, therefore, the cables must have been disturbed or moved thereafter in order to cause a short circuit.

It was emphasized on behalf of the respondents that there was no proof that where the cables crossed at or near the base of the batteries they touched and no proof that they were crossed at the point of the fire. It is clear, upon the evidence, that unless there was an actual contact of copper to copper or copper to some other metal a short circuit would not, in the circumstances, have been caused. The possibility is suggested of a short circuit caused by a nail or other piece of metal. There is no suggestion that any such material was present either in or on the planks. Then as to the possibility that the short circuit might have been caused by a contact with the frame of the engine, it would seem rather improbable, having regard to the time that elapsed between the affixing of the cables to the starter and

switch and the time of the fire. The transposition of the cables, while it might well disturb the cables for some distance along the boards, would not be so likely, having regard to their condition, to move those parts beside the engine. Moreover, whatever movement there might have been in the cables beside the engine would more probably be a sliding from one side to the other rather than a turning of the cables and, therefore, not likely to effect any additional contact between the cables and the frame of the engine. Apart from all of these considerations, and possibly even more pertinent, is the fact that the fire occurred on the planks eight or ten inches from the engine and points directly to a short circuit occurring at or very near that point. The evidence does not support a view that the fire spread prior to Martin's seeing it. In so far as it might be suggested that gasoline fumes would be present, that possibility was, for all practical purposes, negatived by the fact that all the gasoline had been removed from the engine room some time before any attempt was made to start the engine.

It is true that neither Martin nor Benson saw a spark or a flash, or heard any sound that would suggest a short circuit, nor, indeed, did Martin observe any interruption in the operation of the starter that would suggest a short had been caused. However, the experts indicate that in this type of equipment a short might be caused without those indices and, as the fire was observed only after the fourth attempt, it is not surprising that an interruption in the operation of the starter was not observed.

Martin was under a duty not only to install the piston rings and cylinder linings but to execute that work in such a manner that the engine would the better perform the work for which it was intended. It would, therefore, be included in his duty that he should test his work by starting the engine. It was in appreciation of this part of his duty that he attempted to start the engine, in the usual and normal manner, by using the batteries and the cables. In doing so he would not be outside the scope of his employment. The fact that Lipsett did not supply the batteries and cables with the engine would not affect Martin's position at this time. He was in the course of performing the work he was employed to do and pursuing the only course that was open to him in the circumstances.

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The evidence, with great respect to the opinion of those learned judges who hold a contrary opinion, supports the view that Martin was negligent in not continuing to exercise reasonable care to see that these cables remained as he had replaced them separate and apart from each other. The learned trial judge when he used the word "crossed" had in mind, I think, contact between the cables, more particularly as he would fully appreciate that mere crossing alone would not, without contact, effect a short circuit. I, with great respect to those who hold a contrary opinion, agree with the learned trial judge's finding under both headings (*b*) and (*c*).

Even if the evidence does not affirmatively establish that Martin was negligent, it would seem that this is a proper case for the application of the res ipsa loquitur rule. The fire started because of a short circuit due to the deteriorated and weakened condition of the insulation of the cables. Exception is taken to the finding of the learned trial judge that "He" (Martin) "and Benson were in sole control not only of the engine but of the building in which it was situated when the fire occurred." The evidence fully supports this finding when construed, not in the sense that Trans-Canada had surrendered possession, but that its employees had withdrawn, and, while Martin and Benson were working upon the engine, they were given complete charge and control of the engine and the room. Martin admitted such to have been the position and, further, that he was not at any time interfered with.

In *United Motors Service, Inc.* v. *Hutson* (1), the lessees of a garage were cleaning a cement floor, using gasoline, scrubbing it with a stiff brush and using a metal scraper when necessary, and finally washing it with a preparation known as oakite. A workman had requested that gasoline be poured on the floor in front of him and immediately the fire followed. Kerwin J., with whom my Lord the Chief Justice (then Rinfret J.) and Crocket J. concurred, stated at p. 303:

> The operations being under the control of the appellant and the accident being such 'as in the ordinary course of things does not happen if those who have the management use proper care,' the doctrine res ipsa loquitur serves to make these circumstances 'reasonable evidence, in the

(1) [1937] S.C.R. 294.

absence of explanation by the defendant, that the accident arose from want of care.' *Scott* v. *London & St. Katherine Docks Co.*, (1865) 3 H. & C. 596.

Duff C.J., with whom Davis J. concurred, stated at p. 296:

> I am satisfied that the circumstances established in evidence afford reasonable evidence of negligence in the sense that, in the absence of explanation, the proper inference is that the damage caused was the result of the negligence of the appellants; and that the explanations advanced are not of sufficient weight either to overturn or to neutralize the force of the inference arising from the facts proved.

Martin, throughout his evidence, does not indicate that he observed the cables with the care that the circumstances required in that interval of time between the placing of them one and one-half to two inches apart and the time of the fire. He admits that a short must have occurred, but he does not know just where or why there was a short circuit. His evidence does not deal with the cables throughout the critical period in a manner that offsets or neutralizes the inference of want of care on his part that the circumstances justify.

The learned trial judge found that Heaps was employed by Trans-Canada to do the work in question. Prior to the negotiations relative to this work it was understood between Trans-Canada and Heaps that orders must be in writing and, as already stated, the order here in question was in writing and covered both the supplying and installation of the piston rings and the cylinder linings. Indeed, apart from some evidence which Wall, the local manager of Heaps at Prince George, gave and which was not accepted by the learned trial judge, all the evidence supports the finding that Trans-Canada contracted with Heaps that this work should be done. As the learned trial judge states: "I accept Lymburner's statement that he did not know of Lipsett's connection with the work until after the fire." In the circumstances here present the negligent performance of the work under this contract constituted a breach thereof for which Heaps is liable in damages to Trans-Canada.

It does not follow that because Heaps contracted with Trans-Canada to do the work that Martin and Benson, in doing same, were, particularly as between Heaps and Lipsett, the servants of the former. This was not an isolated engagement. It was one arising out of the relationship between Lipsett as general and Heaps as local agent for

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these engines and, in particular, the agreement which these parties made with regard to servicing and repairing the engines. The learned trial judge found:

> I find that the arrangement which was made was that if a customer of Heaps required repair work to be done which was beyond the capabilities of Wall, Lipsett would supply the labour and charge Heaps for it.

This finding is supported by the evidence. Under date of September 27 Lipsett, writing to Heaps, included the following: "where the job is too much for you to handle that you call upon us to have the work done." Then under date of January 25, 1949, Lipsett, in writing to Heaps, dealing with the matter of service, recommended that they should keep in stock "a fair amount of fast moving parts" and stated: "In order to do 100 per cent justice to those who have purchased Murphy Diesels from you, adequate service should also be maintained, and, here the services of a qualified mechanic are required." The letter then suggested that it would be desirable that Heaps should employ a qualified mechanic. As that was not a term of the contract it was, in fact, no more than a suggestion which emphasized the necessity of prompt and efficient service which the letter of January 25 further stressed in the statement: "The very important question always is to maintain proper service."

At the trial a portion of the evidence called on behalf of Lipsett rather emphasized that Lipsett was supplying only the men and Van Snellenberg, Manager of Lipsett, stated:

> It was also arranged that the service work, which Mr. Wall couldn't handle, because he didn't have the technical ability to handle them he could call upon us and we would gladly supply him with the men experienced with the engines, to do the work.

Then, in reply to the question "Did you undertake to do anything, besides making these men available?" the answer was "No, we didn't. We just supplied labour." When, however, these statements are read and construed with the other portions of his evidence and the fact that it was in the interests both of Lipsett and Heaps that the servicing and repairing of customers' engines should be both prompt and efficient, it cannot be concluded that Lipsett was to supply only the men. On the contrary, it was to supply men competent to do the servicing of the engines for which purpose Lipsett had selected them or instructed

them and over whom, so far as that work was concerned, Lipsett retained complete control. Heaps directed Martin and Benson to the engines and indicated, as specified by the order of December 8, the nature and extent of the work to be done, but it was not its duty nor was it expected that it would direct or control how the particular work was to be done. In fact it was common knowledge between Lipsett and Heaps that neither Wall nor any other of the employees of Heaps at Prince George was qualified to instruct or direct these men. Martin and Benson were at all times in the general employment of Lipsett from whom they received their pay and by whom such deductions from their wages as required by law or stipulated by the employees were made. Lipsett charged Heaps, as all other local agents, at a rate per hour and Heaps billed the customers. Apart from the guarantee that went with these engines, which had no relevancy in this case, it was the understanding that the customer would pay for servicing and repairing.

Quarman v. *Burnett* (1), decided in 1840, is referred to by Viscount Simon in the *Mersey Docks case* (2), as one that "has always been treated as a guiding authority." In that case the defendants, two elderly ladies, owned a carriage, but hired horses and a coachman from one Mortlock. The ladies directed the coachman where to drive and provided him with a livery. On the day in question, when he had returned to the house of the ladies and they had left the carriage, he, in replacing the hat in the house, left the horses unattended, when they ran away, causing injury to a third party who claimed damages therefor. Baron Parke, delivering the judgment of the Court, stated:

> The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care.

It was held that the ladies were not liable, as the driver remained the servant of Mortlock,

> who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; . . .

(1) (1840) 6 M & W. 499. (2) [1947] A.C. 1.

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In *Century Insurance Co., Ltd.*, v. *Northern Road Transport Board* (1), respondents, owners of petrol tankers, contracted with Holmes & Co. to deliver petrol to garages. Through negligence of the driver of a tanker a loss was suffered and the appellant, who had insured the respondent, refused to make payment under the policy, as in its view the driver was, at the time of the loss, acting as agent of Holmes & Co. and not of the respondent. Under its contract with Holmes & Co. respondent agreed to insure against fire and spillage in transit, dress all employees as Holmes & Co. might direct, carry workmen's compensation insurance and obey orders of Holmes & Co. respecting delivery and the payment of accounts, and that respondent should dismiss employees failing to obey orders of Holmes & Co. The contract also contained a proviso that the drivers were not servants of Holmes & Co. Lord Wright stated at p. 497:

> Davison (the driver) was subject to the control of Holmes Mullin & Dunn, Ltd., only so far as was necessary to enable the respondents to carry out their contract. In doing so he remained the respondent's servant. They paid him and alone could dismiss him. Even in acting on the directions of Holmes Mullin & Dunn, Ltd., he was bound to have regard to paramount directions given by the respondents and was to safeguard their paramount interests.

Lord Wright, after further emphasizing that the employee in the position of Martin receives instructions from Heaps "so far as is necessary or convenient for the purpose of carrying out the contract" with Lipsett on behalf of and as servant for Lipsett, uses language particularly appropriate to the present circumstances:

> Where the contract is a running contract, for the rendering of certain services over a period of time, the places where, and the times at which, the services are to be performed being left to the discretion (subject to any contractual limitations) of the other contracting party, there must be someone who is to receive the directions as to performance from the other party, and they are given to the employer, whether he receives them personally or by a clerk or by the servant who is actually sent to do the work.

In *Mersey Docks and Harbour Board* v. *Coggins & Griffith (Liverpool) Limited* (2), the appellant board owned certain cranes and employed skilled workmen to operate them. The Board leased a crane and driver to respondent company as stevedores to load cargo on a ship. Owing to the negligence of the driver, one MacFarlane was injured. The sole question before the House of Lords was

(1) [1942] 1 All E.R. 491. (2) [1947] A.C. 1.

whether the driver was the servant of the Board or the stevedores. Viscount Simon, at p. 10, refers to the heavy burden resting upon an employer in the position of Lipsett:

> It is not disputed that the burden of proof rests on the general or permanent employer—in this case the appellant board—to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances. It is not easy to find a precise formula by which to determine what these circumstances must be.

Lord Macmillan, after pointing out, at p. 13, that the stevedores, who were in a position comparable to that of Heaps, "were entitled to tell him where to go, what parcels to lift and where to take them, that is to say, they could direct him as to what they wanted him to do," then pointed out "they had no authority to tell him how he was to handle the crane," and concluded: "In driving the crane, which was the appellant board's property confided to his charge, he was acting as the servant of the appellant board, not as the servant of the stevedores."

Lord Simonds, at p. 18, states the consequences that flow from the negligence of one in the position of Martin:

> Here the fault, if any, lay with the appellants who, though they were not present to dictate how directions given by another should be carried out, yet had vested in their servant a discretion in the manner of carrying out such directions. If an accident then occurred through his negligence that was because they had chosen him for the task, and they cannot escape liability by saying that they were careful in their choice.

It is a question of fact in a particular case whether, at the relevant time, an employee is a servant of his general employer or that of another party. An illustration of where he was not in the employment of his general employer is *Bain* v. *Central Vermont Railway Co.* (1), where Lord Dunedin stressed the essential time when the relationship of master and servant must be determined.

> Their Lordships think that this is leaving out of view the point of time at which the position must be determined. In the words of the judgment reported by Sirey and quoted by Brodeur J. you are to look to the 'patron momentané qui avait ce préposé sous ses ordres et sur lequel il avait une autorité exclusive au moment de l'accident.' It is nothing to the purpose that there may be at the same time a sort of residuary and dormant control of the 'patron habituel.'

(1) [1921] 2 A.C. 412.

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The foregoing authorities emphasize that the onus is upon Lipsett to establish that Martin, as he worked upon and endeavoured to start this engine, was subject to the control and direction of Heaps. That Heaps directed him to the engine and indicated the nature and character of the repairs required, as disclosed by the order of Trans-Canada, does not make him the servant of Heaps. In receiving these directions Martin did so on behalf of Lipsett in order that the arrangement made between the latter and Heaps might be carried out. Throughout, how and in what manner Martin would make the repairs and start the engine was for him to decide, as an expert in the employ of Lipsett. As Lord Porter stated:

> It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.

Mersey Docks and Harbour Board v. *Coggins & Griffith (Liverpool) Limited, supra,* at p. 17.

It, therefore, follows that the finding of the learned trial judge that Martin and Benson were the servants of Lipsett must be affirmed.

It is contended that Trans-Canada was negligent in two respects:

(*a*) in supplying to Martin cables which it knew, or ought to have known, were unsafe for use and without any warning as to their condition;

(*b*) in permitting fire hazards to exist in and about the premises in which Martin was required to do his work and in failing to have a fire extinguisher readily available.

The learned trial judge found that there was no contributory negligence on the part of Trans-Canada. Mr. Justice O'Halloran was of the opinion that, though the fire was caused by the negligence of Martin, the damage "was contributed to and greatly increased by contributory negligence of Trans-Canada, in permitting fire hazards to exist . . ." or, as he otherwise stated:

> But his inability to put out the small fire at the start, coupled with Trans-Canada's failure to control or prevent its spread, in my judgment at least, cannot reasonably be attributed entirely to Martin; . . .

The learned judge would have apportioned the fault 20 per cent to Martin and 80 per cent to Trans-Canada.

The evidence, with great respect, does not appear to establish contributory negligence on the part of Trans-Canada in supplying the cables in the condition in which Martin found them. It must be conceded that Trans-Canada knew, or ought to have known, the condition of these cables. The fact that Lipsett, in selling these engines, did not supply batteries and cables is not the test. They were an essential accessory providing the only means by which these engines were started. Martin fully appreciated this and stated that he had started many engines using such equipment. Moreover, Lipsett evidenced its concern with regard to these batteries and cables by its letter to Heaps dated January 25, 1949, in which it advised that the "batteries supplied should be of heavy duty 'starting' type, of not less than 15 plates. Cables, also should be of the heavy duty type using '00' wire and should be kept as short as possible." Moreover, the running of lights off these batteries, Lipsett stated, ought not to be permitted as "the batteries are primarily for the purpose of starting the engine."

Martin was never an employee of Trans-Canada and it need not be disputed that in the circumstances he was an invitee. As between the invitor and the invitee it is always a question of fact whether there is an unusual danger and whether the invitee has knowledge of the risk incident thereto. *London Graving Docks Co. Ltd.* v. *Horton* (1). Even if we assume that there was an unusual danger within the meaning of the authorities and that danger existed in an accessory to the engine, the position is that of an owner who contracts for certain repairs and turns the engine and its accessories over to an expert to make those repairs in circumstances in which he had a right to expect that the expert would, as Martin did in regard to the cylinder linings, call his attention to defects or want of repair in respect to both engine and accessories. In the discharge of his duty Martin, as the learned trial judge found, "was aware of the dangerous condition created by the defective cables." As a consequence, and upon such examination as he made, he concluded it was safe to use them as he did. As already pointed out, this conclusion might have been justified had he continued to use due care in using these cables. It was

(1) [1951] A.C. 737.

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his negligence in the using thereof that constitutes the effective cause of the damage which followed. *Davidson* v. *Stuart* (1); *Quebec Light & Power Co. Ltd.* v. *Fortin* (2); *Sharpe Construction Company* v. *Begin* (3).

Moreover, the evidence does not establish that fire extinguishers, as normally placed in an engine room such as this, would have controlled this fire. There was oil and grease about and tar paper put up by Martin and Benson. Martin's clothes almost immediately caught fire and he had to run out in the snow in order to avoid more serious consequences than those which he suffered. Benson does say: "If there was a fire extinguisher in the engine room, we could have put it out." He, however, goes on to say that he had never used a fire extinguisher and admits that he would have had to take time to read the instructions before using it. He says he tried to put it out with a shovel, but "I saw the fire around the bottom of the batteries on the floor, and it started to spread to the walls, and as soon as it hit the tar paper, away she went." When he was asked: "Now, when you first saw or noticed it and showed it to Martin, what did you see?" he answered: "Well, the fire was spreading very rapidly." There were extinguishers in other parts of the mill which were, in fact, used. McKinley, the Assistant Manager, was in the yard when he heard the call "Fire!" and ran to the storage shed where he put out a patch of fire with a pair of coveralls. He then went to the engine room where he endeavoured to put out the fire, but after a short period there was an explosion enveloping the room in flames so he left it. The evidence, having regard to the particular condition of this engine room and the rapidity with which the fire spread, does not establish that the presence of fire extinguishers in the engine room would have restricted the fire.

It was suggested that Hoff had already complained of the fire hazards about the planing mill. In particular, attention is called to the last paragraph of the letter of December 13, 1948, where it is stated: "Mr. Hoff requires the fire hazards around the mill to be cleaned up, and the mill made safe from any possibility of destruction by fire." This letter was written the day before the fire. It makes no particular

(1) (1903) 34 Can. S.C.R. 215. (2) (1908) 40 Can. S.C.R. 181.
(3) (1918) 59 Can. S.C.R. 680.

reference to the engine room and must be read along with Hoff's evidence of his visit to the engine room some time previous to the fire when, because of the noise, he suggested the engine should be overhauled. When asked: "And what condition did you observe that day? You mentioned the noise. Anything else?" he answered: "Well, no. No, I coud not say that I seen anything." Upon the evidence it cannot be said that this room was kept in a manner that took cognizance of the possibility of fire, but Martin himself concluded it was a safe place to work in and, while he did take exception to the presence of dirt, which I assume includes oil and grease, he did not press that point.

Trans-Canada claimed $139,568 for loss of profits and the learned trial judge allowed $76,000. The respondents submit that there was no loss of profits, as Trans-Canada's lease would expire January 9, 1949, and, while it had an option to purchase the mill, it was not in a financial position to do so.

Trans-Canada found a ready market for all of its products and its business had been increasing. At the bank it had a loan of $250,000 for purchases of inventory and lumber. In November the company was financially embarrassed by Lymburner's purchasing too much capital equipment. As a consequence Lome, the largest shareholder and who had, in support of the $250,000 loan, given a guarantee of $50,000 to the bank, visited Prince George and advanced an additional $20,000 to be applied on account of purchasing capital equipment. Upon his return to Toronto he apparently explained the position to the bank, which allowed the line of credit to remain as arranged at $250,000. Lome also had Brooker of Toronto go to Prince George to work with Lymburner and look after his interests.

Lome instructed Brooker to take up the option in the lease. Brooker succeeded in concluding these negotiations on December 13, the day before the fire, subject, however, to approval by the directors of Trans-Canada. As the fire occurred the following day and destroyed the subject matter of the option, no further action was taken and the option lapsed on January 9, 1949. The option would not have been exercised on the terms set out in the lease. The purchase price remained the same. Trans-Canada, however, wanted easier terms of payment and Hoff agreed, provided

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the payments were guaranteed by the bank and certain other obligations, incurred since the date of the option, were paid.

The learned trial judge concluded: "The option would have been exercised before the expiration of the lease." Such a finding, upon the evidence, could be no more than a reasonable probability. Trans-Canada had not bound itself to purchase and there was an important item of financing still to be arranged on its part. At the time of the fire there remained between the parties only the option which at least constituted a contract under which Trans-Canada, during the currency of the lease, might purchase the planing mill. It is that right to purchase which was destroyed by the fire and it is the value of that right that Trans-Canada is entitled to by way of damages. In the determination thereof the probability of its being exercised might well be a factor. The learned trial judge has computed the sum of $76,000 on the basis of loss of profits, which would be the basis had the option been accepted and a binding contract to purchase in existence between the parties. However, I do not think that a reference back to the learned trial judge, with the attendant cost, to determine this item is, in the circumstances, necessary. It was to Trans-Canada a substantial right and one which the evidence of Lymburner indicates the company always intended to exercise and was in the course of doing so when the fire occurred. It would seem that the sum of $40,000 would be a fair and reasonable amount.

Exception is also taken to an item "Cost of cleaning yard —$1,005.74" on the basis that this would be a proper item only if Trans-Canada had continued the operation of the mill. In other circumstances that might be a valid objection, but here the work was done and paid for by Trans-Canada. Had the company not done the work it would be a proper item to be included in the damages awarded to Hoff. Such was not allowed to Hoff, there is no duplication and, therefore, it would seem a proper charge.

Objection was also taken to an item of $10,000 which it is suggested was computed upon the basis of 250,000 feet of lumber rather than 181,000. If the learned trial judge allowed this item at all he included it in some other item

and no facts were drawn to our attention which would support the conclusion that the learned trial judge erred as here suggested.

When the option was not exercised Hoff was in the position of one who owned a planing mill subject to a lease which, when destroyed by fire, entitled him to damages for loss of building and loss of revenue during an estimated period of construction. The learned trial judge appears to have considered all of the facts and fixed amounts which seem fair and reasonable.

It is contended that Hoff has not proved title to the premises. No documents of title were produced. The uncontradicted evidence clearly shows that he has been in possession at least since 1946, when he commenced construction of the planing mill here in question, and that after the fire he rebuilt the mill and sold it. He himself states that he is in possession under and by virtue of a lease. In any event as between the parties he has established possession and, therefore, made a prima facie case of ownership sufficient to support the awarding of damages in this case. *Peaceable* v. *Watson* (1); *Jayne* v. *Price* (2); *Smith* v. *McKenzie* (3); Phipson on Evidence, 9th Ed., 123.

As between Lipsett and Heaps, the work of repairing and testing the engine was of a type the former agreed to and did, in fact, upon this occasion, undertake to perform. The damages arising out of Martin's negligence in the performance of that duty was a liability of Lipsett. In the circumstances judgment has been given against Heaps and Lipsett for the damages suffered by Trans-Canada. These parties were not joint tortfeasors. In so far as Heaps may be called upon to pay these damages, that company is entitled to be indemnified by Lipsett. *Eastern Shipping Co. Ltd.* v. *Quah Beng Kee* (4); *McFee* v. *Joss* (5).

The appeals should be allowed and the judgment of the learned trial judge restored, but varied by deleting the sum of $125,653.79 and inserting the sum of $89,653.79. The appellant Hoff should recover her costs in the Court of Appeal and in this Court from Lipsett. The respondents Lipsett and Heaps have obtained a substantial reduction in

(1) (1811) 4 Taunt 16; 128 E.R. 232.
(2) (1814) 5 Taunt 326; 128 E.R. 715.
(3) (1854) 2 N.S.R. 228.
(4) [1924] A.C. 177.
(5) (1924) 56 O.L.R. 578.

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the damages awarded to Trans-Canada and had such been made in the Court of Appeal it would seem that at least some portion of the costs would have been allowed. It would, therefore, appear that the respondents Lipsett and Heaps should have one-half of their costs in the Court of Appeal against Trans-Canada. Trans-Canada should recover its costs in this Court from Lipsett and Heaps. Heaps should recover its costs of the third party proceedings from Lipsett and is entitled to be indemnified by Lipsett against any costs of the appeal to this Court which it may be required to pay to Trans-Canada.

LOCKE J. (dissenting):—These appeals are taken by the plaintiffs in two actions for damages, which were consolidated for the purpose of trial, arising out of the destruction of a planer mill and its contents by fire. The actions were tried before Clyne J. who gave judgment for the Trans-Canada Company against the respondents and, in the third party proceedings taken by the Heaps Company against the Lipsett Company, directed the latter to indemnify it against the damages recovered by the plaintiffs. In the action brought by the appellant Hoff, damages were awarded against the Lipsett Company but, as against the Heaps Company, the claim was dismissed. For the sake of brevity, I will refer to the respective parties hereafter as Trans-Canada, Heaps, Lipsett and Hoff. C. B. Hoff died during the course of the litigation and the respondent Ada Flora Hoff, the executrix of his will, continued the proceedings in her name.

The relevant facts to be considered in determining the question of the liability of the respondents to the appellants are, in my opinion, as follows: the late C. B. Hoff alleged that on December 14, 1948, he was the owner of a saw mill and planing mill in Prince George, B.C. which on July 8, 1948, he had leased to one Lymburner for a term of six months, with an option to the latter to purchase the premises at the expiration of the term. The property leased contained certain planer mill equipment, including a Murphy Diesel engine which will be referred to in more detail hereafter. Before the expiry of the term, Lymburner assigned his interest under this contract to Trans-Canada. The latter company entered into possession and expended considerable sums in adding equipment and improving the

property and was in possession at the time of the fire. The Diesel engine referred to had been purchased by Hoff from Heaps, a company which had its head office and principal place of business in New Westminster, B.C. but operated a branch at Prince George. Lipsett carried on its business in Vancouver and was the exclusive agent for the sale of Murphy Diesel engines in British Columbia and had appointed Heaps its local agent at Prince George for this sale. Hoff ordered the Murphy Diesel engine from Heaps at Prince George, his order including four batteries and battery cables which would be required, inter alia, for starting the engine. The New Westminster office of Heaps purchased the engine from Lipsett in Vancouver but not the batteries or the cables. The invoice from Heaps to Hoff for the engine dated July 2, 1947, included a charge for these but they had apparently been purchased elsewhere than from Lipsett by Heaps.

The arrangement whereby Heaps was given the agency for the sale of Murphy engines in the Prince George area had been made early in the year 1947. That company did not obtain the exclusive right to the sale of the engines in the area, the Lipsett Company reserving the liberty to itself to also sell there. The Heaps Company did not have the personnel at Prince George with sufficient technical ability to service the engines sold and it was agreed between the companies that Heaps might call upon Lipsett to supply, when requested, properly qualified men on terms agreed upon between the parties.

About the middle of November 1948, the Diesel engine had been operating unsatisfactorily and Lymburner, who was the Manager of the Trans-Canada operations, consulted Jack Wall, the Manager of Heaps at Prince George, and asked him to advise him what the trouble was. Wall, after communicating with Lipsett at Vancouver, told him that new piston rings were required. Thereupon, Lymburner gave a written order to Heaps dated December 8, 1948, to furnish and install the rings. In advance of receiving the written order, Wall had asked Lipsett to send men to do the work and had been told to get in touch with Roy Martin, an experienced Diesel mechanic, and A. C. Benson,

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a mechanic's helper, both of whom were employees of Lipsett and were then working on a job at Huston, B.C. They were sent by Wall to the Trans-Canada mill to perform the work on December 8, 1948.

The Murphy Diesel engine, when purchased by Hoff, had not been installed in the mill proper but placed upon skids outside the building, without any protection from the elements. Later, Hoff had built a roof above it. Trans-Canada had closed the space in and some gravel had been put on the floor. There was no cement work or other flooring and the engine stood upon skids placed beneath it. Martin described the room in which the Diesel engine was placed as being roughly 10 ft. wide and 15 ft. long. One of the sides of the enclosure was the side of the mill and the wall opposite that was double board and fairly tight, but the other two walls were made of one by fours and there were half inch cracks between the boards. It was very cold and, in order to carry on the work with some degree of comfort, Martin and Benson got from Wall a stove and piping and the millwright at the mill gave them a roll of tar paper. The stove was installed and the tar paper put around the inner walls to make the place less drafty. Martin was apparently instructed that they were not to start work until Trans-Canada had written a given order for the work and, when this was done, they commenced work on the engine in the afternoon of December 8.

Martin described the room as having a dirt floor. Beside the engine there were two 12 volt Hart batteries wired together. These were disconnected, the cables connecting them to each other and to the engine were disconnected and put on a shelf and the batteries were carried out of the room. The batteries were not those which had been supplied when Heaps sold the engine to Hoff, they apparently having been purchased later by Trans-Canada. Asked to describe the condition of the cables, Martin said that they were very dirty. The engine was apparently also dirty and the workmen obtained Diesel oil and gasoline and washed the parts which were being used. The rags used for this were thrown into the stove and burned. As the work of taking down the engine progressed, they found a cracked liner and this was reported to Wall. Lymburner, apparently on Wall's advice, ordered six new liners which it was

necessary to get from Lipsett in Vancouver. This necessitated a delay in finishing the work but, when the liners were received, Martin and Benson proceeded to finish it. It is upon what transpired during this work that the question of liability depends. After the rings and liners had been installed and the engine reassembled, Martin told Benson to clean up the engine or, as he expressed it, to try to get as much of the oil and grease off the engine as possible to make it look better. It was then filled with oil and antifreeze and the batteries were brought back into the engine room from outside for a lean-to. These were placed in the same position as before on two planks beside the engine. Martin took the cables off the shelf and said that he then wiped them over with a clean rag and connected the two batteries together and the batteries to the engine.

There was a short length of cable some ten inches in length, which connected the two batteries, and two, described by Martin as being from 3½ to 4 ft. in length, to connect the batteries with the starting mechanism of the engine. Having attached the cables to the terminals of the battery and to the engine, Martin attempted to start it without any result. He then transferred the cables, putting the one which he had connected to what he had thought was the positive terminal on to the other terminal and connected the other cable to the former. He says that the cables were firmly attached to the posts of the battery and to the starting motor on the engine. He then tried again to start the engine and it turned over freely but would not fire. Four attempts in all were made and, apparently, after the last of these, Benson drew Martin's attention to a fire behind him which the latter described as being on the planks between the battery cables some 8 or 10 inches from the side of the engine. The two cables were lying parallel on the planks at this point from 1½ to 2 inches apart and the fire, which was described as being some 4 inches in diameter, was around the cables and on the planks, with flames shooting 10 inches to a foot high. There was no fire around the batteries themselves and at this time none elsewhere in the engine room. Martin attempted to extinguish the blaze but his own clothes caught fire. There was no fire extinguisher in the engine room and, in the result, the fire spread and burned down the engine room and the mill,

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causing very heavy loss. It was the opinion of Martin that if there had been a fire extinguisher available the blaze could have been put out immediately.

The case of the respondent Trans-Canada is that the only manner in which a fire could have been ignited in these circumstances was by a spark resulting from a short circuit, that this could only have occurred if the insulation in the cables was either so defective or so lacking that contact between the two cables, or between one of them and some conductor such as a metallic object, could produce a short circuit and a resulting spark and that Martin failed in his duty, either contractual or at common law, apart from contract, to detect the defect in the cables before using them to transmit electricity from the battery to the starter of the engine. As to the liability in tort, it is said that the principle res ipsa loquitur is applicable, the cause of the fire being the battery with its connections and these being shown to have been in the possession and control of Martin and Benson at the time the fire commenced. As to Hoff, there can be no contractual liability asserted but it is said as to Martin and Benson that their failure to take reasonable care to avoid injury to property of others affects them and their employers with liability for negligence.

It is thus necessary to examine closely the evidence as to the condition of these batteries and their connections as they were found by these workmen when they arrived at the Trans-Canada premises. In strictness, neither the placing of new rings or liners in the Diesel engine required the use of the starting apparatus of the engine. The employment was only to install these parts on the engine but, as the purpose of the work was to produce a satisfactorily operating Diesel engine, I agree with the learned trial Judge that it cannot be said that to test the effectiveness of the work by starting up the motor was not within the scope of the employment of Martin and Benson.

Other than the fact that these were Hart 12 volt batteries, there is no evidence regarding them, either as to the time they were purchased or their condition at the time in question, except that the tops of them were not clean. As to the cables, where they came from is left uncertain by the evidence. The original invoice from Heaps to Hoff dated July 2, 1947, includes a charge for four batteries and four

battery cables. The batteries then supplied were not those that were in the engine room. There is no other description of the four cables than that contained in the invoice. On August 17, 1948, an invoice produced showed that Trans-Canada purchased two 6 ft. cables from Heaps. The cables found by Martin which connected the batteries to the starting motor were, however, only 3½ to 4 ft. in length. Where these came from or how long they had been in use is not disclosed by the evidence. The Trans-Canada Company, as shown by the evidence of Lymburner, employed millwrights whose duties included starting the Diesel engine when required and a mechanic, Russell Dean, who, according to Lymburner:—

> inspected all the equipment of the company, and that was his job, he did nothing else, but whether he changed the oil or whatever you mentioned in that particular machine, I don't know. He was in charge of all the operating equipment.

Dean was not responsible to the millwrights but directly to Lymburner. Dean who, no doubt, could have spoken with some knowledge as to the origin of these cables, their quality, the nature of the insulation and the length of time they had been used, was not called by the plaintiffs nor were the mill superintendent or millwrights. In the result, these matters which seem to me to be of importance in determining the question of liability were not dealt with.

Martin, who appears to have been a very frank witness, was not an electrician and the Lipsett Company did not deal either in batteries or cables of the kind used to connect these with the starting motor of their engines. He was, however, a very experienced Diesel engine mechanic and had worked on a great many of such engines in British Columbia and thus had considerable practical experience with the apparatus used to start them. The batteries were on the planks beside the engine, with cables connected to the starting mechanism, when Martin arrived at the engine room. The engine had apparently been operating up to within a few days of the time the work was undertaken. Martin was not able to give any description from his own knowledge of the nature of the insulation ordinarily used on these cables. As to this, he said that while he was not an electrician he believed that the copper wires were wrapped with rubber and some kind of black asbestos coating on the outside. He could give no further information on the

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subject. He said that the cables were very badly soaked in oil and covered in saw dust and that this would deteriorate the insulation and that they looked to him as if they might have been soaked for a long time. He did not, however, observe any breaks in the insulation. It was very cold and while he wiped the cables over with a clean rag before using them, this did not remove all the saw dust and oil, so that he was not able to closely examine the insulation. He had looked for breaks and had seen none and thought that it was safe to use the cables. In answer to a question as to whether it was a very minute examination, he said it was not, and to a further question as to whether it had not been a very casual one, he said that it had been and that there might have been defects which his inspection did not detect. Following the fire, he had been interviewed by one of the solicitors representing Trans-Canada and had signed a statement which said, amongst other things, that the wire cables were oily and frayed and that it was possible that a short circuit occurred at such a frayed point and caused the fire to start. As to this, he said that he believed the question that had been put to him was whether it would be possible if the cables were frayed to cause a fire and that he had said that, if they were frayed and oil soaked, they could, and followed this up by the direct statement that while they were oily they were not frayed.

The defendants had requested Professor Frank Noakes of the staff of the University of British Columbia and a consulting engineer to make certain tests with two 12 volt batteries and cables which, he said, were one of the standard sizes used in starting internal combustion engines. Whether they were the same as those in the Trans-Canada engine room was not established. He described these generally as consisting of strands of cable wire with rubber insulation bound with a braid which was usually impregnated with some sort of material to reduce mechanical abrasion. The witness had left a piece of this cable in Diesel oil for a few weeks and this resulted in the rubber splitting open and being so soft it could be removed easily. He had also dipped a length of the cable in Diesel oil and, after wiping it off, hung it up so that it was exposed to air and after a few weeks the rubber was found to be softened so it was easily picked away with the fingers. He said, in answer to

a question on cross-examination, that it was likely that, if cables of the kind he had examined were lying loose on the floor of an engine room for some months, they would suffer some damage, and agreed that it would be remarkable if cables used continually like that in an engine room for several months were not defective. Oil on the exterior of such a cable would not be a conductor of electricity.

The plaintiffs could, no doubt, have proven the origin of these cables and their quality, how long they had been in use and their condition immediately prior to the fire, but did not do so. In the absence of any such evidence, we are left with Martin's description of their condition in determining the question as to whether or not he was negligent in using them.

It is not, in itself, an answer to the claim of the respondents that Martin was not employed to examine the starting equipment or that he was not skilled as an electrician. From the evidence in this case, I think the only proper inference to be drawn is that the fire was commenced by a short circuit. The men were not smoking and the fire they had built in the stove was out. It appears to me that such a short circuit might have been caused, assuming that at some place the copper wires of the cables were exposed or the insulation so thin as to be ineffective, either where the cables were crossed if they were brought into contact, or by a cable in this condition touching a nail or some other metallic conductor on the planks or coming into contact with the side of the engine itself before reaching the point at which the connection was made with the starting motor. The inference I draw from the evidence is that the cables which were crossed near the battery did not there come into contact, and the distance where they were thus crossed from the point where the fire was first observed seems to exclude any such contact as the means by which it was started. While it is, of course, possible that an exposed part of one of the cables might have come in contact with the side of the engine itself, there is no evidence of this and the distance of any such place of contact from the point where the fire started would seem to me equally to exclude this as the source of the blaze. The evidence is that the cables, where they lay upon the planks, were some $1\frac{1}{2}$ to 2 inches apart and the evidence of Professor Noakes, in my

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opinion, excludes the view that a spark might have been caused by the cables being in this position. I think it is not possible, on the evidence, to reach any sound conclusion as to how the short circuit was caused.

The learned trial Judge found that Martin who, he said, had impressed him as being a competent workman and an honest witness, had been negligent in endeavouring to start the engine when he knew the insulation of the battery cables was defective, in permitting the battery cables to become crossed, in making only a casual inspection of the battery cables, in failing to advise the plaintiff Trans-Canada that the batteries should be placed in their proper container and that new and longer cables should be procured and in failing to warn the plaintiff Trans-Canada of the danger of continuing to use cables, the insulation of which had deteriorated. I am unable, with great respect, to agree with these findings.

I am in agreement with the judgment of the majority of the Court of Appeal (1) delivered by Sidney Smith, J.A. that no actionable negligence on the part of Martin is disclosed by this evidence. The batteries and the connecting cables had been apparently in effective use by Trans-Canada in starting the Diesel engine until a short time before December 8 and this fact and the further fact that the batteries were connected by the cables to the engine when Martin arrived to commence his work would undoubtedly lead him to believe that they were in a safe condition to be used. Neither the mill superintendent, the millwrights nor Dean had informed Martin that there was any doubt that they might be used with safety. The case for the appellant really is that the cables used in connection with starting the engine were in such a defective condition when Martin arrived that he should have detected that fact and that his failure to do so was actionable negligence.

I think this is to place the duty of Martin on too high a plane. I think it is unnecessary to decide whether the principle res ipsa loquitur applies in the circumstances of this case but, if it be assumed for the purpose of argument that it does, this would not impose upon the respondents the duty of showing how the fire was caused but simply to

(1) [1953] 3 D.L.R. 672.

show that Martin was not negligent (*Woods* v. *Duncan* (1). I agree that, if the condition of the cables had been such that it would be apparent to a man familiar with the operation of starting Diesel engines that it was unsafe to use them, to put the cables into use would have been a negligent act, but I do not think that this was so in the present case. I think that Martin, in answering in the affirmative the question as to whether his examination of the cables had not been a very casual one, was simply agreeing that it was not a minute examination but that, having wiped off some of the accumulated saw dust and oil caked upon the cables, he had simply looked at them and had seen no defect in them. It was, after all, the appellants who had left the cables in this condition and it is not my opinion that, under these circumstances, there was a duty imposed upon Martin to remove, in whatever manner would be necessary, all of the accumulation on the exterior of the insulation of the cables to ascertain if any wires were exposed or the insulation was so defective as to make them unsafe for use. It is pointed out in the reasons for judgment of the majority that if Martin had, when he first arrived, used the batteries and the connecting cables to start the engine to assist him in deciding why it was functioning badly and a fire had resulted, it would be impossible to say that he was acting tortiously. With this I respectfully agree, subject, of course, to the reservation which is implicit in the statement, unless the condition of the cables was such that it should have been apparent to him that it would be dangerous to use them. I think the position was no different after the work on the engine had been completed and the batteries and cables placed again in the position in which they were found.

I am unable to agree with the opinion of the learned trial Judge that the evidence discloses that Martin knew the insulation of the cables was defective or that crossing the cables had anything to do with the starting of the fire.

In so far as the claim of Trans-Canada against Heaps is founded on contract, for the same reasons I think it should fail. There was, in my opinion, no breach of any duty imposed upon the defendant Heaps by the contract.

I would dismiss these appeals with costs.

(1) [1946] A.C. 401.

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CARTWRIGHT J.:—The relevant facts are set out in the reasons of my brothers Estey and Locke. I am in general agreement with the reasons of my brother Estey but wish to add the following observations. In referring to the parties I will adopt the contractions used by my brother Estey.

On the pleadings, the claim of Hoff against both respondents is solely in tort, that of Trans-Canada against Lipsett is solely in tort and against Heaps is in contract and alternatively in tort. In the statements of defence, Heaps denies any contract between itself and Trans-Canada alleging that the contract to repair the engine was made between Trans-Canada and Lipsett the role of Heaps being merely that of intermediary, Lipsett denies any contract between itself and Trans-Canada, both Lipsett and Heaps allege that Martin was the servant of the other, deny that Martin was negligent and plead contribtuory negligence on the part of Trans-Canada.

I agree with the finding of the learned trial judge that the contract for the repairs to the engine was made between Trans-Canada and Heaps and that the relationship of Heaps and Lipsett in regard to the making of the repairs was that of contractor and sub-contractor. For the reasons given by my brother Estey I agree with his conclusion that Martin was at all relevant times the servant of Lipsett and not of Heaps.

In determining the question whether Martin was negligent I am prepared to assume the correctness of the view of Sidney Smith J.A. that there was no contractual obligation to inspect the cables or to advise Trans-Canada as to their condition. It was however within the scope and course of Martin's employment to start the engine after installing the new parts which had been ordered. It was necessary that he should make use of the batteries and cables for this purpose and, in my opinion, the learned trial judge has accurately defined Martin's duty at that point in the words of Lord MacMillan in *Bourhill* v. *Young* (1), which he quotes:—

> The duty to take care is the duty to avoid doing or omitting to do anything, the doing or omitting to do which may have as its reasonable

(1) [1943] A.C. 92 at 104.

and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

It seems to me unquestionable that Martin owed a duty to Hoff the owner of the building in which he was working and to Trans-Canada the tenant of that building and the owner of equipment and material in it, to take reasonable care not to set fire to the building. The question whether a reasonable man in Martin's position, who intending to use the cables became suspicious that their insulation was defective, would have made a more careful inspection than Martin did or would have used greater care in handling them after such inspection as he did make is one of difficulty, as is attested by the difference of opinion in the courts below and in this court. After a careful consideration of the relevant evidence, for the reasons given by my brother Estey, I agree with his conclusion that Martin was negligent. In argument stress was laid upon the fact that the defective cables were supplied for Martin's use by Trans-Canada but, as was pointed out by Atkin L.J. in *Ellerman Lines Ltd.* v. *Grayson* (1), a person in the position of Martin is bound to exercise care not generally but in relation to the conditions which he finds. The judgment of Atkin L.J. was expressly approved in the House of Lords; vide *Grayson* v. *Ellerman* (2).

On the question as to whether Trans-Canada was guilty of contributory negligence I agree with my brother Estey and wish only to add that, in my opinion, to hold, in the circumstances of this case, that Trans-Canada was negligent in permitting conditions to exist which would render the spread of a fire more rapid and in not providing fire-extinguishers would be contrary to the reasoning on which the judgments proceeded in *Grayson* v. *Ellerman Lines Ltd.* (*supra*) and in *C.N.R.* v. *Canada Steamship Lines Limited* (3), affirmed in this Court (4).

I do not understand any party to contend that Heaps would not be liable to Trans-Canada if it should be held that the contract for the repairs was made between Trans-Canada and Heaps and that the loss was caused solely by

(1) [1919] 2 K.B. 514 at 535.
(2) [1920] A.C. 466 at 475, 476, 477.
(3) [1947] O.R. 585; [1948] O.R. 311.
(4) [1949] 2 D.L.R. 461.

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the negligence of Martin. I mention this only for the purpose of making it clear that I express no opinion as to whether it could have been maintained that Lipsett alone was liable.

On the question of the assessment of damages I agree with the reasons and conclusion of my brother Estey.

I would dispose of the appeal as proposed by my brother Estey.

Appeals allowed.

Solicitors for the appellants: *Bull, Housser, Tupper, Ray, Guy & Merritt.*

Solicitors for Heaps, Waterous Limited: *Tysoe, Harper, Gilmour & Langfield.*

Solicitors for Lipsett Engine & Manufacturing Co. Limited: *Guild, Lane, Sheppard, Yule & Locke.*

COLONIAL STEAMSHIPS LIMITED (*Defendant*) ..... APPELLANT;

AND

THE KURTH MALTING COMPANY and McCABE GRAIN COMPANY LIMITED (*Plaintiffs*) ..... RESPONDENTS.

1954

*Feb. 15, 16, 17
*May 19

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, ONTARIO ADMIRALTY DISTRICT

Shipping—Damage to cargo—Seaworthiness of vessel—Perils of the sea—Onus—Water Carriage of Goods Act, 1936, 1 Ed. VIII, c. 49.

In an action for damage caused to a cargo of barley shipped in good order by the respondent on the appellant's vessel under bills of lading subject to the *Water Carriage of Goods Act, 1936,* the appellant pleaded that the vessel had been seaworthy and that the loss had been caused by perils of the sea. The District Judge in Admiralty found that the damage had been caused by a break in a steam pipe which had occurred some time before the accident relied upon by the appellant as a peril of the sea, that the appellant had not discharged the onus of showing that the damage resulted from perils, dangers and accidents of the sea, and that the unseaworthiness of the vessel had not been shown.

Held: The appeal should be dismissed since the appellant had not satisfied the onus which rested upon it to show that the damage resulted from perils, dangers and accidents of the sea.

Per Taschereau, Locke and Cartwright JJ.: Since the District Judge had found that the defence of perils of the sea had not been made out, it was, in the state of the pleadings, unnecessary for him to deal with the seaworthiness of the vessel at the time the cargo was shipped. (*Bradley* v. *Federal Steam Navigation Co. Ltd.* (1927) 27 Ll.L.R. 395, *Gosse Millard* v. *Canadian Government Merchant Marine* [1927] 2 K.B. 432 and *Paterson Steamships Ltd.* v. *Canada Co-operative Wheat Producers* [1934] A.C. 538 referred to).

APPEAL from the judgment of the Exchequer Court of Canada, Ontario Admiralty District, Barlow J., District Judge in Admiralty (1), in an action for damage to a cargo shipped on the appellant's vessel.

F. Gerity and *P. B. C. Pepper* for the appellant.

R. C. Holden Q.C. for the respondents.

KERWIN J.:—I agree with the trial judge as I am of opinion that the appellants have not satisfied the onus which rested upon them. The appeal must be dismissed with costs.

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

(1) [1953] Ex. C.R. 194.

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COLONIAL STEAMSHIPS LTD. v. THE KURTH MALTING CO. et al

The judgment of Taschereau, Locke and Cartwright JJ. was delivered by:—

LOCKE J.:—The claim of the respondents as pleaded is in damages for breach of the contracts evidenced by the bills of lading issued by the appellant for the barley shipped on the steamship "Laketon" at Port Arthur on November 19, 1951, for transport to Milwaukee. While the manner in which the steam escaped from the return pipe was ascertained on November 22 when the hatches were opened at the latter place, the Statement of Claim contained no allegation of unseaworthiness.

The bills of lading were issued subject to the provisions of the *Water Carriage of Goods Act, 1936,* and the Rules in the Schedule to that *Act.* By way of Defence the appellants pleaded, inter alia, that they had exercised due diligence before and at the beginning of the voyage to make the ship seaworthy and the holds fit and safe for the reception, carriage and preservation of the barley and that the loss was caused by perils, dangers and accidents of the sea.

By way of Reply the respondents pleaded that the damage to the pipe had occurred before or soon after the commencement of the voyage and that the damage had resulted from the unseaworthiness of the ship. The allegation that the loss resulted from perils of the sea was put in issue.

Subsection 2 of Article IV of the *Water Carriage of Goods Act, 1936,* provides that the ship shall not be responsible for loss or damage arising or resulting from perils, dangers and accidents of the sea. The burden of proof on this issue was upon the appellant and the learned trial Judge (1) has found that this onus was not discharged. My consideration of the evidence leads me to the same conclusion and upon this issue the appeal should fail.

Whether by reason of the fact that the appellant considered that to succeed upon the defence of perils of the sea it was necessary to prove that the ship was seaworthy at the port, and at the time, of shipment, or by reason of the allegation of unseaworthiness contained in the Reply, the appellant gave evidence directed to that issue.

(1) [1953] Ex. C.R. 194.

In *Bradley* v. *Federal Steam Navigation Co. Ltd.* (1), Viscount Sumner, in delivering the judgment of the Judicial Committee, said in part (p. 396):—

> The bill of lading described the goods as 'shipped in apparent good order and condition' and proceeded 'and to be delivered at the ship's anchorage from her deck (where the ship's responsibility shall cease) at the Port of London.' Though the usual words 'in the like good order and condition' do not appear after the word 'delivered,' it was common ground that the ship had to deliver what she received as she had received it, unless relieved by excepted perils. Accordingly, in strict law, on proof being given of the actual good condition of the apples on shipment and of their damaged condition on arrival, the burden of proof passed from the consignees to the shipowners to prove some excepted peril which relieved them from liability, and further, as a condition of being allowed the benefit of that exception, to prove seaworthiness at Hobart, the port of shipment, and to negative negligence or misconduct of the master, officers and crew with regard to the apples during the voyage and the discharge in this country.

That was an action in which the exceptions were contained in the *Sea Carriage of Goods Act, 1904,* of Australia.

In *Gosse Millard* v. *Canadian Government Merchant Marine* (2), Wright J. adopted this statement as applicable to an action to which the *Carriage of Goods by Sea Act 1924 (Imp.)* applied, and in *Paterson Steamships Ltd.* v. *Canadian Co-Operative Wheat Producers* (3), the language of Lord Sumner was adopted in the judgment of the Judicial Committee as applying to the *Water Carriage of Goods Act* (R.S.C. 1927, c. 107).

In this view of the law, since the learned trial Judge found that the defence that the loss had been occasioned by perils or accidents of the sea had not been made out, it was, at least in the state of these pleadings, in my opinion, unnecessary to deal with the question as to whether the ship was seaworthy, within the meaning of the Article, at the time the cargo was shipped at Port Arthur.

I would dismiss this appeal with costs.

RAND J.:—This action was brought for damages to a cargo of barley carried from Port Arthur to Milwaukee. The steamship company pleaded perils of the sea and it was sought to show that longitudinal as well as transverse cracks and fissures and the separation of a union in a return steam pipe the parallel line of which heated the forward

(1) (1927) 27 Ll. L.R. 395. (2) [1927] 2 K.B. 423 at 437.
(3) [1934] A.C. 538 at 54a.

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living quarters were caused by a sudden and unforseeable bending, tortion or racking strain to the vessel's structure while in the trough of the sea during heavy weather which had communicated similar stresses to the pipe. Both pipes were supported by steel loops attached to longitudinal or other steel beams. The longitudinal cracks in the only piece of pipe recovered were in large part along the seam of a butt weld. The parallel supply pipe, about 18 inches inboard and of the same size and quality of metal, suffered no similar or other damage. The particular occurrence lasted ten minutes or so and there was evidence that within eighteen hours the grain under the effect of the steam heat was showing germination and sprouting. The preponderance of the expert evidence was that internal stresses played a part in the collapse of the pipe but as the steam pressure in it could not have exceeded two or three pounds their only suggested source was ice which had formed in the pipe immediately prior to and during the loading at Port Arthur.

The trial judge, Barlow J., came to the conclusion that the appellants had not made out a case in support of their plea, and after a careful reading of the record, in the light of the argument addressed to us, I am in agreement with him. I find it quite impossible to say, on any balance of probabilities, that there could have been any such tortion to the pipe as was claimed.

The appeal must therefore be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McMillan, Binch, Wilkinson, Stuart, Berry & Dunn.*

Solicitors for the respondent: *Heward, Holden, Hutchison, Cliff, McMaster, Meighen & Hebert.*

ARMAND DUHAMEL (*Defendant*) .....APPELLANT;

1954

*May 10
*May 19

AND

DAME GEORGETTE COUTU (*Plaintiff*) .....RESPONDENT.

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

Appeal—Jurisdiction—Lack of substance in appeal—Motion to quash.

As the judgment appealed from demonstrated that there was a manifest lack of substance in the appeal, the respondent's motion to quash was granted.

MOTION to quash for want of jurisdiction.

Paul Michaud for the motion.

J. G. Ahern Q.C. contra.

KERWIN J.:—In *National Life Assurance Co.* v. *McCoubrey* (1), an appeal was quashed for a "manifest lack of substance" and in *Cameron* v. *Excelsior Life Insurance Co.* (2), it was decided that the appeal "ought not to be permitted to proceed further". These cases and others are referred to in *Oatway* v. *Canada Wheat Board* (3). Upon the argument of a motion by the respondent in the present case to quash an appeal, it was suggested from the bench that there was no merit in the appeal and we heard all that counsel desired to say upon the matter.

In one of the considerants of the formal judgment of the Court of Queen's Bench (Appeal Side) (4), it is stated that the appellant had not established the only ground of defence invoked in the appeal, which was that there had been a tacit renewal of the lease in question. The trial judge had found against this contention and decided that the lease was terminated as of April 30, 1952, and the members of the Court of Queen's Bench (Appeal Side) unanimously agreed with him. In the opinion of the majority of the Court (Mr. Justice Rand and Mr. Justice Estey not concurring in this) the notes of Mr. Justice St. Jacques and the

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

(1) [1926] S.C.R. 277.
(2) [1937] 3 D.L.R. 224.
(3) [1945] S.C.R. 214.
(4) Q.R. [1953] K.B. 330.

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Kerwin J.

judgment of the Superior Court demonstrate that there is a manifest lack of substance in the appeal and that this motion should be entertained favourably—as stated in the McCoubrey case, "as a convenient way of disposing of the appeal before further costs have been incurred."

Motion granted with costs.

Solicitors for the appellant: *Hyde & Ahern.*

Solicitors for the respondent: *Michaud, Mercier & Denis.*

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*Oct. 21, 22, 23

1954

*May 19

JAMES EDMUND TAYLOR (*Plaintiff*) ....APPELLANT;

AND

SILVER GIANT MINES LIMITED and GIANT MASCOT MINES LIMITED (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Agent—Right to commission—Engaged to negotiate sale—Agreement made with party introduced by agent—Break in continuity of negotiations.

Desiring to dispose of a mining property, the respondent Silver Giant Mines Ltd. engaged the appellant as agent to negotiate a deal with the Hedley Mascot Gold Mines Co. Ltd. Subsequent to his engagement, the appellant signed a memorandum agreeing to a certain commission. Later he declined to be limited to that commission, but the Silver Giant company did not elect to treat his withdrawal as a repudiation.

The two companies were initially brought into relation with each other through the efforts of the appellant. The negotiations which followed were broken off by letter of the Silver Giant company to the Hedley Mascot company. Negotiations later carried on resulted in the parties entering into an agreement whereby the Hedley Mascot company acquired control of the property in question. The agreement reached differed in many material particulars from the one drafted before the break down.

The appellant took no direct part in the negotiations before the break down and none thereafter. His action against both respondents for a commission claiming that he had been the effective cause of the sale was maintained by the trial judge, but dismissed by the Court of Appeal.

Held: (Kellock and Estey JJ. dissenting), that the appeal should be dismissed.

Per Rinfret C.J., Taschereau and Locke JJ.: The arrangement between the appellant and the respondent was not a general employment in the sense in which that expression was used in *Toulmin* v. *Millar* ((1888) 58 L.T.R. 96), but the work which the appellant was invited to do was to negotiate a sale of the property. Had the negotiations initiated by him resulted in a sale, the claim to the commission would have been complete. Since, as found by the Court of Appeal, such negotiations broke down and were terminated and the appellant did not negotiate the sale eventually made, the claim for a commission failed.

The evidence did not support the view that the negotiations were broken off for the purpose of depriving the appellant of a claim to a commission, even though it be assumed that to do so would have afforded the appellant any legal remedy.

Per Kellock and Estey JJ. (dissenting): The evidence established that the appellant's engagement was that if he found a buyer who, as a result of his introduction, purchased the property, he would be entitled to a commission.

Construing the letter which broke off the negotiations in relation to what took place both before and after its writing, it did not constitute a break in the continuity of the negotiations. The attitude of both companies showed them to have been for some time and to be still, at the time of the writing of the letter, convinced that it was desirable an agreement should be made. Construed in the light of the evidence, the letter was but a continuation of the former efforts to conclude an agreement.

Since the appellant had agreed to the amount of his commission, he was precluded from now contending that he was entitled to the usual commission of 10 per cent. But since the shares which were to be his commission were not now available and since, having performed the service, he had an enforceable contract, he was entitled to damages, they being the value of the shares to be computed as of the date of the non-delivery or breach on the part of the respondent.

The fact that delivery of the shares was withheld did not provide a basis for the award of interest or of damage in respect to the withholding thereof.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment at trial in an action by an agent for a commission.

A. W. Johnson for the appellant.

Alfred Bull Q.C. and *D. M. M. Goldie* for the respondents.

The judgment of Rinfret C.J., Taschereau and Locke JJ. was delivered by:—

LOCKE J.:—Upon the question as to the employment of the appellant by the respondent Silver Giant Mines Limited, the learned trial Judge, after considering the conflicting evidence, made the following finding:—

(1) [1953] 9 W.W.R. (N.S.) 407.

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Locke J.

The plaintiff says that he was engaged by Wheeler, the President and Managing-Director of the Silver Giant Company, to negotiate a deal with the Hedley Mascot Company and that a deal was negotiated as a result of his services. The plaintiff's evidence to the effect that through his efforts a deal was negotiated is supported by the evidence of Dr. Dolmage, Tremaine and McLelan. I have no hesitation in accepting that evidence.

In delivering the unanimous judgment of the Court of Appeal (1) allowing the appeal of the present respondent from the judgment at the trial, Bird J.A. has said that he concluded from the reasons for judgment that the learned trial Judge had made, inter alia, a finding of fact that the plaintiff was employed some time prior to September 27, 1949, by the Silver Giant Company, through its President, Wheeler, as the company's agent to conclude a deal with the Hedley Company. This was expressed rather differently in a later passage in his reasons for judgment which read:—

> The language of the learned trial Judge when discussing, in his reasons for judgment, the employment of Taylor by the Silver Giant Company, leads me to the conclusion that the effect of the learned Judge's finding is that the employment which took place some time prior to September 27, 1949 was an employment to negotiate a deal, the compensation for such services not having been discussed or settled between the parties prior to September 27, 1949.

I think it is clear from the passage quoted that the learned Judges of the Court of Appeal agreed with the learned trial Judge, not only as to the fact of Taylor's employment by the Silver Giant Company but as to the nature of that employment, and there are thus concurrent findings of fact upon this question.

The question to be decided is as to whether the appellant did negotiate the deal, within the terms of this arrangement, which resulted in the acquisition of the undertaking of the Silver Giant Company by the respondent Giant Mascot Mines Limited, a company organized at the instance of the Silver Giant Company, and Hedley Mascot Gold Mines (N.P.L.) under the terms of an agreement entered into between them dated May 1, 1950. From the fact that the matter is not referred to in the reasons for judgment delivered by the learned trial Judge as to the effect of the breakdown of the negotiations between the Silver Giant Company and the Hedley Mascot Company, brought about by the letter from the solicitors for the

(1) [1953] 9 W.W.R. (N.S.) 407.

former company to the Hedley Mascot Company dated February 6, 1950, I assume that it was not argued before him.

Following the examination of the property of the Silver Giant Company made by Dr. Dolmage, the consulting geologist of the Hedley Mascot Company, in September of 1949, which resulted in his making a favourable report on the property to that company, active negotiations were carried on between the two companies and, early in October, they had practically reached an agreement whereby the property of the Silver Giant Company would be acquired by a new company to be formed, and the Hedley Mascot Company would, in addition to giving financial aid, install upon the property a ball mill then situate upon its property at Hedley, B.C. The two companies were to be paid for their respective contributions by shares to be issued in the new company. On October 31, 1949, the solicitors for the Hedley Mascot Company wrote that company to say that the form of the agreement to be executed by the parties had been settled by them with the solicitors for the Silver Giant Company but this document was never executed, apparently owing mainly to difficulties in arranging the financing of the new company. Negotiations were continued during the month of November and on December 12 the solicitors for the Silver Giant Company wrote to Dr. Dolmage making a proposal as to the one point upon which they said the parties were not in accord. Following a meeting of the directors of the Hedley Mascot Company held on December 13, 1949, Dr. Dolmage, on behalf of the Hedley Mascot Company, wrote to the solicitors for the Silver Giant Company making a counter proposal which was rejected by a letter from the said solicitors bearing the same date, which stated that the only acceptable proposal was that made in their letter of December 12.

While it is not very clear from the evidence as to the nature of the negotiations carried on between that date and January 27, 1950, it is, I think, evident that during this interval the principal officers of the two companies continued to negotiate in the hope of reaching an agreement. On the last mentioned date the minutes of a meeting of the Board of Directors of the Hedley Mascot Company state that the General Manager reported to the meeting

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Locke J.

the nature of a proposal which he had re-negotiated with the Silver Giant group, which differed in material respects from the terms of the draft agreement which had been referred to in the letter from the solicitors of October 31, 1949. The directors approved the proposal, subject, however, to the approval of the shareholders and the company making an arrangement with the fiscal agents of the company to purchase 400,000 shares of the company's stock at .25 cts a share. On January 30, 1950, the solicitors for Hedley Mascot wrote to the Silver Giant Company formally proposing an agreement and stating its terms. This proposal was considered at a meeting of the directors of the Silver Giant Company held on February 4, 1950, to consider, in the language of the minutes, "the last and final offer of Hedley Mascot Gold Mines Ltd." At this meeting it was unanimously resolved that the proposal be rejected and this decision was communicated to the Hedley Mascot Company by a letter dated February 6, 1950, the concluding portion of which read:—

> Under these circumstances we are directed by our clients to advise you that the protracted and fruitless negotiations which have been carried on must now be considered to be at an end.

On September 27, 1949, when apparently it was contemplated that an agreement between the two companies would be reached, the appellant had attended an informal meeting of the directors of the Silver Giant Company, at which time he signed a memorandum agreeing to accept 30,000 shares of the Silver Giant Company "as my commission on any deal with Hedley Mascot Gold Mines Ltd. (N.P.L.) whereby they get control of Silver Giant Mines Ltd. or the property." The memorandum further stated that these shares were to be the full amount of the appellant's commission and were to be issued on the deal being completed to the satisfaction of the Silver Giant directors. There can be no doubt, in my opinion, that this agreement on the part of Taylor referred to services theretofore rendered for bringing the parties together and to any services that he might render thereafter. According to the evidence of some of the directors of the Silver Giant Company who were present at this meeting, Taylor then represented that he was on friendly terms with Dr. Dolmage and some of the other directors of the Hedley Mascot Company and could thus be of material assistance in completing a

deal. Earlier, according to the uncontradicted evidence of W. G. Mackenzie, the President of the Hedley Mascot Company, Taylor had told him that he was a friend of Wheeler and could arrange to "fix this thing up." Assuming that the appellant expected a commission from the Silver Giant Mines Company for his services for negotiating a deal with Hedley Mascot, it appears to be the case that prior to the meeting of September 27 he had intended also to claim a commission from the Hedley Mascot Company. In a conversation with Mackenzie he had suggested to him that that company should pay him a commission if a deal went through and he (Mackenzie) had told him that the Hedley Mascot Company had no commitment with him at all. The date of this discussion is not made clear in the evidence. Mackenzie thought it was in August 1949 that Taylor asked for a commission from Hedley Mascot and said that somebody had to pay him a commission, either one company or the other, at which time Mackenzie said he told him that his company was not committed and made it clear to him that he was not acting as its agent in any capacity. Whatever prompted his action in the matter, Taylor reappeared at Wheeler's room, where the arrangement of September 27, 1949, had been made, within a few days thereafter and said that he was not satisfied with the amount of the commission, that he had agreed upon and said that he would decline to be bound by it and wanted a commission of 10 per cent. Wheeler and Allen, one of the directors of the Silver Giant Company who was also present at the meeting, said that at this time Taylor told them that the Hedley Mascot Company was declining to pay him any commission, which was apparently his reason for demanding a larger amount from Silver Giant. The directors of the Silver Giant Company declined to change the arrangement and by letter dated January 7, 1950, Taylor wrote them to say that he withdrew from the agreement of September 27, 1949, adding:—

> That memorandum related only to a particular deal I was then negotiating for you with Hedley Mascot Mines Ltd. (N.P.L.). That deal did not go through and I refuse to be limited by the memorandum of September 27, 1949 as to commission earned in respect of any deal now pending with Hedley Mascot Mines Ltd. (N.P.L.).

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The Silver Giant Company did not elect to treat this letter as a repudiation of the agreement of September 27, 1949, and as between the appellant and that company matters were in this state on February 6, 1950, when negotiations were broken off by it.

It is quite apparent from the evidence that the appellant was not familiar with the nature of the negotiations being carried on between the two companies between September 1949 and the date these negotiations broke down and took no part in them but, as pointed out by the learned trial Judge, it is undoubtedly the case that his services for the purpose of assisting in them were available if they had been required by either party. It is equally clear, however, that the experienced business men who, with their advisers, were carrying on the negotiations between August 1949 and February 6, 1950, could not be assisted in any way by Taylor. Taylor apparently knew nothing of the proposal that the two companies should collaborate in forming a third company which would acquire the Silver Giant property and the mill machinery from Hedley Mascot. He had apparently rendered the only service of which he was capable towards negotiating a deal when he brought the parties together in April 1949 and enlisted the interest of Dr. Dolmage and his associates in the Silver Giant property.

It was admitted by the appellant and is made abundantly clear by the evidence that he took no part in the further negotiations between the two companies after February 6, 1950, which ultimately resulted in their entering into the agreement of May 1, 1950. It is, in my opinion, impossible upon the evidence to suggest that the Silver Giant Company broke off negotiations on February 6, 1950, for the purpose of depriving the appellant of a claim to a commission, even though it be assumed that to do so would have afforded the appellant any legal remedy. The evidence does not support any such view. At the directors' meeting of February 4, 1950, at which the directors of Silver Giant decided to reject the offer of the Hedley Mascot Company and terminate the negotiations, the question of interesting other mining companies in the company's property was discussed and the solicitor reported on certain discussions which he had had with the officials of the two companies and with an inventor and was instructed to

endeavour to interest the Bralorne Mines Ltd. in the property. On February 23, 1950, the directors of the Hedley Mascot Company met and considered various mining properties where their available milling machinery, which was no longer required at Hedley by reason of the exhaustion of the ore, might be useful. The minutes show that three of such properties were considered and the general manager was instructed to arrange for an examination of one of these properties. The company had a substantial amount of cash in its treasury at this time and Dr. Dolmage and the general manager reported to the Board that a proposal had been made to them that the company take an interest in the drilling of an oil well in the Leduc oil fields in Alberta and instructions were given to investigate the matter. No mention appears in these minutes of any negotiations with the Silver Giant Company which were apparently considered as having been abandoned.

There is no dispute as to the manner in which the negotiations which thereafter resulted in the agreement with the Silver Giant Company of May 1, 1950, were initiated. W. G. Mackenzie was the President of the Western City Company Ltd., a financial concern which had at an earlier date underwritten shares of the Hedley Mascot Company and otherwise been interested in its financing. Mr. P. E. Wootten, the general manager of the Western City Company had known generally of the negotiations which had been carried on between the two mining companies and had been informed by Mackenzie early in February 1950 that they had been terminated. At a date fixed by him as early in March 1950, he had talked with Mackenzie about the possibility of again opening negotiations and the latter had suggested to him that he make an effort to do so. Wootten did not know either Wheeler or any of the other directors of the Silver Giant or their solicitor Mr. Jestley and had never heard of Taylor. On March 8, Mackenzie telephoned to Jestley and arranged for Wootten to see him and, after doing so, took the matter up with Wheeler and Thompson, one of the other directors of Silver Giant. The negotiations thus initiated by Wootten were continued during the months of March and April. Mr. R. H. Cunning, who had been for many years a director of the Hedley Mascot Company, and Wootten, who had been appointed as a committee of one by the directors to carry on the negotiations.

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apparently acted together in endeavouring to arrange a deal. The Silver Giant Company also appointed a committee to negotiate on its behalf and on March 29, 1950, they submitted a proposal to Gunning, wherein they suggested terms which they were apparently prepared to recommend to the directors of their company. Counter-proposals were made and on April 21, 1950, a written memorandum containing heads of an agreement was signed on behalf of the Hedley Mascot Company by Mackenzie and Gunning and by Wheeler and Thompson on behalf of Silver Giant and this was followed by the preparation and execution of the agreement of May 1, 1950.

The agreement thus eventually reached differed in many material particulars from that drafted early in October 1949. Both that draft and the agreement finally reached provided for the formation of a new company to acquire the mining properties of the Silver Giant and part of the milling machinery of the Hedley Mascot but, while the earlier draft would have given the Silver Giant Company 49 per cent of the issued capital stock of the new company and Hedley Mascot 51 per cent, these proportions were changed to 45 per cent and 55 per cent in the agreement reached. Further, the earlier draft would have required the Hedley Mascot Company to advance a total sum of $250,000 to the new company and such further funds, in addition, which the directors of the new company might decide to be necessary to bring the property into production and to operate the mill. The agreement reached obligated the Hedley Mascot Company to furnish at such times as the directors of the new company might decide all of the funds necessary to bring the said mineral claims into economic production and to operate the mill and, of this amount, Hedley Mascot was to be reimbursed only to the extent of $165,000 of the funds so supplied out of the first smelter returns. By the earlier draft, Silver Giant Company were to receive as part of the consideration 300,000 fully paid shares of Hedley Mascot and this figure was reduced to 200,000 of such shares in the agreement finally reached. I think the proper inference to be drawn from the evidence is that the main obstacle to the completion of a deal between the two companies in the Fall of 1949 was the inability of the Hedley Mascot Company to finance its part of the proposed activities of the new company upon

the basis of the division of the shares of that company then proposed and that the success of the negotiations initiated by Wootten was attributable to the financial arrangements which the Western City Company were prepared to make to finance the operations on the different terms then agreed to by the Silver Giant Company. The agreement finally reached appears to me to have been more favourable to the Silver Giant Company than that under discussion when the negotiations broke down in February.

The appellant's case is that, having introduced the Silver Giant property to the Hedley Mascot Company and an agreement having eventually been reached for the acquisition of its property by the new company that was formed under the name Giant Mascot Mines Limited, voting control of which was given by the terms of the agreement to the Hedley Mascot Company, his right to a commission is complete. No point is made on behalf of either party that the sale was to the new company rather than to the Hedley Mascot Company and it is common ground that this circumstance does not affect the question to be determined. The appellant says that he found a purchaser to whom eventually the Silver Giant property was sold on terms agreeable to it and that, accordingly, the commission has been earned.

It is impossible, as has been so clearly pointed out in the reasons for judgment delivered in the House of Lords in *Luxor* v. *Cooper* (1), to state any general rule by which the rights of the agent or the liability of the principal under commission contracts are to be determined. As Lord Russell said, the contracts by which owners of property desiring to dispose of it put it in the hands of agents on commission terms are not, in default of specific provisions, contracts of employment, in the ordinary meaning of those words, since no obligation is imposed on the agent to do anything. In the present matter, the work which the appellant was invited to do was to negotiate a sale of the property. The argument for the appellant really is that the arrangement made was a general employment, in the sense in which that expression was used by Lord Watson in his judgment in *Toulmin* v. *Millar* (2), an expression which Lord Atkinson said, in delivering the judgment of the

(1) [1941] A.C. 108.
(2) (1888) 58 L.T.R. 96.

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Judicial Committee in *Burchell* v. *Gowrie* (1), meant that should the property be eventually sold to a purchaser introduced by the agent he would be entitled to commission at the stipulated rate. I am unable to agree with this contention.

It is apparent from the evidence as to the discussion which took place between the directors of the Silver Giant Company and Taylor on September 27, 1949, and from the terms of the memorandum then drawn up by one of the directors and signed by Taylor, that the directors interpreted the arrangement between them as entitling Taylor to a commission of the amount mentioned in the memorandum, for his services theretofore rendered and such further assistance as he might be able to render in negotiating a sale of the property, if such a sale should result from the negotiations then being carried on. Had these resulted in a sale, as the directors of the company obviously then contemplated would be the case, the appellant's claim to the agreed commission would have been complete. The learned judges of the Court of Appeal have unanimously found upon the evidence that those negotiations broke down and were terminated. This is the only finding before us on this question of fact since, no doubt for the reason which I have above indicated, the learned trial judge did not deal with the matter. After examining with care all of the evidence in this case, I respectfully agree with the opinion expressed by Mr. Justice Bird, in delivering the judgment of the Court, that the appellant did not negotiate the sale of the Silver Giant property, within the meaning of the offer made to him, and that the services rendered by him were not the effective cause of the sale.

I would dismiss this appeal with costs.

The dissenting judgment of Kellock and Estey JJ. was delivered by:—

ESTEY J.:—The appellant at trial recovered judgment for $33,000 for services rendered by him to and at the request of the respondent Silver Giant Mines Limited (hereinafter referred to as Silver Giant) in introducing a

(1) [1910] A.C. 614 at 626.

buyer who purchased its mine. This judgment was reversed in the Court of Appeal (1). Appellant in this appeal asks that the judgment at trial be restored and varied by increasing the amount thereof.

The learned trial judge found that the plaintiff was requested by Silver Giant prior to September 27, 1949, to and did find a buyer that purchased its mine.

The learned judges in the Court of Appeal were of the opinion that there was evidence to support the finding as to the appellant's request, but reversed the learned trial judge because

> . . . there can be no room for doubt that on February 6, 1950, the parties, having failed to agree on terms which were mutually satisfactory, the negotiations initiated by Taylor were finally determined.

The respondent Silver Giant contends that there are no concurrent findings of fact relative to employment prior to September 27, 1949, and that the finding of the learned trial judge to this effect should be reversed. It further contends that on that date (September 27, 1949) the appellant entered into an agreement with Silver Giant for services to be rendered thereafter which was never carried out. In the alternative, if there was any other agreement, it was that the appellant should "initiate, negotiate and conclude a deal," which he did not perform and that in any event whatever agreement may have been entered into it was determined as found by the learned judges in the Court of Appeal.

The reasons of Mr. Justice Bird, written on behalf of the Court (1), rather support the conclusion that there are concurrent findings of fact relative to employment prior to September 27, 1949. Even if, however, the contention of the appellant be accepted, the evidence fully supports the finding of the learned trial judge upon this point.

The Silver Giant, incorporated in 1947, owned a lead mine which was not in production. The appellant, a prospector and miner, stated that in 1948 Wheeler, President of Silver Giant, asked him if he "could get a buyer for it" (Silver Giant mine). As a result, appellant, on August 4, 1948, visited the mine. Wheeler was there and accompanied him upon his inspection and assisted in getting

(1) [1953] 9 W.W.R. (N.S.) 407.

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certain samples. On that occasion appellant says he mentioned Hedley Mascot Gold Mines Limited (hereinafter referred to as Hedley Mascot), when Wheeler explained his inability to do business with its officers, but said: "If you can and you make a deal, all right, it doesn't matter to me, I want to sell the mine." Wheeler does not dispute the fact of the visit, the inspection nor the taking of samples, but denies any reference to a sale of the mine then or upon any previous occasion. His explanation of appellant's visit is that he had previously endeavoured to sell shares to him and he would not invest until he had seen the mine. This explanation was obviously not accepted by the learned trial judge.

After this visit, and again with the concurrence of Wheeler, appellant spoke to Dr. Dolmage, a consulting geologist with Hedley Mascot, to whom he stated that Silver Giant "looked like a good thing." For some time the matter remained in abeyance because of an option Silver Giant had given to Siscoe Gold Mines Limited, of which the appellant was informed. This option was not exercised and expired March 15, 1949.

Thereafter Wheeler asked appellant "to go ahead." As a consequence, in April, 1949, he saw Dr. Dolmage who asked that appellant bring Wheeler to his office. This appellant did upon several occasions. Dr. Dolmage was apparently sufficiently impressed to discuss the matter with Mackenzie, President of Hedley Mascot, and a minute of Hedley Mascot directors on April 29, 1949, discloses that:

> The President told the Meeting that Dr. Dolmage had been talking to him about this property, which appeared to have merit, and that he had therefore asked him to attend this Meeting so that he might fully report to the Board.

After Dr. Dolmage's report and "considerable discussion," the minutes disclose that Dr. Dolmage

> was requested to have a further talk with Mr. Wheeler to see whether or not something tangible might be reduced to writing, in order that the Board might feel justified in asking Dr. Dolmage and Mr. Tremaine to proceed to the Silver Giant property to make a complete study and report back to the Board of Directors.

Two days later, April 28, 1949, appellant accompanied Wheeler to Dr. Dolmage's office, where possible terms were discussed and Dr. Dolmage drafted a proposal in which Hedley Mascot would provide the mill, equipment and

capital for operating the mine and would receive 1,700,000 shares of Silver Giant. Wheeler admits that he went with and at the request of the appellant to Dr. Dolmage's office; that in the course of the discussion, the fact that Siscoe was out of the way was mentioned and also "about how many shares were issued" of Silver Giant. He does not, however, admit any discussion about a proposed agreement. In fact he says he did not there see the proposal and, if he had, he would not have agreed to it. He, however, admits that the proposal was shown to him by McLelan, Secretary of Silver Giant, about the date thereof (April 28, 1949) and that it came from Dr. Dolmage's office. McLelan was not asked as to the proposed agreement, but does say:

> . . . sometime in April Mr. Wheeler brought Taylor in, introduced him to me and told me that Taylor was negotiating a deal between Silver Giant and Hedley Mascot. I told Mr. Wheeler at the time, I said, 'Do you think they will negotiate with you?'

However much Wheeler may insist he knew nothing of any proposal of April 28, a letter from Mackenzie, President of Hedley Mascot, dated May 12, 1949, commences:

> We are writing you with reference to our negotiations for the proposed purchase of 1,700,000 Treasury shares of your company.

Further letters were exchanged, which are not material hereto.

Dr. Dolmage was away during July and August and in his absence Hedley Mascot merely kept negotiations open. Appellant states that in August Wheeler complained that the deal was "going pretty slow" and asked him if he (appellant) "could get him contact with Mackenzie, the President." As a result of arrangements made by appellant, Wheeler, Dr. Dolmage, appellant and possibly Thompson went to Mackenzie's office. On September 7, 1949, Hedley Mascot, through its Secretary William Patterson, submitted in writing a request for an option in Silver Giant mine. This request was not acted upon.

Dr. Dolmage states that in September appellant and Wheeler came to his office and in the course of their urging him to visit the mine, appellant "went so far as to offer to pay my fees and expenses." Thereafter, possibly the next day, in any event, September 14, appellant and Wheeler again visited Dr. Dolmage's office, when Wheeler brought maps, samples and other information relative to the Silver

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Giant mine. Upon that occasion Dr. Dolmage again discussed a possible agreement, but, while he inferred that Wheeler would enter into an agreement, he (Dr. Dolmage) "was unable to pin him down to anything very definite." A few days later, September 18, Dr. Dolmage and Wheeler went to the mine, where they remained two or there days. Dr. Dolmage, referring to this visit, stated:

> My conclusion very definitely was that the mine came nearer to satisfying the requirements of our company than anything we would be likely to find.

When asked what the requirements were, he stated:

> We hadn't very much money but we had a first class mill which was standing idle and we had no ore to use that mill on.

About the end of September, or early in October, the parties had reached a practical agreement, a draft of which was prepared but never executed. Tremaine, General Manager of Hedley Mascot, was of the opinion that it would have been executed but for the difficulty Hedley Mascot experienced in arranging the necessary financing.

Notwithstanding all that appellant had done prior to September 27, 1949, the respondent contends that appellant had not been requested to "get a buyer for it," and that whatever negotiations had taken place were not by virtue of any efforts on appellant's part. However, respondent's directors depose that about this time they concluded appellant should be asked to assist in the negotiations and invited him to an informal meeting of the directors at Wheeler's home. There the following agreement was entered into and signed by the appellant:

> I hereby agree to accept Thirty Thousand (30,000) shares of Silver Giant Mines Ltd. (N.P.L.) as my commission for any deal with Hedley Mascot Mines Ltd. (N.P.L.) whereby they get control of Silver Giant Mines Ltd. or the property. This amount of shares to be my commission in full and these shares to be issued to me on the deal being completed to the satisfaction of Silver Giant Directors.

The learned trial judge heard the directors present at that meeting depose that the agreement was in relation to future services only and stated: "I cannot accept this evidence." No explanation was offered as to why they selected the appellant to assist them in the negotiations at that time. They gave to him no directions or instructions. In fact, there does not appear to have been any difference in the relationship of the parties after September 27, 1949,

except that possibly appellant was not as active as prior thereto, perhaps because the parties had reached a point where a complete agreement was anticipated and, in any event, thereafter it was a matter of terms in regard to which he took no part. Three days thereafter, on September 30, the directors decided that "a committee of two or more directors do negotiate with the Hedley Mascot Mining Co. Ltd. or other Mining Company or Financial Group," yet the appellant's name is not there mentioned. Moreover, at the same meeting Mr. Jestley was appointed legal adviser to the company and appears soon thereafter to have conducted negotiations on its behalf.

The parties at that time had almost reached an agreement and it would appear that the learned trial judge rather accepted the evidence of appellant, who deposed that at the informal directors' meeting Mr. Thompson, who did most of the talking, said:

> 'Mr. Taylor, I want to get this commission settled'. I said, 'Have you settled on the deal', and he said, 'Just about'. 'We want to get this commission settled', and he said, 'How much will you take to get right down to brass tacks, what are you going to take for commission, we want to get this thing wound up quick', and I said, 'I will take 50,000 free shares for my commission'.

Appellant very shortly thereafter became dissatisfied with his remuneration as fixed by this agreement and made that fact known to the directors. Finally, on January 7, 1950, he endeavoured by letter to "withdraw my agreement to accept 30,000 shares." This letter of withdrawal was not accepted or otherwise acted upon by Silver Giant. It therefore does not affect the rights of the parties, as one of them cannot by such an act avoid his contractual obligations. *Sailing Ship "Blairmore" Co.* v. *Macredie* (1). His conduct and letter however are consistent with his contention that he was requested to find a buyer and that he had agreed upon remuneration for his services.

The finding of the learned trial judge that he did not accept the evidence of the directors upon this issue ought to be accepted not only because of the advantage the learned trial judge had in hearing and observing the witnesses as they gave their evidence, but also his conclusion finds support in the language used in the agreement and

(1) [1898] A.C. 593.

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more particularly when read and construed in the light of the evidence that preceded and immediately followed the making thereof.

This agreement was therefore intended, and must be accepted as fixing the appellant's remuneration. The making thereof by the directors was a ratification of Wheeler's request to the appellant and constitutes an answer to the contention on the part of Silver Giant that if Wheeler did employ the appellant he did so without authority.

The other terms of appellant's engagement were not in writing and must be ascertained from the language used by the witnesses, construed in relation to the circumstances under which they were made. Wheeler, at the outset, wanted appellant to "get a buyer for me." Subsequently, he used the words "if you can make a deal." These statements were made prior to the appellant interviewing any party. Appellant thereafter brought the parties together as prospective buyers and sellers and, at least in the early stages, assisted in interesting Dr. Dolmage and others in the merits of the Silver Giant mine. Throughout, he appears to have conducted himself in the manner described by Tremaine: "The main part he took was to try to iron out the difficulties that would crop up from time to time between us, and try to keep the different parties in contact." He never did, nor was he, upon the record, expected to enter into the involved and complicated negotiations that were apparently necessary. These were conducted at times by officials and experts of the respective companies, committees of their directors, their solicitors and finally by Wootten, Mackenzie, Gunning, Wheeler and Thompson.

The evidence relative to respondent's contention that appellant at times conducted himself in a manner inconsistent with the existence of any request to find a buyer prior to September 27 is either so vague or inconclusive that no conclusion adverse to the appellant ought to be based thereon.

The evidence establishes that appellant's engagement by Silver Giant was that if appellant found a buyer who, as a result of his introduction, purchased the property, he was entitled to a commission.

The negotiations continued and in December the parties thought there was only one difficulty to be overcome before an agreement might be made. On December 13 Hedley Mascot made an offer which was not accepted. Dr. Dolmage was in the hospital a short time at the end of December and when he came out in January the first day he was at the office he met Wheeler and Jestley, but again no agreement was made. Thereafter Dr. Dolmage did not have much to do with the negotiations. On January 30 the solicitors for Hedley Mascot made another proposal which the directors of Silver Giant considered and then directed their solicitor to write the following letter:

MacDOUGALL, MORRISON & JESTLEY

Marine Building,
355 Burrard Street,
VANCOUVER, B.C.
February 6, 1950.

DELIVER
Hedley Mascot Gold Mines Limited,
(Non-Personal Liability)
908 Royal Bank Building,
Vancouver, B.C.

Dears Sirs:

Inasmuch as the proposal submitted on your behalf through Messrs. Farris, Stultz, Bull & Farris by letter dated January 30, 1950, differs so materially from that which your negotiating committee had previously agreed upon we are instructed by Silver Giant Mines Limited (N.P.L.) to advise you that its Board of Directors at a meeting held on February 4, 1950, has unanimously rejected the same.

Under these circumstances we are directed by our clients to advise you that the protracted and fruitless negotiations which have been carried on must now be considered to be at an end.

Yours truly,

MacDOUGALL, MORRISON & JESTLEY
per 'H. L. Jestley'

The learned judges in the Appellate Court were of the opinion that whatever agreement may have been made with the appellant it was terminated by the foregoing letter of February 6, 1950. The learned judges emphasized that subsequent to the letter of February 6, 1950, the appellant had taken no part in the renewed negotiations and, indeed, that he was not even aware that the same were being carried on. They also pointed out that neither Dolmage nor McLelan had any part in negotiations subsequent to February 6. Mr. Justice Bird stated:

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that the earlier negotiations were terminated on February 6, 1950, and that thereafter the respondent made no contribution towards the consummation of a deal.

The letter of February 6, 1950, must be read and construed in relation to what took place both before and after the writing thereof. On December 12 the solicitor for Silver Giant concluded his letter: "that this offer to resolve the last difficulty in negotiations is final." On December 13 Hedley Mascot wrote: "Before permitting these prolonged negotiations to break off" the directors were making "one further proposal." On December 13 solicitor for Silver Giant replied "that the only proposal which is acceptable is that which we made to you as proposal (*a*) in our letter of December 12, 1949." There does not appear to be any further correspondence until January 30, when the solicitors for Hedley Mascot submitted another offer. It is in reply to this offer that the letter of February 6, 1950, is written and concludes with the words already quoted. In other words the parties had been writing in terms of finality upon other occasions with the evident hope that an agreement might be arrived at without further delay. The letter of February 6, 1950, is of the same type in so far as it states: "protracted and fruitless negotiations" must be considered "at an end." It is a fact that these negotiations through the solicitors did not continue, but, as upon previous occasions, another effort was made. Both parties had and still realized that an agreement was desirable and to their respective advantages. Wootten, Manager of Western City Company, the fiscal agents of Hedley Mascot, and who had been kept in touch with negotiations, immediately he heard they were at an end deposed: "I made a mental resolve that I was going to try and do my best to reopen it, if possible." He interviewed Mackenzie and as to these interviews, Mackenzie deposed:

> I always felt that the deal was a good deal for both companies and it was too bad if it was not consummated. . . . and anyway, we talked it over and Phil Wootten knew of this situation.

and again:

> 'Well, don't let this thing die. I would like to open it up again; I think I can do something. Will you let me have a crack at it?' Those were his exact words. I was going away and I said, 'Phil, if you think you can get the companies together, go ahead.'

Wootten found Mackenzie's associates in Hedley Mascot of the same opinion and later, when Wheeler and his associates in Silver Giant were interviewed, they entertained the same view. These were the circumstances under which the new negotiations were taken up and which resulted in the agreement of May 1, 1950. Tremaine, Manager of Hedley Mascot, aptly described the position when, referring to the negotiations and the letter of February 6, he stated:

> Officially they were supposed to come to a halt but actually there was still efforts being made by different members of the two firms to keep the thing alive to see if something couldnt' be arrived at.

Respondent, however, submits that the letter of February 6, 1950, constituted a complete and decisive break and contends that by virtue of this letter in the language of Lord Shaw of Dunfermline the continuity between the original relation and the ultimate transaction had been not merely dislocated but broken. Lord Shaw's statement reads as follows:

> (1) When it is proved—and it must, of course, be proved—that parties to a transaction are brought together, not necessarily personally but in relation of buyer and seller through the agency of an intermediary employed for the purpose, the law simply is that if a transaction ensues, then that intermediary is entitled to his reward as such agent; (2) nor is he disentitled thereto because delays have occurred, unless the continuity between the original relation brought about by the agent and the ultimate transaction has been not merely dislocated or postponed but broken; and (3), finally, the introduction by one of the parties to a transaction of another agent or go-between does not deprive the original agent of his legal rights, and he cannot thus be defeated therein.

This statement was made by Lord Shaw in *Bow's Emporium, Limited,* v. *A. R. Brett & Co. Ltd.* (1), where the agent recovered his commission notwithstanding that the vendor intimated in January and then positively stated in February that he had decided against the purchase. In fact the purchase was concluded in September through another agent. It was there held that the first agent was entitled to his commission. Viscount Haldane stated at p. 197:

> the agent who has got an agreement to be paid the commission, and who has introduced the purchaser, is entitled to it, even where the actual sale is not ultimately effected through him. The question is whether the services of the agent were really instrumental in bringing about this transaction.

(1) (1927) 44 T.L.R. 194 at 199.

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This case illustrates that a delay of months, together with the fact that the agent was not a party to the final negotiations may not constitute a break in continuity.

The cases of *Wallace* v. *Westerman* (1), and *Turner, Meakin & Co. Ltd.* v. *Yip* (2), were cited. These are cases where the sale was effected through a second agent whose commission has been paid or not disputed, and the first agent by action claims a commission. In the former the efforts of the first agent were concluded under circumstances that Chief Justice Macdonald said "show that the transaction was completely ended." In the second the efforts of the first agent ceased when he was told that the property had been sold. Robertson J.A., delivering the judgment of the Court, stated:

> At this time it is clear to me that the plaintiff had abandoned all hope of getting a higher offer . . . and were not themselves doing anything further in connection with the sale.

In both cases the courts went on to find that the effective cause of the sale was the activity of the second agent to whom a commission had been paid.

The issue of abandonment or determination must be ascertained upon a consideration of the facts of a particular case. In the present case the conclusion of negotiations between the solicitors does not constitute a break in the continuity of the negotiations. Both parties had been for some time and were, on February 6, 1950, still convinced that it was desirable an agreement should be made. This is evident both by virtue of the attitude of those associated with Hedley Mascot and that when they sought to reopen or continue negotiations, those associated with Silver Giant immediately acquiesced. In essence it was but a continuation of the former efforts to conclude an agreement.

The appellant, inasmuch as he had agreed on September 27, 1949, to the amount of his commission, is precluded from now contending that he is entitled to the usual commission of 10 per cent. Under the terms of that agreement of September 27, 1949, he would be entitled to an order directing the delivery of 30,000 shares. We were, however, told that these were not now available. The learned trial judge proceeded upon that basis and awarded damages. He found that, if the appellant had received

(1) (1928) 40 B.C.R. 35. (2) [1953] 8 W.W.R. (N.S.) 168.

these shares, he would have received 1,040 shares in the new Giant Mascot Mines Ltd. for each 1,000 shares he held in Silver Giant; the market value at the date of the trial of the shares in Giant Mascot Mines Ltd. was approximately $1 per share and he therefore fixed the commission payable to the plaintiff at $33,000. Respondent contends that the learned trial judge erred in that he should have determined the value of these shares as of the date of the breach, which was 42c, and awarded damages on that basis.

While one in the position of the appellant is under no obligation to find a purchaser and, therefore, not "employed" as that word is used in contracts of mutual obligations, once he performed the service there is an enforceable contract. As stated by Lord Russell of Killowen in *Luxor Ltd.* v. *Cooper* (1):

> The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent.

When, therefore, the agreement between Silver Giant and Hedley Mascot was concluded, appellant became entitled to 30,000 shares in Silver Giant. These were not delivered and, as they are not now available, he is entitled to damages.

In *Burchell* v. *Gowrie and Blockhouse Collieries Ltd.* (2), it was held that Burchell, who had earned his commission, was, under the circumstances, entitled to damages. The sale price consisted of mortgage bonds, preferred and ordinary shares. The matter was tried in the first instance before a referee who found that the plaintiff was entitled to damages computed on the basis of the par value of the bonds and stock. This decision was affirmed in the Privy Council where Lord Atkinson, on behalf of their Lordships, stated at p. 626:

> It was quite open to the referee to take, as the measure of damages, what would have been Burchell's commission at the stipulated rate, 10 per cent, on the consideration actually received for the sale. This is apparently what he did. In their Lordships' view, therefore, the conclusions at which the referee arrived on the nature and limits of the appellant's employment, as well as on the amount of damages to be awarded, are not only sustainable upon the evidence, but are in themselves right.

(1) [1941] 1 All E.R. 33 at 44. (2) [1910] A.C. 614.

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In *McNeil* v. *Fultz* (1), defendant, on behalf of himself and others, acquired three licenses to search for coal. Subsequently and with the concurrence of all parties these licenses were included at a value of $27,000 in an amalgamation from which the parties were to receive bonds and shares in that amount. The defendant, who received the bonds and shares on behalf of himself and associates, wrongfully withheld a portion thereof. This Court affirmed the judgment in the Court of Appeal which gave judgment against the defendant for the cash value of the bonds and shares unaccounted for, calculated upon the basis of their selling value at the date of the default. In that case the bonds and shares improperly withheld had been disposed of. Sir Lyman Duff, delivering the judgment of the Court, stated at p. 206:

> Treated simply as a contractor who had agreed to deliver the bonds he is clearly liable to pay damages for the breach of his contract based upon the selling price of the bonds at the time when the obligation to deliver arose. Mayne on Damages, at page 195.

The damages must, therefore, be computed as of the date of the non-delivery or breach on the part of Silver Giant. When the agreement was concluded these shares may have, by virtue thereof, acquired a new and different value from that of the market immediately prior thereto. This possible value is not covered by the evidence and, therefore, a reference should be directed before the learned trial judge to determine this value.

The fact that Silver Giant withheld delivery of the shares does not provide a basis for the award of interest or of damages in respect to the withholding of the shares. *London, Chatham & Dover Rly. Co.* v. *South Eastern Rly. Co.* (2). In *The Custodian* v. *Blucher* (3), interest was allowed for the non-payment of money. This, however, was possible because of legislation in the province of Ontario, to which there does not appear to be any comparable legislation in British Columbia.

The appeal should be allowed and judgment directed in favour of the appellant for damages equal to the value of 30,000 shares at the time of the respondent's breach and failure to deliver the shares at the conclusion of the agree-

(1) (1907) 38 Can. S.C.R. 198. (2) [1893] A.C. 429.
(3) [1927] S.C.R. 420.

ment of May 1, 1950. This value or amount of damages to be determined upon a reference to the learned trial judge. The appellant is entitled to his costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *M. G. M. Lougheed.*

Solicitors for the respondents: *MacDougall, Morrison & Jestley.*

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PETER E. R. BALCOMBE .....APPLICANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1954

*May 13
*May 19

MOTION FOR LEAVE TO APPEAL

Appeal—Leave—Criminal law—Conviction for murder—Jurisdiction—Situs of crime, question of law—Publication and distribution of written articles prior to trial—Prejudice.

The situs of a crime, in so far as it is related to the question of jurisdiction of a Superior Court of Criminal jurisdiction to try an accused, is a question of law exclusively for the Court to decide—even if, to its determination, consideration of the evidence is needed. It is not a question within the domain of the jury whose lawful fulfilment of duties rests on the assumed existence of the jurisdiction of the Court to try, at the place where the trial is held, the accused for the crime charged. The jury is concerned with the facts as they may be related to guilt or innocence but not to jurisdiction.

On an application for leave to appeal to this Court from the judgment of the Court of Appeal for Ontario affirming the conviction of the applicant for murder.

Held: The application must be dismissed.

1. The Lower Courts have pronounced that the Court sitting at the County of Dundas, in the Province of Ontario, and which tried the applicant, had the jurisdiction to try him, and, in this respect, the latter has failed to rebut the presumption *Omnia presumuntur esse rite acta* which applies to a Superior Court of Criminal jurisdiction.
2. The applicant has failed to show that there should be disagreement with the conclusion of the Court of Appeal that the publication and distribution, prior to the trial, of written reports and articles having reference to the case, did not in fact prevent him from having a fair trial.
3. The argument submitted by the applicant with respect to the alleged failure of the trial judge to direct the jury on the theory of the defence or as to an alleged lack of motive, does not justify leave to be granted.

*PRESENT: Fauteux J. in Chambers.

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BALCOMBE v. THE QUEEN

MOTION by the applicant before Mr. Justice Fauteux in Chambers for leave to appeal from the judgment of the Court of Appeal for Ontario, affirming the applicant's conviction on a charge of murder.

J. M. P. Kelly for the motion.

W. B. Common Q.C. contra.

FAUTEUX J.:—This is an application for leave to appeal, under s. 1025(1) of the *Criminal Code*, on points of law, to the Supreme Court of Canada, from a unanimous judgment of the Court of Appeal of Ontario dismissing the appeal of Balcombe against his conviction by the Chief Justice of the High Court and a jury, at the city of Cornwall, that he did, at the County of Dundas in the province of Ontario, on or about the 15th day of October 1953, murder one Marie Annie Carrier.

The first ground as to which leave to appeal is sought is:—

> That the evidence does not substantiate nor prove that the offence alleged was committed within the province of Ontario and therefore there is no jurisdiction in any Ontario Court to try the accused on the said charge.

This point was first raised in the form of an objection made at trial, at the close of the case for the prosecution. Counsel rested his submission on the following part of the provisions of s. 888 of the *Criminal Code*:—

> Nothing in this Act authorizes any Court in one province of Canada to try any person for any offence committed entirely in another province . . .

Overruling the objection, the presiding Judge said:—

> If the death took place in Ontario, it would be sufficient to give Ontario Courts jurisdiction because there could be no murder until the death took place, so the offence would be partly here anyway.
>
> .....
>
> I see no evidence before the Court, except possibly the hypothesis you suggest, which might be a very extreme one, that there may have been a fatal blow outside of Ontario. The evidence is all one way as to where the death occurred.

The point having been urged again in the Court of Appeal, the Chief Justice of Ontario, delivering orally the unanimous judgment of the Court, stated:—

> We are of the opinion that having regard to time factors, location and condition of the body, and other evidence in this case, the Crown has proved that the crime was committed in the Province of Ontario and within the jurisdiction of the Supreme Court of Ontario.

To these judicial pronouncements, it may be added that on the hearing of the present application, counsel for the applicant conceded at least that on the evidence, there were two possible views in the matter: the first one being that the crime was committed in Ontario and the second—the one contended for but not substantiated by counsel—that it was committed in the province of Quebec. If the situs of the crime, in so far as it is related to the question of jurisdiction, was a question exclusively for the Court to determine, it has not been shown that the above judicial pronouncements on the matter were wrong. The maxim *Omnia presumuntur esse rite acta* applies to a Superior Court of criminal jurisdiction. It was then for the applicant to show that on the record the presumption had been rebutted. This he has failed to do.

But, pursues counsel for the applicant, the question was one for the jury to decide and the trial Judge should have directed them that they had to be satisfied beyond a reasonable doubt that the offence alleged was committed within the province of Ontario.

That Marie Annie Carrier was murdered is not open to question. And so far as the situs, where the fatal blows were inflicted or where the death actually occurred, was material to determine whether or not the accused was the author of the crime, the jury were sufficiently directed. The submission is simply that they should have been instructed to determine, as a matter related to jurisdiction and not as a matter related to guilt or innocence, whether, upon the view taken by them of the evidence, they were satisfied beyond a reasonable doubt that either the wounds were inflicted or the death occurred within the province of Ontario.

The question of jurisdiction is a question of law—consequently, for the presiding Judge—even if, to its determination, consideration of the evidence is needed. It is a question strictly beyond the field of these matters which under the law and particularly under the terms of their oath, the jury have to consider. They are concerned only with the guilt or innocence of the prisoner at the bar. Indeed the lawful fulfilment of their duties rests on the assumed existence of the jurisdiction of the Court to try, at the place where it is held, the accused for the crime charged.

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They are concerned with facts as they may be related to guilt or innocence but not to jurisdiction. There is nothing under the law entitling them, through the whole course of the execution of their duties, to legally make any other pronouncements but those as to which a general or special verdict is authorized by law.

The applicant also raised the point that the evidence failed to establish that the offence charged was committed at the County of Dundas as alleged in the indictment. This ground was also related to the jurisdiction of the Court and as such must be disposed of in the same manner as the preceding ones.

In another submission, it is alleged that a fair trial of the accused was irremediably prejudiced by the extensive publication and distribution, prior to the trial, throughout the province of Ontario and in particular in the united counties of Stormont, Dundas and Glengarry from whence the Jury men were selected, of written reports and articles having reference to the case at bar. The record shows that the accused challenged only four jurors for cause and, in each instance, the triers found that the challenged juror was indifferent. All the twelve Jury men having been selected and sworn, counsel for the accused, in the absence of the jury, informed the Court of such publicity and contented himself to ask, for sole relief, that special instructions be given to the jury in this respect. This the trial Judge did, not only in his address to the jury, but, before one single witness was heard, he instructed them, in the clearest and strongest possible terms, as to what their duty was in the matter. On this point, the Court of Appeal expressed the opinion that they were unable to perceive any ground for holding that, in fact, the accused was prejudiced by the publicity he complained of. Nothing was advanced to suggest that I should disagree with that opinion.

As to the last two grounds alleged, i.e., that the learned trial Judge failed to direct the jury on the theory of the defence, or as to an alleged lack of motive, it is sufficient to say that the argument heard in this respect does not justify leave to be granted.

The application is refused.

Leave refused.

BURRARD DRYDOCK COMPANY LIMITED (*Third Party*) ..... APPELLANT;

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*Mar. 4, 5, 8
*Jun 21

AND

CANADIAN UNION LINE LIMITED and UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED (*Defendants*) ..... RESPONDENTS;

AND

AUSTRALIAN NEWSPRINT MILLS LIMITED (*Plaintiff*) .....

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Damages—Negligence—Third Party proceedings—Water carrier—Carrier held liable for damages to cargo—Relief over against negligent ship's repairer—Proximate cause of the damage—Contributory negligence—Estoppel—Water Carriage of Goods Act, 1936, c. 49—Contributory Negligence Act, R.S.B.C. 1948, c. 68.

In a judgment from which no appeal was taken, the cargo owner recovered damages from the respondents, the ship owner and the charterer, for a cargo damaged during its carriage in the respondents' ship, on the ground that due diligence had not been exercised to make the ship seaworthy. The trial judge found that the damage had been caused by the imperfect tightening of the covering of a storm valve which had allowed water to seep through to the cargo.

Immediately prior to loading the cargo, the appellant, a ship repairing company, had overhauled and repaired the ship, including this storm valve. An officer of the ship had inspected the work generally, but in spite of his apprehension that the valve might not have been screwed tight, no final inspection of it was made. A certificate that the repairs had been done to their satisfaction was signed by the officers of the ship.

In the third party proceedings taken by the carriers against the appellant and tried subsequently, judgment for relief over was given at trial and this was affirmed in the Court of Appeal.

In this Court the appellant contended that the failure to fulfil the contract had not been the proximate cause of the damage, that the respondents were estopped from denying that the work had been properly done, and that, in any event, there had been contributory negligence.

Held: The appeal should be dismissed.

Per Rinfret C.J., Kerwin and Estey JJ.: The damage to the cargo was a natural and probable consequence that was, or ought to have been, in the appellant's contemplation when it breached its contract. Assuming

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

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that the phrase *novus actus interveniens* may apply to a case of contract, that breach was the proximate cause of the damage and not the action of the ship's officers. The repairer's negligence continued even though the ship's officers failed to intervene. Furthermore, there was no duty owing by the respondents or their agents to the appellant to inspect. The taking of the ship to sea was the very thing contemplated as well by the appellant as by the respondents.

As the repairs to the valve itself had in fact been properly done, the signing of the certificate did not create an estoppel.

Although the evidence of the appellant's workmen that the bolts had been tightened securely was not believed by the trial judge, it must be taken that they would have reported to their foreman who would thereupon have given the same information to the respondents and, therefore, there was no negligence on the part of the respondents which caused or contributed to the damage.

Per Rand and Cartwright JJ.: The damages sought were such as would be contemplated or anticipated and came well within the scope of those for which redress is given.

The ground on which the default of the intermediate actor, the ship, was not be treated as a *novus actus* was that the respondents were entitled to rely upon their contract for the completeness of the work to be done. So far as the respondents inspected the work, they did so in their own interest and not because of any obligation toward the repairer. There was an absolute obligation to finish the work with care and skill. Nor is the burden of guarding against such an oversight to be thrown on the ship as a matter of policy in limiting damages. For those reasons also, it could not be said that, as between these parties, there were concurrent causes of damages.

The certificate of satisfaction did not imply an acceptance of all particulars regardless of latent flaws and could not be intended to conclude against the ship such a delinquency as was present here.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming, Sloan C.J.A. dissenting in part, the judgment at trial in a third party proceeding for relief over against a ship's repairer for damage to the cargo of a ship.

J. W. de B. Farris Q.C. and *J. D. Taggart* for the appellant.

C. K. Guild Q.C. and *V. R. Hill* for the respondents.

The judgment of Rinfret C.J., Kerwin and Estey JJ. was delivered by:—

KERWIN J.:—Australian Newsprint Mills Limited brought action in the Supreme Court of British Columbia against Canadian Union Line Limited, the owner of the S.S. "Waitomo", and Union Steamship Company of New Zealand Limited, the charterer by demise of the ship, for

(1) [1953] 9 W.W.R. (N.S.) 13; 2 D.L.R. 828.

damages to a quantity of unbleached sulphite wood pulp shipped by the plaintiff in the Waitomo from Powell River, British Columbia, to Tasmania. Third party proceedings were taken by the defendants for indemnity from Burrard Dry Dock Company Limited against any liability that might be imposed upon them in the main action. Counsel for all parties took part in the trial of the action and on November 24, 1951, judgment was given by Mr. Justice Coady for the plaintiff against the defendants for $21,384 and costs. From that judgment no appeal was taken.

Subsequently Mr. Justice Coady presided at the trial of the issues in the third party proceedings in which, by agreement, the evidence in the main action, so far as it had any application, was taken as if it had been repeated. Also by agreement both parties to the issues put in further evidence. Judgment was given for the plaintiffs in the third party proceedings against the Dry Dock Company for $21,384 and interest at five per cent per annum from November 24, 1951; for $1,653.25, being the taxed costs of the plaintiff in the main action; for the costs of the defendants in that action, and the latter's costs as plaintiffs in the third party proceedings. Subsequently, pursuant to an order made by the trial judge, the plaintiffs in the third party proceedings amended their claim by asking, in the alternative, for relief over against the Dry Dock Company in respect of any and all damages and costs found against them in the main action. Special leave was given to post-date the judgment in the third party proceedings from March 26, 1952, to October 6, 1952.

An appeal to the Court of Appeal (1) was dismissed although the Chief Justice of British Columbia would have given judgment for only one-half of the damages and costs as he was of opinion that there was active, concurrent, continuing negligence of the ship's officers, as well as of the Dry Dock Company, and that the case came within the British Columbia *Contributory Negligence Act*, R.S.B.C. 1948, c. 68. That point was raised for the first time in the Court of Appeal by the Chief Justice and hence there is no reference to it in the reasons for judgment of the trial judge.

(1) [1953] 9 W.W.R. (N.S.) 13; 2 D.L.R. 828.

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The Dry Dock Company now appeals. Some of the arguments advanced in the Courts below need not now be considered as counsel for the appellant realized that there were concurrent findings of fact. However, judging from the form and scope of the reasons for judgment, the main questions have been presented to us in a somewhat different manner and, in view of the argument, a new approach to the problem must be made.

In the main action Mr. Justice Coady held that the respondents had not exercised due diligence to make the Waitomo seaworthy as required by paragraph 1(*a*) of article 3 of the Rules relating to Bills of Lading scheduled to *The Water Carriage of Goods Act, 1936* (Canada), c. 49. He found:— "The cause of the damage to the Plaintiff's goods was occasioned by a storm valve the covering of which had not been screwed down tightly thereby allowing sea water in 'tween decks and when this water had there accumulated in sufficient quantity it flowed over the hatch combing and down into the No. 3 hold where the goods in question were stowed." Part of what the trial judge says later is relied on by the appellant and it is therefore transcribed:—

> The defendants here probably did rely on and expect the Third Party to do the work entrusted to it in a proper and workmanlike manner but I am not now dealing with any claim or liability arising as between them with respect to that. In the discharge of the defendants' statutory duty to the Plaintiff however it is clear the defendants did rely to some extent at least on Captain Beaton to check the work of the Drydock Company in respect to any matter of repair which could affect the seaworthiness of the ship. Captain Beaton admits that his duty went that far. With respect to the valve coverings, he knew that these had been removed—he knew that the inspections had been made by the surveyors when the valve coverings were removed—he knew that they had not been replaced when the surveyors were there—he knew that the failure to replace properly would affect the seaworthiness of the ship. With this knowledge and in pursuance of what he considered his duty, he asked an employee of the Drydock Company to be advised when the valve coverings had been replaced so that he could check them, and he says that he would have checked them to see that these valve coverings had been replaced and properly screwed down if he had been so advised. He states however that he was not advised when or if these valve coverings had been properly replaced and he consequently did not check. That certainly was not the exercise of due diligence—that was not carrying out what he admits was his duty. He apparently assumed, not having been advised, that the valve coverings had been replaced and securely fastened. Before he had any opportunity to check, the valves had been boxed in. But it would not even then have been a difficult matter for him to check as he ought

to have done. It is difficult to understand his conception of duty when he says he would have checked had he been advised and did not apparently consider it necessary to check when not advised.

The only conclusion I can arrive at upon the evidence here is that there was a lack of due diligence on the part of the defendants under the circumstances.

The appellant is a dry dock company having its works at North Vancouver. Prior to the voyage of the Waitomo to Tasmania, the appellant had contracted with the respondents to overhaul and repair the ship in order that it might pass Lloyd's four year survey. This contract included specifically the work on and in connection with the storm valves as the following requisition shows:—

All storm valves to be put into working order. At present ineffective.

The account ultimately rendered by the appellant to the respondents for its services totals approximately $126,000 and includes this item:—

Order No. 5645

Storm Valves

Opening up all storm valves throughout vessel and cleaning for examination. Supplying and fitting new flap leathers as necessary, freeing up valves, rejointing and closing up in good order. Removing sparred protection boxes in way of valves in Nos. 3 & 4 'tween decks for access and refitting in good order.

Then follow the charges for work and labour.

About one hundred employees of the appellant had been engaged in the work. For the respondents, the Chief Officer of the ship (Beaton) was on duty from 8 a.m. to 5 p.m. each working day but it is made clear in the evidence that he could not possibly oversee everything. The appellant removed the old sparring and covering which protect the valves, and repaired and reseated the valves. Confining ourselves to the valve in question, the evidence shows that it was examined by Beaton and one of the appellant's workmen. They removed the plate, worked the flap back and forth, found the valve "in effective condition", and replaced the plate. The bolts were put on and tightened by hand but, as it was necessary that they should also be tightened by a spanner, Beaton told the workman to let him know later through the appellant's foreman when the spanner had been used. He heard nothing further about the matter from anyone. The ship proceeded from the dry dock to Powell River and Ocean Falls and thence to New Westminster where Beaton noticed that "the valves

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had been completely boxed in" i.e., with new sparring and covering. In the course of Beaton's cross-examination by counsel for the plaintiff in the main action this appears:—

Q. Now, before your ship commences a voyage, is it not one of your normal duties to see that all inlet and outlet valves are closed?

(After an objection, which was overruled, the question was read by the reporter).

A. No, not if the ship is just making a normal voyage and hasn't gone into dry dock, or hasn't had those valves open, we don't go around and inspect them.

Q. Assuming it has been in dry dock for repairs to be opened, is it part of your duty to see that it is closed?—A. To the company.

Q. It is your duty to your company, is that right?—A. Yes.

Q. And your company owes that duty to its shippers, doesn't it?—A. I should say so, yes.

Q. And I think that you have already given evidence to the effect that the only reason you didn't in this case was because you were waiting for some further word from the Burrard Dry Dock Company's foreman?—A. That is more or less true, yes.

The interjection by the Court at this stage is of particular significance:—

THE COURT: That is only part of the reason. He has already stated that he saw that they were all boxed in, and he assumed that the work had been done by the Burrard Dry Dock that they were supposed to do.

On October 1, 1948, a "shop order" was prepared by the appellant reading as follows:—

5645 *Storm Valves*

All storm valves to be put into working order. At present ineffective.

5646 *Port Deep Tank Ladder Rung*

Rung to be inserted in steel ladder to port deep tank (to replace missing rung).

5647 *Mainmast Head Light Screen*

Horizontal screen to mainmast head range light to be readjusted to requirements. At present screen ineffective and light illuminates bridge.

The above work has been carried out to our satisfaction.

This was signed by Ritchie, the Master of the ship, and Beaton.

Upon these facts the contentions advanced on behalf of the appellant are:— (1) the appellant's failure to fulfil its contract to overhaul and repair the ship was not the proximate cause of the damage giving rise to the judgment in the main action against the respondents: (2) by reason of the signatures of their officers to the shop order of October 1, 1948. the respondents are estopped from denying that the

work was properly done: (3) in any event, the respondents are entitled to judgment only as proposed by the Chief Justice of British Columbia.

As to the first point, it being established that the appellant breached its contract, the damage to the wood pulp was a natural and probable consequence that was, or ought to have been, in its contemplation. But it is said it was not the appellant's breach of contract but the action of Beaton, amounting to a *novus actus interveniens,* that was the proximate cause of the damage. Assuming that the phrase may apply to a case of contract, the real position is that the appellant's negligence continued even though Beaton failed to intervene. Beaton did not do anything which permits it to be said that that original negligence ceased to operate. Furthermore, there was no duty owing by the respondents or its agents to the appellant to inspect: *Mowbray* v. *Merryweather* (1), a decision of the Court of Appeal which was followed in *Vogan* v. *Oulton* (2), and which was also followed by a trial judge in *Scott* v. *Foley* (3). There is nothing in *Nance* v. *British Columbia Electric Railway Company Ld.* (4), inconsistent with this. *Buckner* v. *Ashby and Horner Limited* (5), was relied on by the appellant but, there, the Court of Appeal merely affirmed the decision of Atkinson J. on the facts, and that was a case of a plaintiff who was injured failing to recover against contractors who had agreed with the Corporation of the City of London to erect a roof above the ground in a private passage as a protection against "blast" and "shrapnel" to the satisfaction of the Corporation. Similarly, in my opinion none of the other decisions referred to on behalf of the appellant has any bearing upon the question. Connected with this first point of the appellant is the argument that the damage was really caused by the respondents taking out the ship in an unseaworthy condition. As to this it is sufficient to say that the action of the respondents in taking the ship to sea was the very thing contemplated as well by the appellant as by the respondents.

On the point of estoppel, I agree with Mr. Justice Sidney Smith that the repairs to the valve itself had in fact been properly done and that the fault was in the appellant's

(1) (1895) 2 Q.B. 640.
(2) (1899) 81 L.T. 435.
(3) (1899) 16 T.L.R. 35.
(4) [1951] A.C. 601.
(5) [1941] 1 K.B. 321.

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workmen not securely bolting the plate. I also agree with him that, as stated by the trial judge, the shop order of October 1, 1948, must be construed reasonably. "It cannot", Mr. Justice Sidney Smith says, "be read as meaning that every item incidental to repair must be inspected by the ship's people—otherwise they would have to follow the workmen all day long and every day. The ship was in Burrard hands for three weeks and the repairs were extensive, costing $126,000." What the trial judge had stated with reference to this matter in his reasons for judgment in the trial of the third party proceedings is as follows:—

> It would be going a long way to hold that the defendant's officers had by signing the memorandum in question released the Third Party from any liability with respect to work negligently done in the repair and overhaul of this ship which was, as I stated, a rather major job. To hold that, would be to hold that the defendants have assumed a duty to check every nut and bolt handled by the Third Party's workmen to see that these workmen were not negligent. In other words, it would be necessary to have someone representing the defendants continuously with the workmen of the Third Party inspecting their work as they proceeded to see that nothing was left undone which they ought to have done. This was never in the contemplation of the parties. The defendants owed no duty to the Third Party to check the work done by the workmen engaged by the Third Party and the Third Party cannot take refuge now behind the memorandum to which I have referred and claim to be relieved from liability for the negligent acts of its workmen.

The third point raised by the appellant before us is that, in any event, it should be held liable for only one-half of the damages and costs by virtue of the *Contributory Negligence Act*. In his reasons for judgment in the third party proceedings the trial judge found that the plate on the valve had not been properly replaced and that it had not been properly screwed down, and that owing to the negligence of the workmen employed by the appellant. He then continued:—

> The evidence permits of no other reasonable conclusion despite the evidence of the workmen who contended that this valve covering was properly screwed down. Their evidence as to that, while given in good faith no doubt, I cannot accept.

One of the workmen referred to, Murdo Maclean, testified in chief as follows:—

> Mr. TAGGART: Q. After the chief officer and yourself had inspected that particular valve, what action did you take with regard to that valve? —A. Tightened the holding-down nuts.
>
> Q. You positively recall that?—A. Yes.
>
> Mr. GUILD: That, again, is a leading question.

Mr. TAGGART: Q. After you had tightened down the holding down nuts, what action did you then take?—A. I informed my foreman that the job was completed.

Q. And that was the end of the job?—A. That was the end of the job.

The other workman, Stuart Grant, testified in chief:—

Mr. TAGGART: Q. Can you add anything, now to that answer? The question was: Do you wish to add anything to the last answer?—A. After the officer told Maclean to put the cover plate on, on the last one that was left open, we went back and closed it up, bolted it securely. I was the last one to test it with a spanner to see if it was tight.

Q. Do you remember how many valves you worked on?—A. It is hard to say, but I think we put the cover plates on three storm valves on the starboard side and two on forward port and one on after port.

Mr. TAGGART: That is to say, two on the forward port side, and one on the after port side, my lord.

Q. In what condition were these valves when you finally finished the work?—A. In good shape.

This is the evidence referred to by the trial judge and which he did not accept, and his finding in that respect is one that was approved by the Court of Appeal and upon which no attack has been made. However, in view of this evidence, it must be taken that the foreman would have reported to Beaton that the bolts had been tightened with a spanner and, therefore, there was no negligence on the part of the respondents which caused or contributed to the damage.

The appeal should be dismissed with costs.

The judgment of Rand and Cartwright JJ. was delivered by:—

RAND J.:—The question raised on this appeal is one of damages. The appellant undertook certain large scale repairs to a vessel owned by the respondent, placed in dry-dock for the purposes of undergoing a four-year Lloyd's survey, included in which was that of putting a galley drain storm valve in proper condition. This valve, about $2\frac{1}{2}$ inches in diameter, was affixed to the side of the vessel in a 'tween deck hold about three feet above the water line. A flap prevented sea water from entering but permitted the discharge of the drainage. A box with a removable cover was set on the horizontal portion of the valve about a foot or so from the vessel's side and by removing the cover the operation of the flap could be observed. The cover fitted over four threaded stud bolts and was held in position by

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nuts screwed on the studs. The flap had been working sluggishly, admitting water, and after the repair had been done an inspection for the purposes of certification was made for which the cover had to be removed. After replacing it, the nuts were to some extent screwed on by hand to be later tightened with a wrench.

An officer of the vessel inspected the work generally as it was being done, including that of the valve, and in fact assisted a workman in replacing the cover and giving a turn to two of the nuts. At that time there was no wrench available and the officer asked to be notified when the nuts were made tight and he would make a further examination, but no notice was given and no further inspection made.

In the course of the next voyage, entered upon immediately after the repairs, water entered the hold and damaged cargo. It was found that the nuts had not been tightened and that there was a play in the cover of about three-eighths of an inch at one end through which the water had entered. The claim of the cargo owners was allowed for unseaworthiness and a failure of due diligence on the part of the vessel. From this judgment no appeal was taken.

Third party procedure was invoked by the vessel against the contractor, the appellant company, which being found responsible for the failure to tighten the nuts was held liable to the vessel in the amount of judgment and costs of the main action. This second judgment was affirmed on appeal (1) and from that ruling the appellant has brought the case here.

Mr. Farris, in a thorough and lucid argument, put his case thus. The third party claim is for damages and damages only, and there is no case for indemnity; it is then a matter solely of the extent to which damages are allowable. The issue is whether the judgment recovered against the vessel by reason of a breach of warranty of seaworthiness can be taken to be the measure of damages resulting from the breach of the contract to repair. The chain of consequences in damages is broken by the intervention of the act of a new conscious volition, and there was such an intervening act here in putting the vessel to sea with the cover loose, in the knowledge that it had not been given a final inspection. That inspection was a duty of the ship

(1) [1953] 9 W.W.R. (N.S.) 13; 2 D.L.R. 828.

toward the cargo, its failure was culpable, and combined with the act of setting upon the voyage was the sole cause of the loss. Being a duty toward cargo, it is to be taken as something contemplated and expected by both parties to the repair contract. He criticizes the references in the judgments below to there being no "duty" on the part of the ship toward the contractor as confusing negligence with damages. Incidentally, he raises the question of collateral liability in tort for negligence in the defective work done and its significance to the recovery of damages by both cargo and ship. He relies on a written acknowledgement by representatives of the vessel that the work of repairs had been done to their satisfaction. His final submission is that in any event there was concurrent default on the part of the vessel which jointly with that of the contractor brought about the damage.

Notwithstanding the force of this argument, I am unable to agree with it. It is unnecessary to cite authority for the general proposition that damages for breach of contract reach at least to consequences which, if the parties to the contract had thought about the question at all, would have come within the range of foreseeable likely, probable or reasonably possible happenings. The language used to express this idea has taken various forms; they are "natural consequences", consequences within "the contemplation of the parties" or what, as reasonable men, they would "anticipate". These I take to mean the same thing; they are intended to convey the notion of proximate events following the culpable act in the not exceptional course of things, not necessarily proximate in time or space but in consequential relation.

In the circumstances here there can be no doubt of what those events would have been. The valve was one of the few means by which sea water could enter the holds, and in the latter would soon be stowed goods which would be damaged by sea water. It was a vital feature of repair the importance of which everybody appreciated. It was equally evident that the goods, if not owned by the respondent, would be carried under the ordinary and uniform terms—prescribed in fact by statute—and that the seaworthiness of the ship would be one of the obligations of the vessel. That the cargo would in all probability be damaged if the

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top of the box was not tightly fastened would be patent to every person familiar with the workings of a vessel. On principle, then, the damages sought are such as would be contemplated or anticipated and come well within the scope of those for which redress is given. Whether any such distinction between a contractor for the general repair of the vessel for survey purposes and one engaged for, say, the repair of a valve only, can, as suggested by Smith J.A., be made, does not call for consideration.

We are not lacking in express authority on such a situation. In *Mowbray* v. *Merryweather* (1), the defendant agreed to supply a chain along with other equipment to be used in discharging a cargo from a ship. The chain was defective and broke while being so used. An employee of the purchaser was injured and recovered judgment against his employer on the ground that the latter could have discovered the defect by reasonable inspection. The employer then brought action against the seller on the warranty that the chain was suitable for the purpose intended. The Court of Appeal held the employer's liability to the workman to be the natural consequence of the breach of warranty reasonably presumed to have been within the contemplation of the parties when entering into the contract.

To the application of this case two objections are made: first, that there was no conscious act on the part of the dockman who was carrying on the work, but rather a mere failure to inspect; and secondly, that a claim by the workman against the person furnishing the chain could there, but not here, have been maintained. The "consciousness" in the present case is the knowledge that the tightness of the screws had not been tested; but equally so was the knowledge of the dockman that he had not examined the chain before using it. Then, whether a direct liability in negligence toward the injured person by the original wrongdoer in any case exists depends upon its circumstances; but that question is not involved here. The basis of a wrong under the general law and that arising under a contract have no necessary relation, and how far the former can be affected, if at all, by the circumstances of the latter offers a bait to speculation that must be refused: what must be kept in mind is the fundamental distinction between their

(1) (1895) 2 Q.B. 640.

origins. The appellant is liable on its contract to put the valves "in working order" and the respondent on its warranty to furnish a seaworthy vessel. The third person, in this case the cargo owner, has no claim arising out of that contract for repairs; but no rule has ever been laid down that a contractual claim in damages reaching to injury done to a third person is conditioned upon a collateral tortious liability in the original wrongdoer to the third person. A duty under the general law may or may not have arisen between the contractor and either or both the vessel and the cargo owner, and a like duty between the vessel and the cargo; but these collateral possibilities are irrelevant to the issue before us.

In *Mowbray, supra,* Kay L.J. referred to a direct remedy and Rigby L.J. mentioned its admission by the defendant as concluding the question of damages: but there was no reference to it by Lord Esher M.R. nor was there any suggestion that it was a condition of the recovery which was allowed. The question was incidentally mentioned in *Boston Woven Hose* v. *Kendall* (1). In that case a boiler had been warranted to stand a pressure of 100 pounds. It was defective and the defect was patent to any real inspection. Subjected to a pressure much below 100 pounds, the boiler weakened to allow naphtha to escape which exploded and injured employees of the purchaser. The latter admitted liability to the employees, paid the damages suffered and was allowed to recover them from the seller. In giving the judgment of the court, Holmes C.J., in speaking of *Mowbray, supra,* said:—

> It is intimated in that case that the workman himself could have recovered in the first place against the defendant. Whether that is a necessary condition of a recovery over we need not consider . . . There are many cases in our own and other reports which offer as strong or stronger applications of the principle of liability over.

The ground on which the default of the intermediate actor, here the vessel, is not to be treated as a *novus actus* is that the respondent was entitled to rely upon its contract with the Drydock Company for the completeness of the work to be done, and it is that persisting contractual right which differentiates the case from one of negligence. So far as the respondent inspected the work, it did so in its own

(1) 178 Mass. 232.

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interests and not because of any obligation toward the contractor. The default was in relation to an item of detail which it would be absurd to say the parties contemplated or anticipated would be the matter of a specific inspection by the vessel as a check for the benefit of the contractor. That would require the ship owner to see that every nail was properly driven and every screw tightened in the entire course of the work. Here was an absolute obligation to finish the work with care and skill. So long and so far as the respondent is entitled to rely on that contract, it cannot be said that any act of his in the ordinary run of things is *novus actus,* and that reliance, as it is here, may be of the essence of the agreement. If he is not so entitled, then a new situation is presented. Circumstances may indicate a common understanding or assumption that, for example, a machine repaired will not be put in use without a fresh inspection or test of the part repaired, an inspection, say, required by law: but that is another way of saying that there is no right to rely on the contractor's obligation.

Nor is the burden of guarding against such an oversight to be thrown on the vessel as a matter of policy in limiting damages. The object of such a policy should be to minimize losses, but how can that be done by exempting the guilty person from responsibility for its consequences? Except in special circumstances, and as between the parties, reliance upon undertakings is essential to modern business and in fact to our daily affairs generally; occasionally there will be failures, but that possibility cannot justify such a transfer of the burden, which in practical terms would mean the shifting of the obligation of insurance from the culpable to the innocent.

These considerations furnish the answer also to the last contention that, as between these parties, there were concurrent causes: the original failure was in a setting which contemplated reliance on the contractor, a fact which the evidence puts beyond dispute; and so long as that reliance was justified, there can be no intervening cause.

The certificate of satisfaction related, obviously, to the general performance of the different items of the work including that of the valve; it did not imply an acceptance of all particulars regardless of latent flaws; that would have been equivalent to a release which the persons furnishing

the certificate had no authority to give. Nor is this avoided by treating it as an estoppel. If the certificate had been refused or had expressly excepted defects in the work, what would the Dockyard Company have done? Certainly not entered upon a minute re-inspection of the whole work. As Smith J.A. intimates, the purpose of the certificate is primarily to authorize payment; it is not intended to conclude against the vessel such a delinquency as was present here.

I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Farris, Stultz, Bull & Farris.*

Solicitors for the respondents: *Macrae, Montgomery & Macrae.*

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*Nov. 24, 25, 26
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*May 19

THE DISTRICT REGISTRAR OF THE LAND TITLES DISTRICT OF PORTAGE LA PRAIRIE (*Defendant*) ... APPELLANT;

AND

CANADIAN SUPERIOR OIL OF CALIFORNIA LTD. and WILLIAM HIEBERT (*Plaintiffs*) ..... RESPONDENTS.

Real Property—Crown lands brought under Real Property Act (Man.)—Minerals not reserved in certificate of title—Title of bona fide purchaser from registered grantee from Crown—Whether "grant from Crown" includes a transfer therefrom—Manitoba Provincial Lands Act, 1887, c. 21, ss. 20, 21—Provincial Lands Act, R.S.M., 1913, c. 155, s. 25—Real Property Act, R.S.M., 1913, c. 171, ss. 2(a), 78(a), 79—Real Property Act, R.S.M., 1940, c. 178, ss. 61, Dominion Lands, 1883, c. 17, s. 43.

The title to the lands giving rise to the present appeal was originally in the Crown in the right of Canada which, in 1901 by Order in Council, vested it in the Crown in the right of the Province of Manitoba. Shortly thereafter one "M" made application to purchase the lands on terms which provided that all valuable stone, coal or other minerals were reserved to the Province. The latter in 1903 by Order in Council directed that the lands be brought under the operation of *The Real Property Act* (Man.) and a certificate of title issued to the Crown in the right of the Province. In 1914 "M" quit claimed his rights to one "N" to whom, on completion of payment of the purchase price in 1919, a transfer in the form prescribed by *The Real Property Act,* (R.S.M. 1913, c. 171) of all the estate and interest of the Crown in

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

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the lands was executed and a new certificate of title issued. There was no specific mention of minerals either in the certificate or the transfer but the latter was under the Act made subject to any reservation contained in the original grant from the Crown. Subsequently the lands became vested in the respondent Hiebert to whom was issued a certificate of title similar to that issued "N". Hiebert executed a lease of the petroleum and natural gas in the lands of which the respondent oil company became the assignee. The latter presented a caveat to the appellant for registration based on the lease and assignment thereof. The appellant refused to register it on the ground that the lessee had no estate or interest in the lands. In the litigation that ensued the appellant contended that the petroleum and natural gas by reason of s. 21 of The *Manitoba Provincial Lands Act, 1887* did not at any time pass from the Crown. The contention of the respondents, which prevailed in the courts below, was that as there was no express reservation in the original transfer from the Crown the mineral rights passed to the transferee and were not reserved by s. 21.

Held (Rinfret C.J., Estey and Locke JJ. dissenting):—

1. That in enacting the *Manitoba Provincial Lands Act, 1887*, the Legislature expressly brought all lands held by the Crown in the right of the Province under that general statute.

2. That in construing *the Provincial Lands Act* (R.S.M. 1913, c. 155) and *The Real Property Act* (R.S.M. 1913, c. 171) the two statutes must be read together and when so read the word "grant" in the declaration contained in s. 21 of the 1887 Act (s. 25 of R.S.M. 1913, c. 155), that no grant from the Crown of lands in freehold has operated or will operate as a conveyance of any minerals therein unless expressly conveyed in such grant, includes a transfer of lands from the Crown under *The Real Property Act*. The effect of s. 21 is as if the transfer bore an endorsement that it was subject to the provisions of s. 21.

Per Rinfret C.J. and Locke J., dissenting:—Section 21 of the *Manitoba Provincial Lands Act, 1887* (s. 25 of R.S.M. 1913, c. 155) with a minor change, was taken verbatim from s. 43 of the *Dominion Lands Act, 1883* and the words "grant from the Crown" should be attributed the same meaning in both statutes, that is, as referring only to grants by letters patent. As in the case of the Dominion Act, the only means specified for conveying Crown lands was in this manner.

The transfer to "N", made in the form prescribed by *The Real Property Act* of 1913 pursuant to Order in Council of Nov. 10, 1914, transferred "all our estate and interest in the said land". By virtue of the definition of land in *The Real Property Act*, and of s. 88 of that Act, there being no contrary intention expressed in the transfer, all mines and minerals in the lands were "expressly conveyed in such grant" within the meaning of s. 25 of the *Provincial Lands Act* of 1913, if the transfer was a grant.

Per Estey J. (dissenting): After the enactment of The Lands Registration Act in 1880 and *The Real Property Act of 1885* Manitoba had two systems of land registration. The *Manitoba Provincial Lands Act, 1887* did not alter or amend either and the Crown thereafter made its conveyances according to which Act its land was under. The contention that a conveyance by way of "grant" would not include a "transfer" therefore cannot be accepted. Here since the Crown's title

to the land was under a statute which contemplated that a conveyance should be made by transfer it must follow that the term "grant" in legislation providing for the administration of such land must be read to include the word "transfer" as used in *The Real Property Act*. That Act contemplated that whenever the Crown granted land under it it would be by way of patent deposited with the Registrar and the issue of a certificate of title to the transferee. The land here was placed under that Act by Order in Council and conveyed by transfer so that the transfer must be accepted as the original grant from the Crown. Since under *The Real Property Act of 1885* and the *Manitoba Provincial Lands Act, 1887* "land" is defined to include "minerals", the conveyance to "N" would include them because they were not specially excepted.

APPEAL from a judgment of the Court of Appeal for Manitoba (1) affirming with a variation the judgment of Freedman J. (2).

A. E. Hoskin, Q.C. and *John Allen, Q.C.* for the appellant.

J. G. Cowan, Q.C. for the Attorney General of Manitoba.

F. M. Burbridge, Q.C. and *D. C. L. Jones* for the respondents.

The dissenting judgment of Rinfret C.J. and Locke J. was delivered by:—

LOCKE J.:—It is, in my opinion, necessary, in order to determine the questions raised in this appeal as to the proper interpretation of s. 25 of *The Provincial Lands Act* (R.S.M. 1913, c. 155) and of the relevant sections of *The Real Property Act* (R.S.M. 1913, c. 171, R.S.M. 1940, c. 178), to examine the legislation enacted, both by Parliament and by the Provincial Legislature, defining the manner in which the public lands in Manitoba should be dealt with following the creation of that province in 1870.

The Manitoba Act 1870 (33 Vic. c. 3) provided, inter alia, that all grants of land in freehold made by the Hudson's Bay Company up to March 8, 1869, should, if required by the owners, be confirmed by grant from the Crown, the mode and form of such grants to be determined by the Governor General in Council.

The first *Dominion Lands Act* related exclusively to the public lands of Manitoba and the Northwest Territories and was enacted as c. 23 of the Statutes of 1872. This

(1) (1952) 5 W.W.R. (N.S.) 686; [1952] 3 D.L.R. 773.
(2) (1953) 8 W.W.R. (N.S.) 49 and 417; [1953] 3 D.L.R. 437.

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defined the manner in which the lands acquired by Canada by virtue of the surrender of the rights of the Hudson's Bay Company in Rupert's Land and the North-Western Territory might be dealt with. Provision was made for sales of such land and the granting of homestead rights to settlers. On the completion of such purchases or the fulfilment of the prescribed homestead duties it was provided that title should be conveyed by letters patent, to be signed on behalf of Her Majesty by the Governor General or his Deputy, and the grants to those holding titles by grants from the Hudson's Bay Company were to be made in like manner. By the terms of the deed of surrender from the Hudson's Bay Company to the Crown, that company was entitled to certain lands in each township in part of the territory surrendered: as to part of these, it was provided by s. 21 that title should be vested in the company without requiring patents to issue: as to the remainder, letters patent in the name of the company were to be granted. Section 36 of the Act provided that no reservation of gold, silver, iron, copper or other mines or minerals should be inserted in any patent from the Crown granting any portion of the Dominion lands.

The Act of 1872 was repealed by c. 31 of the Statutes of 1879 which was described as an Act to Amend and Consolidate the several Acts respecting the Public Lands of the Dominion. This substantially reproduced the earlier Act. Section 36 of the Act of 1872 appeared as s. 37 of the Consolidated Act.

By c. 26 of the Statutes of 1880 s. 37 and other sections which had appeared in the Acts of 1872 and 1879 under a sub-heading "Mining Lands" were repealed and a section substituted which provided that lands containing gold or other minerals should not be subject to the provisions of the Act respecting sale or homestead but should be disposed of in such manner as might from time to time be determined by the Governor in Council by regulations to be made in that behalf.

The Act was again repealed and consolidated by c. 17 of the Statutes of 1883. The amendment of 1880 which had replaced s. 37 of the Act of 1879 appeared as s. 42, with

other sections, under a sub-heading "Mining and Mining Lands." Section 43 of this Act, forming part of this group of sections read:—

It is hereby declared that no grant from the Crown, of lands in freehold or for any less estate, has operated or will operate as a conveyance of the gold or silver mines therein, unless the same are expressly conveyed in such grant.

In this Act, settlers making homestead entries were given the further right of making a pre-emption entry for an adjoining unoccupied quarter section of land.

The surrender by the Hudson's Bay Company, as has been stated, was made to the Dominion of Canada and the Province did not, with some minor exceptions for roads or road allowances, receive any part of the public lands within its boundaries when constituted in 1870. Thereafter, however, the Province became entitled to certain lands by reason of arrangements made with the Dominion in respect to drainage and it became necessary to provide a means whereby such lands and any other lands that the province might acquire might be sold or disposed of. Accordingly, by c. 12 of the Statutes of Manitoba of 1883, provision was made whereby any such lands which had become, or might thereafter become, the property of the province might be sold and title given under letters patent under the Great Seal of the Province, duly authorized by the signature of the Lieutenant-Governor and the Secretary of the Province.

The Real Property Act, 1885 (c. 28) introduced the Torrens system into Manitoba. Under this Act a certificate of title issued by the Registrar General (whose appointment was provided for) and signed by him under his seal of office, became the root of title to lands subject to the Act in lieu of letters patent issued either under the *Dominion Lands Act* or the Provincial Lands Act of Manitoba.

The interpretation section of the Act contained the following definitions which bear upon the present matter:—

3. In this Act, and in all instruments purporting to be made or executed thereunder, unless the context otherwise requires:—

(1) The expression "Land" shall extend to and include land, messuages, tenements and hereditaments, corporeal and incorporeal, of every kind and description, whatever may be the estate or interest therein, together with all paths, passages, ways, water-courses, liberties, privileges, easements, mines, minerals and quarries appertaining thereto, and all trees and timber thereon, and thereunder lying or being, unless any such are specially excepted;

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(19) The expression "Grant" shall mean and include any grant of Crown land, whether in fee or for years, and whether direct from Her Majesty or pursuant to the provisions of any statute.

By s. 22 it was provided:—

Hereafter no words of limitation shall be necessary in any conveyance of any land in order to convey all or any title therein, but every deed or instrument conveying land shall operate as an absolute conveyance of all such right and title as the grantor has therein at the time of its execution, unless a contrary intention be expressed in such conveyance; but nothing herein contained shall preclude any conveyance from operating by way of estoppel; and hereafter the introduction of any words of limitation into any conveyance or devise of any land, shall have the like force and meaning, as the same words of limitation would have if used by way of limitation of any personal estate, and no other.

Part V of the Act defined the procedure under which owners of land might apply to have their title registered under the Act and obtain certificates of title.

Section 61, so far as relevant to the present matter, read:—

61. The land mentioned in any certificate of title granted under this Act, shall, by implication, and without any special mention in the certificate of title, unless the contrary be expressly declared, be deemed to be subject to:—

(*a*) Any subsisting reservations contained in the original grant of said land from the Crown;

* * *

(*g*) Any right of expropriation which may by statute be vested in any person or body corporate;

Section 62 read:—

62. Every certificate of title granted under this Act, when duly registered, shall (except in case of fraud wherein the registered owner shall have participated or colluded) so long as the same remains in force and uncancelled under this Act, be conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever, that the person named in such certificate is entitled to the land included in such certificate, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in section 61, except as far as regards any portion of land that may by wrong description of boundaries or parcels be included in such certificate when the holder of such certificate is neither a purchaser or mortgagee for value, nor the transferee of a purchaser or mortgagee for value, and except as against any person claiming under any prior certificate of title granted under this Act in respect of the same land and for the purpose of this section, that person shall be deemed to claim under a prior certificate who is holder of, or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate granted, notwithstanding such certificate may have been surrendered and a new certificate granted upon any transfer or dealing.

Section 65 provided that an owner desiring to transfer the title of property under the Act might execute a transfer in the form contained in Schedule D and required such transfer to contain an accurate statement of the estate intended to be conveyed.

Part XV provided for the setting up of an Assurance Fund which might be resorted to in certain specified events, which included losses sustained by any omission, mistake or misfeasance of the Registrar-General or of anyone employed in the various Land Titles Offices.

In 1887 the Provincial Lands Act of 1873 was repealed and a new statute substituted (c. 21). The preamble to this statute read:—

> Whereas it is expedient and necessary to make provision for the administration of the public lands now acquired or which may be hereafter acquired in any manner whatsoever by the Government of the Province of Manitoba, whether earned under the Statutes or Orders-in-Council of this Province, or of the Dominion of Canada relating to the draining of submerged or swamp lands, or the granting of swamp lands to this Province for public purposes, lands foreclosed under mortgages or acquired for arrears of taxes and all lands that may be or become vested in Her Majesty for the use of this Province or in any way become the property of this Province:
>
> Therefore Her Majesty by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:—

By s. 1 the expression "Land" was declared to extend to and include, inter alia, mines, minerals and quarries appertaining thereto. As in the case of the earlier statutes, it was provided that conveyances of Provincial lands should be made by letters patent issued under the Great Seal of the Province.

By s. 12 provision was made whereby Provincial lands which had been sold and the purchaser's interest, having become liable to taxes, sold for arrears, the Land Commissioner might direct the issue of letters patent to the purchaser at such tax sale upon completion by him of the conditions of location or sale.

Under the sub-heading "Mining Lands", s. 20 provided that lands containing coal or other minerals should be disposed of in such manner and on such terms as might be fixed by the Lieutenant-Governor in Council, the language being merely an adaptation of the language of s. 42 of the *Dominion Lands Act, 1883*.

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Section 21 read:—

It is hereby declared that no grant from the Crown of lands in freehold or for any less estate has operated or will operate as a conveyance of the gold or silver mines or any other mineral therein, unless the same are expressly conveyed in such grant.

It will be noted that this was almost a replica of s. 43 of the *Dominion Lands Act* which is above set out, the only change made being that after the word "mines" there was inserted in the Provincial legislation "or any other mineral."

The land in question in this action originally formed part of a land grant made by the Dominion of Canada prior to 1899, to assist in the construction of the Manitoba and North Western Railway. No patents had been granted in respect of any of the said lands but land warrants had been issued and, by an agreement dated May 9, 1899, which was approved by c. 19 of the Statutes of Manitoba of 1899, warrants for land including this parcel were surrendered to the Province. By a Dominion Order-in-Council made on May 31, 1901, it was recited that the railway company had requested that "title be passed for certain of these lands to the Crown in the right and for the use of the Province of Manitoba", that the Government of the Province had forwarded the warrants for the land for which title had been applied and it was recommended that title be vested in His Majesty King Edward the Seventh in the right and for the use of the said Province of Manitoba. Annexed to the order was a list describing lands which included the land in question. No patents were issued in respect of any of these lands by the Dominion. The effect of the Order-in-Council was that the right to the beneficial use of the lands was appropriated to the Province and became subject to the control of its Legislature, the land itself being vested in the Crown (*St. Catherine's Milling and Lumber Co.* v. *The Queen* (1)).

In 1902, by c. 43, *The Real Property Act* was reenacted and the Statute of 1885, as amended, repealed. Section 29 read:—

The Lieutenant-Governor-in-Council may by order direct a District Registrar to bring under this Act any land belonging to His Majesty in the right of Manitoba and the filing with a District Registrar of such Order-in-Council shall in all respects have the same force and effect as the filing of an application to bring land under this Act.

(1) (1888) 14 App. Cas. 46 at 56.

Acting under this section of the Act, an Order-in-Council was made by the Government of the Province on May 13, 1903, directing that certificates of title do issue to His Majesty the King for lands which included the lands in question. In pursuance of this direction, a certificate of title was issued out of the Land Titles Office at Portage la Prairie in the name of His Majesty the King in the right of Manitoba for the east half of Section 13 in Township 16, Range 10, West of the Principal Meridian. The certificate was in the terms prescribed by *The Real Property Act* and there was endorsed on the face of it a statement that the land was subject by implication to, inter alia, any subsisting reservation contained in the original grant of this land from the Crown. Unless the Dominion Order-in-Council above referred to, which transferred the right to the beneficial use of the lands to His Majesty in right of the Province, could be described as a grant (and I think it could not) there had been no grant of this land from the Crown. If it was a grant, there were no reservations of any kind contained in it.

The purpose of the Province in directing that these particular lands should be made subject to the provisions of *The Real Property Act* is not apparent, nor why, having done so, certificates of title were issued in the name of His Majesty. The title of the Crown in the right of the Province to these lands, in the circumstances above described, could not possibly be questioned, and obtaining certificates of title under the provisions of the statute could add nothing to the incontestable nature of that title. *The Provincial Lands Act* which was then in force provided for the disposition of Provincial lands by letters patent only, which would indicate that it was never contemplated when that statute was passed that Provincial Crown lands should be made subject to *The Real Property Act* while remaining the property of His Majesty. It is due to this having been done and a certificate of title issued for the lands in question, which would by virtue of the provisions of *The Real Property Act* require conveyances to be made by way of transfer, that the difficulty arises which is responsible for the present litigation.

The facts as to the transactions in regard to this particular land following the issue of the certificate of title, so far as it is necessary to consider them, are as follows:—In

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the year 1901, one Richard Morgan had made application in writing to the Provincial Lands Department to purchase the east half of section 13-16-10 West, which by its terms said that all valuable stone, coal or other minerals were to be reserved to the Province. In September 1914, Morgan's interest in these lands was acquired by one Noble and, upon his completing payment of the purchase price, a transfer in the form required by *The Real Property Act* authorized by an Order-in-Council was given on November 10, 1914.

The language of the transfer, so far as it is necessary to consider it, was as follows:—

> His Majesty the King in the right of our Province of Manitoba being registered owner of an estate in fee simple in possession subject however to such encumbrances, liens and interests as are notified by memorandum underwritten or endorsed hereon in all that piece or parcel of land known or described as follows (describing it and stating the consideration) the receipt of which sum we do hereby acknowledge transfer to the said William P. G. Noble all our estate and interest in the said land.

The instrument was executed by the Lieutenant-Governor, the Attorney-General, the Provincial Secretary and the Acting Provincial Lands Commissioner, and the Great Seal of the Province affixed. There were no "encumbrances, liens and interest" underwritten or endorsed on the instrument.

While by the terms of Morgan's application the minerals were to be reserved to the Crown, this apparently was ignored or overlooked when the transfer was given to Noble. It is sufficient for the purpose of disposing of the present matter to say that thereafter title to this land was transferred under the provisions of *The Real Property Act* to various other persons, that it was sold for taxes and title acquired by the Rural Municipality of Lakeview, by which it was sold and transferred pursuant to the provisions of the Act. Eventually, on November 30, 1948, a certificate of title was issued by the District Registrar at Portage la Prairie, wherein William Hiebert of the Post Office of Langruth was stated to be seized of an estate in fee simple in possession:—

> subject to such encumbrances, liens and interest as are notified by memorandum underwritten (or endorsed hereon) in all that piece or parcel of land known and described as follows:—
>
> the south-half of the south-east quarter of section thirteen in Township sixteen and Range Ten West of the Principal Meridian in Manitoba.

There were no encumbrances, liens and interest notified by memorandum or endorsed on the certificate other than those to which all certificates of title issued under the Act, unless the contrary be expressly declared, are deemed to be subject by the terms of s. 60 of *The Real Property Act* (R.S.M. 1940, c. 178). In so far as it affects the present matter, with minor changes in wording which did not alter the meaning, that section was in the terms of s. 61 of *The Real Property Act of 1885*.

On August 2, 1950, Hiebert granted a lease of the petroleum, natural gas and related hydrocarbons within, upon or under the said lands to one Ted Harris for a term of ten years at a stipulated annual rental. By assignment, the rights of the lessee under this instrument were subsequently vested in the respondent company. Upon the company seeking to file a caveat in the Land Titles Office at Portage la Prairie for the protection of its interest under the said lease, the District Registrar declined to accept the instrument on the ground that the company had acquired no interest in the said lands, since Hiebert was not the owner of any of the minerals contained therein. The present proceedings were initiated by the respondent company to establish its right to the registration of its caveat.

The refusal of the District Registrar to accept the caveat for registration is based upon the ground that the transfer from the Crown to Noble was a grant within the meaning of s. 25 of *The Provincial Lands Act* of 1913 and that, accordingly, by statute any minerals in or under the land remained the property of the Crown since they were not, in the language of the section, "expressly conveyed."

For the respondent, it is contended that the expression "grant" does not include transfers of land in the statutory form required by *The Real Property Act* and that, accordingly, Noble became and Hiebert was on the date upon which he granted the lease to Harris the owner of the minerals contained in the land.

It will be seen from the above recital of the legislation passed by the Dominion and by the Province in dealing with lands surrendered by the Hudson's Bay Company that the Province adopted the mode of conveyance earlier decided on by Parliament for the disposition of Dominion lands. The grants thus made to those holding Hudson's

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Bay titles or who might become entitled to conveyances under the provisions of the Dominion Lands Act of 1872 were to be made by letters patent and it is to be noted that it was in this manner that the Dominion conveyed lands under the Act from that time until the year 1950, when the Act was repealed by the Territorial Lands Act (c. 22). There can, therefore, be no doubt that when s. 43 was introduced into the *Dominion Lands Act, 1883* the "grant from the Crown" referred to was a grant by letters patent and that that was the proper interpretation of the expression in that Act until 1908, when the section in which it occurred was omitted. In the consolidation of that year (c. 20) other provisions were included dealing with the disposition of lands containing minerals and there was no counterpart of s. 43.

The Dominion, while conveying lands of the Crown in the manner specified by the Act followed the lead of the Province in introducing the Torrens system into the Northwest Territories by c. 15 of the Statutes of 1886. This was the Territories Real Property Act, which was made applicable not only to the Northwest Territories but to the District of Keewatin and all other territories of Canada. The Act closely followed the language of *The Real Property Act* of Manitoba which had been passed by the Legislature in 1885. Ss. 61 and 62 of the Act reproduced the terms of the same sections in the Manitoba Real Property Act. Registration districts were established in the Northwest Territories where persons who already held title to their lands by letters patent from the Crown might have their title registered under the provisions of the new Act. By s. 44 it was provided that whenever any land was granted in the Territories by the Crown the letters patent, when issued, should be forwarded to the Registrar of the registration district in which the lands were situated, to be retained, and a certificate of title granted to the patentee. Thus, all lands alienated by the Crown or by other owners would eventually become subject to the provisions of the new statute. That Act was repealed and replaced by the Land Titles Act of 1894, which did not differ from it in any material particular. When the Provinces of Alberta and Saskatchewan were created in 1905, similar legislation of the same name was adopted by them. There is nothing in any of the Dominion legislation to indicate that it was ever

contemplated that, so long as the lands remained the property of Canada, they would be subject to the provisions of the Act or that certificates of title should issue to the Crown.

When the Provincial Lands Act of 1887 was passed *The Real Property Act* had been in force for two years in the Province of Manitoba. The Provincial Lands Act, as was the case with all of the Dominion Lands Acts, provided that the title of the Crown when alienated should be conveyed by letters patent and the manner in which such grants were to be executed was defined. There is nothing in it to indicate that it was ever contemplated at that time that Provincial Crown lands should become subject to the provisions of *The Real Property Act* while the title remained in the Crown. *The Real Property Act of 1885* had provided by s. 28 that from the commencement of the Act all lands unalienated from the Crown in the Province should, when alienated, be subject to its provisions and by s. 29 that when patents were issued thereafter they should be deposited with the Registrar General and a certificate of title issued to the person entitled. This, as in the case of the Dominion legislation adopted in the year following for the Northwest Territories, indicated that the Legislature had considered it desirable that in the course of time lands in the Province purchased from the Crown should be made subject to the new system. The Act contained nothing of this nature affecting lands owned by the Crown.

In my opinion, the words "grant from the Crown" in s. 21 of the Act of 1887 are to be construed in the same manner as those words in s. 43 of the *Dominion Lands Act*. In accordance with the fundamental rule, it is in the first instance the intention of the Legislature of 1887 which is to be determined. There is another principle of statutory construction that the language of a statute which deals with a genus is generally extended to new things which are a species of that genus which were not known and could not have been contemplated by the Legislature when it was passed (Maxwell, 10th Ed. p. 79). A case illustrating the application of this principle is *Attorney-General* v. *Edison Telephone Co.* (1). If it could be said that that principle has any application to the differing manners in

(1) (1880) 6 Q.B.D. 244.

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which title to land may be conveyed, its application would not assist the case of the appellant since the new manner of conveying lands provided by the Torrens system had been established two years earlier. It is, of course, elementary that the language of s. 21 is to be construed in its context and the entire Act considered in endeavouring to arrive at the meaning to be assigned to the word "grant". If this be done, it is, in my opinion, a necessary conclusion that the grants referred to were grants of the only kind authorized by the statute, namely by letters patent.

There is nothing in the record to indicate that at any time prior to the year 1903, when the Order-in-Council directed the District Registrar to issue certificates of title for the Manitoba and North Western Railway lands in the name of the Crown, any Provincial Crown lands were held in this manner. While these lands had been thus brought under the Act and certificates of title issued, the Legislature did not amend *The Provincial Lands Act* and the prescribed mode of conveyance continued to be by means of letters patent. In the case of the land conveyed to Noble, however, since a certificate of title in the name of the Crown had issued it was apparently considered necessary to execute the statutory form of transfer. I assume that the Lieutenant-Governor in Council in authorizing its execution did so under what were considered the powers given by s. 7.

In the revision of 1913 an amendment to *The Real Property Act* (R.S.M. 1913, c. 171, s. 30) provided that all lands in the territory added to the Province by *The Manitoba Boundaries Extension Act, 1912* should be subject to the provisions of the Act and that, thereafter, no instrument affecting any of such lands should be registered under the old system. By that Act the boundaries of the Province had been greatly extended to the north and east and the provision that not only the lands privately owned in the added territory but those of the Provincial Crown should be subject to the Act was a departure from the policy declared by the Provincial Lands Act, 1887. It is to be noted that in this added territory the right to all minerals was reserved to the Crown in the right of the Dominion.

The Provincial Lands Act was reenacted as c. 155 in the 1913 revision. Section 25 of the Act was in the terms of

s. 21 of the Act of 1887. While various changes were made, those sections dealing with the manner in which title should be given to purchasers from the Crown remained unchanged. The lands which had come to the Province from the land grant to the Manitoba and North Western Railway Company were at this time subject to the provisions of *The Real Property Act* pursuant to the direction contained in the Order-in-Council of 1903, and presumably certificates of title had been issued to the Crown in the right of the Province for all of these lands, as had been done in the case of the lands sold to Noble. As to the lands added to the Province in 1912, no question of the application of s. 25 could arise since the minerals in them remained the property of His Majesty in the right of Canada. In these circumstances and for the same reasons which lead me to conclude that the expression "grant" in s. 21 of the Act of 1887 referred to conveyances by letters patent, I am of the opinion that the same meaning should be assigned to it in the Act of 1913.

I have no doubt that the fact is that the effect of the action of the Government in directing that the Manitoba and North Western Railway lands be brought under the Act and certificates of title issued, without making any change in the language of s. 21 of the Act of 1887 and of the relevant sections of *The Real Property Act,* was simply overlooked. In so far as the *Provincial Lands Act* is concerned, the oversight was corrected when that Act was repealed and reenacted by c. 32 of the Statutes of 1930 which, by s. 9, provided that there was reserved to the Crown *out of every disposition* of Provincial lands under the Act all mines and minerals. This was, however, too late to affect the issues in the present matter.

The transfer given by the Crown pursuant to the Order-in-Council of November 10, 1914, transferred "all our estate and interest in the said land." Section 88 of *The Real Property Act* provided that every transfer should, when registered, operate as an absolute transfer of all such rights as the transferor had therein at the time of its execution, *unless a contrary intention be expressed in such transfer or instrument.* No such contrary intention was expressed and, accordingly, the entire interest of the Crown in the land and all mines, minerals and quarries became vested in the

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transferee upon registration. The certificate of title issued to Noble on July 25, 1919, declared him to be seized of an estate in fee simple in possession in the lands in question, subject only to the reservations to which all certificates of title were subject by implication by reason of the provisions of s. 78 of the Act of 1913. As in the case of the Act of 1885, the only reservation which affects this matter was expressed as:—

> any subsisting reservation contained in the original grant of the land from the Crown.

If it be assumed for the purpose of argument that the transfer from the Crown to Noble was "the original grant of the land from the Crown" since no patent had ever issued in respect of the land, there was no reservation in it.

Hiebert's title was not obtained until 1948. The sections of *The Real Property Act* of 1940 which affect the matter do not differ from those in the Act of 1913 which are quoted at length in the judgment of Adamson J.A. and need not be repeated. Whether or not the Crown might have impeached the title of Noble, so long as these lands were registered in his name by virtue of the fact that he acquired the lands as the assignee of Morgan and the documents make it clear that it was not intended that the sale of the land to the latter should include the minerals, this cannot possibly affect the position of Hiebert. The land had been transferred many times under the provisions of the Act and that Hiebert had purchased them in good faith and for value is common ground. His title to the land could be impeached, if at all, only upon the ground asserted by the appellant, and that claim for the reasons I have stated is, in my opinion, without foundation.

I am further of the opinion that, even if it were to be assumed that the contention of the appellant that the grant from the Crown referred to in s. 21 should be construed as including transfers of land under the provisions of *The Real Property Act,* this appeal should fail.

If it was intended that such transfers were to be included, it must then have been contemplated that the Crown in the right of the Province, while still retaining ownership of Provincial lands, would bring them under the new system and that certificates of title would be issued in respect of them. This, in turn, would mean that when such lands

were alienated by the Crown, the form prescribed by *The Real Property Act* would be employed to effect the transfer. To do this involved the legal consequences resulting from the provisions of *The Real Property Act*. In my opinion, the combined effect of the definition of "land" in s-s. 1 of s. 3 and of s. 22 of the Act of 1885 was that the expression "land" in any such transfer includes mines and minerals unless, in the words of s. 22, "a contrary intention *be expressed in such conveyance.*" The definition and s. 22 appeared unchanged in meaning as subsection (*a*) of s. 2 and s. 88 in the revision of 1913. In my opinion, when the word "land" was employed in the transfer to Noble, it was as if the expression as defined in the interpretation section was written out in full. In this respect, I think the legal effect of employing the defined word does not differ from the use of the short forms prescribed by the Short Forms Act (c. 8, R.S.M. 1913). Unless the provisions of s. 88 are to be ignored, any exception to be effective must have been expressed in the transfer and there was none such in the transfer to Noble. I am, therefore, of opinion that the mines and minerals in this land were "expressly conveyed in such grant", within the meaning of s. 25 of the Provincial Lands Act of 1913, if the transfer was a grant.

If this were not the legal effect of these provisions of *The Real Property Act,* there would be repugnancy between such provisions and s. 25. As to the legislation of 1885 and 1887, *The Real Property Act* provided that "all such right and title as the grantor has therein at the time of its execution" should pass unless it was excepted in the transfer, while the Statute of 1887 declared that minerals should not pass unless "expressly conveyed in such grant." It is not suggested on behalf of the appellant that, in view of this obvious repugnancy, since the Provincial Lands Act was passed two years after *The Real Property Act* these sections of the latter Act were impliedly repealed, in so far as they might apply to transfers by the Crown. The fact that both Acts were re-enacted in the revision of 1913 in substantially the same form would be, in any event, a complete answer to any such argument. That this situation would result if full effect were to be given to the argument

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of the appellant gives further support to the contention of the respondent that the language of the section was intended to refer only to conveyances by letters patent.

I would dismiss this appeal with costs.

The judgment of Kerwin, Taschereau and Fauteux JJ. was delivered by:—

KERWIN J.:—On November 30, 1948, under the Manitoba Real Property Act, R.S.M. 1940, c. 178, the District Registrar for Portage La Prairie issued to the respondent, William Hiebert, a certificate in the usual form that he "is now seized of an estate in fee simple in possession subject to such encumbrances, liens and interests as are notified by memorandum underwritten (or endorsed hereon) in all that piece or parcel of land known and described as follows: "The South-Half of the South-East quarter of Section Thirteen in Township Sixteen and Range Ten West of the Principal Meridian in Manitoba". The relevant part of the only memorandum underwritten or endorsed reads:—

> The land mentioned in a certificate of title shall by implication and without special mention in the certificate, unless the contrary be expressly declared, be deemed to be subject to:
>
> (*a*) Any subsisting reservation contained in the original grant of the land from the Crown.

That Act and its predecessors provided in Manitoba for what is generally known as the Torrens System for lands subject to it. The object of that system is well known and the provisions of the corresponding Alberta statute, *The Land Titles Act,* have been considered by this Court in *C.P.R.* v. *Turta* and *Hager* v. *United Sheet Metal Co. Ltd.,* the judgments in which appeals are being handed down contemporaneously herewith. By s. 61 of the 1940 Manitoba Act, the certificate issued to Hiebert is, with certain exceptions irrelevant to the present appeal, conclusive evidence as against everyone, including His Majesty, that Hiebert is entitled to the lands described; and by s. 2(*f*):—

> (*f*) "land" means land,, messuages, tenements, hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein, and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges and easements, appertaining thereto, and all trees and timber thereon, and all mines, minerals and quarries, unless specially excepted;

Unless, therefore, s. 25 of *The Provincial Lands Act*, R.S.M. 1913, c. 155, which will be discussed later, requires us to hold otherwise, Hiebert is entitled to the base metals in the lands described in his certificate. In addition to the authorities referred to in the various reasons for judgment in the two appeals mentioned, many others have been cited and considered in the present case but its disposition depends upon the proper construction and effect of the two statutes.

On August 2, 1950, Hiebert gave to one Ted Harris what is called a Petroleum and Natural Gas Lease covering his lands. On August 10, 1950, Harris assigned that lease to Superior Oil of California Ltd., which Company, on August 22, 1950, filed with the District Registrar of the Land Titles District of Portage La Prairie a caveat claiming an estate or interest in the lands. The Registrar recorded the caveat but refused to complete the registration thereof. Having been required in accordance with the statute so to do the District Registrar, with the approval of the Registrar General, on January 4, 1952, set forth as the reason for his refusal that the Company had no estate or interest in and to the lands. On an appeal by the Company and Hiebert to a judge of the King's Bench of Manitoba, the District Registrar and the Attorney General of Manitoba being respondents, it was declared that Hiebert was the owner of the minerals, except gold and silver, within, upon and under the lands subject only to the lease of August 2, 1950, assigned to the Company, and the District Registrar was directed to complete the registration of the caveat. On appeal by the District Registrar and Attorney General, the Court of Appeal for Manitoba amended the judgment so as to declare that the Company was entitled to an interest in the petroleum and natural gas and related hydrocarbons except coal and valuable stone within, upon or under the lands, but otherwise affirmed the judgment below.

The District Registrar and Attorney General now appeal and their position is that the Company has not such an interest because of s. 25 of *The Provincial Lands Act*, R.S.M. 1913, c. 155, referred to above, which section reads as follows:—

> 25. It is hereby declared that no grant from the Crown of lands in freehold or for any less estate has operated or will operate as a conveyance of the gold or silver mines or any other mineral therein, unless the same are expressly conveyed in such grant.

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This section goes back through several consolidations of the statutes to s. 21 of the *Manitoba Provincial Lands Act, 1887* and in each case the wording is the same.

The 1913 Act is referred to because it was while it was in force that a transfer of the lands under *The Real Property Act* by His Majesty the King in the right of Manitoba was executed dated November 10, 1914, and a certificate of title issued under date of July 25, 1919, to one Noble a predecessor in title of Hiebert. That is, by force of the provisions of the then current Real Property Act, Noble would have become the owner of the base minerals while, by s. 25 of *The Provincial Lands Act,* R.S.M. 1913, c. 155, if applicable, those minerals did not pass because they were not expressly conveyed.

The title to the lands was originally in the Crown in the right of Canada but was transferred to His Majesty in the right of the Province of Manitoba. On May 27, 1901, one Richard Morgan applied to the Department of Provincial Lands to purchase the lands on a form which stated:— "All valuable stone, coal or other minerals are reserved by the Province." That statement of reservation in the application is mentioned merely as a matter of historical interest, because, in my view, it does not affect the determination of the appeal. At that time the land was not under *The Real Property Act* but later, pursuant to an order-in-council, a certificate of title, dated May 23, 1903, issued to His Majesty under that Act. Subsequently Morgan quit claimed his interest in the land to Noble, and upon that being shown to the satisfaction of the Department, the transfer to Noble of November 10, 1914, was executed and the certificate of title of July 25, 1919, issued to him. Neither this nor any subsequent certificate of title contained any reservation of mines or minerals.

Several arguments were advanced on behalf of the respondents. First it was contended that in view of the provisions of s. 20 of the 1887 Act, s. 21 had reference only to lands in which it was known that mines or minerals existed, s. 20 (being the same in substance as s. 24 of R.S.M. 1913, c. 155) being in these words:—

> 20. Lands containing coal or other minerals shall not be subject to the provisions of this Act respecting sale, but shall be disposed of in such manner and on such terms and conditions as may, from time to time, be fixed by the Lieutenant-Governor in Council, by regulations to be made in that behalf.

Presumably it was intended to deal administratively with known mineral lands in a manner different from lands that were thought to contain no minerals but that circumstance, in my opinion, cannot detract from the explicit wording of s. 21.

Next it was said that s. 21 has no application to transactions and certificates of title under *The Real Property Act*. In this connection it is to be noted that there was an earlier statute entitled "An Act Respecting the Acquisition and Sale or Disposal of the Public Lands of the Province", being c. 12 of the statutes of 1883. This Act recited that the Government of Manitoba was entitled to have certain lands transferred to it by the Dominion Government under certain provisions as to drainage and that Manitoba held and might acquire other lands, some, or all, of which it might be necessary or advisable to sell. It then authorized the disposal of any such land, or any interest therein, by letters patent under the Great Seal of the Province duly authorized by the signature of the Lieutenant-Governor and the Secretary of the Province and in such form as should be approved by the Attorney General.

The *Manitoba Provincial Lands Act, 1887* repealed the Act of 1883 but recited:—

> Whereas it is expedient and necessary to make provision for the administration of the public lands now acquired or which may be hereafter acquired in any manner whatsoever by the Government of the Province of Manitoba, whether earned under the Statutes or Orders-in-Council of this Province, or of the Dominion of Canada relating to the draining of submerged or swamp lands, or the granting of swamp lands to this Province for public purposes, lands foreclosed under mortgages or acquired for arrears of taxes and all lands that may be or become vested in Her Majesty for the use of this Province or in any way become the property of this Province.

The Legislature was thus indicating its intention to legislate with reference to "all lands that may be or become vested in Her Majesty for the use of this Province or in any way become the property of this Province." At that time there were two land registration systems in force in the Province—one the old system under *The Registry Act* and the other, the new, or Torrens System, which first came into force as of July 1, 1885, by virtue of *The Real Property Act* of 1885, c. 28. The existence of the two systems was, of course, well known and in fact, in ss. 32 and 33 of *The*

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Provincial Lands Act, 1887 reference is made to the Registrar General (an official under *The Real Property Act*) as well as to the registrar of every registration division (an official under *The Registry Act*). The lands under both systems were, therefore, in the contemplation of the Legislature as was also the fact that certain of such lands had been Dominion swamp lands or Dominion lands to which a railway company was entitled as a subsidy and the right to which was transferred by the railway company to the Province.

The third contention was that there was no "grant" from the Crown to which on its proper construction s. 21 could apply. The word "grant" is not defined in the Act and in view of the expressed intention of the Legislature to deal with all lands, there is no difficulty, in my opinion, in holding that it includes a transfer from the Crown of lands the title to which it had in its own name by virtue of a certificate of title issued under *The Real Property Act,* and the certificate issued to the transferee. Section 21 is not merely a direction to an official as to what should be included in a grant (or transfer or certificate) of Crown lands but it is a specific declaration that gold or silver mines, or any minerals in the lands are not included unless expressly mentioned. That declaration has the same effect as if base minerals were expressly excepted in the transfer and as if the certificate of title issued to Noble bore an endorsement that it was subject to the provisions of the section. The fact that Hiebert subsequently secured a certificate of title under *The Real Property Act* does not advance his position.

The preceding paragraph incorporates my conclusion on the last point to be considered. In that connection it is reasonable to infer that the Legislature dealing with provincial public lands in 1887 had in mind the provisions of s. 43 of the *Dominion Lands Act, 1883*:—

> 43. It is hereby declared that no grant from the Crown, of lands in freehold or for any less estate, has operated or will operate as a conveyance of the gold or silver mines therein, unless the same are expressly conveyed in such grant.

The Manitoba Legislature did not copy this enactment verbatim but inserted the words "or any other mineral" between "mines" and "therein". Just as the word "therein" in s. 43 of the Dominion Act refers to lands so "therein" in

s. 21 of the Manitoba statute does not refer to gold or silver mines but to lands. While this opinion has been arrived at without reference to what is now stated, it may be noted that when s. 21 was first enacted, there was a comma after the word "mineral" as well as one after the word "therein" although in subsequent revisions and consolidations the comma after "mineral" disappeared.

The appeal should be allowed, the judgment below set aside, and the refusal of the District Registrar to complete the registration of the caveat restored. There should be no costs to any party in this Court.

RAND J.:—The issue in this appeal is whether a conveyance of land by the Province of Manitoba by means of a transfer under *The Real Property Act* carried with it petroleum rights to subsequent purchasers for value to whom certificates of title were issued; and to appreciate the circumstances in which the question arises it will be necessary to refer briefly to the early land registration law of Manitoba.

Prior to 1885 the system in effect was similar in its general provisions to those of the eastern provinces under which, through public registers, notice was given to all persons of deeds or other conveyances of estates or interests in lands lying within the registry district.

In 1885 *The Real Property Act* was passed setting up a scheme of titles which, in its general conceptions, is known as the Torrens system, and under which, by means of what is called a certificate of title, the ownership of any interest in land is, by the force of the statute, declared to be as therein set forth. In other words, and subject to certain qualifications, the certificate constitutes the conclusive evidence of the title declared by it.

By the terms of the legislation creating the province of Manitoba, all public lands were retained by Canada, but in 1885 an agreement was come to by which the federal government agreed to convey to the province what were known as swamp lands. This was followed in 1887 by the enactment of The Provincial Lands Act, c. 21 of the statutes of that year, which, superseding c. 12 of the statutes of 1883, created a department for the management and sale of pro-

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vincial lands, to be presided over by a member of the executive council known as the Provincial Lands Commissioner. The recital to the Act declared it to be.

> expedient and necessary to make provision for the administration of the public lands now acquired or which may be hereafter acquired in any manner whatsoever by the government of the Province of Manitoba, whether earned under the Statutes or Orders-in-Council of this Province, or of the Dominion of Canada relating to the draining of submerged or swamp lands, or the granting of swamp lands to this Province for public purposes, lands foreclosed under mortgages or acquired for arrears of taxes and all lands that may be or become vested in Her Majesty for the use of this Province or in any way become the property of this Province.

Special provisions were made relating to mining lands. By s. 20 lands containing minerals were not to be subject to the provisions of the Act respecting sale, but should be disposed of in such manner and on such terms and conditions as might, from time to time, be fixed by regulations made under Order in Council. S. 21 declared that

> no grant from the Crown of lands in freehold or for any less estate, has operated or will operate as a conveyance of the gold or silver mines or any other mineral, therein, unless the same are expressly conveyed in such grant.

This later became s. 25, R.S.M. 1913, c. 155.

Under date of May 31, 1901, railway subsidy lands to the extent of 185,000 acres were transferred by Order in Council of the Dominion government to the province, as nominee of the railway company entitled to them. On May 13, 1903, by a provincial order in council made under s. 29 of c. 43 of the statutes, 1902, *The Real Property Act* of that year, the lands were brought under that Act and certificates of title were issued to the Crown accordingly. As of May 27, 1901 the land here in question, which was included within those so dealt with, became the subject of an application to purchase, one of the terms of which was that the minerals would be reserved to the province. The purchase money was ultimately paid in full and the interest of the purchaser transferred to one Noble to whom in 1914, as assignee, a transfer of all the estate and interest of the Crown in the land, under *The Real Property Act,* was executed. This was registered in 1919 and a new certificate of title issued. There is no specific mention of minerals either in the transfer or the certificate, but the latter was made subject to all of the "reservations contained in the original grant from the Crown." On subsequent conveyances and

a lease of petroleum rights the respondents rest their claim. The precise questions are, then, whether the transfer of 1914 constitutes a grant of the land within the language of s. 21 of *The Provincial Lands Act,* and whether the minerals are, by force of that section, to be deemed to have been reserved from that instrument and all succeeding instruments.

Freedman J. at trial held that, as against the original transferee Noble, the minerals, by the effect of the section, did not pass, but that the purchasers from Noble, through force of the provisions of *The Real Property Act,* were entitled to the fee simple interest in the land declared in the certificate of title issued in 1919. On appeal this conclusion was unanimously affirmed, although the reasoning of the members of the court was not entirely the same nor, as between themselves, was it identical.

That the conveyance by way of transfer is a grant within the meaning of s. 21 does not, in my opinion, admit of any substantial doubt. The technical meaning of the word "grant", so far as it relates to the conveyance of land, is an instrument under seal expressed in language appropriate at common law to the creation or transference of estates and interests in land. Words of limitation, for instance, were necessary to an estate in fee; but, apart from the language, the essential formality was the seal. Such grants were originally confined to incorporeal interests and those in expectancy; conveyance of the present freehold required livery of seisin.

The argument of the respondent that the word "grant" in s. 21 does not include a transfer assumes that there is something of a special nature in what is known as a "patent". This is a term signifying what is more properly denominated "letters patent". These describe an instrument which, bearing the imprint of the Great Seal, and in language apt to its purpose, is open for all to see as contradistinguished from a letter-claus, a close letter, so-called because it is commonly sealed up and made private with the royal signet or privy seal: Wharton's Law-Lexicon, 10th Ed., pp. 452-3.

The transfer of 1914 was executed under the Great Seal of the province and attested by the hand of both the Lieutenant-Governor and the Deputy Commissioner of

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Lands. It is adequate to the purposes of a conveyance in fee under *The Real Property Act* by language which supersedes that of the common law, and at the same time it satisfies all the requirements of letters patent.

On a familiar principle, the Crown could, apart from the section enacted in 1902, have availed itself of the provisions of *The Real Property Act* to bring Crown lands under the new system. It seems, therefore, clear that the objects of *The Provincial Lands Act,* providing as it does for the entire administration of Crown lands and contemplating the bringing of Crown lands under the general statute, would be defeated were it to be limited in its application to lands held and disposed of by the Crown as at common law. The administration of so important a natural resource looked obviously to the entire land law as available for its functioning and such a restriction upon its scope as is now suggested must be rejected.

I can see no ground for any doubt of the effect of s. 21: it withdraws all minerals from the operation of grants in any form unless they are mentioned by express language; its purpose was, obviously, to prevent the possibility of their conveyance when that was not specifically intended, to conclude, in fact, any question of the nature of that which has arisen in this case. It has the same effect as if its language were printed on every transfer executed by the Crown. For the purposes of ownership by the Crown, the minerals were severed from lands as fully as the precious metals are at common law.

In the Court of Appeal it is suggested that *The Real Property Act* is a paramount statute and that its provisions, being inconsistent with s. 21, override it. I confess to a difficulty in appreciating the soundness of that suggestion. The statute of 1887 covers a special interest of the province and on ordinary principles of interpretation it would prevail over any general enactment. It is conceded, as I understood it, that s. 21 would apply to a grant of provincial lands not then governed by *The Real Property Act.* In that case, and whether the land is thereupon automatically or voluntarily brought under that Act, if the result is as claimed, the section is completely nullified except as against the first grantee. Such a result would be unique in the history of legislation. The two statutes must obviously

be read together, and so read it is seen to be the law of the province that from every grant of Crown lands the mineral rights are reserved unless in the instrument they are expressly declared to be conveyed. How it can be taken that such an unequivocal declaration of the legislature can be written out of provincial grants and off the statute book by interpreting a general law which speaks of the "reservations contained in the original grant from the Crown" as meaning, in effect, "made by way only of express stipulation in the grant", is a proposition for which, to say the least, no authority has as yet been cited.

Since, then, the certificate of title on its face contains a reference to the reservation in the original grant, in this respect simply incorporating the provision of *The Real Property Act* itself, and since through the operation of s. 21 the minerals were reserved from the transfer of 1914 as the original grant, the title to these interests did not pass from the Crown. All succeeding certificates were, likewise, subject to that reservation.

I would therefore allow the appeal and direct an order dismissing the appeal of the respondents from the refusal of the District Registrar to complete the registration of caveat recorded on the 22nd of August, 1950, as No. 27348. There will be no costs to any party in this Court.

KELLOCK J.:—The lands in question were vested in the province by order of the Governor-General in Council of the 31st of May, 1901. On the 27th of May following, one Morgan made application to purchase, by the terms of which "all valuable stone, coal or other minerals" were reserved by the province. On May 13, 1903, an order of the Lieutenant-Governor in Council was passed directing that a certificate of title should issue to His Majesty in the right of the province, which was accordingly issued on May 23 following.

On November 12, 1914, the Crown executed a transfer of the lands under *The Real Property Act* in favour of one Noble, who had, on the previous September 26, obtained a quit claim of Morgan's rights. The transfer purported to convey "all our estate and interest in the said land". On July 25, 1919, Noble, having completed his payments,

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obtained a certificate of title to the lands for "an estate in fee simple in possession". By endorsement the certificate was made subject, inter alia, to

1. Any subsisting reservation contained in the original grant of this land from the Crown.

Ultimately the lands became vested in the respondent Hiebert, to whom was issued a certificate of title in the same form as that to Noble. The respondent company claims under Hiebert.

The contention of the respondents, which prevailed in the courts below, is that they are entitled as against the appellant to the petroleum and natural gas in or under the land in question. The appellant submits, on the contrary, that by reason of s. 21 of the Provincial Lands Act, 50 Vic., c. 21, title to the minerals in or under the lands, did not at any time pass from the Crown. That section is as follows:

It is hereby declared that no grant from the Crown of lands in freehold or for any less estate *has operated or will operate* as a conveyance of the gold or silver mines or any other mineral therein, unless the same are expressly conveyed in such grant.

The respondents argue in the first place that the transfer to Noble was not a "grant" from the Crown within the meaning of the section. It is said that the Provincial Lands Act had in view the old registry system only, and not the land titles system provided for by *The Real Property Act,* and that "grant" in s. 21 means letters patent.

The Real Property Act had been passed two years prior to the Provincial Lands Act as c. 28 of the Statutes of 1885 and there is express reference in ss. 32 and 33 of the later statute to the Registrar-General under *The Real Property Act,* which is of itself sufficient to render it impossible to say that the later statute was passed having in view only the old registration system.

I am quite unable to accept the argument that the word "grant" in s. 21 of the Provincial Lands Act 1887 has the limited meaning for which the respondents contend. In my view the whole purport of that Act, including its recital, is opposed to any such construction. It may be added that the statute employs the word "patent", e.g., in ss. 26 and 27. It cannot therefore be said that when the Legislature uses the one word it is necessarily synonymous with the other.

It is next said for the respondents that the word "therein" in s. 21 of *The Provincial Lands Act* refers back to the word "mines" and not to the word "lands". Having regard to the section immediately preceding, it is impossible, in my view, with respect, to agree with this contention or to apply the *ejusdem generis* rule to the words "or any other mineral". It is provided by s. 20 that "lands containing coal or other minerals" shall not be subject to sale under the statute but shall be disposed of under regulations to be made by the Lieutenant-Governor in Council. It is plain, I think, that the Legislature did not have in contemplation in either section anything less than all minerals.

The respondents further contend that by reason of the statutory definition of "land" in s. 2(*a*) of *The Real Property Act* (R.S.M. 1913, c. 171) and s. 79 of that statute, every transferee from Noble obtaining a certificate of title obtained title to the "land" therein described, including the mineral. By the terms of s. 79, however, as well as by s. 78, to which the former refers, the respondents are forced back to a consideration of the original grant from the Crown, which instrument, in its interpretation, is subject to the provisions of s. 21 of the Provincial Lands Act. In the absence of express words conveying the minerals, the language of the grant is, by this section, required to be read as reserving them. There is accordingly a "subsisting reservation contained in the original grant" within the meaning of s. 78(*a*) of *The Real Property Act*.

I would therefore allow the appeal. There should be no costs in this court.

ESTEY J. (dissenting):—It is the contention of the appellant that petroleum and natural gas, admittedly base minerals, have been at all times material hereto the property of the Crown by virtue of s. 25 of *The Provincial Lands Act* (R.S.M. 1913, c. 155), while the respondents maintain that, as there was no express reservation in the original transfer from the Crown, these passed to the transferee and were not reserved by s. 25. Section 25 reads as follows:

> 25. It is hereby declared that no grant from the Crown of lands in freehold or for any less estate has operated or will operate as a conveyance of the gold or silver mines or any other mineral therein, unless the same are expressly conveyed in such grant.

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This section was enacted as s. 21 of the first *Manitoba Provincial Lands Act, 1887* (S. of M. 1887, 50 Vic., c. 21).

At all times material hereto the relevant statutory provisions are contained in the Revised Statutes of Manitoba, 1913, and, unless otherwise specially mentioned, the citations of statutes are to that revision.

The land here in question ($E\frac{1}{2}$ of 13-16-10 W.P.M.) was, on July 25, 1919, transferred, without any express reservation as to minerals, from His Majesty in the right of the Province of Manitoba to William P. G. Noble. Counsel for the appellant, however, contends that under the foregoing s. 25 petroleum and natural gas remained the property of His Majesty and subsequent transferees have taken subject thereto. Therefore, when the present registered owner, William Hiebert, one of the respondents, under date of August 2, 1950, executed a lease of the petroleum and natural gas in the said land to Ted Harris he purported to lease that which he did not possess. It follows, under this submission, that neither Ted Harris nor his assignee, the respondent Canadian Superior Oil of California, Ltd. (hereinafter referred to as the respondent oil company) obtained any rights to the said petroleum and natural gas and when the respondent oil company presented a caveat to the Registrar of the Land Titles District of Portage la Prairie based upon the said lease and assignment thereof registration was properly refused.

The respondents' contention is that the word "grant" in s. 25 does not apply to transfers under *The Real Property Act* and, in any event, that s. 25, when properly construed, applies only to gold and silver mines. Therefore, the Crown, under the transfer, without any express reservations, conveyed to Noble the mines and minerals other than gold and silver mines.

An appeal from the Registrar's refusal was allowed by Mr. Justice Freedman, who directed registration of the caveat. In the Court of Appeal the order for registration was varied to read:

> It is declared that the plaintiff, Canadian Superior Oil of California, Ltd., is entitled to an interest in the petroleum, natural gas and related hydrocarbons, except coal and valuable stone within, upon or under the Land described in Certificate of Title No. 69899, as set out in the lease from the plaintiff, Hiebert to Ted Harris, dated the 2nd day of August 1950, which said lease was assigned by the said Harris to the plaintiff Canadian Superior Oil of California, Ltd.

The said E½ of 13 was included in a block of land vested in His Majesty, the administration of which was transferred to the Province of Manitoba by a Dominion Order-in-Council dated May 31, 1901. A provincial Order-in-Council dated May 23, 1903, placed this land under *The Real Property Act* and as of that date a certificate of title covering the said E½ of 13 was issued under that statute in the name of His Majesty The King in the right of the Province of Manitoba.

The Real Property Act of 1885 introduced into the province the Torrens system of land registration. Not all of the land was brought under that system and thereafter Manitoba had two systems of land registration, the one under The Lands Registration Act of Manitoba (Cons. S.M. 1880, c. 60) and the other under *The Real Property Act of 1885,* which are, for convenience, referred to as the old and new system respectively.

That *The Real Property Act of 1885* (S. of M. 1885, c. 28) was enacted in respect of registration of land is made clear by its preamble, which reads:

> Whereas, it is expedient to give certainty to the title to estates in land in the Province of Manitoba, and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive;

Two years after the enactment of *The Real Property Act* the Legislature enacted the *Manitoba Provincial Lands Act, 1887* (S. of M. 1887, c. 21), including s. 25 (then s. 21). The intent and purpose of the Legislature in enacting the latter is evidenced by its preamble: (See ante p. 327).

It will, therefore, be observed that the Legislature in 1885 set up a new land registration system and in 1887 provided for the administration of the public lands which had been, or might thereafter be acquired by the province. *The Provincial Lands Act, 1887* did not, nor did it purport to alter or amend any statutory provision relative to registration under either the old or the new system. These statutes, *The Real Property Act* and *The Provincial Lands Act,* were enacted for distinct and separate purposes and, like other statutory enactments of the same Legislature, should be construed, so far as the language thereof may reasonably permit, to avoid contradiction or repugnancy.

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Then, referring particularly to the land here in question, a provincial Order-in-Council of November 10, 1914, directed that a transfer be "executed on behalf of His Majesty, the King, in the right of the Province of Manitoba, by the Honourable the Provincial Lands Commissioner, to . . . William P. G. Noble." This Order-in-Council made no reservation of "mines, minerals and quarries." The transfer made no reservation, was subsequently registered and, under date of July 25, 1919, a duplicate certificate of title was issued to Noble under *The Real Property Act* without any reservation as to "mines, minerals and quarries." At that time the expression "land" was defined in *The Real Property Act* as follows:

> 2. In this Act, and in all instruments purporting to be made, executed or registered thereunder, unless the context otherwise requires,—
>
> (*a*) the expression "land" means and includes land . . . together with . . . all mines, minerals and quarries, unless any such are specially excepted.

If, therefore, this transfer be construed under the provisions of *The Real Property Act,* there would seem to be no question but that the mines and minerals passed to Noble.

The appellant, however, submits that s. 25 constitutes a statutory exception applicable to all Crown lands and, therefore, to the land here in question, though it was placed under *The Real Property Act.* That the Legislature intended the provisions of *The Provincial Lands Act* should apply to the administration of all Crown lands is apparent from the recital, which states that it is applicable to "all lands that may be or become vested in His Majesty for the use of this Province or in any way become the property of this Province." This intention finds further support in the general nature of the operative provisions. It would, therefore, appear that *The Provincial Lands Act* applies to all the land the property of His Majesty in the right of Manitoba, irrespective of which system it may be registered under.

The land here in question was registered under *The Real Property Act* before the transfer from His Majesty to Noble was given. When so registered, that statute contemplated the land would be conveyed by a transfer (s. 86) rather than by grant. Moreover, as already stated, an Order-in-Council directed the Provincial Lands Commisisoner, who was in charge of the administration of *The Provincial Lands*

Act, to issue, not a grant, but a transfer of the land to Noble. It is not suggested this method of conveyance was an exception and it may be assumed that in respect to Crown lands, registered as this was under *The Real Property Act,* conveyances were normally made by transfer. That was the form of conveyance contemplated by the Legislature under that Act and the Crown complied therewith, the advisers evidently being of the opinion that the word "grant" in s. 25 included a transfer. In fact, that would appear to be the reasonable conclusion. The Crown, at least in this instance and, it may be assumed, generally, administering its land under *The Provincial Lands Act,* made its conveyance thereof according to whether it was under *The Lands Registration Act* or *The Real Property Act* and, if under the latter, the conveyance was by transfer. In these circumstances the contention that a conveyance by way of grant would not include a transfer under *The Real Property Act* cannot be accepted. While the phrase "grant from the Crown" may be generally taken to mean Letters Patent from the Crown (*North Cypress* v. *C.P.R.* (1); *Rex* v. *C.P.R.* (2), it does not follow that the word "grant" has any exact or well defined meaning in law. When, as here, the title is in His Majesty under a statute which contemplates that a conveyance should be made by transfer, it must follow that the term "grant" in legislation providing for the administration of such land must be read to include the word "transfer," as that word is used in *The Real Property Act.* In this connection it may be observed that the word "grant" is not defined in *The Provincial Lands Act,* but is defined in *The Real Property Act,* s. 2(*q*). This definition as phrased is not exhaustive, but does contemplate a conveyance from the Crown in the right of the province and does not preclude the inclusion of a transfer made for that purpose.

Section 29 of *The Real Property Act of 1885* contemplated that whenever the Crown granted land it would be by way of a patent; that a grantee desiring his land to be placed under *The Real Property Act* would deposit his patent with the Registrar under the latter Act, who would then issue to the grantee a certificate of title. That was not done in this case and no explanation appears in the

(1) (1905) 35 Can. S.C.R. 550. (2) [1911] A.C. 328 at 334.

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record as to why that course was not followed, rather than to have the block of land placed by Order-in-Council under *The Real Property Act*. In these circumstances the conveyance from the Crown was the transfer to Noble and must be accepted as "the original grant of the land from the Crown" within the meaning of s. 78(*a*) of *The Real Property Act*.

In considering the respective contentions as to the construction of s. 25, it is important to observe that in both s. 3(1) of *The Real Property Act of 1885* and s. 1 of the *Manitoba Provincial Lands Act, 1887* "land" is defined to "extend to and include . . . mines, minerals and quarries appertaining thereto . . . unless . . . specially excepted." Both of these definitions are, in all relevant respects, carried forward in the respective statutes in the revision of 1913. Under these definitions of "land" a conveyance such as that to Noble would include the mines and minerals because they were not specially excepted.

Section 25 (then s. 21) as enacted in 1887 was, except for the insertion of the words "or any other mineral," identical with s. 43 of the Dominion Lands Act as enacted in 1883 (S. of C. 1883, 46 Vic., c. 17). S. 43 was enacted in 1883 to clarify the provisions of an earlier s. 36 (S. of C. 1872, 35 Vic., c. 23) and to make it clear that gold or silver mines passed from the Crown to a grantee only when expressly conveyed. In *Reference re Precious Metals* (1). At that time, and when the abovementioned s. 25 was enacted in 1887, grants from Her Majesty in the right of the Dominion of Canada conveyed the base metals, unless they were expressly reserved.

The practice of the Government of Canada in the disposition of Crown lands would be well known to the members of the Legislature when enacting s. 25 (then s. 21) in 1887. It would also be present to their minds that two years earlier the Legislature had introduced into Manitoba the Torrens system "to give certainty to the title to estates in land" and "to render dealings with land more simple and less expensive"; that in doing so it provided in s. 62 of *The Real Property Act of 1885* (s. 79 in the 1913 revision) that "every certificate of title granted under this Act . . . shall . . . so long as the same remains in force and uncancelled

(1) [1927] S.C.R. 458 at 478.

under this Act, be conclusive evidence at law and in equity as against Her Majesty and all persons whomsoever" and further by s. 61 (s. 78 in the 1913 revision) that the land mentioned in "any certificate of title granted under this Act, shall, by implication, and without any special mention in the certificate of title, unless the contrary be expressly declared, be deemed to be subject to:— (*a*) any subsisting reservations contained in the original grant of said land from the Crown." In view of the established practice and the purpose of the Torrens system it would seem that, if the Legislature had intended to effect such a change as the appellant here contends for in respect to the conveyance of mines and minerals by the Crown and to create an exception to its statutory definition of "land" as contained in *The Real Property Act,* it would have used language more clearly expressive of such an intention and would probably have amended s. 61 (s. 78(*a*) in the 1913 revision), in order that one searching the title might be directed not only to the original grant but to the statutory exception, if such were intended.

In this connection it is significant that in s. 25 no mention is made of mines or minerals in relation to base metals, but only the words "or any other mineral" are inserted.

Moreover, I am in agreement with Mr. Justice Coyne that the foregoing is in accord with the grammatical construction of the section. It must be assumed that the words "or any other mineral" were carefully inserted and due regard must be had to their meaning and effect in the section when read as a whole. They are preceded by the words "gold and silver mines" and followed by the word "therein." The draftsman would realize that, while the word "therein" referred to "land" before the insertion of these words, that thereafter it would be understood to refer to "mines." As stated by Lord Wensleydale in *Grey* v. *Pearson* (1):

> . . . in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument . . .

Not only is there no absurdity or repugnance involved in this construction, but it avoids any conflict between the definition of "land" in s. 2(*b*) and the provisions of s. 25.

(1) (1857) 6 H.L.C. 61 at 106.

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Moreover, in so far as punctuation may be relevant it may be noted that as enacted in 1887 a comma was placed both before and after the word "therein." In 1891 the first comma was deleted. This would but emphasize that the word "therein", after the insertion of the words "or any other mineral", was intended to refer to "mines".

While the Legislature had in 1883 enacted a lands act relative to the disposition of Crown lands, this enactment of 1887 was the result of a more thorough and exhaustive study of the problems associated therewith and no doubt the attention of the Legislature would have been directed to the possible presence of other minerals in gold and silver mines. Their presence in such mines had caused considerable difficulty after *The Mines Case* in 1568, 1 Plow. 310, and which had been the subject of legislation thereafter, and inserted these words with the intent of making it clear that any other mineral found in gold and silver mines would be treated in any conveyance as part thereof. That such was the intention of the Legislature finds support in the conflicts already discussed, the absence of any reference to mines and the practice of the Government of Canada.

It, therefore, follows that mines and minerals, apart from gold and silver, were transferred to Noble and had passed by successive transfers to William Hiebert, who gave a valid lease to Ted Harris, which the latter assigned to the respondent oil company.

The foregoing is not affected by the fact that the agreement between the Crown and Morgan, who originally purchased the land here in question, contained a provision that "all valuable stone, coal or other minerals are reserved by the Province." In 1914 Morgan assigned his agreement to Noble. The foregoing provision does not appear to have been again mentioned and is not included in the Order in Council authorizing the transfer to Noble, the transfer or the certificate of title issued to Noble. In other words, the last three documents were executed without any reservation of mines and minerals. It may well be that while the title remained with Noble rectification may have been possible. Noble, however, transferred the land to another in 1921 and, after further transfers, it became the property of the present registered owner, William Hiebert, to whom a certificate of title was issued. The latter, under s. 79 of *The Real Property Act,* holds a certificate of title as "conclusive

evidence at law and in equity as against His Majesty and all persons whomsoever that the person named in such certificate is entitled to the land described therein for the estate or interest therein specified." There are certain exceptions to this general statement in s. 79, but it is not suggested that William Hiebert holds his title subject to any of these.

The appeal should be dismissed and the judgment of the Court of Appeal should be affirmed.

CARTWRIGHT J.:—I agree with the reasons of my brothers Kerwin, Rand and Kellock. I wish, however, to add some observations as to three of the many points which were argued before us. I shall refer to the relevant sections of *The Provincial Lands Act* and of *The Real Property Act* as they appear in the Revised Statutes of Manitoba, 1913.

The first argument with which I wish to deal may be summarized as follows. It is said for the respondents that, assuming that s. 25 of *The Provincial Lands Act* applied to the transfer from the Crown to Noble, such transfer, by the combined effect of ss. 88 and 2(*a*) of *The Real Property Act,* did expressly convey to Noble all minerals in the lands described in the transfer. It is said, (i) that the transfer should be read as if instead of the word "land" the words of the definition in section 2(*a*) were written out in full so that the operative words would read:—

> . . . do hereby . . . transfer to the said William P. G. Noble all our estate and interest in the said land, messuages, tenements, hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein may be and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges and easements, appertaining thereto, and all trees and timber thereon, and all mines, minerals, and quarries, unless any such are specially excepted;

(ii) that, by force of s. 88, this transfer when registered operated as an absolute transfer of all such right and title as the transferor (that is His Majesty in the right of Manitoba) had in the land therein described at the time of its execution unless a contrary intention be expressed in such transfer; (iii) that in such transfer nothing was specially excepted and no contrary intention was expressed; (iv) that the transferor had at the time of the execution of the transfer the sole right and title to the land and the minerals; and therefore (v) the minerals were expressly conveyed in the transfer within the meaning of s. 25 of *The Provincial Lands Act.*

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There appear to me to be several obstacles in the way of this argument.

Dealing first with the effect of s. 2(*a*), it will be observed that by its terms the definition of "land" is carried into the act and into instruments purporting to be made under the act subject always to the proviso "unless the context otherwise requires". *The Real Property Act* and *The Provincial Lands Act* are *in pari materia* and for purposes of construction must be read together. When the instrument to which it is sought to apply the words in s. 2(*a*) of *The Real Property Act* is a grant from the Crown of lands in freehold which does not expressly convey the minerals therein then the context does otherwise require. Even if this were not so and the words of the definition should be taken as being written into the transfer the respondents would then be confronted with the concluding words of the definition, "unless any such are specially excepted", and, the transfer being a grant from the Crown which does not expressly convey the minerals, the minerals are, by force of s. 25 of *The Provincial Lands Act,* "specially excepted".

Dealing next with the effect of s. 88, it must first be born in mind that, as is pointed out by my brother Rand, the effect of s. 25 of *The Provincial Lands Act* is that for the purposes of ownership by the Crown minerals are severed from lands as fully as the precious metals are at common law and are withdrawn from the operation of grants from the Crown in any form unless they are mentioned in express language. Section 88 deals not with the description of the land but rather with the nature of the estate which a transfer under the act operates to convey and dispenses with the necessity of words of limitation, which would have been required at common law, to effect a transfer of an estate in fee simple. Under the transfer from the Crown to Noble all the right and title of the Crown in the lands therein described passed to him, but the lands therein described were the lands without the minerals which were severed as above set out and formed no part of the subject matter of the transfer.

On this first point I am in agreement with Freedman J., when he says:—

> . . . I have reached the conclusion that Sec. 25 of The Provincial Lands Act was a declaratory enactment, creating a statutory reservation of mineral rights in favor of the Crown, and that such reservation would not

be extinguished, as against a grantee from the Crown, except by an express conveyance of mineral rights *eo nomine*. I hold that when the Crown, using the form of transfer prescribed by The Real Property Act, purported to transfer "all our estate and interest in the said land," it did not divest itself of mineral rights, because mineral rights were not expressly named or mentioned in the transfer. For the Crown to lose the mineral rights which were reserved to it by Sec. 25 of The Provincial Lands Act, the same would have to be "expressly conveyed in such grant", otherwise the concluding words of Sec. 25 are without meaning. The transfer being silent on the subject of mineral rights, the statutory protection afforded by Sec. 25 of The Provincial Lands Act operated in favor of the Crown.

The second argument with which I wish to deal is one which found favour with Freedman J., that although the transfer to Noble did not transfer the minerals to him but left the title to them in the Crown he was able to give a purchaser in good faith and for value a title to the minerals. This argument is based primarily on s. 79 of *The Real Property Act* which, it is said, makes the certificates of title granted to Noble and to subsequent purchasers "conclusive evidence . . . as against Her Majejsty . . . that the person named in such certificate is entitled to the land described therein". The difficulty in accepting this argument is that s. 79 expressly preserves the right of any person to shew that the land described in the certificate is subject to any of the exceptions or reservations mentioned in s. 78, the first of which is:—

(*a*) any subsisting reservation contained in the original grant from the Crown.

In my view the effect of these provisions is that a certificate of title issued under *The Real Property Act* assures to the holder thereof the title to the land therein described which was conveyed by the original grant thereof from the Crown and nothing more. Another way of expressing this is that the purchaser from a holder of a certificate of title who relies on such certificate is by the express terms of the certificate and of ss. 78 and 79 of *The Real Property Act* put on inquiry as to, and affected with notice of, the terms of the original Crown grant and obtains title to whatever was conveyed by such grant but not to anything withheld thereby. On looking at the transfer to Noble, which is in this case the original grant from the Crown, it at once appears that as it is silent as to minerals they were not conveyed. Indeed, insofar as this particular point in the argument is concerned, *ex hypothesi* the transfer to Noble

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did not convey the minerals. While the retaining of the title to the minerals by the Crown might be more accurately described as an exception than as a reservation I think that on a reading of both acts together it appears that the word "reservation" in ss. 78 and 79 of *The Real Property Act* is not used in a narrow technical sense but is wide enough to cover the retention of the title to the minerals by the Crown. Such reservation is clearly a subsisting one. It is also, in my opinion, "contained in" the original grant from the Crown, as the effect of that grant is to convey the lands without the minerals to Noble and so to retain the minerals in the Crown.

The third argument which I wish to mention is that the respondent's case is assisted by the fact that when a certificate of title was issued to Noble the certificate of the Crown in regard to these lands was cancelled "in full". This fact appears to me to be irrelevant. If the views which I have expressed above are correct Noble's certificate did not, and the certificate now held by Hiebert does not, purport to state that the holder thereof is entitled to the minerals in the lands therein described. The cancellation of the Crown's certificate "in full" was an error and can be corrected. This error does not assist the respondents because on their own documents of title they are unable to make out title to the minerals.

I wish to add one further observation of a more general nature. If it should appear that certain provisions of *The Real Property Act* cannot be reconciled with s. 25 of *The Provincial Lands Act* then, since the last mentioned section is a special provision clearly designed to prevent the possibility of the conveyance of minerals in a grant of lands from the Crown unless expressly conveyed *eo nomine*, it must prevail over the inconsistent provisions in *The Real Property Act* which deals generally with the effect of all transfers of land under that Act. *Generalia specialibus non derogant.*

I would dispose of the appeal as proposed by my brother Kerwin.

Appeal allowed. No costs.

Solicitors for the appellant: *A. E. Hoskin* and *John Allen.*

Solicitors for the respondents: *MacInnes, Burbidge, Hetherington, Allison, Campbell & Findlay.*

ALEXANDER CAMPBELL MACKENZIE (PLAINTIFF) ..... APPELLANT;

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*Feb. 11, 12
*May 19

AND

OLIVER M. MARTIN (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Justices and Magistrates—Preventive justice, power to exercise—False Imprisonment—The Public Authorities Protection Act, R.S.O. 1937, c. 135, ss. 1, 2, 3(1)—The Criminal Code, R.S.C. 1927, c. 36, s. 748 (2)—The Magistrates Act, R.S.O. 1937, c. 133, s. 8(1).

The respondent, a police magistrate for the Province of Ontario and a justice of the peace, convicted the appellant, a blind man, on a charge of unlawfully repeatedly calling on the telephone the appellant's estranged wife at her boarding place and at her place of employment thereby causing annoyance and a breach of the peace. He ordered the appellant to find two sureties to be answerable for his good behaviour for three years and on default committed him to gaol for six months. The appellant secured his discharge from custody by habeas corpus proceedings and sued the respondent in damages for false imprisonment. The Court of Appeal for Ontario dismissed an appeal from the judgment of the trial judge who had dismissed the action. The appellant again appealed on the grounds that the respondent was not protected by s. 2 of *The Public Authorities Act*, R.S.O., 1937, c. 135, which prohibits an action against a justice of the peace for any act done by him in the execution of his duty with respect to any matter within his jurisdiction unless done maliciously and without reasonable and probable cause, but was by s. 3 of the Act liable for acting in a matter in which he either had no jurisdiction, or had exceeded it.

Held: (Rand J. dissenting)—That the common law preventive justice was in force in Ontario and neither s. 748 (2) of the *Criminal Code* nor any other section thereof to which the Court's attention was drawn, interfered with the use of that jurisdiction. The respondent therefore had jurisdiction and did not exceed it. He did not proceed on a mistaken view of the law and there was no evidence of malice. *Lansbury v. Riley* [1914] 3 K.B. 229 followed in *Rex v. Sanbach* [1935] 2 K.B. 192 and *Rex v. County of London Quarter Sessions* [1948] 1 All E.R. 72, applied.

Per: Rand J., dissenting—The conditions that at common law vest in a justice of the peace jurisdiction to exercise preventive justice are those that threaten private peace or offend public order or morality. There was nothing of that description here. What the acts did was to annoy but they were of a nature and in circumstances beyond any range of conduct touching peace, order or morality. *Reg. v. Dunne* (1840) 113 E.R. 939; *Reg. v. Justices of Londonderry* 28 L.R. Ir. 440; *Rex v. Justices of Londonderry* [1912] 2 Ir. L.R. 374; *Barton v. Bricknell* 13 Q.B. 393; *Lawrenson v. Hill* (1860) 10 I.C.L.R. 177.

*PRESENT: Rinfret C.J., Kerwin, Rand, Estey and Fauteux JJ.

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APPEAL from the order of the Court of Appeal for Ontario (1) dismissing the appeal of the appellant from the judgment of Judson J. dismissing the action with costs.

F. A. Brewin, Q.C. for the appellant.

G. D. Watson, Q.C. for the respondent.

The judgment of Rinfret C.J. and of Kerwin, Estey and Fauteux JJ. was delivered by:

KERWIN J.: Originally there were several defendants in this action, brought by the plaintiff appellant, but all except the respondent have disappeared from the litigation and we are concerned only with the claim for damages for false imprisonment against the latter, who is a Police Magistrate for the Province of Ontario. The plaintiff is a blind man, possessing real estate of value and residing at Swansea. He was separated from his wife, Martha, who resided, and was employed at Creed's Furs Limited, in Toronto. On March 29, 1945, an information and complaint was sworn to before a justice of the peace for the County of York by a detective of the City of Toronto police force:—

who saith that Alexander Mackenzie, 93 Durie Street of the Village of Swansea, in the County of York, in the months of February and March, A.D. 1945, at the Village of Swansea and City of Toronto, in the said County of York, did unlawfully repeatedly call on the telephone Mrs. Martha MacKenzie, Miss Elsie T. Hodgson, and Creed's Furs Limited, thereby causing the said parties and employees of Creed's Furs Limited, annoyance, loss of sleep, inconvenience and worry, said acts tending towards a breach of the public peace, wherefore the complainant desires that the said Alexander Mackenzie should be brought before a court of summary jurisdiction and that an ORDER should be granted against the said Alexander Mackenzie directing him to find one or more sureties who will be answerable for his good behaviour during such period of time as may seem to the Court just, in accordance with the law, contrary to The Common Law of England, in such case made and provided.

Elsie T. Hodgson was the landlady of the plaintiff's wife.

A summons was issued directed to the plaintiff, reciting the information and stating that the complainant desired that the plaintiff should be brought before a court of summary jurisdiction and that an order should be granted against him directing him to find one or more sureties who would be answerable for his good behaviour during such

(1) [1952] O.R. 849; [1953] 1 D.L.R. 161.

period of time as might seem to the Court just in accordance with the law, and commanding him to appear on April 5th.

On that day the plaintiff appeared before the respondent and pleaded not guilty. The evidence disclosed a very great number of telephone conversations by him with his wife, with various persons at Creed's, and with Elsie T. Hodgson,—all as a result of calls made by him. In connection with one to his wife when she was at her rooming house she testified in chief:—

> Sometimes he cries. He says he is lonesome. He says he loves me. and he tells me he is going to send someone to kill me. I think he is a madman.

and on cross-examination by the plaintiff:—

> Q. You got me to sign another piece of paper in which you take the furniture?—A. The furniture is mine. I was just asking for my own. I am going to sue for it. There is nothing of yours.
>
> Q. You did not do that?—A. I will ask for the furniture. I do not think you too blind to murder me and marry another woman.

The landlady testified that the plaintiff "phoned continually every day any way from sixty to one hundred calls, sometimes over that"; "First we told him to keep off the line and he said how can I keep off the line when I am in love with you"; "I did not keep track of all the time but one day in particular he called one hundred and ten times". The following also appears in her evidence:—

> Q. All these numerous calls you say were the voice of the accused man. Mr. Mackenzie, the accused man here in court to-day?—A. Yes.
>
> Q. What did he have to say on the numerous occasions?—A. He threatened his wife's character; he blackened her character; he threatened her life and the life of her child. He was continually telling what a notorious woman she was, going out with other men. He had the house watched. He would tell me when he phoned up to find out what time she came in and one night she was quite late in returning.

The same witness testified as to a conversation she had with the plaintiff at his home:—"You threatened your wife if she didn't sign over (certain property) in two days she would be found dead on the street corner and nobody would know about it."

The evidence disclosed that the plaintiff made so many telephone calls to Creed's endeavouring to speak to his wife that the Office Manager intervened and told the plaintiff to stop bothering the switchboard operators.

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Upon the conclusion of the evidence on behalf of the complainant, the plaintiff gave evidence and was cross-examined. There being no other witnesses, the magistrate decided:—

> We certainly cannot have this kind of thing going on in our city calling people on the telephone and annoying them so much, so you are ordered Mr. MacKenzie to find two sureties in the sum of $1,000. each who will be answerable for your good behaviour for three years; in default of this you will be committed to jail for six months.

A "Conviction upon a plea of not guilty" was signed by the respondent, followed by a warrant of commitment.

The plaintiff was taken from the room where the inquiry had taken place to the basement in the same building and thence to the Toronto gaol. All this occurred on April 5, 1945. On April 3, 1945, he had been convicted of doing malicious damage to property and had been remanded one week for sentence. On April 10, 1945, he was sentenced on this charge to three months in gaol. He appealed that conviction and was released from custody on bail June 4, 1945, although he was also in gaol under the warrant of April 5, 1945. In the meantime, on June 1, 1945, his application for discharge from custody under that warrant upon a writ of habeas corpus had come before a judge of the Supreme Court of Ontario, who dismissed it on July 4, 1945. The plaintiff appealed to the Court of Appeal from that decision and, pending the hearing of the appeal, was allowed out on bail by order of a judge of the Court of Appeal. Pursuant to his undertaking contained therein, he surrendered himself into custody on September 10, 1945, preparatory to the hearing of his appeal on September 13 and 14, 1945, and he remained in gaol until November 9, 1945, when the Court of Appeal allowed his appeal and ordered his discharge from custody.

The reasons for judgment of the Court of Appeal (1) were delivered by Chief Justice Robertson who first disposed of the argument that no appeal lay from the refusal to set the plaintiff at liberty by holding that the proceedings to compel the plaintiff to find sureties were civil in their nature and that therefore there was a right of appeal under s. 8 of *The Habeas Corpus Act*, R.S.O. 1937, c. 129. He then determined that, in view of the omission from the warrant and "conviction" of a statement that the plaintiff

(1) [1945] O.R. 787.

had neglected or refused to find the required sureties, or that he was in default in that regard, the documents were invalid and, therefore, there was illegality or irregularity in the plaintiff's original caption which afforded ground for his discharge. A question had been raised as to the magistrate's jurisdiction to administer preventive justice but, while the Chief Justice referred to some of the matters to be considered with respect thereto, in view of his conclusion that the warrant and "conviction" were illegal, he did not pursue the subject further.

The present action was then commenced. It was dismissed by the trial judge upon motion for a non-suit at the conclusion of the plaintiff's case. That judgment was affirmed by the Court of Appeal but for different reasons. Several questions were argued before us but, in the view I take of the matter, it is sufficient to consider only one.

The respondent was appointed a magistrate for the Province under s. 2 of *The Magistrates Act,* R.S.O. 1937, c. 133. By s-s. 1 of s. 8 of that Act he was ex officio a justice of the peace. *The Public Authorities Protection Act* in force at the commencement of the action was R.S.O. 1937, c. 135, and by s. 1 "justice of the peace" includes magistrate. Section 2 and s-s. 1 of s. 3 are as follows:—

2. No action shall lie or be instituted against a justice of the peace for any act done by him in the execution of his duty as such justice with respect to any matter within his jurisdiction as such justice, unless the act was done maliciously and without reasonable and probable cause.

3. (1) For any act done by a justice of the peace in a matter in which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, or for any act done under a conviction or order made or a warrant issued by him in such matter, any person injured thereby may maintain an action against the justice in the same case as he might have heretofore done, and it shall not be necessary to allege or prove that the act was done maliciously and without reasonable and probable cause.

The question is whether the respondent in holding the inquiry and making the "conviction" and signing the warrant of commitment acted in the execution of his duty as a justice of the peace with respect to any matter within his jurisdiction as such justice.

Reference was made to s-s. 2 of s. 748 of the *Criminal Code,* R.S.C. 1927, c. 36, which as it stood at the relevant time reads as follows:—

2. Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child

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some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizance, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

The information was not laid under this or any provision of the *Code*.

Whatever was alleged to have been done by the plaintiff was, according to the information, "contrary to the common law of England" and the "conviction" is to the same effect. The point was considered by the Queen's Bench in *Haylock v. Sparke* (1) wherein Lord Campbell, at page 71, considering that the law on the subject commenced with the statute 34 Edw. III, c. 1, states:—

> This statute, intrusting the Magistrates with a wide discretion, authorizes them "to take of all them that be not of good fame sufficient surety and mainprise of their good behaviour towards the king and his people." In 4 *Institute*, p. 181, Lord Coke, remarking upon this clause, says, that the offences against the peace after they are done having been provided for, "now followeth an express authority given to Justices for the prevention of such offences before they are done, viz., to take of all them that be not of good fame (that is, that the defamed and justly suspected that they intend to break the peace) sufficient surety and mainprise of them for good behaviour towards the king and his people (which must concern the king's peace, as is also provided by the word subsequent), to the intent that the people be not by such rioters troubled or indamaged, nor the peace blemished, nor merchants nor other passing by the highways disturbed, nor put in the peril that may happen of such offenders.

In that case it was held that it must be taken that the defendant intended to require sureties for good behaviour, notwithstanding the words "sureties of the peace" in the warrant. It was also held that a Justice of the Peace had jurisdiction to require sureties for good behaviour in some cases of libels against private individuals and that, therefore, the defendant had jurisdiction in the matter out of which the cause of action arose, and within the meaning of 11 & 12 Vict. c. 44, s.1, and consequently was not liable to an action of trespass. Section 1 of this statute is as follows:—

> WHEREAS it is expedient to protect justices of the Peace in the Execution of their Duty: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament

(1) (1853) 22 L.J. (N.S.) M.C. 67, 1 E & B. 471, 118 E.R. 512.

assembled, and by the Authority of the same, That every Action hereafter to be brought against any Justice of the Peace for any Act done by him in the Execution of his Duty as such Justice, with respect to any Matter within his jurisdiction as such Justice, shall be an Action on the Case as for a tort; and in the Declaration it shall be expressly alleged that such Act was done maliciously, and without reasonable and probable Cause; and if at the Trial of any such Action, upon the General Issue being pleaded, the Plaintiff shall fail to prove such Allegation, he shall be nonsuit, or a Verdict shall be given for the defendant.

The operative words therein are to the same effect as s. 2 of the Ontario Public Authorities Protection Act, R.S.O. 1937, c. 135, and the first part of s. 2 is in substance the same as s-s. 1 of s. 3 of the Ontario statute.

The matter was considered in more recent times in *Lansbury v. Riley* (1). The actual decision was that where a Court of summary jurisdiction is satisfied that a person brought before it was guilty of inciting others to commit breaches of the peace and intends to persevere in such incitement, the Court may order him to enter into recognizances and to find sureties for his good behaviour, or be imprisoned in default of so doing. However, for present purposes the judgment of Avory J. is of importance as he was of opinion that the statute of 34 Edw. III was not exhaustive of the magistrate's jurisdiction.

Avory J. was also a member of the Court which decided *The King v. Sandbach* (2). There the applicant was convicted of obstructing a police constable in the execution of his duty, by warning a street bookmaker of the approach of the police and so enabling him to evade arrest. Evidence was given at the police court that the applicant had already been convicted of similar offences several times and that the infliction of a fine was no deterrent. The magistrate ordered the applicant to enter into a recognizance to be of good behaviour together with two sureties, or in default to be imprisoned for two months. The applicant sought a rule nisi for a certiorari to quash the magistrate's order on the ground that the magistrate had no jurisdiction to make it, because there was no actual or apprehended breach of the peace, by, or as a result of the conduct of the applicant. Lord Hewart was clearly of opinion that the rule ought to be discharged as he considered the case covered in all material respects by *Lansbury v. Riley* (1) and especially

(1) [1914] 3 K.B. 229. (2) [1935] 2 K.B. 192.

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by the judgment of Avory J. The latter agreed and quoted from Blackstone, Vol. iv, p. 251, to show that the scope of the remedy of binding over a person to be of good behaviour is not limited to circumstances where he has done something which tends to a breach of the peace. The passage from Blackstone reads:—

> This preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour.

Humphreys J. concurred, quoting the following extract from Blackstone at page 256:—

> The other species of recognizance, with sureties, is for the *good abearance* or *good behaviour*. This includes security for the peace, and somewhat more; we will therefore examine it in the same manner as the other. First then, the justices are empowered by the statute 34 Edw. III, c. 1, to bind over to the good behaviour towards the king and his people, all them that *be not of good fame,* wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame,* it is holden that a man may be bound to his good behaviour for causes of scandal, *contra bonos mores,* as well as *contra pacem.*

In *Rex v. County of London Quarter Sessions* (1) Lord Goddard pointed out that *Lansbury v. Riley* was clear authority that justices can bind over whether the person is, or is not, of good fame. Later he stated:—

> in the case of the present statute there is a consensus of opinion to be found in the books extending back for some 400 years that this Act, which was described by both Coke and Blackstone as an Act for preventive justice, does enable justices at their discretion to bind over a man, not because he has committed an offence, but because they think from his behaviour he may himself commit or cause others to commit offences against the King's peace. It is abundantly clear that for several centuries justices have bound by recognizances persons whose conduct they consider michievous or suspicious, but which could not, by any stretch of imagination amount to a criminal offence for which they could have been indicted.

Lord Goddard expressed the view that the catalogue of the large number of instances which would justify sureties for good behaviour being taken, given in Dalton's Countrey Justice was not intended to be exhaustive. In my view the common law preventive justice was in force in Ontario; s-s. of s. 748, or any other provision of the *Criminal Code* to

(1) [1948] 1 All E.R. 72.

which our attention was directed, does not interfere with the use of that jurisdiction, and the respondent was intending to exercise it. He, therefore, had jurisdiction over the subject-matter of the complaint, and did not exceed it. Mr. Brewin admitted that the respondent might be excused from the consequences of a mistake of fact by reason of which he assumed a jurisdiction which did not exist: *Calder v. Halket* (1); but he contended that the respondent proceeded upon a mistaken view of the law. In my view the respondent committed no such error.

There was no evidence of malice and the appeal should be dismissed with costs.

RAND J.: (dissenting): This action was brought for damages for false imprisonment arising under the following circumstances. An information was laid by one Martindale, a detective, before the respondent charging that the appellant

did unlawfuly, repeatedly called on the telephone Mrs. Martha MacKenzie (his wife), Mrs. Elsie Hodgson, and Creed's Furs Limited thereby causing said parties and employees of Creed's Furs Limited, annoyance and loss of sleep, inconvenience and worry, the said acts tending towards a breach of the public peace, wherefore the complainant desires that the said Alexander MacKenzie should be brought before a court of summary judisdiction and that an order should be granted against the said Alexander MacKenzie directing him to find one or more sureties, who will be answerable for his good behaviour during such period of time as may seem to the court just, in accordance with the law, contrary to the Common Law of England, in such case made and provided.

A summons was issued containing the language of the complaint. At the conclusion of the hearing in which evidence was adduced by both sides, the magistrate made the following statement:—

We certainly cannot have this kind of thing going on in our city calling people on the telephone and annoying them so much, so you are ordered, Mr. MacKenzie, to find two sureties in the sum of $1,000.00 each who will be answerable for your good behaviour for three years; in default of this you will be committed to jail for six months.

A form of conviction was drawn up which, after setting forth the charge, proceeded:—

And I adjudge the said Alexander MacKenzie for his said offence, to find two (2) persons to go security for his good behaviour in the sum of $1000.00 each for a period of three (3) years, and failing to find two (2) persons to go security for his good behaviour, I adjudge the said Alexander

(1) (1839) 3 Moo. P.C. 28; 13 E.R. 12.

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MacKenzie to be imprisoned in the Common Gaol in and for the said County of York (and there to be kept to hard labour) for the term of six (6) months.

On the same day and so far as appears at the same time, a warrant of commitment was signed which concluded:—

> These are therefore to command you, to take the said accused and him safely to convey and deliver to the prison aforesaid, together with this precept; and I do hereby command you, the keeper of the said prison, to receive the said accused into your custody in the said prison, there to imprison and keep at hard labour for the term of six (6) months, in default of carrying out the court order that Alexander MacKenzie find two (2) persons to go security in the sum of One Thousand Dollars ($1000.) each for a period of three years. And for your so doing this shall be your sufficient warrant.

The accused who is blind and apparently possessed of considerable property, but who was not represented by counsel, was thereupon, on the same day, delivered into prison. So far as it appears, the nature of the conviction was not made clear to him; he was not asked if he was willing to obtain sureties nor is there any suggestion that he refused to do that or was given an opportunity to reach any persons suitable for that purpose. He remained in jail from April 5th to June 4th when he was released on bail by a Justice of the Court of Appeal on the condition that he surrender himself before the hearing of an appeal from a refusal to discharge him on habeas corpus. He surrendered accordingly on September 10th. The judgment of that court setting aside the commitment was rendered on November 9th at which time he was set free.

The action was shortly afterwards brought. At the trial the case was withdrawn from the jury by Judson J. as being barred by the limitation of six months from the "act, negligence or default complained of" as provided by s. 11 of *The Public Authorities Protection Act,* R.S.O. (1950) c. 303. On appeal, the court, though disagreeing with the trial judge on the plea of limitation, affirmed the dismissal but on the ground that the matter of the proceedings being that of binding over to keep the peace, in contradistinction to being ordered to be of "good behaviour", and thus within the jurisdiction of the Justice, the action did not lie unless the act had been done maliciously and without reasonable and probable cause, s. 2 of c. 303, of which there was no evidence.

The *Criminal Code* deals sparingly with the matter of preventive justice. Sec. 748 codifies the cases of binding over upon conviction of an offence directed against the peace and upon a complaint of threats made of personal injury to the complainant or to his wife or child or of setting fire to his property, and forms are provided accordingly. But this by no means exhausts the immemorial exercise of this special jurisdiction. In early Saxon law preservation of the peace was secured in the liability of the freemen of a tithing or a hundred for the conduct of each person within it, which in the time of Edward the Confessor became at least supplemented by an ordinance empowering sureties to be required, administered by conservators of the peace. This capacity was, after the Conquest, incident to certain high offices of state, or based on prescription, or annexed to certain tenures of land. Generally, however, the conservators were elected by the freeholders sitting in full county court before the sheriff. What they were to preserve was the King's peace, to guard the community and individual life of his subjects against mischievous disturbances and fear of personal injuries and trespasses on or to their possessions.

The first modification of this general administration was the sending of writs by Edward III in the first year of his reign to every sheriff commanding him

> that the peace be kept throughout his bailiwick on pain and peril of disinheritance and loss of life and limb.

This was immediately followed by a statute enacted in the same year which provided that

> for the better maintenance and keeping of the peace in every county, good men and lawful who were not maintainers of evil or barretors in the country should be assigned to keep the peace": Blackstone, Bk. 1, p. 350-51.

This assignment was construed to be by royal commission and transferred the appointment of conservators from the freemen to the King. Later, by 34 Edward III, c. 1, the name "justice" was introduced, and jurisdiction for the first time was conferred upon two or more of them to try felonies. As to keeping the peace, they were charged jointly and severally; but a further authority was vested in them to take of those

> that be not of good fame . . . sufficient surety and mainprize *of their good behaviour* towards the King and his people . . . : Burn's Justice of the Peace, 13th ed. vol. 5, p. 755.

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In their commissions these powers were, in Ontario, set forth in detail until 1934; but, as appears in a valuable annotation by C. R. Magone, Q.C., Deputy Attorney General of Ontario, published in 93 Can. C.C. 161, since that year the commission confers generally all the rights, powers and immunities of "justices of the peace"; and as those powers have been exercised for approximately six centuries, the abbreviated incorporation of them by such a reference is not to be taken as in any degree lessening their scope.

This, then, is the foundation of the jurisdiction with which a justice of the peace is invested, but if he acts beyond the authority delineated by this ancient law he does so at his peril. The question is whether in this case he has done so or not.

The Chief Justice of Ontario, speaking for the Court of Appeal, puts the case shortly: it is a matter of binding over to keep the peace; being initially within the jurisdiction of the justice, it was not thereafter lost. The information contains no allegation that a breach of the peace was likely or apprehended but the particulars given are treated apparently as "circumstances that might reasonably tend to breach the peace". It is added that there was some evidence that a threat was made and that this likewise sufficed for jurisdiction.

I regret that I find it impossible to concur in this view of the case. It is necessary to remind ourselves that personal liberty is one of the supreme principles of our law, and where one person is set up in authority over another, he must, in the actions he sets in motion that may shackle that liberty, be able to justify what he does in some power or authority given him by law, or he must answer for the consequences.

What is "jurisdiction" as we use that much abused term? We hear of the "want", the "exceeding", the "declining" and the "abuse", of jurisdiction. In the simpler cases the meaning is clear: a justice of the peace cannot, for example, convict a person of treason: his act purporting to do that would be a nullity; but when the case becomes encumbered with complex features, it requires something more than the mere repetition of these phrases to reach what appear to me to be the essential elements of the conception underlying the term. What is involved is a field of

determinative and coercive action outlined in law within which the authority conferred is to be exercised. Since we are concerned with judicial procedure, the authority to enter upon an inquiry at all may be absent and the subject matter either in its nature or magnitude, or the parties, may determine that. But given that authority, steps thereafter taken may be without a legal foundation. They must be steps of the essence of adjudication or execution, and in these proceedings, the exercise of judicial power; an erroneous ruling on evidence, or an error in the course of the proceedings not of a fundamental character affecting, for example, a person's liberty, would not be of that nature. Once such a basic act is seen to be outside the express or implied authorization of action, then the magistrate is in fact making use of the machinery of justice as a private individual and not as a public officer.

The sources of authority already mentioned and the examples cited by the standard authorities, Dalton, Burn, Hawkins and Blackstone, make it abundantly evident that what the powers here in question are to be directed at are acts and behaviour that "blemish" the peace, as the statute of 34 Edward III puts it, or that offend the moral sense of the community. Most of the examples given are now public wrongs such as vagrancy, keeping disorderly houses, malicious destruction of property, public mischief, libel and the like, and they but confirm the conclusion that the conditions to the exercise of the special power are those that threaten private peace or offend public order or morality.

There is nothing of that description here. The information puts it beyond discussion that what was sought was the cessation of telephone calls directed by the appellant, the object of which was in fact to try to persuade his wife to return to his home. The language "tending to a breach of the peace" was a purely formal phrase with not the slightest foundation either in the acts complained of or in the evidence, which the remarks of the respondent at the conclusion of the hearing make uncontrovertible. What the acts did was to annoy, but annoyance of the nature and in the circumstances here is beyond any range of conduct touching peace, order or morality.

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The case of *Regina v. Dunn,* (1) is particularly pertinent. There articles of the peace were exhibited against a barrister of London for a course of calculated intrusions upon an unmarried daughter of a knight by means of letters, accostings, seeking admittance to her home, and in waiting for and following her upon the streets, to the extent that she became alarmed for her own safety. But no threat was alleged. In giving the judgment of the court, Lord Denman C.J. said:—

> The fair meaning (that is, the terms of the commissions to the justices) is that, if one person informs the court, or a justice of the peace, that he goes in fear and danger of personal violence from another by reason of threats employed by him, and prays the protection of sureties of the peace, that protection may be granted. Unless such a case appear, no jurisdiction appears; nor can we ever infer facts necessary to give jurisdiction from the mere circumstance of an inferior court assuming to act as if they possessed it . . . If this person's conduct did not amount to a threat of personal violence, the justices had no power to bind him over; but if it did, the exhibitant ought to have so stated in the articles, which are defective by reason of the omission . . . But, the power of the sessions and of the justice of the peace to make the order now challenged before us depending wholly on the words of the commission, and those words not being satisfied by the articles exhibited, we are bound to decide that the person must be discharged.

This requirement of precise observance of the authority given obviously expresses the appreciation of the court of the importance of the proceeding. Here we have mere annoyances which compared with those of the complainant in Dunn are petty trivialities.

The same view was taken in *The Queen v. Justices of Londonderry* (2), where it was held that in the absence of evidence showing a danger or likelihood of a breach of the peace, there was no jurisdiction for an order. At p. 446, Sir P. O'Brien C.J. says:—

> It is plain then that in the case before Lord Fitzgerald the evidence was not only looked at but jealously scrutinized, with a view to ascertaining whether the magistrates had acted within their jurisdiction in the order they made—not that I think we should assume the duty of determining the preponderance of the evidence, but we should see whether there was adduced before the magistrates evidence upon which they might reasonably order sureties for good behaviour.

and Holmes J. at p. 461:—

> And the question is, do they (the depositions) contain any legal foundation for the order made by the justices? . . . But . . . the jurisdiction can only be exercised when some facts are proved from which it can be reasonably inferred that there was actual danger of the peace being broken . . .

(1) (1840) 113 E.R. 939 at 947-8. (2) (1891) 28 L.R. Ir. 440.

In *Rex v. Justices of Londonderry,* (1) it was ruled that an order of justices requiring a person to find sureties to keep the peace and be of good behaviour must show on its face facts necessary to give the justices jurisdiction to make such order. In *Caudle v. Seymour,* (2) Lord Denman, in relation to the entering upon an enquiry into a criminal charge, says that "to give him (the magistrate) jurisdiction over the individual accused, there should have been an information properly laid."

Neither the information nor the evidence was sufficient to give jurisdiction to the magistrate on either the ground of threatened breach of the peace or for good behaviour. To say that the general jurisdiction to enter upon the hearing was present is to disregard both of those facts. But assuming that initial authority to be present, the act causing the trespass was without legal foundation and it is to that act we must look. In *Barton v. Bricknell,* (3), in addition to a proper conviction, there were added the words "that in default of sufficient distress" the plaintiff "should be put in stocks for two hours, unless the penalty and costs were sooner paid." The Protection of Public Authorities Act, 11-12 Vic. c. 44, which corresponds to the provisions of the Ontario statute, had been invoked, and Coleridge J., in examining the second section, said:—

> I am not prepared to deny that the present case falls within the literal meaning of these words; for this is an act done under a conviction in a matter in which the defendant has exceeded his authority. But if we give these words their full literal meaning, they contradict the first section We must then try to construe them so as to give effect to the whole act; and I think we do this if we confine sect. 2 to cases in which the act by which the plaintiff is injured is an act in excess of jurisdiction.

In *Lawrenson v. Hill,* (4), an action was sustained against a justice for arrest on a warrant to commit for trial based on a complaint that the plaintiff had refused "to give up a key" of a certain house. The allegation stated only a ground for a civil action, and in the course of delivering the judgment of the court Pigot C.B. puts the same view in these words:—

> In the case before us an act done without, or in excess of, jurisdiction is the very act which caused the imprisonment complained of.

(1) [1912] 2 Ir. L.R. 374.
(2) (1841) 1 Q.B. 889.
(3) (1849) 13 Q.B. 393.
(4) (1860) 10 I.C.L.R. 177

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The magistrate acted in good faith; but it is in the lower levels of the administration of justice that injustices too frequently abound; and the courts when from time to time they are called upon to redress grievances must see to it that the arrogation of authority which routine dealing with petty delinquencies and conflicts may tend to produce shall be kept strictly within the limits of the law.

On the other grounds urged by Mr. Watson, I agree with the reasons given for rejecting them by the Court of Appeal and have nothing to add.

I would therefore allow the appeal and remit the case to the trial court for an assessment of damages with costs throughout.

Appeal dismissed with costs.

Solicitors for the appellant: *Cameron, Weldon, Brewin & McCallum.*

Solicitors for the respondent: *Smith, Rae & Greer.*

1953

*Nov. 30

1954

*May 19

C. ROY SAVAGE (*Defendant*) ..... APPELLANT;

AND

JOSEPH WILBY and BESSIE WILBY (*Plaintiffs*) ..... } RESPONDENTS,

AND

ROLAND E. DeLONG (*Defendant*) ..... RESPONDENT.

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

Negligence—Landlord and Tenant—Principal and Agent—Liability of lessee for damages done leased premises by contractor's negligence—Duty of Lessee to take reasonable precautions—Exclusion of defence of independent contractor.

S, who operated a restaurant in a building he leased from W, gave a contract to D, a painting contractor, to renovate the interior of the leased premises. It was specified in the contract that the old paint should be removed. In doing the work D used an inflammable paint remover. A fire broke out and damaged the building. In an

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

action brought by W against S and D to recover damages, it was proved that the usual method of removing paint from the interior of a building was used, and that it was attended by the risk of fire, unless special precautions were taken. The trial judge gave judgment against D and dismissed the action against S. The appellate court found both defendants liable. S appealed on the grounds that he knew nothing about the usual methods of removing paint; he did not know that D was using an inflammable paint remover; and as D was an independent contractor, he was not liable for D's negligence.

Held: That S was properly found liable. He had ordered the doing of work which if done by the usual method created a danger of injurious consequences and he therefore came under a duty to take reasonable precautions to avoid them. It was not enough that he himself did not know of the danger, since it was one which would be obvious to any reasonably well-informed person, nor could S escape liability for non-performance of such duty by delegating it to an independent contractor. *City of Saint John* v. *Donald* [1926] S.C.R. 371, applied.

Decision of the Supreme Court of New Brunswick, Appeal Division 32 M.P.R., affirmed.

APPEAL from that part of the judgment of the Supreme Court of New Brunswick, Appeal Division (1) whereby it was directed that judgment be entered against the appellant. The action was brought by the landlords, the Wilbys, against their tenant, Savage, and DeLong, an independent contractor retained by Savage, to recover damages to a building arising from a fire which occurred while the building was in the tenant's possession and which was alleged to have been caused by the negligent use of a dangerous substance by the contractor in removing paint. The trial judge, Bridges J., gave judgment against the contractor and dismissed the action against the tenant. Both the landlords and the contractor appealed. The appellate court unanimously affirmed the judgment against the contractor, and allowed the appeal against the tenant. Hughes J. dissenting, against that part of the judgment maintaining the action against the tenant.

John E. Warner for the appellant.

C. J. A. Hughes, Q.C. for the respondents.

RAND J.:—The question in this appeal is whether a lessee is liable for damages done to the leased premises in the course of work negligently performed by an independent contractor. The work involved the removal of paint from

(1) (1953) 32 M.P.R. 63.

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the interior portions of a restaurant by means of a substance the use of which admittedly called for special care through its tendency to inflammability. On the container in which it was sold a clear warning made known the danger and the painting trade were well acquainted with its risks. Another composition could have been used without danger, but its fumes apparently caused nausea and for that reason, in this instance, after having been used for a short time, it was put aside and the other substituted. The latter was in ordinary use by the trade and the general employment of the contractor must be taken to have contemplated its use in this case. But the lessee in fact knew nothing about the substance, its dangers, or its use.

The rule of law applicable can be said to be well established although its statement is not always in the same terms. Among its earliest expressions was that in *Bower* v. *Peate,* (1), in which a contractor for building a house undertook to protect an adjoining house which was entitled to the support of the neighbouring land. In the course of the judgment, Cockburn C.J. said:—

> The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful.

Although the reference is to consequences to a neighbour, the principle is not limited to that spatial application. In *Grote* v. *Chester and Holyhead Ry. Co.* (2) the defendant for negligence in the construction, under the direction of a competent engineer, of a bridge over which another railway company held running rights, was held liable to a passenger carried by the latter company. In the course of the argument Parke B., to the contention that having engaged the services of a most competent engineer the company had done its duty, interposed the remark:—

> It seems to me that they would still be liable for the accident unless he also used due and reasonable care and employed proper materials in the work.

(1) (1876) 1 Q.B.D. 321. (2) (1848) 2 Ex. 251.

and Pollock C.B., in giving judgment, said:—

> It cannot be contended that the defendants are not responsible for the accident merely on the ground that they have employed a competent person to construct the bridge.

In *Penny* v. *Wimbledon Urban Council* (1), a case holding a district council liable for unlighted obstructions left in a highway being repaired for the council by a contractor, Romer L.J. at p. 78 says:—

> When a person, through a contractor, does work which from its nature is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor if the latter does not take these precautions.

In such circumstances, inherent in the work itself are unusual risks which call for special precautions; and since they result from the act of setting the work on foot, a duty on the person so acting arises as a concomitant of the work, towards interests within the range of the risks, to see that reasonable measures are taken against them. The employment of an independent contractor does not discharge that duty, and if through his negligence there is a failure in it, the owner or person employing him incurs liability. Considerations supporting the rule are not far to seek. If the lessee had owned the premises he would have been remitted to the responsibility of the contractor; why then should he be relieved from dependence on that by transferring it to the landlord where he is dealing with or affecting the latter's property? Since he has, in fact, imposed the dangerous agencies and their hazards on that property, it would be repugnant to principle that he should be permitted to relieve himself of repsonsibility by the introduction of an intermediary. This circumstance is not significant to the ordinary case since the risk there encountered is related to the actor and not the work, and as a matter of policy the promotion of such works is not to be discouraged by extending the liability of those for whom they are done to the delinquent conduct of other persons who have become virtually the necessary means of carrying them out. But such a breach is to be distinguished from that negligence in the course of the work which has been called "collateral", that is, collateral to the risks annexed to the work itself.

(1) (1899) 2 Q.B. 72.

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Difficulties may arise in determining when the circumstances present the degree of danger attracting the rule; but on the facts here I do not find it doubtful to conclude that the excess of risk was present, and that if chargeability with knowledge of it is requisite, that also must be laid against the lessee.

I would therefore dismiss the appeal with costs.

The judgment of Kellock and Fauteux JJ. was delivered by:

KELLOCK J.:—The learned trial judge considered that as the work in question could have been performed by the use of a perfectly harmless agent, and the appellant had no knowledge that other agents which were dangerous were also normally used, he was not liable. In the view of the majority in the court below, however, it was sufficient that the agent actually employed was one normally used.

The governing principle is thus stated in the 11th edition of Salmond at p. 134, as follows:

> if an employer is under a duty to a person or class of persons, he is liable if that duty is not performed and damage thereby results, and cannot evade that liability by delegating the performance of the duty to an independent contractor.

The author, however, goes on immediately to say that

> Whether there is such a duty will depend upon whether the employer as a reasonable man ought to foresee that the persons who suffer damage are likely to be affected by the performance of the independent contractor's acts.

These statements of the law are amply borne out by the authorities. It is sufficient to refer to *Dalton* v. *Angus* (1), Lord Blackburn, at 829, and to *St. John* v. *Donald* (2).

As stated by Anglin J. in Donald's case, *ubi cit,* at 383, vicarious liability arises where the danger of injurious consequences to others from the work ordered to be done is so inherent in it that "to any reasonably well-informed person who reflects upon its nature the likelihood of such consequences ensuing, unless precautions are taken to avoid them, should be obvious, so that were the employer doing the work himself his duty to take such precautions would be indisputable."

(1) (1881) 6 App. Cas. 740. (2) 1926 2 D.L.R. 185. [1926] S.C.R. 371.

It is therefore not enough that the appellant himself did not know of the danger. So long as the means employed was one commonly employed, he is taken to know what, to the person reasonably well-informed as to the nature of the work, would have been obvious.

The appeal should therefore be dismissed with costs.

The judgment of Estey and Cartwright JJ. was delivered by:

CARTWRIGHT J.:—The facts out of which this appeal arises are as follows. The appellant was lessee of the ground floor of a building owned by the respondents and operated a restaurant in the demised premises. The lease was not put in evidence and neither party has suggested that the determination of the appeal depends on its terms. The appellant entered into a contract with the defendant DeLong, who is a painting contractor, to remove the paint from the restaurant booths and refinish them and to paint the walls and woodwork of the restaurant for a lump sum. This contract was an oral one. It is now common ground that DeLong was an independent contractor. The contract was silent as to the method which he should employ in doing the work but it was specified that the old paint was to be removed. There is no suggestion that the appellant acted negligently in selecting DeLong to undertake the work.

On February 8, 1950, DeLong commenced the removal of the paint using a non-inflammable liquid paint remover but, as the fumes from this proved objectionable and tended to make the workmen sick, he abandoned its use and continued the work using a paint remover known as "Taxite". This substance is inflammable and volatile. Its fumes when mixed with air are explosive.

During the progress of the work of removing the paint a fire occurred which spread with great rapidity and caused damage to the plaintiff's building which has been assessed at $9,979.91. The quantum of this assessment is not questioned. There are concurrent findings of fact, amply supported by the evidence, that DeLong was negligent in that he failed to take adequate precautions to prevent the creation of a flame or spark in the room in which the work of paint removal was proceeding.

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The respondent brought action against both DeLong and the appellant. At the trial judgment was given against DeLong but the action as against the appellant was dismissed. On appeal to the Supreme Court of New Brunswick, Appeal Division, DeLong's appeal was dismissed unanimously and the appeal of the present respondent as against the appellant was allowed, Hughes J. dissenting, DeLong did not appeal to this Court and we are concerned only with the question whether or not the appellant was properly held liable.

The question whether the work of removing paint from woodwork in the interior of a building is necessarily attended with danger was fully argued before us. This does not appear to me to be a matter as to which the Court may take judicial notice and to determine it it becomes necessary to examine the evidence. Every witness who was examined on this point stated that the usual method of removing paint from the exterior of a building is to employ blow-torches but that when paint is to be removed from the interior of a building the usual method is to use liquid paint removers. Every such witness stated that some paint removers are inflammable and that he had used inflammable paint removers for this sort of work. Indeed the witness McGinnis who was described as a master painter of thirty-two years experience had never used a paint remover which was not inflammable. All such witnesses agreed that it was necessary to take precautions against fire when using these paint removers. It results from this evidence that a normal, and indeed the most usual, method of removing paint from the interior of a building is to use liquid paint removers which are highly inflammable and the fumes of which are explosive, but that there are other paint removers, not so frequently used, which are not inflammable.

The appeal was argued on the basis that the appellant in fact knew nothing about the usual methods of removing paint and did not know that DeLong was using an inflammable paint remover.

For the appellant it is argued that as DeLong was an independent contractor selected without negligence and employed by the appellant to do a lawful act the appellant is not liable for his negligence. Assuming this to be a correct statement of the general rule, it is a rule to which

there are exceptions, one being that where the act which the independent contractor is employed to do is one which in its nature involves a special danger of injury to the property of another a duty is imposed upon the party employing the independent contractor to take special precautions to prevent such injury and he can not escape liability for failure to discharge such duty by delegating its performance to another. I do not find it necessary to review the many authorities which were discussed on the argument for while it may not be easy to reconcile all the statements which they contain none of them appear to cast doubt on the existence of the exception to which I have referred.

I am in respectful agreement with the majority in the Appeal Division that the facts of this case bring it within the exception mentioned. In my view the appellant ordered the doing of work which, if done by the usual method, would create a danger of fire in the respondent's building and he thereupon came under a duty either to provide that the dangerous method be not used or to provide that if it were used all necessary precautions against fire be taken, and he could not escape liability for the non-performance of such duty by delegating its performance to DeLong.

It is contended that in view of the finding that the appellant was in fact unaware of the usual method of removing paint and the danger attending it, it cannot be said that he ought reasonably to have foreseen the probability of danger and that consequently no duty to take precautions was imposed upon him. It may well be that the inquiry, as to whether the work which the independent contractor has been ordered to do involves in its nature a special danger of injury so as to bring the case within the exception referred to above, is a purely objective one; but, assuming for the purposes of this branch of the argument that a subjective element is involved, the question would be not what was the actual knowledge of the appellant but rather, to adapt the words of Anglin C.J.C. in *St. John* v. *Donald* (1), what would any reasonably well-informed person reflecting upon the nature of the proposed work have foreseen. A person, employing an independent contractor to do work of such a nature that it is common knowledge in the trade to which the independent contractor belongs that

(1) [1926] S.C.R. 371 at 383.

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the doing of the work by the usual method will necessarily be attended with danger to another's property, cannot evade the resultant duty to take precautions because he lacks knowledge and fails to make any inquiry. In my opinion a reasonable man in the position of the appellant ought to have foreseen the danger which the work would create.

As the above reasons appear to me to be sufficient to dispose of the appeal I do not find it necessary to consider the effect of the existence of the relationship of landlord and tenant between the parties which is referred to by Harrison J. or the effect of the statutory provisions (1938 N.B. c. 42 s. 7) dealing with the liability of a tenant for both voluntary and permissive waste.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. E. Warner.*

Solicitors for the respondents: *Inches & Hazen.*

1954

*Feb. 3, 4
*May 19

REINHOLD HAGER and EDA MARY HAGER (DEFENDANTS) ..... } APPELLANTS;

AND

UNITED SHEET METAL LTD. and CHINOOK BUILDING SUPPLIES LTD. (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPEAL DIVISION

Land Titles—Mechanics' Liens—Priorities—Lands sold bona fide purchaser for value without notice—Certificate of title issued to purchaser before registration of liens within statutory period—Whether liens apply—The Lands Title Act, R.S.A. 1942, c. 205 as amended—The Mechanics' Lien Act, R.S.A. 1942, c. 236, as amended.

The appellants, bona fide purchasers of land for value without notice, registered title under *The Lands Title Act,* R.S.A. 1942, c. 205, prior to the registration by the respondents of mechanics' liens within the time permitted by *The Mechanics' Lien Act,* R.S.A. 1942, c. 236.

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

Held: 1. That *The Mechanics' Lien Act* does not alter or modify the provisions of *The Lands Title Act* in respect to such purchasers. The respondents' liens were not "notified on the folio of the register" when the certificate of title was issued to the appellants and therefore the latter, as provided by s. 60(1) of *The Lands Title Act,* held the land free and clear of such liens.

2. That the appellants were not "owners" within the meaning of ss. 2(*g*) and 6 of *The Mechanics' Lien Act.*

Per: Locke J.—While in one sense a person who takes a transfer for value from the person upon whose credit the material is supplied and obtains a certificate of title, "claims under" the former owner in strictness it is not under this transfer that the claim of the holder of the certificate to hold the land free of the lien is based, but rather upon the express terms of ss. 60 and 62 of *The Lands Title Act.*

Judgment of the Appellate Division of the Supreme Court of Alberta (1953) 9 W.W.R. (N.S.) 481, reversed and judgment at trial restored.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta (1) F. Ford and Parlee JJ.A. dissenting, reversing a judgment of Egbert J.(2), declaring the defendants held a certificate of title free from the mechanics' liens of the plaintiffs and directing the removal of the liens from the certificate of title.

D. F. McLeod for the appellants.

T. J. Hopwood for the respondents.

The judgment of Kerwin, Tachereau, Kellock, Estey and Cartwright JJ. was delivered by:

ESTEY J.:—This is an appeal pursuant to special leave granted by the Appellate Division of the Supreme Court of Alberta from a majority decision of that Court reversing the judgment of the learned trial judge in favour of the defendants (appellants).

The issue may be briefly stated: Do the appellants, who bona fide purchased the land here in question and became registered owners thereof after respondents had provided labour and materials utilized in the construction of a building thereon but before they had registered mechanics' liens (though registration thereof was within the time permitted by *The Mechanics' Lien Act* (R.S.A. 1942, c. 236 as amended)) hold the land subject to or free from the mechanics' liens?

(1) (1953) 9 W.W.R. (N.S.) 481; (2) (1952-53) 7 W.W.R. (N.S.) 481. [1953] 4. D.L.R. 308.

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The labour and materials were provided by the respondents at the request of and for the benefit of Frank Carter and utilized in the improvement of a building on land of which he was the registered owner and described as the West 30 feet of the East 40 feet of Lot 13 in Block 12 according to a plan of record in the South Alberta Land Registration District as Plan Upper Hillhurst, Calgary, 6219 L.

The labour and materials were provided prior to June 13, 1951, on which date Frank Carter sold the premises to the appellants, who became bona fide purchasers for valuable consideration and to whom, on that date, was issued, out of the appropriate Land Titles Office, a certificate of title to the said land.

On the following day, June 14, 1951, respondent United Sheet Metal Limited registered a mechanics' lien and subsequently the other respondents registered liens, all of which were within the time permitted for registration by the statute.

The Land Titles Act (R.S.A. 1942, c. 205) is a statute of general application to all the lands throughout the province. *The Mechanics' Lien Act* creates a lien in favour of those who provide labour and materials utilized in the construction, alteration or repair of buildings. It is, therefore, legislation in favour of specified parties who, as a result thereof, may register an incumbrance against the land in the appropriate Land Titles Office. It follows that the effect of registration of a mechanics' lien in the Land Titles Office must be determined under the provisions of *The Land Titles Act,* except as these may be repealed, altered or modified by the provisions of *The Mechanics' Lien Act.* This conclusion, apart from the general principles of construction, is supported by the provisions of *The Mechanics' Lien Act.*

Under *The Land Titles Act* documents become effective upon registration and once a certificate of title is issued to an owner of land that owner, except in the case of fraud, holds it subject only to such incumbrances, liens, estates or interests as are notified on the certificate of title but "absolutely free from all other incumbrances, liens, estates or interests . . . "

The lien under *The Mechanics' Lien Act* is created by s. 6(1). This section reads as follows:

6(1) Unless he signs an express agreement to the contrary and in that case, subject to the provisions of section 4, a person who performs any work or service upon or in respect of or places or furnishes any materials to be used in the making, constructing, erecting, fitting, altering, improving, demolishing, or repairing of any improvement for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for so much of the price of the work, service or materials as remains due to him in the improvement and the land occupied thereby or enjoyed therewith, or upon or in respect of which the work or service is performed, or upon which the materials are to be used.

Section 7 provides that "The lien shall arise at the date of the commencement of the work or at the date of the first delivery of material."

These ss., 6 and 7, specify that the lien exists prior to and apart from registration. The statute, however, goes on to provide for registration within specified times and when registered under s. 19(8) the lien becomes "an incumbrance against the land, or the estate or interest in the land therein described, as provided in *The Land Titles Act*." If, however, the lien is not registered, s. 24(1) provides: "Every lien which is not registered shall absolutely cease to exist on the expiration of the time" fixed for the registration thereof.

The Mechanics' Lien Act, while it does not expressly repeal, does, to some extent, alter or modify certain provisions of *The Land Titles Act* in respect of priorities in relation to mechanics' liens, qua incumbrances.

Section 11 reads as follows:

11. Liens arising by virtue of this Act shall as against the lands and improvements subject to the lien be prior to all unregistered mortgages and prior to all mortgages registered subsequent to the date the lien arose.

Section 11*b*. (1): as enacted in 1943 S. of A. c. 35, s. 5.

11b. (1) Where works or improvements are put upon premises subject to a registered mortgage, liens arising by virtue of this Act shall be prior to such mortgage to the extent of the increase in value of the mortgaged premises resulting from such works or improvements and from all subsequent improvements and no such lien shall be barred or foreclosed in any proceedings on such mortgage.

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Section 11*b*. (9): as enacted in 1943 S. of A. c. 35, s. 5.

11b. (9) In the case of an agreement for the purchase of land where the purchase money, or part thereof, is unpaid, and the purchaser has not been registered as owner thereof, he shall for the purposes of this Act be deemed a mortgagor and the seller a mortgagee, whose mortgage was registered on the date of execution of the agreement for sale.

This provision in s. 11*b*.(9), restricted as it is to a purchaser who still owes a part of the purchase price and has not become registered owner, clearly suggests that the legislature did not intend to legislate, in *The Mechanics' Lien Act,* in respect to a purchaser such as the appellants who have paid the purchase price in full and become registered owners.

The Mechanics' Lien Act, therefore, does not alter or modify the provisions of *The Land Titles Act* in respect to an owner in the position of the appellants who, under s. 60(1) of *The Land Titles Act,* hold their certificate of title "subject . . . to such incumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other incumbrances, liens, . . ." All of the liens here in question were not "notified on the folio" when the certificate of title was issued to the appellants. It must follow that they hold the land free and clear thereof.

It is, however, contended that the foregoing is changed by virtue of the definition of "owner" in s. 2(*g*) and that as a consequence the respondents have a lien against the interests of the appellants as owners.

It will be noted that in s. 6(1) above quoted, the respondents having supplied services and materials "for any owner . . . shall by virtue thereof have a lien . . . in . . . the land occupied thereby . . . " The relevant portions of s. 2(*g*) reads:

2. In this Act, unless the context otherwise requires,—

* * *

(*g*) "owner" extends to every person . . . having any estate or interest in land, at whose request, express or implied, and,—

(i) upon whose credit; or

(ii) upon whose behalf; or

(iii) with whose privity and consent; or

(iv) for whose direct benefit,—any contract work is done and all persons claiming under him or it whose rights are acquired after the commencement of the work;

There can be no question but that the services and materials were supplied at Carter's request while he was registered owner of the land, nor can there be any question but that the appellants purchased the land from Carter. The question, therefore, arises: Are the appellants, as the respondents contend, included in the phrase "all persons claiming under" Carter?

The Mechanics' Lien Act creates a lien apart from and prior to its registration. Once, however, registration is effected, it becomes an incumbrance under *The Land Titles Act* and it would seem to follow that questions in respect to priority must then be determined under the relevant provisions of *The Mechanics' Lien* and *Land Titles Acts*. In these circumstances it would appear that the provisions for registration are such that the words "unless the context otherwise requires" in s. 2(*g*) are important in construing the foregoing phrase which, so far as that is reasonably possible, ought to be construed in a manner that is neither repugnant to nor in conflict with any other provision of the enactment. Moreover, the construction here contended for by the respondents would largely, if not entirely, nullify the provisions with respect to registration and priority where mechanics' liens are in issue under the two above-mentioned Acts.

The foregoing view is supported by the fact that registration is not mentioned in the definition under s. 2(*g*), while its importance in the substantive provisions of the statute cannot be doubted. In my view it was not the intention of the legislature that the phrase "all persons claiming under him" should be given a meaning that would deny to a bona fide purchaser who had received a certificate of title as owner the position that he is otherwise entitled to under *The Land Titles Act* and *The Mechanics' Lien Act*.

We are in this case concerned only with registered owners of land and mechanics' liens registered against land after it has passed into the hands of the appellants who, at all relevant times, were not owners within s. 6 and s. 2(g). A construction that does not include them within the definition of "owner" in s. 2(*g*) does not unduly restrict the effect of the wide and comprehensive language thereof. The Legislature, by s. 2(*g*) as well as by other provisions in

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the statute, makes it clear that "owner" includes both those who are registered as owners and others whose interests are not registered. An example of the latter may be found in s. 11*b*(9), where one who holds the land as purchaser under an agreement for sale, but who owes all or a part of the purchase price and who has not been registered as owner, is included within the definition in s. 2(*g*). The purchaser in the latter section is deemed a mortgagor and the seller a mortgagee "whose mortgage was registered on the date of the execution of the agreement for sale."

While the provisions of the Ontario mechanics' lien legislation considered in *Sterling Lumber Co.* v. *Jones,* (1) are different, the definition of "owner" is substantially to the same effect. There Jones, an owner, obtained services and materials from the lienholder in the construction of a house. When nearing completion, one Oliver purchased and registered his conveyance from Jones on July 9, 1914, prior to the registration of any mechanics' lien. In fact the liens were not registered until the following month. The Ontario Court of Appeal held that Oliver, as registered owner under The Ontario Registry Act (R.S.O. 1914, c. 124), held the property free and clear of the mechanics' liens. Mr. Justice Hodgins at p. 293 stated:

> It is quite possible to give a reasonable interpretation to the words in the definition (sec. 2(*c*)) "all persons claiming under him or them whose rights are acquired after the work or service in respect of which the lien is claimed is commenced or the materials furnished have been commenced to be furnished," without infringing this principle.

The appeal should be allowed and the judgment of the learned trial judge restored. The appellants should have their costs both in the Appellate Division and in this Court.

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

LOCKE J.:—The appellants in the present matter are the registered owners of the lands upon which the respondents claim to be entitled to liens and hold a certificate of title issued to them on June 13, 1951, under the provisions of *The Land Titles Act* (R.S.A. 1942, c. 205). It was admitted by the respondents that this certificate of title issued pursuant to a transfer given by the former registered owner, one Frank Carter, to the appellants for valuable consideration and was registered by them, they having no notice of the claims of the respondents.

(1) (1916) 29 D.L.R. 288.

The materials in respect of which the claims of lien were filed were supplied at the request of Carter prior to the date upon which he delivered the transfer to the appellants. *The Mechanics' Lien Act* (c. 236, R.S.A. 1942) by s. 6 declares that a person who furnishes materials to be used for the purpose of constructing any improvement for any owner, contractor or sub-contractor, shall by virtue thereof have a lien for the price. "Owner" is defined by clause (*g*) of s. 2 as extending, *inter alia,* to every person having an estate or interest in land at whose request:—

> any contract work is done and all persons claiming under him or it whose rights are acquired after the commencement of the work.

The point in the appeal is as to whether the appellants are persons claiming under Carter, within the meaning of clause (*g*) of s. 2 of the Act, and thus "owners" within s. 6.

Section 11 of *The Mechanics' Lien Act* (as amended) declares that liens arising by virtue of the Act shall as against the lands and improvements subject to the lien be prior to all unregistered mortgages and prior to all mortgages registered subsequent to the date the lien arose. Section 11*b* provides, *inter alia,* that when works are put upon premises subject to a registered mortgage, liens arising by virtue of the Act shall be prior to such mortgage, to the extent of the increase in value of the mortgaged premises resulting from such works. Subsection (9) of this section provides that in the case of an agreement for the purchase of land where the purchase money or part of it is unpaid and the purchaser has not been registered as owner, he shall for the purposes of the Act be deemed a mortgagor and the seller a mortgagee whose mortgage was registered on the date of the execution of the agreement for sale. Section 22 provides that a lien may be registered before or during the performance of the contract or within thirty-five days after its completion. By s. 24 it is provided that every lien which is not registered shall cease to exist on the expiration of the time so limited.

The appellants contend that their title to the land, evidenced by the certificate of title issued to them, is not subject to the liens claimed by the respondents and they rely upon the provisions of *The Land Titles Act* (R.S.A. 1942, c. 205) to sustain that position.

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Subsection (*e*) of s. 2, the interpretation section of that Act, defines "incumbrances" as any charge on land created or effected for any purpose whatever and as including mechanics' liens when authorized by statute.

Section 55 declares that instruments registered affecting the same land shall be entitled to priority the one over the other according to the time of registration and not according to the date of execution.

Section 60 provides that the owner of land in whose name a certificate of title has been granted shall, except in certain circumstances which do not bear upon the present matter, hold it subject to such incumbrances as are notified on the folio of the register which constitutes the certificate of title but absolutely free from all other incumbrances, liens, estates or interests.

The land mentioned in any certificate of title granted under the Act is stated by s. 61 to be by implication subject to certain reservations, charges or rights, none of which affect the present question.

Section 62 reads:—

> Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in section 61, except so far as regards any portion of land by wrong description of boundaries or parcels included in the certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land; and for the purpose of this section that person shall be deemed to claim under a prior certificate of title who is holder of, or whose claim is derived directly or indirectly from the person who was the holder of, the earliest certificate of title granted, notwithstanding that the certificate of title has been surrendered and a new certificate of title has been granted upon any transfer or other instrument.

Other than in the definition of "incumbrance" in clause (*e*) of s. 2, the only reference to mechanics' liens in the statute is in s. 148*a* which requires the District Registrar, upon receiving a claim for registration of the lien under the provisions of the Mechanics' Lien Act, to advise the registered owner in writing of the fact.

Liens in favour of workmen and those who supplied material were first provided for in the Northwest Territories by Ordinance No. 6 of 1884. The definition of "owner" in that ordinance included, as does the present statute, the person having an estate, legal or equitable, in the lands at whose request the materials were supplied and:—

all persons claiming under him, whose rights are acquired after the work in respect of which the lien is claimed, is commenced, or the materials or machinery furnished have been commenced to be furnished.

This language appears to have been taken from the Mechanics' Lien Act of Ontario (R.S.O. 1877, c. 120) and first appeared in c. 20 of the Statutes of Ontario of 1875.

It was in 1886 that the Territories Real Property Act, which introduced the Torrens system into the Northwest Territories, was enacted by the Parliament of Canada. Ss. 60, 61 and 62 of that Act, with certain changes which do not affect the present matter, are reproduced in those sections in the present Land Titles Act of Alberta. *The Land Titles Act* first enacted in Alberta in 1906 substantially re-enacted the Dominion Act of 1886 and its successor, the Land Titles Act of 1894. The Mechanics' Lien Ordinance was in turn replaced by *The Mechanics' Lien Act* of Alberta of 1906. Both statutes appear in the revisions of the Alberta Statutes of 1922 and 1942.

I have considered the decisions under the Ontario Statute to which we have been referred, in which the rights of lien holders as against mortgagees or purchasers advancing money or taking title without any knowledge of such claims have been considered. Of these, *McVean* v. *Tiffin* (1), *Reinhart* v. *Shutt* (2), *Wanty* v. *Robins* (3), *Reggin* v. *Manes* (4), and *Sterling Lumber Co.* v. *Jones* (5), appear to support the position of the appellants, at least to this extent that priority of registration under the Registry Act was held to give priority over the claim of lien. They do not, however, directly touch the question to be decided here which turns, in my opinion, upon the effect to be given to the sections of *The Land Titles Act* to which I refer.

While the Territories Real Property Act of 1885 was passed after the first Mechanics' Lien Ordinance to which I have referred, since *The Land Titles Act* and *The*

(1) (1885) 13 A.R.I.
(2) (1888) 15 O.R. 325.
(3) (1888) 15 O.R. 474.
(4) (1892) 22 O.R. 443.
(5) (1916) 36 O.L.R. 153.

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Mechanics' Lien Act were passed at the same time in 1906, 1922 and 1942 by the Legislature of Alberta, it cannot be successfully contended that the provisions of either statute repeal any part of the other by implication. I think it is possible, without doing violence to the language of either, to give effect to the provisions of both.

As I have pointed out, *The Mechanics' Lien Act* in its present form gives priority to the lien claimant over the holder of a registered mortgage to the extent of the increase in value brought about by the performance of the work, and further declares the priority of the lien over all unregistered mortgages and those registered subsequent to the date the lien arose. In addition, by s. 11*b*(9) it declares the rights of the lien claimant as against the vendor under an agreement for sale. While to this extent *The Mechanics' Lien Act* has dealt with questions of priority in regard to claims against land, it is silent as to the rights of a lien claimant against a person to whom a certificate of title has been issued and who has thus obtained the protection afforded by ss. 60 and 62 of *The Land Titles Act* unless, indeed, it can be said that the effect of s. 6, when read with the definition of "owner", conflicts with these sections of *The Land Titles Act.*

In my opinion, the expression "owner" in s. 6 should not be construed as including a person who has obtained a transfer for value and, having registered it and obtained a certificate of title for the land, has become entitled to the protection of the provisions of *The Land Titles Act.* While it is true that in one sense such a person "claims under" the former owner at whose request or upon whose credit the materials are supplied in that the transfer of the land has been given by such person, in strictness it is not under this transfer that the claim of the holder of the certificate of title to hold his land free of the lien is based, but rather upon the express terms of these sections of *The Land Titles Act.* When the appellants obtained their certificate of title, there were no incumbrances or liens notified on the folio of the register which constituted the certificate and so they held it free from any such claim and, by virtue of s. 62, the certificate of title is conclusive evidence in all courts of that fact.

I would allow this appeal with costs in this Court and in the Appellate Division and restore the judgment of the learned trial Judge.

Appeal allowed with costs.

Solicitors for the appellants: *German, Mackay & McLaws.*

Solicitors for the respondents: *Scott & Gregg.*

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ARTHUR ROY (*Plaintiff*) ..... APPELLANT;

AND

THE MUNICIPAL CORPORATION OF THE CITY OF THETFORD MINES AND GEORGES DOYON (*Defendants*) ..... RESPONDENTS.

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*Apr. 6
*May 19
*Jun 21

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

Municipal corporation—Liability—Arrest by municipal police officers—Detention without warrant—Search-warrant—Search performed with great publicity—Whether police officers acting for municipality or as agents of the peace—Whether municipality ratified the acts of the officers—Article 1727 C.C.

Under the denunciation of a citizen, the appellant was arrested and detained without warrant by police officers of the municipality of Thetford Mines for alleged public indecency. Because he was suspected of being the author of certain obscene writings, a search of his house to find evidence was made. The search was performed with much display of police force and consequently with great publicity. The search was unsuccessful. He was later charged with vagrancy and acquitted.

The appellant then brought action in damages against the constable who had laid the charge and had applied for the search-warrant and against the municipality on account of the acts of that constable and all others who had taken part in the events. The action was dismissed by the trial judge and by a majority in the Court of Appeal. The appellant now contends that, in the joint defence produced by the constable and the municipality, the latter ratified, by virtue of Article 1727 C.C., the acts of its officers while attempting to justify them.

Held: The appeal should be dismissed.

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*PRESENT: Rinfret C.J. and Taschereau, Estey, Cartwright and Fauteux JJ.

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Per Rinfret C.J.: It was neither alleged nor established that the actions of the officers had been authorized by the municipality. The defence did not constitute an approbation nor a ratification of their actions under Art. 1727 C.C. It constituted simply an alternative defence.

Per Taschereau, Estey, Cartwright and Fauteux JJ.: As to the constable. The illegality of the detention was conceded but the evidence did not show that he had had any part in it, and furthermore it showed that he had been justified in laying the charge of vagrancy and in having applied for the search-warrant.

Assuming that in law the publicity given to the execution of the search-warrant could, in the circumstances of this case, give rise to an action in damages, the evidence did not establish that in fact the damage of which the appellant complained in this respect differed substantially from the one which could have resulted as well as from the accusation well founded in law as from a normal execution of the search-warrant equally well founded in law.

As to the municipality. The officers were not acting as agents of the municipality but as agents of the peace, enforcing the provisions of the Criminal Code. It had not been alleged nor established that the municipality authorized their actions nor was there any evidence that it ratified them.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Galipeault C.J.A. and St. Jacques J.A. dissenting, the dismissal of an action in damages against a municipality arising out of the arrest and detention of the appellant.

R. G. Taschereau and G. Roberge for the appellant.

L. Drolet Q.C. for the respondents.

The CHIEF JUSTICE: A la suite d'une première audition, la Cour en était arrivée à la conclusion que cet appel n'était pas justifié, soit à l'encontre de l'intimé Georges Doyon, soit à l'encontre de la Corporation de la Cité de Thetford Mines. Cependant, l'affaire avait été prise en délibéré et au cours de ce délibéré la question s'est présentée de savoir si la Cité de Thetford Mines ne pouvait pas être recherchée en responsabilité à raison du fait qu'elle pouvait être considérée comme ayant autorisé, approuvé ou adopté les actes des officiers de police responsables à l'égard de l'appelant Roy.

Comme le procureur de la Cité de Thetford Mines n'avait pas été appelé à exposer ses points de vue sur ce sujet particulier, la Cour a cru préférable d'ordonner une réaudition afin d'entendre son argumentation sur cette question.

(1) Q.R. [1951] K.B. 551.

A la suite de cette réaudition, je suis demeuré convaincu que la responsabilité de la Cité ne saurait être engagée sous ce rapport.

L'appelant a intenté son action en alléguant que les officiers de police qui avaient agi étaient les employés de la Cité et que cette dernière était responsable à raison des actes de ses préposés.

Doyon et la Cité ont produit un plaidoyer commun. Ils ont spécifiquement nié le paragraphe de la déclaration où il était allégué que les officiers de police avaient agi en leur qualité d'employés de la Cité et dans l'exercice de leurs fonctions.

En outre, aux paragraphes 18 et 19 du plaidoyer, il fut allégué que Doyon, dans cette affaire, avait agi comme agent de la paix et que "la Cité de Thetford Mines ne saurait être responsable des actions de son agent ou de ses agents en pareille circonstance". Ce plaidoyer affirme, de plus, que "tous les agents de la paix qui ont été mêlés à l'arrestation et au mandat de recherches, tel que dit ci-dessus, ont agi de bonne foi, sans malice et avec cause raisonnable et probable et nullement dans le but de faire tort à la réputation du demandeur".

L'honorable juge de première instance a jugé en fait que les événements qui s'étaient déroulés le soir du 8 avril 1948 présentaient des circonstances suffisantes pour porter les autorités policières de la Cité de Thetford Mines à croire à la vérité des faits qui leur avaient été dénoncés; que le chef de police avait agi prudemment sur la plainte de Lionel Lagueux et de sa femme; que Doyon, agissant sur les instructions de son chef, était justifiable de porter une plainte contre le demandeur; et que les autorités policières de la Cité avaient agi avec prudence et circonspection avant de demander la levée d'un mandat de perquisition chez le demandeur. L'honorable juge ajoute même qu'il était difficile pour les autorités policières d'agir plus prudemment et que "les circonstances de la cause démontraient que Doyon avait agi sans malice, avec cause probable, de bonne foi et ayant en mains des faits lui permettant de croire raisonnablement à la vérité de la dénonciation, et ce dans les deux cas".

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Rinfret C.J.

La majorité de la Cour du Banc de la Reine (1) a confirmé ce jugement. Elle est arrivée à la même conclusion que la Cour Supérieure et plus spécialement elle a exprimée l'avis que le dossier démontrait que les agents dont le demandeur-appelant se plaignait avaient agi en leur qualité d'agents de l'Etat et qu'ils ne pouvaient dès lors engager la responsabilité de la Corporation intimée.

Sur ce dernier point, la majorité de la Cour s'est inspirée de la doctrine exposée par la même Cour d'appel dans la cause de *La Cité de Montréal* v. *Plante* (2). En particulier, l'honorable juge Rivard, dans cette dernière cause, avait dit au cours de ses raisons (p. 148):

> En d'autres termes, l'officier de police nommé par une corporation ne fait encourir de responsabilité à celle-ci que lorsqu'il agit comme sergent de ville pour l'exécution des lois, des ordonnances et des règlements municipaux; lorsqu'il agit plutôt comme gardien de la paix et du bon ordre, il est le préposé de l'Etat, qui le reconnaît comme un délégué de sa puissance souveraine, et, dans ce cas, la corporation échappe à la responsabilité parce qu'en nommant cet officier elle n'a été que le dépositaire de l'autorité de l'Etat.

Le jugement de *La Cité de Montréal* v. *Plante* fut approuvé par la Cour Suprême du Canada, entre autres, dans la cause de *Hébert* v. *la Cité de Thetford Mines* (3). Dans cette affaire (p. 430), cette Cour déclarait que "les principes qui doivent nous guider sont exposés d'une façon précise et complète" et qu'il serait inutile d'ajouter quoi que ce soit à ce qui avait été dit par les juges de la Cour du Banc du Roi re: *La Cité de Montréal* v. *Plante*.

Sans doute, le jugement poursuit en référant à la décision de la même Cour dans *Doolan* v. *Corporation of Montreal* (4), mais ce dernier arrêt n'y était mentionné que parce que le procureur de l'appelant l'avait cité. Il y est clairement indiqué que le jugement que notre Cour a tenu à approuver était uniquement celui de *La Cité de Montréal* v. *Plante*.

On cite dans la cause de Plante ce passage (pp. 137 et 150) où il y était dit:

> . . . qu'une corporation municipale est aussi responsable de l'acte dommageable commis par ses officiers de police, même si ceux-ci agissent comme gardiens de la paix, lorsqu'elle a autorisé, approuvé ou adopté cet acte.

(1) Q.R. [1951] K.B. 551.
(2) Q.R. (1923) 34 K.B. 137.
(3) [1932] S.C.R. 424.
(4) (1868) 13 L.C. 71.

Or, en l'espèce qui est actuellement devant nous, il n'est ni allégué ni prouvé que la Corporation intimée a autorisé les actes reprochés aux agents de la paix.

L'appelant a voulu soumettre, cependant, qu'elle les avait approuvés ou adoptés. Sur ce point, il a invoqué certains passages dans les raisons des honorables juges dissidents. Ces passages, cependant, ne résultent pas de la preuve. Ils s'appuient, je le répète, sur les paragraphes 18 et 19 du plaidoyer. Il m'est impossible de donner cette interprétation aux deux paragraphes en question.

Le paragraphe 18 nie toute responsabilité à raison des actions des agents qui ont agi dans cette affaire et qui ont été mêlés à l'arrestation et au mandat de recherches. D'autre part, le paragraphe 19 se contente d'ajouter que ces agents "ont agi de bonne foi, sans malice et avec cause raisonnable et probable et nullement dans le but de faire tort à la réputation du demandeur".

En tout respect, cette affirmation du plaidoyer ne constitue ni l'approbation ni l'adoption des actes de ces agents; encore moins comporte-t-elle une ratification. Il s'agit là tout simplement de l'un de ces modes de plaidoiries qui se rencontrent fréquemment dans la procédure de la province de Québec et qui constituent simplement une défense alternative. Tout d'abord, il ne faut pas oublier que Doyon et la Corporation ont, comme nous l'avons signalé, produit un plaidoyer commun et il fallait bien que Doyon mit dans ce plaidoyer tous ses moyens de défense à l'effet qu'il avait agi avec prudence et avec cause raisonnable et probable. Mais, je ne vois pas, pour ma part, ce qui pouvait empêcher la Corporation intimée, après avoir nié que les agents étaient alors ses préposés et dans l'exercice de leurs fonctions, comme employés de la Cité, d'ajouter, pour en avoir le bénéfice, qu'à tout événement les agents eux-mêmes, même s'ils devaient être considérés comme préposés de la Cité, avaient agi avec cause raisonnable et probable.

Et c'est tout ce que comporte le paragraphe 19 du plaidoyer. Il n'adopte pas leurs actes; il ne les approuve pas; il se contente d'invoquer pour le propre compte de la Corporation intimée que ces agents n'ont en aucune façon commis des actes répréhensibles et susceptibles d'entraîner une responsabilité en dommages.

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Comme on l'a fait remarquer lors de la réaudition, il était prudent pour la Corporation de la Cité d'invoquer les deux moyens de défense: premièrement, celui qui consiste à dire que les agents de police n'avaient pas agi comme ses préposés dans l'exercice de leurs fonctions municipales; deuxièmement, que, même dans ce cas, ils n'avaient rien fait qui pouvait constituer une responsabilité en dommages. Et je ne vois pas en quoi le fait d'avoir invoqué ces deux moyens peut être considéré comme une approbation ou une adoption des actes qu'on leur reproche.

Je suis donc d'avis de rejeter l'appel avec dépens.

The judgment of Taschereau, Estey, Cartwright and Fauteux JJ. was delivered by:—

FAUTEUX J.:—Les faits donnant lieu au présent litige peuvent se résumer comme suit:—Vers la fin de l'après-midi du 8 avril 1948, le sergent Blais, en devoir au poste de police de la municipalité intimée, était informé, au téléphone, par un citoyen, que l'épouse d'icelui venait de voir un inconnu exposant publiquement sa personne dans une certaine rue de la cité. Accompagné du constable Martin, le sergent Blais se rendit immédiatement à l'endroit signalé, y rencontra l'informateur lequel pointa, sur la rue, l'appelant comme étant l'auteur du délit. Avec ces informations, les agents interpellèrent Roy, l'invitèrent à monter dans leur voiture pour aller au poste; ce à quoi l'appelant consentit. Prévenu de ces faits, le chef de police Lamonde—par ailleurs, déjà saisi de plaintes à l'effet que, sous le couvert de l'anonymat, un individu envoyait par la poste des pornographies et des écrits obscènes—demanda aux constables de faire écrire une lettre par l'appelant afin d'en obtenir l'écriture et la comparer avec ces écrits anonymes en possession de la police. L'appelant se prêta à cette autre requête mais, sur son refus de signer la lettre qu'il écrivit, on ordonna sa détention au poste où il demeura incarcéré jusqu'au lendemain à onze heures de l'avant-midi. C'est alors que, sur les instructions du chef Lamonde, et après avoir été mis au courant des faits précités et d'autres relatifs à l'identification de l'appelant comme auteur du délit sur la rue, le sous-chef de la cité, Doyon, logea contre ce dernier une plainte de vagabondage. La lettre écrite par Roy et les écrits anonymes furent envoyés au bureau de la

Sûreté provinciale à Québec pour y être l'objet d'une expertise en écriture. L'expert de la Sûreté confirma l'opinion déjà formée par les officiers de police de l'intimée, à l'effet que l'appelant était bien l'auteur de ces écrits; et, avec l'expectative d'y trouver des preuves corroborant cette opinion, cet officier de la Sûreté provinciale recommanda au chef Lamonde de perquisitionner au domicile de l'appelant et lui suggéra, enfin, le concours de sa participation dans l'exécution du mandat de recherches. Sur ce, et à la dénonciation du sous-chef Doyon, un mandat à cette fin fut obtenu et exécuté avec plus de déploiement—et, par conséquent, plus de publicité—qu'il ne paraissait nécessaire, par deux officiers de la Sûreté provinciale, dont l'expert en écriture, et trois officiers de la cité, dont Doyon. Ces recherches furent vaines; et il n'appert pas du dossier que suite ait été donnée à cette incidence de l'affaire. Quant à l'accusation de vagabondage, après que plusieurs mois fussent écoulés, elle fut considérée et la plainte fut renvoyée. D'où l'action en dommages de l'appelant contre le sous-chef Doyon et contre la municipalité à raison des actes de ce dernier et des autres agents de la cité ayant participé dans les événements ci-dessus.

Dans une défense conjointe, où l'on s'est abstenu de toute référence à l'innocence ou à la culpabilité de Roy, on plaida d'abord, tant à la défense de Doyon qu'à celle de la municipalité, que tous ces agents de la paix avaient "agi de bonne foi, sans malice et avec cause raisonnable et probable et nullement dans le but de faire tort à la réputation du demandeur" et, de plus, et spécialement à la défense de la municipalité, que la responsabilité de celle-ci ne pouvait être engagée par ces actes des agents de la paix.

Sur le mérite de l'action contre Doyon, cette Cour, lors d'une réaudition pour considérer celui de l'action contre la municipalité, a déjà indiqué concourir avec le Juge de première instance et ceux de la majorité de la Cour d'Appel (1), dans la conclusion que l'action était mal fondée. A ce sujet, il suffit de dire que le dossier, d'une part, ne révèle aucune participation de Doyon à cette détention sans mandat—détention dont l'illégalité fut concédée par le procureur des intimés—et, d'autre part, justifie Doyon d'avoir logé la plainte pour vagabondage et demandé

(1) Q.R. [1951] K.B. 551.

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l'émission du mandat de recherches. Quant à la publicité donnée à l'exécution de ce mandat par ce déploiement d'activités policières, assumant qu'en droit ceci puisse, dans les circonstances de cette cause, donner lieu à une action en dommages contre Doyon, je ne puis voir que le dossier établisse, en fait, que le dommage dont l'appelant se plaint de ce chef soit, dans son principe ou sa mesure, substantiellement différent de celui pouvant lui résulter, tant du fait de l'accusation légalement logée contre lui, que du fait d'une exécution normale de ce mandat de perquisition, en droit également justifiée.

Sur le mérite de l'action contre la municipalité. Les principes de droit touchant la question de la responsabilité des corporations municipales à raison des actes de leurs officiers de police sont précis. Généralement, et comme tout commettant ou mandant, une corporation municipale répond du dommage causé par la faute commise par ses préposés ou mandataires, alors qu'agissant dans l'exécution et limites des fonctions qu'elle-même leur a assignées. Aussi bien, engage la responsabilité de la corporation, l'acte fautif et dommageable que le policier municipal commet dans l'exécution et les limites de ces fonctions qu'elle-même lui donne et dont la principale est, évidemment, celle d'assurer l'observance des réglementations locales. Mais n'engage pas la responsabilité de la corporation, l'acte fautif et dommageable que le policier municipal commet alors qu'agissant dans l'exécution et les limites de ces autres fonctions que l'État, par les dispositions de la loi, i.e., du Code Criminel, lui attribue, en sa qualité d'agent de la paix, pour assurer l'observance de cette loi. Ainsi, préposé ou mandataire de différents commettants ou mandants, le policier municipal ne lie que le commettant ou le mandant dont il fait l'affaire ou pour le compte duquel il agit au moment où l'acte dommageable est causé. *Hébert* v. *La cité de Thetford-Mines* (1).

En l'espèce, il est certain qu'en procédant à cette détention de Roy sans mandat d'arrêt, en logeant contre lui l'accusation de vagabondage et en obtenant et exécutant un mandat de recherches à son domicile, tous ces officiers de police de la cité, participant dans chacun de ces événements, agissaient, non dans l'exécution et les limites des fonctions

(1) [1932] S.C.R. 424.

à eux données par la cité intimée, mais bien dans l'exécution et les limites de ce mandat légal, qu'au titre d'agents de la paix, ils ont reçu de l'Etat. De ce chef, la corporation intimée ne peut être responsable.

Sans doute, et ainsi qu'il a été décidé dans *Plante* v. *La cité de Montréal* (1), une corporation municipale peut, nonobstant le principe ci-dessus, devenir responsable de ces actes des agents de la paix, commis alors qu'agissant dans l'exécution du mandat légal précité, si elle a, expressément ou implicitement, autorisé ces actes. C'est qu'en ce faisant, la corporation elle-même ajoute aux fonctions normales de ces policiers. En l'espèce, il n'a été ni allégué ni prouvé que la corporation intimée ait autorisé les actes reprochés.

Mais l'appelant, invoquant, en somme, le principe établi au deuxième paragraphe de l'art. 1727 C.C., prescrivant que "le mandant est aussi responsable des actes qui excèdent les limites du mandat, lorsqu'il les a ratifiés expressément ou tacitement", soumet qu'en plaidant et cherchant à établir que tous ces agents de la paix avaient "agi de bonne foi, sans malice et avec cause raisonnable et probable et nullement dans le but de faire tort à la réputation du demandeur", la corporation intimée a, par cette tentative de justification, ratifié ces actes. Suivant le Vocabulaire Juridique d'Henri Capitant, "La ratification est un acte juridique unilatéral par lequel une personne *prend pour son compte,* en ce qui concerne tant les droits que les obligations qui en découlent, une opération juridique *faite pour elle et en son nom,* par quelqu'un qui n'en avait pas reçu le pouvoir." Cette définition manifeste avec justesse la véritable portée de la disposition précitée de l'art. 1727 C.C. Aussi bien, et tenant compte qu'en principe, les sergents de ville, engagés dans la poursuite des offenses criminelles, agissent en exécution du mandat leur venant de l'Etat et qu'en fait, rien dans l'espèce n'indique qu'on ait dérogé à ce principe, je ne vois pas qu'on puisse dire ques les actes reprochés aient été faits *pour et au nom* de la corporation intimée, ou qu'en tentant de les justifier par la plaidoirie et la preuve, elle les ait *pris pour son compte,* dans le sens qu'il faut donner à ces expressions, tant dans la définition ci-dessus que dans la disposition invoquée par l'appelant.

(1) Q.R. (1923) 34 K.B. 137.

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Ces considérations suffisent pour distinguer la présente cause de celle de *Plante* v. *La cité de Montréal,* dont les raisons du jugement de la Cour d'Appel, en tant que pertinentes à la détermination de la cause d'*Hébert* v. *La cité de Thetford-Mines,* furent approuvées par cette Cour. Et elle se distingue également de la cause de *Doolan* v. *Corporation of Montreal,*—également mentionnée par cette Cour dans *Hébert* v. *La cité de Thetford-Mines,*— où le principe ci-dessus de la non-responsabilité des corporations municipales pour les actes commis par les sergents de ville en exécution du mandat qu'ils reçoivent de l'Etat, n'avait pas été plaidé et où, de plus, on alléguait, ainsi qu'il appert aux raisons de M. le Juge Mackay, que les actes reprochés aux constables de la cité avaient été commis par les employés de la cité dans l'exécution du mandat qu'elle leur avait donné.

En conséquence, l'action dirigée contre la municipalité est, en l'espèce, également non fondée.

Je renverrais l'appel avec dépens.

Appeal dismissed with costs.

Solicitors for the appellant: *Talbot & Roberge.*

Solicitor for the respondents: *L. Drolet.*

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*Feb. 23, 24, 25
*May 19

G. NEIL PHILLIPS and JAMES TAYLOR (*Plaintiffs*) ..... APPELLANTS;

AND

THE CORPORATION OF THE CITY OF SAULT STE. MARIE (*Defendant*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Taxation—Municipal Assessment of land belonging to Crown in right of Canada—Validity of tax levied on persons occupying such land to carry out duties as servants of Crown—Whether indirect tax—B.N.A. Act (Imp.) s. 125—The Assessment Act, R.S.O., 1950, c. 24, ss. 4(1), 32(1), (4).

*PRESENT: Rinfret C.J. and Kerwin, Taschereau, Rand, Kellock, Estey and Fauteux JJ.

The appellants occupied houses and premises owned by the Crown in the right of Canada where they were required to live while carrying out their duties as Crown servants. Deductions from their salaries were made bearing no relation to the rentable value of the properties. The right of occupancy terminated with their employment. The respondent municipality pursuant to s. 32(1) of the Assessment Act, R.S.O., 1950, c. 24, assessed the appellants as tenants of land owned by the Crown to whom rent or valuable consideration was paid in respect of such land. The assessments and levies were upheld by the lower courts. The appellants appealed on the grounds that the assessments made and taxes levied were on lands belonging to Canada and invalid by virtue of s. 125 of the *British North America Act,* or in the alternative, that both the assessments and taxes were personal, and in so far as they purported to apply to servants of the Crown in the right of Canada, ultra vires as being a law levying an indirect tax, or as being a law which in pith and substance was not in relation to any of the classes of subjects assigned exclusively to the Legislatures of the Provinces by s. 92 of the B.N.A. Act.

Held: 1. That under s. 32(1) of the Assessment Act (Ont.) the assessor places a value on Crown property for tax purposes but the person assessed in respect of the land is not the Crown but the "tenant" who is the one who pays the tax. The value of the land is the measure of the tax, but the Act does not make the land liable to taxation and, therefore, does not conflict with s. 125 of the *B.N.A. Act.*

2. That the tax is clearly direct. The tenant is the person intended by the Legislature to pay the tax for which he is liable, and it is he who eventually bears the burden of it. That as a result of an agreement or private bargain it be paid by some one else does not change the nature of the tax demanded directly from the tenant. The ultimate incidence of the tax is the main factor in the determination of its classification. *Bank of Toronto* v. *Lambe* 12 App. Cas. 575; *A.G. for B.C.* v. *C.P.R.* [1927] A.C. 934 at 938; *Rex* v. *Caledonia Collieries Ltd.* [1928] A.C. 358 at 361; *Atlantic Smoke Shops* v. *Conlon* [1943] A.C. 550 at 564.

APPEAL, by leave of the Court of Appeal for Ontario, from the judgment of that Court (1) affirming the judgment of Gale J. (2) dismissing an action for a declaration that the assessments made by the respondent against the appellants in respect of lands occupied by them were invalid.

C. F. H. Carson, Q.C. W. R. Jackett, Q.C. and *Allan Findlay* for the appellants and the Attorney General of Canada.

W. H. G. Bennett for the respondent.

C. R. Magone, Q.C. and *D. M. Treadgold, Q.C.* for the Attorney General for Ontario.

(1) [1953] O.R. 264; 3 D.L.R. 50. (2) [1952] O.R. 655; 4 D.L.R. 237.

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PHILLIPS AND TAYLOR v. CITY OF SAULT STE. MARIE

The judgment of the Court was delivered by:—

TASCHEREAU J.:—Under the authority of The Ontario Assessment Act (R.S.O. 1950, c. 24), the Corporation of the City of Sault Ste. Marie assessed the appellants in respect of the houses and premises owned by the Crown in the right of Canada, in which the appellants are required to reside in the course of their employment, in order to carry on more effectively their duties as Crown servants.

The relevant sections of The Assessment Act are the following:—

Exemptions:

4. All real property in Ontario shall be liable to taxation, subject to the following exemptions:

1. Lands or property belonging to Canada or any Province.

* * *

32. (1) Notwithstanding paragraph 1 of section 4, the tenant of land owned by the Crown where rent or any valuable consideration is paid in respect of such land and the owner of land in which the Crown has an interest and the tenant of such land where rent or any valuable consideration is paid in respect of such land shall be assessed in respect of the land in the same way as if the land was owned or the interest of the Crown was held by any other person.

(*a*) For the purposes of this subsection,

(i) "tenant", in addition to its meaning under clause *o* of section 1, also includes any person who uses land belonging to the Crown as or for the purposes of, or in connection with his residence, irrespective of the relationship between him and the Crown with respect to such use.

(4) In addition to the liability of every person assessed under subsection 1 or 3 to pay the taxes assessed against him, the interest in such land, if any, of every person other than the Crown and the tribe or body of Indians for which it is held in trust or any member thereof, shall be subject to the lien given by section 98 and shall be liable to be sold or vested in the municipality for arrears of taxes. R.S.O. 1950, c. 24, s. 32.

In their action, the plaintiffs have asked for a declaration that the assessments made against them are invalid and of no legal force or effect, because they are assessments of property of the Crown, and that taxes levied on those assessments are taxes on "Lands and Property belonging to Canada", and consequently invalid by virtue of s. 125 of the *B.N.A. Act*. Alternatively, if these assessments are personal assessments, and if such taxes are personal taxes, the provisions of the Act authorizing them are *ultra vires*, as invading the field of indirect taxation, exclusively reserved to the Federal Parliament. Mr. Justice Gale dismissed the action, and the Court of Appeal, Mr. Justice Henderson

dissenting, confirmed that judgment. The Attorney General of Canada, and the Attorney General of Ontario were both notified of these proceedings and were represented by counsel.

The law as it now reads was amended in 1950 (Ont. c. 3, s. 6), following a judgment of the Court of Appeal of Ontario (*Stinson* v. *The Town of Middleton* (1), which held in a similar case, that the Act prescribed a tax on land only and that the plaintiffs were not "tenants" of their houses within the meaning of the law.

In 1950, the Legislature defined the word "tenant", as it is now found in s-s. 32(1)(*a*) (*supra*) and the words "the lands" in s-s. 4 were struck out, and the word "him" (*supra*) was substituted therefor.

It is common ground, that as a result of this amendment, the appellants are "tenants" within the meaning of the Act, because they are persons who use land belonging to the Crown, in connection with their residence. But it is argued on behalf of the appellants, and of the Attorney General of Canada, that the amendment to s. 32, s-s. (1)(*a*) has not the effect of changing the nature of this tax which remains a land tax on federal property, and therefore, *ultra vires*.

There can be no doubt that under s. 32(1), the assessor places a value on Crown property for tax purposes, but the person assessed in respect of the land is not the Crown but the "tenant" who is the one who pays the tax. The value of the land is the measure of the tax, but the Act does not make the land liable to taxation and, therefore, does not conflict with s. 125 of the *B.N.A. Act*. Subsection 4 of s. 32 makes this provision clear, when it says that in addition to the liability of every person assessed to pay the taxes *assessed against him*, the interest in such land, *if any*, may be sold, etc. . . . In my view this seems to be a clear indication that what is contemplated is a tax levied against the tenants, for which their personal liability only is engaged, leaving the land free of all encumbrances, if the tenants have no interest in it. Here, the tenants have no interest in the land, and it is therefore not liable to be sold or vested in the municipality for arrears of taxes that may be due by the tenants.

(1) [1949] O.R. 237.

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PHILLIPS AND TAYLOR v. CITY OF SAULT STE. MARIE

Taschereau J.

That the occupier of land owned by the Crown may be assessed in respect of the land, and that the taxes payable by him shall be based on that value, is a proposition that can no longer be challenged. In *Cochrane* v. *Cowan* (1), Chief Justice Meredith said:—

> I see no reason why a Provincial Legislature may not provide that, in assessing the interest of an occupant of Crown lands or of any other person in them, it shall be assessed according to the actual value of the land, or in other words that the taxes payable by him shall be based upon that value; the manifest injustice that would otherwise exist, at all events in the case of an occupant or tenant, is obvious. He would be assessed only for the value of his interest, which might be little or nothing, while his neighbour, who is an occupant or tenant of property owned by a private person, would be taxed on the actual value of the land.

This statement of the law was approved by the Judicial Committee in *City of Montreal* v. *Attorney General for Canada* (2). *Vide* also *Smith* v. *Vermillion Hills* (3), *City of Vancouver* v. *Attorney General of Canada et al* (4)).

The second point raised by the appellants is that if the tax imposed is a personal tax, it is an indirect tax. The contention is that "the normal effect and tendency" of the tax in question, will be for it to be passed by the Crown servants, from whom it is demanded, to the Crown. I do not think that this proposition is sound. It is a well known principle that a tax is direct if it is demanded from the very person who it is intended or desired, shall pay it, and it is indirect, if it is demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. The ultimate incidence of the tax is the main factor in the determination of its classification. *Bank of Toronto* v. *Lambe* (5), *Attorney General for British Columbia* v. *C.P.R.* (6), *Rex* v. *Caledonian Collieries Ltd.* (7), *Atlantic Smoke Shops* v. *Conlon* (8), *Atlantic Smoke Shops* v. *Conlon* (9).

In the present case, I believe that the tax is clearly direct. The tenant is the person intended by the Legislature to pay the tax for which he is made liable. I can see no expectation or intention that he shall pass it and indemnify himself. It is he who eventually bears the burden of it. It

(1) (1921) 50 O.L.R. 169 at 173.
(2) [1923] A.C. 136 at 143.
(3) [1916] 2 A.C. 569 at 573.
(4) [1944] S.C.R. 23.
(5) (1887) 12 App. Cas. 575.
(6) [1927] A.C. 934 at 938.
(7) [1928] A.C. 358 at 361.
(8) [1941] S.C.R. 670.
(9) [1943] A.C. 550 at 565.

may be that as a result of an agreement, or as Martin J.A. said in *Rex ex Rel. Sinclair* v. *Gebhart* (1), as a result of a "private bargain", the tax will be paid by someone else, but this does not change the nature of the tax which is demanded directly from the tenant. In the *Sinclair* case (cited *supra*) it was held that a tax imposed upon pedlars, was a direct tax, although the pedlar could recoup himself by charging a higher price for his goods, or by being reimbursed by his principals.

Counsel for the respondent submitted that the issues in this case were *res judicata*. Each of the appellants appealed to the Court of Revision of the City of Sault Ste. Marie, under the provisions of the said Assessment Act, against the assessments made upon the sole ground that they were not assessable in respect of their use of the lands, and the assessments were confirmed. Each appellant thereupon appealed against the decision of the Court of Revision to the Judge of the District Court of the District of Algoma upon the same ground, but the appeal was dismissed. Under The Assessment Act, s. 80, an appeal lies to the Municipal Board from the decision of the District Judge, but the appellants did not avail themselves of this right. It is now the contention of the respondent that the judgment given by the Judge of the District Court was final and that the question of the validity of the assessments is, therefore, *res judicata*. For the reasons given by Mr. Justice Laidlaw in the Court of Appeal, I believe that this argument fails.

I would dismiss the appeal. The costs of this appeal will be paid by the appellants Phillips and Taylor, to the respondent city. There will be no costs to the Attorney General of Ontario.

Appeal dismissed.

Solicitors for the appellants: *Tilley, Carson, Morlock & McCrimmon.*

Solicitors for the respondent: *Hamilton, Carmichael & Bennett.*

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(1) [1926] 2 W.W.R. 230 at 240.

1954

*Apr. 27, 28, 29, 30
*Jun. 26

HER MAJESTY THE QUEEN *(Defendant)* APPELLANT

AND

ADRIEN JASMIN *(Petitioner)*.....:RESPONDENT

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Expropriation—Petition of right—Land taken over for airfield—Right to compensation—Principles—Compulsory taking—Expropriation Act, R.S.C. 1927, c. 64.

By petition of right, the respondent claimed from the Crown $42,000, as compensation for the expropriation of his land for an airfield. Part of the land was expropriated in 1943 and another portion in 1947. The Crown offered $15,000. The trial judge valued the land at $300. an acre and added $18,425. as damages for a total allowance of $32,825.

Held: The appeal should be allowed in part and the compensation reduced to $26,840.

1. There was sufficient evidence to support the finding of the trial judge as to the valuation of the land and there was no manifest error to justify the intervention of this Court with respect to that item.
2. The respondent had a right to compensation for the damages he suffered, and while their amount is difficult to ascertain in cases of this nature, certainty is not an assential condition to their determination and its lack does not exclude the obligation to reparation. It is the function of the Courts to allow an indemnity which, having regard to the probabilities and all the circumstances, will justly compensate the expropriated. An amount of $10,000. should, on the evidence, be a fair compensation for the damages suffered by the respondent.
3. Under the circumstances of this case, an additional compensation of 10 per cent for compulsory taking should be allowed (*Woods Manufacturing Co.* v. *The King* [1951] S.C.R. 504).
4. Unless there are special circumstances, the notes of the trial judge filed one year after his judgment was rendered and when notice of appeal had already been filed, should not be considered by the Appellate Courts.

APPEAL from the judgment of the Exchequer Court of Canada, Angers J., on a petition of right in the matter of an expropriation.

Roger Ouimet Q.C. for the appellant.

Gustave Monette Q.C. and *Raymond Lachapelle* for the respondent.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Cartwright and Fauteux JJ.

1954

THE QUEEN v. JASMIN

The judgment of the court was delivered by

TASCHEREAU, J.:—Il s'agit dans la présente cause de déterminer la valeur de biens-fonds appartenant à l'intimé, et expropriés par la Couronne pour des fins d'utilité publique.

L'intimé était propriétaire de certaines terres ayant front sur le chemin du Bois Franc dans la Municipalité de la Paroisse de St-Laurent, sur l'Ile de Montréal, connues comme étant les Lots 214 et 215 des plan et livre de renvoi officiels, contenant ensemble 48 arpents. Il les avait acquises de la Compagnie Shedden Forwarding Company, Limited, le 28 mai 1942, et il allègue qu'il les avait occupées pendant plus de six ans avant d'en faire l'acquisition, et qu'il les avait constamment cultivées et amélioréees, et les avait mises en valeur et en état de produire.

Le 3 juillet 1943, la Couronne s'est emparé de la terre N° 215, et de partie de la terre N° 214, ayant ensemble une superficie de 34·13 arpents.

Un avis de cette expropriation fut donné à l'intimé Jasmin à cette date du 3 juillet 1943, conformément aux dispositions de la *Loi des Expropriations,* chap. 64, (Statuts Revisés du Canada 1927), et le même jour, des plans et descriptions des terres expropriées furent déposés au bureau de la Division d'Enregistrement de Montréal. La Couronne par ses officiers, a immédiatement pris possession de ces terres, et s'en est servi pour ses propres fins, mais il est allégué qu'elle a également fait usage de la partie non expropriée de la terre N° 214, en passant avec la machinerie et l'outillage que ses préposés employaient dans l'exécution des travaux sur la partie expropriée.

Le 1er mai 1947, la Couronne a exproprié le résidu de la terre N° 214 ayant une superficie de 13·87 arpents, tel que l'indique un plan déposé au bureau de la Division d'Enregistrement de Montréal, et le 19 mai 1947 par lettre sous pli recommandé, l'intimé fut avisé de cette seconde expropriation.

Comme l'intimé n'avait pas reçu compensation, le 22 juillet 1947 il a intenté contre l'appelant des procédures judiciaires sous forme de pétition de droit, et a réclamé la somme de $42,000.00. L'appelant a offert $15,000.00. et par jugement de l'honorable Juge Angers de la Cour de

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l'Échiquier, l'indemnité a été fixée à la somme de $32,825.00 avec intérêt au taux de 5 p. 100, à compter du vingt-deuxième jour de juillet 1947. Ce montant comprend l'indemnité à laquelle la Cour estime que l'intimé a droit pour les terrains et immeubles expropriés, et pour tous les dommages lui résultant de cette expropriation. L'appelant se pourvoit en appel de cette décision de la Cour de l'Échiquier. Jugement a été rendu sur le Banc le 23 septembre 1949, mais les raisons écrites n'ont été versées au dossier que plus d'une année plus tard, soit vers la fin de 1950, alors que l'avis d'appel avait été logé devant cette Cour le 20 octobre 1949.

A moins qu'il ne se présente des circonstances spéciales qui n'existent pas dans la cause actuelle, je crois que des notes à l'appui d'un jugment, produites si tardivement, ne doivent pas être considérées par les tribunaux d'appel. (*Mayhew* v. *Stone* (1); *Brown* v. *Gugy* (2); *Richer* v. *Voyer* (3); *Mattouk* v. *Massad* (4)). Je n'ai donc pas l'intention d'en tenir compte pour la détermination du présent litige. Tout ce que nous savons c'est que, lors du jugement oral, le juge au procès a accordé $300.00 l'acre pour la valeur des terres expropriées soit $14,400.00, et nous ignorons comment la balance de $18,425.00 a été attribuée.

L'intimé tente de justifier ce montant en soumettant que son exploitation agricole a été sérieusement affectée, que la disjonction des terres lui a causé un dommage substantiel, que le reste de son bien-fonds a perdu de sa valeur à cause de la proximité de l'aéroport, et enfin, qu'il a droit à un montant additionnel de 10% pour dépossession forcée. Du côté nord de la route du Bois Franc, l'intimé est aussi propriétaire d'un autre Lot, connu sous le N° 89 de la même paroisse, où se trouvent situés ses immeubles et bâtiments, et comme conséquence de l'expropriation des Lots 214 et 215, il en résulterait, d'après lui, la perte de l'unité de son entreprise.

Je ne crois pas qu'il y ait lieu de modifier l'évaluation de $300.00 l'arpent faite par le juge au procès, pour la valeur actuelle des terres expropriées. Il y a en effet au dossier une

(1) (1895) 26 Can. S.C.R. 58.
(2) (1863-65) 2 Moo. P.C. (N.S.) 341.
(3) (1873-74) L.R. 5, P.C. 461.
(4) [1943] A.C. 588 at 592.

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preuve suffisante pour permettre au juge de conclure comme il l'a fait, et je n'y puis trouver aucune erreur manifeste qui pourrait justifier une intervention de cette Cour.

Je suis cependant d'opinion que le montant de $18,425.00 accordé pour tous les dommages résultant de cette expropriation est exagéré, et qu'il doit être réduit. Il est clair que l'intimé a subi des dommages, pour lesquels il a le droit à une compensation. Dans les causes de cette nature cependant, le montant qui doit être accordé est difficile à déterminer, mais la certitude n'est pas une condition essentielle à la détermination des dommages, et son absence n'exclut pas l'obligation à la réparation. La précision mathématique est presque toujours une impossibilité. (*Chaplin* v. *Hicks* (1)). Les tribunaux doivent en conséquence, lorsqu'il a été établi qu'il y a dommages, les évaluer en procédant "largely as a jury", comme cette Cour l'a dit dans la cause de *Haack* v. *Martin* (2). C'est leur fonction d'accorder une indemnité, qui, en tenant compte des probabilités et de toutes les circonstances, compensera aussi équitablement que possible, la victime pour les torts qu'elle a soufferts.

Il ne me paraît pas utile d'analyser la preuve volumineuse apportée de part et d'autre. Après en avoir examiné les points essentiels et nécessaires à la fixation de l'indemnité, j'en suis venu à la conclusion que les fins de la justice seront bien servies, si en outre du montant de $14,400.00 accordé pour la valeur des 48 acres expropriés, une somme de $10,000.00 était versée à l'intimé pour les dommage que lui a fait subir l'expropriation. Les circonstances de cette cause justifient également cette Cour, d'ordonner le paiement de la compensation additionnelle de 10 p. 100 pour dépossession forcée, ce qui fait un grand total de $26,840.00. (*Woods Manufacturing Company* v. *The King* (3)).

Le jugement de la Cour de l'Échiquier sera donc modifié en conséquence, l'indemnité sera fixée à $26,840.00 avec intérêt au taux de 5 p. 100 par année, à compter du vingt-deuxième jour de juillet 1947. Quant au surplus, l'appel

(1) [1911] 2 K.B. 786.
(2) [1927] S.C.R. 413 at 419.
(3) [1951] S.C.R. 504.

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doit être rejeté. L'intimé aura droit à ses frais en Cour de l'Échiquier, et, aux trois-quarts de ses frais devant cette Cour.

Appeal allowed in part.

Solicitor for the appellant: *R. Ouimet.*

Solicitors for the respondent: *J. C. H. Dussault, J. Dussault and J. Vadeboncœur.*

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*Apr. 8, 9
*Jun. 21

DAME ELIZA BOILEAU *(Petitioner)*.....APPELLANT

AND

HER MAJESTY THE QUEEN *(Defendant)* RESPONDENT

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Petition of right—Pedestrian struck by automobile driven by employee of the Crown on duty—Pedestrian crossing street—Failure to keep proper look-out—Common fault.

By petition of right, the appellant claimed damages for injuries she suffered when she was struck by an automobile belonging to the respondent and driven by a constable of the R.C.M.P. admittedly in the course of his duties. She claimed that she, with a companion, was crossing a street in a southerly direction and was within a cross-walk; that she looked in both directions and saw that the street was clear; that at a point south of the most southerly street-car rail she saw the respondent's automobile but thought that she had time to complete her crossing. The constable claimed that the street was clear except for a truck coming towards him, that the truck turned to its left and stopped to let him go ahead of it, and that as he passed the truck he saw the appellant for the first time and immediately applied his brakes.

The trial judge dismissed the petition of right as he found that the appellant's injuries were the result of an unfortunate accident and that no blame attached to the driver of the automobile.

Held (Rinfret C.J. dissenting), that the appeal should be allowed and that both parties should be held to have been equally at fault.

Per Rand, Estey, Locke and Cartwright JJ.: Accepting the evidence of the constable, his negligence is established by his failure to see the appellant prior to the time when the truck momentarily hid her from his sight, as from the time she commenced crossing until she was struck there was nothing except the truck to obstruct his view. On any assumption as to the rate at which she was walking and the rate at which he was driving which is consistent with the uncontradicted

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

evidence the period during which she was hidden from his view must have been very short and he offered no explanation for failing to see her prior to the instant when the truck intervened.

The appellant was also negligent. She did not see the truck stop but it was her duty to be looking towards the west, as she was well passed the centre line of the street and it was only from the west that she need anticipate danger. Had she seen the truck stopped she should have realized that it was probably stopping to let an east-bound vehicle pass in front of it and should have proceeded with caution instead of continuing, as she did, at a brisk walk.

Per Rinfret C.J. (dissenting): It would not be possible to hold that the findings of the trial judge were not supported by the evidence. It cannot be held that the constable ought to have seen the appellant sooner than he did, and this, coupled with the fact that he was not to expect the appellant to cross where she did, relieved him of all blame.

APPEAL from the judgment of the Exchequer Court of Canada Saint-Pierre J., dismissing an action for damages suffered by a pedestrian when she was struck by an automobile belonging to the Crown.

Louis Philippe Gagnon Q.C. and *Paul L'Heureux* for the appellant.

Alban Flamand for the respondent.

The CHIEF JUSTICE:—(dissenting): The trial judge, after a most detailed and elaborate review of the evidence, discussed each of the complaints alleged in the petition of right and came to the conclusion that the petition should be dismissed. He says:—

Cet accident n'est dû à aucune négligence, imprudence ou inhabileté du constable McCulloch qui a, dans les circonstances, fait tout son possible pour éviter l'accident, mais la présence de la requérante à l'arrière du camion, quelle que soit la distance où elle se trouvait, ne pouvait pas permettre au constable McCulloch de se douter de cette présence, et de faire plus qu'il a fait pour éviter l'accident.

Our duty in this Court on appeal from that judgment cannot consist in substituting our own findings of fact for those of the trial judge, but merely to decide whether his findings are supported by the evidence. It do not think it would be possible to hold that they are not. At the spot on Dorchester St. where the accident happened, Metcalfe St., north of Dorchester St., is not in line with Cathedral Street to the south, and there is no occasion, and indeed no possibility, to apply, when crossing Dorchester St., the by-law of the City of Montreal, para. 18 of No. 1319. I mean that

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pedestrians at that particular place are not supposed to cross in a straight line from the east side of Metcalfe St. to the south side of Dorchester St., but they must cross from the east side of Metcalfe St. to the east side of Cathedral St. That was not where the appellant was crossing. Moreover, she intended to go to the Canadian National Railways station at the corner of Dorchester and Mansfield Streets, so that not only was she crossing at the wrong place, but there was no necessity for her to cross there at all, as the natural crossing would have been along Mansfield St. where she would have had the advantage of finding in the middle of Dorchester St. an island, making the crossing much easier. That must have been the reason why the trial judge suggested that it would have been much safer for her to cross Dorchester St. at that spot. Be that as it may, Constable McCulloch, for whose actions the appellant sought to hold the Crown responsible, had not to expect that the appellant would be found at the place where she was struck by his automobile. He had his motor-car under control and the trial judge found that he was not driving at more than 20 miles an hour and that as soon as he saw the petitioner he immediately applied his brakes. Indeed the allegation that he was not observing the municipal by-laws was withdrawn at the hearing in the Exchequer Court. There is ample evidence to establish that he could not see the appellant sooner than he did, because she was hidden behind the truck waiting to enter Cathedral St. as soon as McCulloch had passed that street. On the evidence it cannot be held that McCulloch ought to have seen her before, coupled with the fact, already stated, that he was not to expect the appellant to try and cross where she did.

In the circumstances, I am unable to come to any other conclusion than that reached by the trial judge, and I would dismiss the appeal with costs.

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

CARTWRIGHT J.:—This is an appeal from a judgment of Mr. Justice St. Pierre pronounced on the 20th of May, 1952, dismissing the petition of the appellant for damages for injuries suffered by her when struck by an automobile belonging to the respondent. It is admitted that at the time

of the accident this automobile was being driven by a constable of the Royal Canadian Mounted Police in the course of his duties. The learned trial judge assessed the appellant's damages at $2,660.25 and this assessment is not questioned by either party. The only questions raised on this appeal are whether the driver of the respondent's car was guilty of negligence causing the accident and, if so, whether the appellant was guilty of contributory negligence.

The accident happened, at about 8 p.m. daylight saving time on September 7, 1950, on Dorchester Street in the City of Montreal a short distance east of Cathedral Street. At this point Dorchester Street is 76 feet in width from curb to curb. In its centre there are tracks for both east-bound and west-bound street cars. The appellant was on her way to the Canadian National Railway station which is situate on the south side of Dorchester Street east of Mansfield Street. She had alighted from a street-car at the corner of Peel Street and Dorchester Street, had walked easterly along the side-walk on the north side of Dorchester Street, and had crossed Metcalfe Street which is the first street east of Peel running northerly from Dorchester Street. The next street to the east of Metcalfe is Mansfield which runs both north and south of Dorchester which it intersects at right angles. Peel Street does not run south of Dorchester Street, but Windsor Street runs south from Dorchester, its easterly side-walk being about in line with the westerly side-walk of Peel. The only street between Peel and Mansfield running southerly from Dorchester is Cathedral Street its easterly side-walk being about in line with the westerly side-walk of Metcalfe. The Cathedral is on the south side of Dorchester Street between Cathedral Street and Mansfield Street.

The evidence does not fix precisely the point at which the appellant crossed Dorchester Street. Her counsel contends that the proper conclusion to be drawn from the evidence is that she crossed from the north-easterly corner of Metcalfe Street and was walking within the prolongation of the curb and property lines on the east side of Metcalfe Street and so was within a cross-walk as defined in by-law No. 1319 of the City of Montreal. Counsel for the respondent submits that the appellant was crossing some little distance

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to the east of this and not at a cross-walk. The learned trial judge does not make any specific finding as to whether the appellant was crossing at a cross-walk. He says in part:—

> Le 7 septembre 1950 la requérante a traversé la rue Dorchester entre la rue Metcalfe et la rue Mansfield en compagnie de Madame Trépanier, entre 8 et 9 heures de l'après-midi. La rue Dorchester a 76 pieds de largeur à cet endroit et a deux voies de tramway. Elle a traversé vis-à-vis la porte de la Cathédrale catholique qui se trouve à l'ouest et qui est à quelque distance de la rue Cathédrale.

This would seem to be in accord with the respondent's contention, although, unfortunately, the position of the west door of the Cathedral was not fixed in the evidence and is not shewn on the plan which counsel furnished to the Court. On the other hand the learned trial judge appears to have given full credence to the evidence of McCulloch who testified that the appellant was struck 29 feet east of the east curb line of Cathedral Street which would be about 20 feet west of the prolongation of the east curb line of Metcalfe Street.

While the exact spot at which the appellant was struck is not fixed with precision there is really no conflict of evidence as to the other relevant facts. Immediately prior to the accident McCulloch was driving the respondent's automobile easterly on Dorchester Street. Before starting to cross Dorchester Street the appellant waited for a westbound automobile to pass. She then looked in both directions and saw that the road was clear. She and her companion then started to cross, walking rapidly. When she had reached a point south of the most southerly street-car rail she saw the respondent's automobile "about at Windsor Street" and thought she had time to complete her crossing. She continued southerly and a truck which was travelling from east to west passed behind her and her companion and made a left turn intending to go down Cathedral Street. The appellant says that she thought that this was a good opportunity to complete her crossing in safety under the shelter of the truck and she proceeded at a brisk walk. At this moment the truck stopped in such a position that its front was about 20 feet from the south curb line of Dorchester Street. Unfortunately, the appellant did not notice that the truck had stopped and she continued on her way. The respondent's car struck her when she was about 16 feet from the south curb of Dorchester Street. The

appellant's evidence in chief indicates, and on cross-examination makes it clear, that she did not stop at any time after she had left the sidewalk on the north side of Dorchester Street up to the moment when she was struck. The evidence does not show how far east of the truck the appellant was when she was struck. It appears that the reason that the truck had stopped was to let the respondent's car pass.

McCulloch testified that he was driving easterly on Dorchester at twenty to thirty miles per hour, that it was dusk and he had his driving lights on, that the road was clear except for a truck coming towards him from the east, that this truck turned to its left apparently intending to go south on Cathedral Street but stopped to let him go ahead of it and as he passed the truck he saw the appellant and her companion for the first time and immediately applied his brakes. He did not swerve either right or left and his car struck the appellant.

In these circumstances the learned trial judge held that the appellant's injuries were the result of an unfortunate accident and that no blame attached to the driver of the respondent's car. It therefore became unnecessary for him to consider whether the appellant was herself negligent.

It should be mentioned that the truck proceeded on its way and its driver was not called as a witness at the trial.

In my opinion McCulloch was negligent in failing to see the appellant and her companion prior to the time when the truck momentarily hid them from his sight. From the time they commenced crossing Dorchester Street until the appellant was struck there was nothing except the truck to obstruct McCulloch's view of these two women. On any assumption as to the rate at which they were walking and the rate at which he was driving which is consistent with the uncontradicted evidence the period during which they were hidden from his view by the truck must have been very short and he offers no explanation for failing to see them prior to the instant when the truck came between him and them. Had he seen them before the truck intervened he would have known that they were walking southerly into

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his path and it seems reasonable to assume that he would not have run into them. As was said in *Swartz* v. *Wills* (1):

> Where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible.

I do not find it necessary to consider the argument which was addressed to us as to the application of section 53 (2) of the *Motor Vehicles Act,* R.S.Q. 1941, c. 142, because in my view this is a case in which it is not necessary to have regard to the onus of proof. Accepting McCulloch's evidence, I am of opinion that his negligence is established.

It remains to consider whether the appellant was herself negligent. She had seen McCulloch's car and must have realized that it was proceeding easterly along Dorchester Street and would cross her path. She was, I think, free of any negligence up to the moment when the truck stopped. She says that she did not see it stop but I think it was her duty to be looking towards the west, as she was well past the centre line of the road and it was only from the west that she need anticipate danger. Had she seen the truck stopped she should have realized that it was probably stopping to let an east-bound vehicle pass in front of it and should have proceeded with caution instead of continuing, as she did, at a brisk walk.

In my view, therefore, both the appellant and McCulloch were guilty of negligence causing the accident. I think that the blame should be divided equally.

In the result I would allow the appeal and declare that the appellant is entitled to be paid $1,330.13, that is one half of the amount at which the learned trial judge assessed her damages, together with her costs in this Court and in the Exchequer Court.

ESTEY, J.:—I agree with my brother Cartwright, in whose judgment the facts are fully set forth.

The evidence discloses that at the critical time, in any relevant distance, only the truck and the automobile were upon Dorchester Street. The driver and those present with him in the respondent's automobile all agree that when, as they were passing the truck, they first saw the appellant

(1) [1935] S.C.R. 628 at 634.

and another woman they were about twenty feet in front of the automobile. This statement is substantiated by the measurements and was accepted by the learned trial judge. It indicates the position of the parties at all relevant times. The women had, in attempting to cross, passed in front of the truck. Then, seeing the respondent's automobile approaching, apparently hesitated momentarily, observed the truck turning toward Cathédrale Street and hurriedly proceeded to the sidewalk. Before the truck turned slightly toward Cathédrale Street the evidence discloses that there was an appreciable time in which the driver of the automobile could have seen the appellant and the other woman. There was, at least from the moment they crossed in front of the truck, on that side of the street upon which the respondent's automobile was proceeding, nothing between the driver and the appellant that would prevent him from seeing the women. Once the truck turned there would be a time in which the driver could not see the women. The learned trial judge, while commenting upon the period in which the position of the truck would prevent the driver of the automobile from seeing the appellant, with great respect, does not appear to have given sufficient weight to the time and opportunity afforded the driver to see the women before the truck prevented his doing so.

The law imposes a positive duty upon the driver of an automobile to maintain a lookout commensurate with the circumstances which surround him. As he approaches an intersection he is usually required to exercise a higher degree of care in making observations than upon other parts of the street. In this case, while he appears to have exercised an adequate degree of care in other respects, it seems impossible, upon the evidence, to avoid the conclusion that he ought to have seen the appellant and the other woman and to have then proceeded in a manner that would have avoided his striking them. While the exact position of the appellant and the other woman in relation to the cross-walk from the northeast corner of Metcalfe and Dorchester Streets cannot be determined with accuracy, it does seem, having regard to the evidence as to the point from which they left the north curb to where they were struck, that they proceeded in a direction that would place them, at the moment the appellant suffered her injury,

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either upon that cross-walk or west of it. In either event they were in a position where the driver ought to have seen them. If they were on the cross-walk he had a duty to permit them to pass. If they were not on the cross-walk even if they were proceeding contrary to the by-law, he having observed them doing so, was under a duty to exercise reasonable care not to injure them.

The women, on their part, appear to have been careful not to leave the north sidewalk until a vehicle (neither of the above-mentioned) had passed and, as they proceeded, to have observed the truck which approached from the east and passed behind them as well as the respondent's automobile approaching from the west. Their conclusion that the truck turning into Cathédrale Street would give them an opportunity to reach the sidewalk was reasonable, but in failing to keep an eye on that truck and to observe that it stopped in a position that would permit respondent's automobile to continue eastward constituted negligence which contributed to appellant's injury.

I would, therefore, allow the appeal as directed by my brother Cartwright.

Appeal allowed with costs.

Solicitors for the appellant: *Sauve, Gagnon and L'Heureux.*

Solicitor for the respondent: *A. Flamand.*

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*Jun. 10
*Jun. 26

HER MAJESTY THE QUEEN *(Plaintiff)*...APPELLANT

AND

MORRIS MENDELSON *(Defendant)*.....RESPONDENT

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Sales tax—Pawnbroker—Whether redemption by borrower of article pledged, a sale—*Excise Tax Act,* R.S.C. 1927, c. 179, ss. 140, 142.

The respondent, in addition to buying and selling new and used articles, made loans on pledge. A customer, wanting to borrow money, was made to sign a form declaring that he had sold the article pledged.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Cartwright and Fauteux JJ.

The object was described in the form and the amount of the sale indicated therein. The period for which the loan was made was set out in code and within that period, on repayment of his debt, the borrower could redeem his article.

The Crown claimed that the repossession of the article by the borrower amounted to a sale and demanded sales tax pursuant to s. 140 of the *Excise Tax Act*, R.S.C. 1927, c. 179. The action was dismissed by the Exchequer Court of Canada.

Held: The appeal should be dismissed.

Though the contract entered into between the respondent and his customers used the word "sale", the transaction was not a sale. The obligation of the respondent to return the article pledged upon repayment of the loan was part of the original contract and therefore the return of the article was nothing else than the carrying out of that contractual obligation. The respondent was simply giving back the possession to the borrower who had remained the owner under a suspensive condition. Before the expiration of the specified loan period, the respondent could not have disposed of the article pledged.

APPEAL from the judgment of the Exchequer Court of Canada (1) Archibald J., dismissing a claim by the Crown for sales tax.

John G. Ahern Q.C. for the appellant.

Gustave Monette Q.C. and *Jack Rudner* for the respondent.

The judgment of the court was delivered by

The CHIEF JUSTICE:—Il s'agit d'un jugement de la Cour de l'Échiquier (1) en vertu duquel la réclamation de l'appelante a été rejetée sans frais. Cette réclamation était pour une somme de $20,187.47, dont l'appelante voulait tenir l'intimé responsable en vertu de la *Loi sur la taxe d'accise* (loi spéciale des revenus de guerre, c. 179, S.R.C., telle que revisée), art. 140, à raison de certaines prétendues ventes effectuées par l'intimé.

L'article en question se lit comme suit:

Lorsque des marchandises mentionnées à l'annexe VI de la présente loi, qui ont été fabriquées ou produites au Canada, ou importées au Canada, sont livrées au consommateur ou à l'usager, il est imposé, prélevé et perçu à l'égard de ces marchandises, en sus de tout autre droit ou taxe qui peut être exigible aux termes de ladite loi ou de tout autre statut ou loi, une taxe d'achat au détail au taux indiqué en regard de chaque article de ladite annexe, calculée sur le prix de vente.

(1) 53 D.T.C. 1067.

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Et voici, maintenant, les transactions en vertu desquelles l'appelante fait sa réclamation:

L'intimé est un regrattier faisant affaire à Montréal. Il achète et vend des articles neufs et usagés, et fait aussi des prêts ou avances d'argent sur gage. Ces prêts sur gage se renouvellent parfois jusqu'à plusieurs fois par année, entre l'intimé et les mêmes clients, les mêmes objets étant alors repris et redéposés à l'occasion de chaque prêt.

Lorsqu'un client se présente chez l'intimé, dans le but d'emprunter une somme d'argent sur la garantie d'un objet qu'il laissera en dépôt, l'intimé lui fait signer une formule par laquelle il déclare avoir vendu à l'intimé l'objet déposé en gage. Sur la même formule, l'objet est décrit et le prix de vente indiqué; la date et l'heure de l'emprunt y apparaissent, ainsi que le nom de l'emprunteur, son adresse, son âge, sa taille, son poids, son apparence et souvent la couleur de l'habit qu'il porte au moment d l'emprunt. La formule contient encore un numéro de série et une rubrique intitulée "registered". Une formule semblable a été produite comme exhibit B (d. c. p. 7).

Pour des raisons d'administration et de convenance, ainsi sans doute pour faciliter la revente de l'objet déposé en gage, au lieu d'indiquer à la formule signée par le client la nature exacte du contrat (prêt sur gage) et le délai du paiement, il était convenu de mettre à la rubrique "registered" seulement deux lettres: la première, indiquant d'après un code préétabli, le nombre de semaines ou de mois pour lesquels le prêt était effectué (ne dépassant jamais dix), et la deuxième, indiquant s'il s'agissait de mois ou de semaines (dans le premier cas, on employait la lettre M pour "month", dans le deuxième cas, la lettre W pour "week").

Pour symboliser le nombre de semaines ou de mois, l'intimé utilisait les différentes lettres d'un dicton en yiddish, GOT HELF MIR, qui lui servait aussi d'emblême, dicton qui se traduit en anglais par GOD HELP ME. C'est ainsi que pour signifier que le prêt était pour une semaine (ou un mois), au lieu d'utiliser le chiffre 1, l'intimé utilisait la lettre g; pour 2, la lettre o; pour 3, la lettre t, etc.

Après avoir signé cette formule-contrat, l'emprunteur recevait une carte portant le nom et l'adresse de l'intimé, le même numéro de série que celui de la formule qu'il avait signée, et la date ultime à laquelle l'article pouvait être recouvré sur remboursement du prêt effectué, (tel qu'il appert de l'exhibit J (d.c. p. 23)).

Il est à noter que les inscriptions qui apparaissent sur la formule et sur la carte sont identiques; la carte répète le numéro de série de la formule et porte une date chiffrée en nombres cardinaux, alors que la même date, sur la formule, est symbolisée par les deux lettres de code agréées par les contractants.

La vente proprement dite des objets gagés ne survenait qu'après le contrat de prêt expiré, et, c'était pour ce motif qu'on employait dans l formule signée par l'emprunteur le terme "vendu" au lieu de "emprunté" Cette substitution facilitait la vente des objets reçus en gage, après l'expiration du délai convenu pour le recouvrement des objets gagés. Jusqu'à l'expiration de ce délai, les objets étaient déposés dans une section spéciale du magasin, et ils étaient soit enveloppés ou étiquetés suivant leur grosseur. L'étiquette portait le numéro de série de la formule signée, la date du prêt, la description de l'objet déposé en gage, l'adresse de

l'emprunteur, ainsi que la date à laquelle celui-ci devait se présenter pour recouvrer son gage, ainsi qu'il appert des exhibits D, E, F, (d.c pp. 18-19).

Sur ces enveloppes ou étiquettes, la date de l'expiration du contrat de prêt est inscrite en nombres cardinaux, et n'est pas codifiée comme sur la formule, afin qu'à l'expiration du délai, l'intimé puisse montrer un titre de propriété clair et non équivoque.

Dans le cas de prêt sur gage, lorsque les clients payaient leur dette et reprenaient l'objet gagé, l'intimé les faisait signer dans le registre comptable et mentionnait la date à laquelle l'objet leur était remis, ainsi qu'il appert de l'exhibit G (d.c. p. 20). Par contre, si le client ne se présentait pas pour recouvrer l'objet gagé, l'intimé, qui devenait propriétaire dudit objet à l'expiration du délai, le vendait et entrait à la rubrique "particulars" la date de cette vente. Ce registre comptable, appelé aussi "registre policier", était vérifié chaque jour par un représentant de la police lequel, à l'occasion, inspectait aussi les objets prêtés sur gage. L'opération avait un caractère éminemment public.

La taxe qui est réclamée par l'appelante est à raison des cas où le client reprend possession de l'objet mis en gage en remboursant à l'intimé le montant qu'il a reçu lors de la transaction initiale.

L'appelante émet la prétention que cette reprise de possession par le client constitue une vente tombant sous le coup de l'article de la loi ci-dessus reproduit. Naturellement cette prétention s'appuie sur les mots employés par l'intimé dans le contrat qu'il passe avec son client. Le contrat emploie le mot "sale". Mais, c'est un précepte bien reconnu en loi et en jurisprudence que les mots employés dans un contrat ne qualifient pas nécessairement la transaction effectuée entre les parties; au-delà des mots il faut envisager le caractère du contrat, tel que les parties l'ont fait en réalité.

Nous ne devons pas nous laisser arrêter par l'emploi du mot "sale" entre l'intimé et son client, mais nous devons nous demander quel est véritablement le contrat qu'ils ont fait.

Or, dans les circonstances de ce litige, il est impossible de donner à la transaction la dénomination de vente. Ce n'est en aucune façon une vente qui a eu lieu de la part de l'intimé à celui qui a repris possession de l'objet qu'il a mis en gage contre la remise de l'argent qu'il a reçu de l'intimé. L'obligation par l'intimé de remettre l'objet contre remboursement faisait partie du contrat originaire et cette remise de l'objet n'est rien autre chose que l'exécution par l'intimé de l'obligation qu'il avait contractée. Il

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ne revend pas; il remet tout simplement la possession de l'objet à celui qui en est toujours resté le propriétaire sous la condition suspensive que s'il ne rembourse pas à la date fixée pour ce remboursement, il perd la propriété de l'objet mis en gage. Tant que le terme n'est pas arrivé, l'intimé est si peu propriétaire qu'il ne peut disposer de l'objet mis en gage. Ce n'est qu'après l'expiration du terme qu'il acquiert le droit de vendre l'objet à une tierce personne.

Envisagé de cette façon, l'article 140 (2) ne saurait s'appliquer à ces transactions, et, à mon avis, c'est à juste titre que la Cour de l'Échiquier a décidé dans ce sens.

Il en résulte que je confirmerais le jugement dont est appel avec dépens.

Appeal dismissed with costs.

Solicitor for the appellant: *J. G. Ahern.*

Solicitors for the respondent: *Monette, Filion & Lachapelle.*

CANADIAN PACIFIC RAILWAY CO. LTD. AND IMPERIAL OIL LIMITED *(Defendants)* ..... APPELLANTS

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*Jan. 26-29,
*Feb. 1-3
*May 19

AND

ANTON TURTA *(Plaintiff)* ..... RESPONDENT;

AND

WILLIAM SEREDA, MONTREAL TRUST CO. AND NICK TURTA (Third Parties) ..... RESPONDENTS.

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

Real Property—Land Titles—Omission by error of reservation of petroleum in transfer—Issue of certificate of title to transferee—Unauthorized addition by registrar of "and petroleum" to reservation—Right to petroleum by subsequent purchasers for value—"Wrong description" —"Misdescription"—"Prior certificate of title"—The Land Titles Act, 1906, (Alta.) c. 24.

In 1903 the C.P.R., the owner of a tract of land in what is now the province of Alberta, registered it under The Land Titles Act of the Northwest Territories and obtained a certificate of title, No. 424, certifying it to be the owner thereof in fee simple. By virtue of the *Alberta Act,* 1905 (Can.) c. 3, the certificate continued in effect under the Alberta *Land Titles Act* of 1906, c. 24. In 1908 the C.P.R. transferred from out of the tract the quarter section now in suit to P reserving the coal and petroleum. The registrar of land titles however in issuing a certificate of title to P reserved only the coal and endorsed on certificate No. 424 a memorandum to the effect that it was cancelled as to P's quarter section. In 1910 P transferred the east half to S and in 1911 the west half to the respondent Anton Turta. In 1918 S transferred the east half to Turta and the registrar issued a new certificate to the latter covering the entire quarter section. In all of these transfers and certificates only coal was reserved to the C.P.R. In 1910 certificate 424, because of the many endorsements on it, was, with the consent of the C.P.R., cancelled and a new certificate, as well as a duplicate, issued covering the lands which then remained uncancelled on No. 424. In 1943 the errors were detected by officials in the land titles office and entries were made on the cancelled certificate No. 424 as well as on the duplicate by adding the words "except coal and petroleum" to the memorandum of cancellation originally made, and by adding the words "and petroleum" to the reservations in Turta's certificate and the duplicate then in the office. In 1944 Turta transferred to the respondent Nick Turta the east half of the quarter section and in 1945 the west half to Metro Turta. The new certificates

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

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contained a reservation of coal and petroleum to the C.P.R. In 1946 the latter gave an option to lease all petroleum and natural gas underlying the quarter section to Imperial Oil which the latter exercised in 1951. In 1950 the respondents, Montreal Trust Co. and Sereda, entered into an agreement with Anton Turta relative to the petroleum rights and appear as caveators upon the title.

In an action to determine title to the petroleum rights:

Held: (Rinfret C.J., Locke and Cartwright JJ. dissenting) that: 1. The omission to insert the reservation of petroleum in the certificate of title granted Anton Turta did not constitute a misdescription within the meaning of s. 104(*e*) of *The Land Titles Act*.

2. Since certificate of title No. 424 was cancelled prior to any relevant date, there never was a contemporaneous existence of two certificates of title within the meaning of s. 104(*f*).

3. The purported corrections made by the registrar could not be made without prejudicing the rights conferred for value on Anton Turta, and therefore were not authorized by the Act and were of no effect.

4. The action was not barred by the *Limitation of Actions Act,* R.S.A. 1942, c. 133.

Per: Rinfret C.J., dissenting. The omission by the registrar to reserve the petroleum in granting the certificate of title to P was made contrary to the Act and was ultra vires. The certificate was a complete nullity and could never become the root of title to subsequent transferees and since the cancellation of certificate No. 424 was the consequence of the issuance of the certificate to P. it must be set aside for the same reasons. There was misdescription within the meaning of s. 62 of the Act as the property transferred to P was described so as to make it include other land, that is to say the petroleum which falls within the definition of land under s. 2 (*a*).

Per: Locke J., dissenting: To include in the lands described in the certificate of title issued to P the petroleum rights was a misdescription of the lands conveyed by the transfer from the C.P.R. within the meaning of that expression in ss. 44, 104 and elsewhere in the Act. The general statements as to the interpretation of the Victoria *Transfer of Land Statute* of 1866 in *Gibbs* v. *Messer* [1891] A.C. 248 at 254, and by Sir Louis Davies C.J. as to *The Land Titles Act,* 1917, of Saskatchewan in *Union Bank of Canada* v. *Boulter Waugh Ltd.,* 58 Can. S.C.R. 385, cannot be applied without qualification to the Alberta statute. The rights of those deprived of their property by misdescription of land are expressly reserved to them by the latter statute and it cannot be construed to defeat such rights. The rights to the petroleum were adequately excepted from the operation of the transfer to P.

Per: Cartwright J., dissenting: Ss. 25, 42 and 135, if read alone would seem to make the certificate of title of a purchaser in goood faith for value conclusive, but they must be construed with ss. 44, 104 (*e*) and 106 and the last mentioned group must be read with them. When so read the C.P.R.'s claim falls with s. 104 (*e*) and no other provision of the Act requires a restriction or modification of the ordinary meaning of the words used in such clause.

APPEAL by defendants from a judgment of the Supreme Court of Alberta, Appellate Division (1), affirming, C. J. Ford J.A., dissenting, the judgment of Egbert J. (2), declaring plaintiffs' right to petroleum in certain land.

C. F. H. Carson, Q.C., S. J. Helman, Q.C., I. D. Sinclair and *Allan Findlay* for C.P.R.

H. G. Nolan, Q.C. and *J. H. Laycraft* for Imperial Oil.

G. H. Steer, Q.C. and *G. A. C. Steer* for Anton Turta and Montreal Trust Co.

M. E. Manning for Nick Turta.

The CHIEF JUSTICE (dissenting): This case calls for the application of The Alberta *Land Titles Act* of 1906. If the contentions of the respondents were to prevail, as they were upheld by the learned trial judge and the majority of the Appellate Division of the Supreme Court of Alberta, I may say, with respect, that in my opinion, it would create an intolerable situation. Interpreted as suggested by the respondents, the statute would do away with all traditional principles of law and equity. Indeed, I am not sure that it does not boast of such intention, for, in section 135, the very words are used by the legislator whereby it is stated:—

> Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease, from the owner of any land for which a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, ANY RULE OF LAW OR EQUITY TO THE CONTRARY NOTWITHSTANDING . . . ". (The capitals are my own).

And, if it were so, I confess that the statute in question would not fill me with enthusiasm.

But, fortunately, I fully share the dissenting opinion of Mr. Justice Clinton J. Ford in the Appellate Division (3). After a most anxious study of the case, like Clinton Ford J.A., I would allow the appeal and dismiss the action and

(1) (1953) 8 W.W.R. (N.S.) 609; [1953] 4 D.L.R. 87.
(2) (1952) 5 W.W.R. (N.S.) 529.
(3) (1953) 8 W.W.R. (N.S.) 609 at 630.

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give to the appellant, The Imperial Oil Co. Ltd., the remedy asked for in its counter-claim, and to the appellant, The Canadian Pacific Railway Company, the remedy sought in its third party notice, with costs against the respondents and the third parties who fought the issues.

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Let us face the facts:—On the 19th June, 1908, the Canadian Pacific Railway Co. transferred to one Podgorny the land in issue "reserving all coal and petroleum which may be found to exist within, upon, or under the said land". Upon that transfer the Registrar of Land Titles purported to grant to Podgorny certificate of title No. 182-N-8 to the land described as the "north-west quarter of section 17, township 50, range 26, west of the 4th Meridian, in the said province, containing 160 acres more or less, reserving to the Canadian Pacific Railway Co. all coal on, or under the said land". The reservation so limited is the more extraordinary, because the Registrar evidently relied upon the transfer to specify that the coal was reserved to the Canadian Pacific Rly. Co.; and, for no reason that can be imagined, he did not mention in the certificate of title the petroleum specified in the same reservation.

All courts and all parties in the case have had to admit that the omission of the petroleum was undoubtedly what they call an error, and if it is only an error, it borders on stupidity. In fact, it is stupidity of the most glaring character. I do not call it a simple error. I think either the granting of the certificate to Podgorny cannot be taken as having included the petroleum, or, at all events, if it must be understood to include it, it was done by the stupidity of the Registrar without power, or authority, derived from *The Land Titles Act*. The omission, in my view—if it is to be treated only as an omission—was made contrary to the Act and was *ultra vires*. On the other hand, Podgorny, who took and accepted such a certificate, if he was really under the impression that it gave him title to the petroleum, acted fraudulently. An attempt was made to excuse him on the ground that he was ignorant, but, of course, that can never excuse him if such ignorance is understood to mean that he did not know the law. I am not inquiring whether he had the *mens rea*, which would

have branded him as a criminal, but his action in taking possession of the certificate, under the circumstances, was certainly a fraud according to the civil law, because, whether he ignored the law or not, he could not ignore the reservation of petroleum in the transfer made to him by the Canadian Pacific Railway Co. Assuming that he understood the certificate of title to give him the ownership of the petroleum, to which he had absolutely no right, he then proceeded further to transfer the land, without the reservation of petroleum to The Canadian Pacific Railway Company, in part to one Sitko and in another part to the respondent Anton Turta. In the transfer to Sitko no exception of coal was made, but the certificate issued to the latter reserved unto The Canadian Pacific Railway Co. all coal on or under the said land. In the transfer to Turta even the coal was not excepted, but the certificate of title issued to him contained the reservation "unto the Canadian Pacific Railway Co. all coal on or under the said land". Later the respondent, Anton Turta, acquired land which Podgorny had transferred to Sitko and the reservation of the coal was mentioned in the transfer to him. Then Turta requested that his titles to the east and west halves of the quarter section be consolidated and his application for consolidation described himself as the owner of the east half and the west half of the quarter section without any exception. However, the certificate of title issued to him for the consolidated halves of the quarter section did show Turta "reserving unto The Canadian Pacific Railway Co. all coal".

On January 16, 1943, corrections were made in the Land Titles Office to certain certificates of the quarter section held by Podgorny, Sitko and the respondent Anton Turta. These corrections were made by one, H. T. Logan, a solicitor, who was acting Deputy Registrar at the time. By these corrections petroleum was excepted from the land described in the certificates of Podgorny, Sitko and Anton Turta; and since petroleum had been excepted and reserved to The Canadian Pacific Railway Co. in its original transfer of the quarter section to Podgorny, the corrections brought these certificates into accord with that original transfer.

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On April 17, 1944, Anton Turta transferred to Nick Turta, his son, and one of the third party respondents, the east half of the north-west quarter of section 17, "reserving unto The Canadian Pacific Railway Co. all coal and petroleum"; and the certificate of title issued as a consequence to Nick Turta showed him to be the owner of the east half in question "reserving unto The Canadian Pacific Railway Co. all coal and petroleum".

Anton Turta, on the 30th December, 1944, transferred to his son, Metro Turta, and his daughter-in-law, Bessie Turta, the west half of the north-west quarter of section 17, "reserving unto The Canadian Pacific Railway Co. all coal and petroleum". Accordingly, the certificate of title issued to Metro and Bessie Turta showed them to be the owners of the west half of the quarter section "reserving unto The Canadian Pacific Railway Co. all coal and petroleum".

By an encumbrance dated December 30, 1944, Metro and Bessie Turta, describing themselves as the registered owners of the west half of the quarter section "reserving unto The Canadian Pacific Railway Co. all coal and petroleum", encumbered the land as security for the performance by them of the terms of an agreement between them and Anton Turta of the same date. The agreement attached to the encumbrance states that it was executed by Anton Turta, as well as by Metro and Bessie Turta, and in the said agreement the fact that there was "reserved to the Canadian Pacific Railway Co. from the land all coal and petroleum" appears eight times.

By the amended Statement of Claim, Anton Turta claimed a declaration that he is entitled to be registered as owner of all the petroleum in, upon and under the quarter section, and that the substitutions and alterations made to various documents to show the contrary were wrongful.

The learned trial judge held that Anton Turta was entitled to the declaration claimed and found it unnecessary to deal with the claim for title by prescription, which Turta had inserted in his statement of claim. It is significant that the learned trial judge, having found that Anton Turta could not understand English, held as a fact that he acquired the quarter section involved in this action for a farm and that he knew nothing about minerals at the time

and did not discuss them with either Podgorny or Sitko and placed no value on them. He also found that all the corrections of the certificates of title made on January 16, 1943, were a complete nullity. In the learned trial judge's view the Registrar had power, by s. 174 of *The Land Titles Act*, merely to correct clerical errors as between parties to the transaction and did not have power to make the alterations of the instruments in question, thereby prejudicing rights conferred for value. He also held that s. 174 was governed by s. 159 so that if Anton Turta was a bona fide purchaser for value, and there was no misdescription, s. 174 did not confer powers on the Registrar to deprive him of his land. The learned trial judge found that Anton Turta gave valuable consideration for everything comprised in his vendors' certificates, including petroleum, and that he dealt "upon the faith of the register" in the sense that he transacted on the "basis" of the register, although he never saw it. Accordingly, he held that Anton Turta was a bona fide purchaser for valuable consideration; and, by virtue of s. 106 of the 1906 Act, his title was indefeasible unless there was a prior certificate of title or there had been misdescription. He was of the opinion that for the exception of prior certificate the Act contemplates two contemperaneous certificates of title for the same land and that in this case there was never more than one certificate. As to misdescription, His Lordship considered that there must be "other land" to bring the case within s. 104, and that here there was only one parcel involved. He thought that "misdescription" is a narrower term than "error", as used in s. 106, and that this is a case of error.

The Appellate Division (1) affirmed the judgment of the trial judge, Mr. Justice C. J. Ford dissenting. The Chief Justice of Alberta, although he concurred in the judgment of the majority, stated that he did so reluctantly, because, in his opinion, the result of the decision is to take from The Canadian Pacific Railway Co. without its consent and without consideration what may prove to be valuable oil rights and give them to the respondent who never expected to get them.

(1) (1953) 8 W.W.R. (N.S.) 609; [1953] 4 D.L.R. 87.

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Parlee J.A., with whom Frank Ford and Macdonald JJA. concurred, found that Anton Turta bought the quarter section as a farm and was not interested in any minerals or aware of any reservation until after the discovery of petroleum in Leduc in 1947. He found that, although the Registrar was in error in granting the certificate to Podgorny, there was no error by the Registrar when certificates were granted to Anton Turta. As to the contention of The Canadian Pacific Railway Co. that it had a prior certificate of title, he held that the certificate of the latter, No. 424, was effectively cancelled and the Act requires two contemporaneous certificates, and that, in any event, such a contention disregards the plain language of s. 106 of the 1906 Act. As to misdescription, he held that since there was involved only one parcel of land throughout, it was a case, not of misdescription, but of error in the Registrar's office. Dealing with the alterations subsequently made in the Registrar's office, Parlee J.A. held there was a nullity; and, in his view, the Registrar had no authority to make corrections which prejudiced rights conferred for value.

As for Mr. Justice C. J. Ford, who dissented, he was of opinion that the Registrar had registered Podgorny as the owner of petroleum under his land, contrary to *The Land Titles Act* of 1906, and, therefore, such title was void. The creation of an unauthorized title did not cancel an existing title and, in his opinion, the purported cancellation of certificate C.P.R. 424 was a nullity. He held, therefore, that The Canadian Pacific Railway Co. has a title prior to Anton Turta's, with the right to recover possession. He also held that Anton Turta's claim for title by prescription, based on actual or constructive possession of minerals under colour of title, failed because the Canadian Pacific Railway Co. had a separate estate in minerals, which could not be defeated by mere non-user. He found it unnecessary to deal with the points raised by The Canadian Pacific Railway Co. and Imperial Oil Co. Ltd. as to *The Limitation of Actions Act* and whether Anton Turta acquiesced in the corrections. He would, therefore, have dismissed the action and have allowed the remedies sought by The Canadian Pacific Railway Co.

With great respect, I am of opinion that sufficient attention has not been given in the Courts below to the definition of the word "land" in section 2(*a*) of the 1906 Act. That section (as re-enacted in 1945, c. 58. s. 1) reads as follows:—

> 2. In this Act, unless the context otherwise requires,—
>
> (1) "Land" or "Lands" means lands, messuages, tenements and hereditaments, corporeal and incorporeal, or every nature and description, and every estate of interest therein, whether such estate or interest is legal or equitable, together with paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto and trees and timber thereon, and mines, minerals and quarries thereon or thereunder lying or being, unless any such are specially excepted.

It is common ground that petroleum is a mineral, and it is also clear that under the above definition, minerals are "land". In the transfer from The Canadian Pacific Railway Co. to Podgorny, it may be repeated, coal and petroleum were specifically excepted and reserved to The Canadian Pacific Railway Co. The dissenting judge in the Appellate Division refers to the dicta of Blackburne C.J., in *McDonnell* v. *McKinty* (1):—

> The excepting of the quarries in the deed of 1738 severed them both as to estate and possession from the estate in possession of the lands; in both respects they became thereon separate and distinct; the grantor's estate and possession of the quarries remained unaffected; and he retained them as he had them; they were never out of him. *Cardigan* v. *Armitage* (2).

The learned judge also referred to *Farquharson* v. *Barnard Argue Roth Stearns Oil & Gas Co.* (3), where Boyd C. expressed a similar view, stating that the possession of the surface owner is not adverse to or inconsistent with the possession in law of the subjacent proprietor, and referred to *Hodgkinson* v. *Fletcher* (4).

The judgment of Blackburne C.J. was approved by the Privy Council in *Agency Co.* v. *Short* (5), in which Lord Macnaghten said:—

> We entirely concur in the judgment of Blackburne C.J., in *McDonnell* v. *McKinty,* (6) and the principle on which it is founded.

According to these authorities, therefore, the coal and petroleum excepted and reserved in the transfer to Podgorny were severed from the estate transferred to the latter

(1) (1847) 10 Ir. L.R. 514 at 525.
(2) 2 B. & C. 197; 107 E.R. 356.
(3) (1910) 22 O.L.R. 319 at 326.
(4) (1781) 3 Doug. K.B. 3; 99 E.R. 523.
(5) (1888) 13 App. Cas. 793 at 799.
(6) 10 Ir. L.R. 514.

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and they became separate and distinct from the estate. This would seem to indicate that as a result of such a transaction and from then on there should have been in the Registry Office separate records for the land and for the coal and petroleum. As a consequence, at all events, the coal and petroleum could no longer be regarded as being part of the land itself for registration purposes; and it would be arguable that when the certificate of title was issued to Podgorny without mention of petroleum it did not transfer the petroleum to Podgorny, since it was not specifically included and petroleum was correctly treated as being a separate land. I must confess, however, that the judgments below gave no attention to such an argument and they treated the certificate issued to Podgorny as including the petroleum, because the latter was not excepted and reserved in that certificate. But, on that ground, it follows that the issuance of the certificate to Podgorny, if it is to be regarded as having transferred the petroleum to him, was not a mere error, but really a certificate of ownership to a land (petroleum), to which he had no right whatever, to which he was in no way entitled, which was contrary to his transfer from The Canadian Pacific Railway Co., and, therefore, a certificate made not in accordance with The Land Titles Act, altogether outside the power and authority of the Registrar and *ultra vires*.

It is very well to say that the certificate of title is the whole thing under *The Land Titles Act*, or, if you wish, under the so-called Torrens System; but it must necessarily be a certificate which the Registrar has power to issue. The title may be indefeasible, although it admittedly contains errors made by the Registrar; but, in order to receive the protection of the Act, the certificate must have been issued in accordance with that Act. The Act does not protect a certificate issued without power, or authority. It is already bad enough that this Registrar, after having created the mess in which the parties in this case found themselves, is not made responsible for his errors. I would venture to say that he is the only man on earth who is not held responsible under the law for his errors. Indeed, he is invited to make errors, since he is told by the law that that will entail no responsibility on

his part. He is invited to be negligent. However, he can only escape responsibility when he is acting within his powers and, in this case, he was not acting within them when he issued the certificate which is claimed to have covered the petroleum. So far as it may be held that it did, I respectfully am of opinion that it was a complete nullity and could never become the root of a title to subsequent transferees.

The Court is asked to decide that notwithstanding the erroneous and illegal actions of the Registrar in delivering the certificate of title to Podgorny, all those objections are not available to The Canadian Pacific Railway Co. because Podgorny fraudulently transferred the estate, as it appeared in his certificate of title, to Anton Turta and Sitko, on the reasoning that they were bona fide purchasers for valuable consideration. The evidence of Anton Turta discloses that he bought the property to farm and that he put no value on any minerals in his transfer, or his title. In fact, he did not know whether Podgorny's title covered any minerals and in the amount which he paid Podgorny not a single dollar was intended to cover the value of the petroleum. Podgorny did not intend to sell or transfer petroleum and Sitko and Anton Turta did not intend to buy petroleum. As a matter of fact, they did not even suspect the existence of any petroleum. We are now asked to say that under those circumstances they gave valuable consideration for that mineral. I cannot bring myself to believe that someone may be held to have given valuable consideration for a thing he does not intend to buy and the existence of which he does not even suspect.

I also fail to see how a purchaser can be held to have acquired in good faith something which he never intended to purchase and which, as far as he was aware, was non-existent.

Of course, if the reference in so many reported cases to acquiring land "on the faith of the register" was to be applied in the present appeal and considered as meaning that the purchaser should at least consult the register, we have it in the present case that neither Sitko, nor Turta, took the trouble of consulting it. Now it is contended that under this registration system the certificate of title is the

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whole thing and nothing else should be considered. On that ground it is claimed that Podgorny's certificate of title, although admittedly erroneous, must stand and is valid under *The Land Titles Act*. If that be so, I cannot understand why a different interpretation is given to the certificate of title which the third parties got from the Registrar and in which the coal and petroleum were excepted and stated to be reserved for The Canadian Pacific Railway Co. If the initial error made when the certificate to Podgorny was issued is of no account, then why should not the so-called error by the Registrar in making corrections to the title and in issuing certificates of title to third parties be equally considered as decisive? In the case of these third parties, the certificates of title which they received from the Registrar excepted and reserved the coal and petroleum for The Canadian Pacific Railway Co. I cannot understand how under the same statute the initial certificate to Podgorny must be reverently regarded as sacred, notwithstanding the admitted error, and the certificates of the third parties, on the contrary, should be held to contain illegal corrections. There are provisions in the statute authorizing the Registrar to make corrections and the only objections that were made were that they did not follow the procedure outlined in the statute itself. In those cases, I would consider that the corrections were mere irregularities, while the issue to Podgorny of a certificate covering, as is contended, the petroleum was an action which the Registrar had absolutely no power to make. The third parties accepted the certificates which they got and which included the exceptions and reservations in favour of The Canadian Pacific Railway Co. I would not think that they should now be permitted to say that those insertions by the Registrar were inoperative. Anton Turta brought his action after the corrections had been made and after the certificates of title to the third parties had been issued with the exceptions and reservations in favour of The Canadian Pacific Railway Co. His interest in bringing an action of the character which we have before us could very well be disputed, as he had parted with the property. He is apparently bringing the action so as to make good the title which his transferees have accepted. They, and not Anton

Turta, would get the benefit of the decisions of the Courts on that point. The corrections made in 1943 in the Register have at least the value of admissions by the keeper of the register that errors had been made when the certificate was issued to Podgorny.

There are several other questions which were raised in this case and which were not decided adversely to the appellants in the judgments appealed from. If I thought that a decision on those questions was necessary for the conclusion at which I have arrived, I would adopt the reasoning of the dissenting judge in the Appellate Division with regard to them.

Only one word should be added in respect to the cancellation of certificate No. 424 of The Canadian Pacific Railway Co., because it seems to me to follow that if the Registrar had no authority to issue a certificate to Podgorny covering the petroleum, equally he lacked authority to cancel certificate No. 424 in full as he did. That cancellation was the consequence of the issue of the certificate to Podgorny and must be set aside for the same reasons for which, in my opinion, the certificate of title itself should be held to be *ultra vires*. I am unable to read the statute so as to make it validate all that has been done by the Registrar in this matter. I have no doubt The Canadian Pacific Railway Co. could ask the Court for permission to raise those questions against the respondent Anton Turta and the respondent third parties, even though they were held to be bona fide purchasers for valuable consideration, which, as I said above, I do not consider them to be. If, according to the definition of "land" in the statute, the petroleum was a land by itself, separate from the rest of the estate, then this at least is a case of misdescription as required by the statute to enable The Canadian Pacific Railway Co. to dispute the title of the respondents. This case would constitute misdescription within the meaning of s. 62 of *The Land Titles Act*. It is argued that in order to have a case of misdescription there must be "other land involved", but there is other land involved in the premises. The petroleum coming under the definition of land by force of the statute and the insertion of the petroleum in the description of the property in the certificate of Podgorny does involve other land, and I do not see how, in that respect, the decision in

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Hamilton v. *Iredale* (1) can be distinguished. It is cited in the reasons for judgment of Parlee JA. and a portion of the head note reads as follows:

> Wrong description is where an applicant intending to describe Blackacre describes Whiteacre, or so describes Blackacre as to make it include Whiteacre. It is not wrong description where the applicant correctly describes the land he is applying for, though the land is not his. It is then a case of no title . . .

In the present case the property transferred to Podgorny was described so as to make it include another land, that is to say, the petroleum belonging to The Canadian Pacific Railway Co., and such misdescription opens the way to The Canadian Pacific Railway Co. to urge the claim that it now makes.

On the whole, as stated at the beginning of this judgment, and for the above reasons I would allow the appeal, dismiss the action and give the appellants the remedies prayed for by them, with costs throughout.

The judgment of Kerwin, Taschereau, Estey and Fauteux JJ. was delivered by:

ESTEY J.:—The respondent Anton Turta has been, both by the learned trial judge and the majority of the learned judges in the Appellate Division (2), declared to be the owner of the petroleum in the N.W. $\frac{1}{4}$ of Section 17, Township 50, Range 26, W. of the 4th Meridian, Province of Alberta, on the basis that he is an owner thereof to whom a certificate of title was granted March 12, 1918, reserving only the coal to the Canadian Pacific Railway Company. The appellant Canadian Pacific Railway Company contends that, having received this quarter section in a grant from the Crown in 1901 and never having transferred the petroleum, it was and still remains the owner thereof, notwithstanding the issue of the certificate of title to Anton Turta, a purchaser bona fide for valuable consideration.

The C.P.R. acquired the quarter section as part of a grant dated July 13, 1901, brought it under *The Land Titles Act* of the Northwest Territories on March 9, 1903, and as of the same date was granted certificate of title

(1) (1903) 3 (S.R.) N.S.W. 535.
(2) [1953] 8 W.W.R. (N.S.) 609; 4 D.L.R. 87.

No. 424. By virtue of s. 16 of the *Alberta Act* (4 & 5 Edw. VII, c. 3) that statute and the certificate of title No. 424 continued in effect after Alberta became a province.

On June 19, 1908, the C.P.R. transferred this N.W. $\frac{1}{4}$ of 17 to Mike Podgorny, reserving coal and petroleum. When this transfer was registered in the land titles office on July 13, 1908, the registrar, in preparing Mike Podgorny's certificate of title, reserved only the coal to the C.P.R. At the same time the registrar indorsed a memorandum on certificate of title No. 424 to the effect that it was cancelled so far as it affected this N.W. $\frac{1}{4}$ of 17. These errors were not detected at the time, nor, indeed, until 1943, some time after Podgorny had disposed of the quarter section.

On February 2, 1910, Podgorny transferred all his estate and interest in the E. $\frac{1}{2}$ of this $\frac{1}{4}$ section to Andrew Sitko, when a new certificate of title was issued to the latter, reserving the coal, but not the petroleum, to the C.P.R.

On September 2, 1910, apparently because certificate of title No. 424 contained so many indorsements, that certificate was cancelled and a new certificate No. 2687 was issued to the C.P.R. The registrar, at that time, placed an indorsement on certificate No. 424 to the effect that it was cancelled in full.

On November 10, 1911, Podgorny transferred the W. $\frac{1}{2}$ of the N.W. $\frac{1}{4}$ to Anton Turta without any reservation, but on May 2, 1912, when this transfer was registered, the registrar, again apparently relying upon the certificate already issued to Podgorny, reserved only the coal to the C.P.R. On February 23, 1918, Sitko transferred the E. $\frac{1}{2}$ to Anton Turta, reserving coal, and on March 12, 1918, this transfer was registered and, at Turta's request, the registrar issued to him one certificate of title covering the entire quarter section, reserving the coal to the C.P.R.

In 1943, in the course of an investigation by the officials in the land titles office, these errors were detected and corrections made upon the original certificate issued to Podgorny and all subsequent certificates of title relative to this quarter section. These corrections, if valid, reserved the petroleum to the C.P.R.—in other words, so far as this

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quarter section was concerned, corrected the error made by the registrar in July, 1908, and showed both coal and petroleum reserved to the C.P.R.

Anton Turta transferred the E. $\frac{1}{2}$ of this $\frac{1}{4}$ section to Nick Turta, to whom certificate of title was issued as of May 21, 1944. Anton Turta also transferred the W. $\frac{1}{2}$ of this $\frac{1}{4}$ section to Metro Turta and the latter's wife Bessie Turta, to whom certificate of title was issued under date of January 3, 1945. In both of these latter certificates the coal was reserved and, by virtue of the corrections made in January, 1943, and above referred to, the petroleum was also reserved to the C.P.R.

The C.P.R., as of August 2, 1946, gave an option to Imperial Oil Limited to lease all petroleum and natural gas underlying this N.W. $\frac{1}{4}$ of 17. Imperial Oil Limited exercised this option and under date of March 6, 1951, became the lessee of the petroleum. The Montreal Trust Company and William Sereda entered into an agreement with Anton Turta relative to the petroleum rights and appear as caveators upon the title.

The immediately preceding paragraphs explain the presence of the parties hereto other than the C.P.R. and Anton Turta. The main issues, however, arise between the C.P.R. and Anton Turta and must be determined upon a consideration of the C.P.R.'s transfer to Podgorny, the effect of the error in the land titles office in granting a certificate of title to Podgorny, the subsequent cancellation thereof and the issue of a new certificate of title to Anton Turta, a purchaser bona fide for valuable consideration.

Anton Turta's certificate of title dated March 12, 1918, was granted under *The Land Titles Act* (S. of Alta. 1906, c. 24) which continued in that province the Torrens system of land registration adopted in the Northwest Territories when in 1886 Parliament enacted the *Territories Real Property Act* (S. of C. 1886, c. 26). As the main issues must here be largely determined upon a construction of certain sections of the 1906 *Land Titles Act,* it will be of assistance, while giving full effect to the language thereof, to keep in mind the intent and purpose of the

Legislature in continuing this system. In the preamble to *The Territories Real Property Act* of 1886 this intent and purpose is expressed as follows:

> Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive:

In this Court Sir Louis Davies C.J., in *Union Bank of Canada and Phillips* v. *Boulter Waugh Ltd.*, (1), in referring to the Saskatchewan statute, which is similar to that of Alberta, quoted from a New Zealand case at 387:

> The cardinal principle of the statute is that the register is everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. *Fels* v. *Knowles* (2).

Chief Justice Harvey of Alberta gave expression to a similar view:

> The principle of the Act is that a person may ascertain the state of the title by a reference to the records of the land titles office and the person who is the registered owner has the right by transfer duly registered to convey a good title to a bona fide purchaser subject only to what appears on the register and the reservations and exceptions of Sec. 58 (i.e. Sec. 44 of the 1906 Act). It is registration that gives and extinguishes title . . . *Dobek* v. *Jennings* (3).

Lord Watson in *Gibbs* v. *Messer* (4), a case from Australia, stated at p. 254:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bonâ fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

The foregoing preamble and quotations, as well as others to similar effect, emphasize that the Torrens system is intended "to give certainty to the title" as it appears in the land titles office. That one who is named as owner in an uncancelled certificate of title possesses an "indefeasible title against all the world", subject to fraud and certain specified exceptions, while one who contemplates the acquisition of land may ascertain the particulars of its title at the appropriate land titles office and deal

(1) (1919) 58 Can. S.C.R. 385.
(2) 26 N.Z. Rep. 604 at 620.
(3) (1928) 1 W.W.R. 348 at 351.
(4) [1891] A.C. 248.

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with confidence, relying upon the information there disclosed. Moreover, it contemplates that those who acquire a registerable interest in land will, without delay, effect registration thereof and avoid possible prejudice. That such a system may from time to time impose hardships is obvious and, therefore, in addition to preserving actions against the wrongdoer, the legislature has provided an assurance fund out of which, in appropriate cases, compensation may be paid to those who suffer a loss.

The foregoing features of the system are embodied in *The Land Titles Act* of 1906. Under s. 23 a transfer becomes "operative according to the tenor and intent thereof" upon its registration. Section 41 provides that

> upon the registration of any instrument . . . the estate or interest specified therein shall pass . . . subject to the covenants, conditions and contingencies set forth and specified in such instrument . . .

Anton Turta, in contracting with Podgorny and Sitko, the registered owners, was not, as provided in s. 135, "bound or concerned to inquire into or ascertain the circumstances" under which Podgorny obtained his title. Indeed, Turta rests his rights upon the fact that he had, bona fide and for valuable consideration, become the owner of N.W. 17 and having been granted a certificate of title which included the petroleum, he cannot now be deprived thereof. In this connection the provisions of s. 42 are relevant and, in part, read:

> The owner of land for which a certificate of title has been granted shall hold the same subject . . . to such encumbrances . . . notified on the folio of the register which constitutes the certificate of title absolutely free from all other encumbrances, liens, estates or interests whatsoever, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act or granted under any law heretofore in force relating to title to real property.

The contention of the C.P.R. is founded largely upon ss. 44, 104(*e*) and 106 and particularly the exceptions thereto. Section 44 reads:

> 44. Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the next preceding section, except so far as regards any portion of land by wrong description of boundaries or parcels

included in such certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land; and for the purpose of this section that person shall be deemed to claim under a prior certificate of title who is holder of or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate of title granted, notwithstanding that such certificate of title has been surrendered and a new certificate of title has been granted upon any transfer or other instrument.

This section makes a certificate of title conclusive evidence in a court of law except in a case of fraud and the two further exceptions therein set out. It is with the latter two we are here mainly concerned and for convenience they may be repeated and lettered (*a*) and (*b*). These are (*a*) "so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title" and (*b*) "as against any person claiming under a prior certificate of title".

These exceptions (*a*) and (*b*) are more particularly provided for in s. 104(*e*) and s. 104(*f*) and it will be convenient to deal first with (*a*).

In s. 106 "any purchaser or mortgagee *bona fide* for valuable consideration" who is a registered owner shall not be subject to an action for recovery of damages or of ejectment, or to deprivation of land, on the ground that his transferor had become registered as owner through fraud or error, or had derived his title from or through a person registered as owner through fraud or error, "except in the case of misdescription, as mentioned in section one hundred and four". Section 106 further emphasizes the protection the Act provides to one who bona fide deals with the registered owner. Even if his transferor becomes registered owner thereof through fraud or error, the former is protected "except in the case of misdescription, as mentioned in section one hundred and four". This s. 104 sets forth a general provision that no action of ejectment or other action for recovery of land for which a certificate of title has been granted shall lie or be sustained against the owner unless his case comes within one of the six exceptions there specified. In the exception under clause (*e*) provision is made for "the case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such

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other land or of its boundaries, as against the owner of such other land". This clause contemplates one person claiming land, which has been included in a certificate of title of other land by misdescription of that other land or of its boundaries, against the owner of that other land. In other words, this section contemplates a contest between two parties in respect to a piece of land which has been wrongly included in a certificate along with other land.

Counsel for the appellants contend that as petroleum is a mineral it is land as defined in s. 2(*a*) and that its omission as a reservation by the registrar in the certificate of title issued to Podgorny constitutes misdescription within the meaning of s. 104(*e*) and, therefore, the C.P.R. can claim that petroleum against Anton Turta by virtue of the provisions of s. 106. As the word "misdescription" in s. 106 is as mentioned in s. 104(*e*), this issue turns upon the meaning of the phrase "misdescription of such other land or its boundaries" as it appears in the latter. This clause must be read and construed not only with ss. 44 and 106, but with the other provisions of the statute. In s. 44 the words are "by wrong description of boundaries or parcels" and in s. 104(*e*) "misdescription of such other land or of its boundaries", and it may be added that in s. 121 the words are "misdescription of the boundaries or parcels of any land". In s. 122 the owner of several parcels of land held under separate certificates may have these cancelled and consolidated into one or more, provided "that no one certificate shall include or refer to a greater area than six hundred and forty acres of land". These words "other land", "boundaries" and "parcels" in this context indicate that the legislature had in mind those areas of land defined in the surveys made under the *Dominion Lands Act* of 1883 (46 Vict., c. 17) and *The Alberta Surveys Act,* 1931 (S. of Alta., c. 47), or such modification thereof as may, by *The Land Titles Act,* be permitted.

The relevant language in the transfer to Podgorny, under which the C.P.R. reserved the petroleum and the omission of which reservation from the subsequent certificates it now claims to constitute a misdescription, is as follows:

> all their estate and interest in the said parcel of land, excepting and reserving unto the Canadian Pacific Railway Company, their successors and assigns, all coal and petroleum which may be found to exist within, upon, or under the said land.

The foregoing does not expressly provide for the right to enter upon, drill for and take possession of the petroleum. Even if, however, it be construed as a *profit à prendre*, when regard is had to the "vagrant and fugitive" nature of petroleum it would seem that the legislature did not intend that its omission by the registrar in a certificate of title would constitute a "misdescription of such other land or its boundaries" within the meaning of s. 104(*e*). That this phrase should receive a limited or restricted construction finds support, not only in the fact that it appears as an exception in s. 104(*e*) and as it is imported into s. 106, but also in the provisions of s. 108. In the latter it is contemplated that a "person deprived of any land . . . by any error, omission or misdescription in any certificate of title . . ." may be barred from recovery of either the land or damages from parties involved and thereafter, and in that event only, may he "bring an action against the registrar as nominal defendant" for damages.

It is contended that the registrar had authority to cancel C.P.R. certificate of title No. 424 and issue a new certificate of title to Podgorny only in so far as the transfer to the latter directed and, as the registrar exceeded those directions, the certificate of title to Podgorny was not a certificate within the meaning of the Act and, therefore, a nullity and, as a consequence, the certificate of title issued to Anton Turta was also a nullity. Ss. 23, 41 and 46 are referred to as supporting the foregoing contention. S. 23 provides that an instrument upon registration "shall become operative according to the tenor and intent thereof". S. 41 provides: "Upon the registration of any instrument in the manner hereinbefore prescribed the estate or interest therein shall pass". S. 46 provides that "After the certificate of title for any land has been granted no instrument shall be effectual to pass any interest therein . . . unless such instrument is executed in accordance with the provisions of this Act and is duly registered thereunder; . . ."

Nowhere throughout the statute is it provided that failure upon the part of the registrar to comply with these provisions, or that any omission, mistake or misfeasance on his part, in the preparation of a certificate of title, shall

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render that certificate a nullity. That such was not the intention of the legislature is evidenced by the provisions under which a certificate of title may be corrected and damages claimed in the event of omission, mistake or misfeasance on the part of the registrar, his officers or clerks. There are also those provisions which contemplate the correction of the registrar's omissions in a certificate such as that issued to Podgorny while it remained outstanding and those other provisions under which the position is entirely changed when Podgorny's certificate is cancelled and a new certificate of title issued to one in the position of Anton Turta. Once the certificate is issued to Turta it derives its force and validity, not from the transfer of the C.P.R. to Podgorny, but by virtue of the provisions of the statute.

Anton Turta's position is set forth in s. 42 which provides that he holds his certificate of title, apart from the encumbrances, liens, estates or interests noted thereon, absolutely free from all other estates or interests except in two cases—that of fraud and of an owner claiming under a prior certificate of title. The position of a person dealing with Turta is set forth in s. 135, where it is clear that except in the case of fraud a person who contemplates the acquisition of land may rely upon the certificate of title and shall not be "bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered . . ."

Then as to the contention under what I have referred to as exception (*b*) of s. 44, to the effect that the C.P.R. holds a prior certificate of title dated March 9, 1903, and numbered 424 to that of Anton Turta dated March 12, 1918, and, therefore, by virtue of the provisions of s. 104(*f*) it is still entitled to the petroleum, the difficulty is that certificate of title No. 424 was cancelled prior to any relevant date under this exception. It was cancelled, so far as the N.W. $\frac{1}{4}$ of 17 is concerned, July 13, 1908, when certificate of title was issued to Podgorny. Then again on September 2, 1910, when certificate of title No. 2687 was issued to the C.P.R., which did not include N.W. 17 or any portion thereof, certificate of title No. 424 was cancelled in full. I respectfully agree with the majority of the

learned judges in the Appellate Court that the learned trial judge correctly stated the effect of clause (*f*) when he said that this statutory provision contemplates "the contemporaneous existence of two certificates of title for the same land". The facts of this case, therefore, cannot be brought within the meaning of clause (*f*) inasmuch as at all times relevant hereto the C.P.R. did not possess a certificate of title relative to the petroleum in the N.W. $\frac{1}{4}$ of 17.

In January, 1943, the registrar, in the exercise of the authority that he deemed he possessed by virtue of s. 160(2) of *The Land Titles Act* (R.S. Alta. 1922, c. 133), attempted to correct the certificate of title issued to Podgorny July 13, 1908, by noting thereon a reservation of the petroleum to the C.P.R. At the same time he made a similar notation on the certificates of title issued to Sitko and Anton Turta and, as the property was subject to a mortgage and Turta's duplicate certificate was in his possession, he made a similar notation on that duplicate. The relevant portion of s. 160(2) reads:

> 160(2). If it appears to the satisfaction of the Registrar . . . that any entry or indorsement has been made in error on any certificate of title or other instrument, . . . he may, . . . so far as practicable without prejudicing rights conferred for value, . . . correct any error in such certificate of title or other instrument, or in any entry made thereon . . .

These corrections made by the registrar could not be made without prejudicing the rights of Turta, as these were determined by the certificate of title issued to him, and, therefore, he exceeded his jurisdiction. Whatever the words "so far as practicable" may mean, they do not limit the words immediately following: "without prejudicing rights conferred for value".

In Saskatchewan a similar view was expressed in *Re Land Titles Act* (1). I am, therefore, of the opinion that the corrections made by the registrar were not authorized by *The Land Titles Act* and, therefore, of no effect.

The appellants' submission that, as this action was not brought within a period of six years, it is barred by the provisions of s. 5(1)(*j*) of the Statute of Limitations (R.S. Alta. 1942, c. 133) cannot be maintained. In support of this contention the appellants rely upon observations of Jessel, M.R., in *Gledhill* v. *Hunter* (2), and applied to

(1) (1952) 7 W.W.R. (N.S.) 21. (2) (1880) 14 Ch. D. 492.

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provisions of *The Land Titles Act* in Alberta in *Sutherland* v. *Rural Municipality of Spruce Grove* (1); *Pelletier* v. *Municipal District of Opal* (2); in *Re Land Titles Act* (3). In these cases an action for a declaration of title without a claim for possession was held to be not an action for recovery of land. A reference to the pleadings in this case discloses that respondent Anton Turta asks for a declaration that he has "been in lawful possession" of the petroleum. The appellant C.P.R. denies Turta's possession and pleads, *inter alia,* that it has at all material times been both the owner and in possession of the petroleum. Moreover, the appellant Imperial Oil Limited alleges that Turta never was in possession of the petroleum.

It will, therefore, be observed that in this action both the ownership and the possession of the petroleum in the said quarter section was in issue. This is, therefore, an action for the recovery of land and is brought within the period of ten years permitted by s. 18 of the said *Statute of Limitations.*

The appeal should be dismissed with costs.

RAND J.:—This appeal raises a question of importance under *The Land Titles Act* of Alberta. In 1908 the Canadian Pacific Railway Company, being then the owner in fee simple, executed a transfer of the northwest quarter of sec. 17, T. 50, R. 26, W. 4th M., to one Podgorny, excepting and reserving unto itself "all coal and petroleum which may be found to exist within, upon or under the said land". The duplicate of certificate of title No. 424 covering that quarter section along with many other sections, for convenience in the land transactions of the Company, was then being kept on deposit in the Land Titles Office at Edmonton. The registration of the transfer resulted in the issue of a new certificate and duplicate in the name of Podgorny, reserving to the Pacific Company "all coal on or under the said land". The new certificate contained a reference to No. 424, and on the latter a memorandum signed by the registrar was endorsed in these words:

This certificate of title is cancelled as to the northwest quarter 17-50-26-W4th and a new certificate No. 182-N-8 issued this 13th of July, 1908 to M. Podgorny.

(1) [1919] 1 W.W.R. 274. (2) [1925] 1 W.W.R. 973.
(3) (1951) 3 W.W.R. (N.S.) 97.

An identical memorandum was endorsed on the duplicate.

In 1910 Podgorny transferred the east half of the quarter section to one Sitko. In 1911, the west half of the quarter section was transferred to the respondent Anton Turta. In 1918 Sitko transferred the east half of the quarter section to Turta. On the application for this registration, Turta requested his titles to both halves of the quarter section be consolidated into one. This was complied with and a certificate issued accordingly. In all of these transfers and certificates coal was reserved to the Pacific Company.

In 1910 certificate No. 424, because of the many endorsements upon it, and with the consent of the Pacific Company, was cancelled and a new certificate, as well as duplicate, issued covering the lands which then remained uncancelled under No. 424. The new certificate did not include the northwest quarter in question.

In January, 1943, in the course, apparently, of rectifying errors in registrations, entries were made on the cancelled certificate No. 424 as well as on the duplicate by adding the words "except coal and petroleum" to the memorandum of cancellation originally made, and by adding the words "and petroleum" to the reservation in the certificate of Anton Turta and in the duplicate which at the time was deposited in the Land Titles Office because of an existing mortgage.

In 1944 the east half of the quarter section was transferred by Anton Turta to the respondent Nick Turta and the west half to Metro and Bessie Turta. The new certificates contain a reservation of coal and petroleum to the Pacific Company, the form of which appears to have been obtained by the solicitor acting for Anton Turta either from the previous certificate or duplicate which had been changed as mentioned. In 1949 the reference in the reservation to the Pacific Company was struck out of each certificate. Subsequently the Pacific Company purported to give an option and later a lease of petroleum rights over the quarter section to the appellant Imperial Oil Company Limited.

The mechanics of registration can be shortly stated. When a transfer is presented at the registry office it is immediately stamped and an entry made in a daybook of the day, hour and minute of its receipt, thereafter taken to be the time of registration. A memorandum is then

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endorsed on the certificate describing the interest conveyed by the transfer and to that extent cancelling the certificate. By that entry the transmission of title is effected. At the same time a like memorandum, under the seal and signature of the registrar, is made on the duplicate which is held by the owner and which must be presented to the registrar before a transfer can be registered. The new certificate and duplicate are then prepared and signed by the registrar, the former constituting a folio in the register and the latter being delivered to the transferee or new owner.

Mr. Carson's contention is that the original error of the registrar was a misdescription which, by the terms of s. 106 of *The Land Titles Act,* can be asserted by the Pacific Company against any subsequent purchaser. "Misdescription" as used in that section, so it is argued, includes an error in copying into the certificate the language of a transfer and remains a fatal defect in every title into which it may successively be introduced.

The general and primary conception underlying the statute, as it is of all legislation establishing what is known as the Torrens system of land titles, is that the existing certificate, bearing the name of a real person, is conclusive evidence of his title in favour of any person dealing with him in good faith and for valuable consideration: *Gibbs* v. *Messer* (1). The preamble to *The Territories Real Property Act,* 1886 (Can.), c. 26 which introduced the Torrens system to the western provinces indicates its objects:—

> Whereas it is expedient to give certainty to the title to estates in land in the Territories and to facilitate the proof thereof, and also to render dealings with land more simple and less expensive:

This general principle is subject, of course, to certain qualifications declared in the statute but that it expresses the broad purpose of the system is unquestionable.

S. 106 is in these words:—

> Nothing in this Act contained shall be so interpreted as to be subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of land in respect to which he is registered as owner, any purchaser or mortgagee *bona fide* for valuable consideration of land under this Act on the plea that his transferror or mortgagor has been registered as owner through fraud or error, or has derived title from or through a person registered as owner through fraud or error, except in the case of misdescription, as mentioned in section one hundred and four.

(1) [1891] A.C. 248.

and s. 104:—

No action of ejectment or other action for the recovery of any land for which a certificate of title has been granted shall lie or be sustained against the owner, under this Act in respect thereof, except in any of the following cases, that is to say:

* * *

(*e*) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the owner of such other land;

(*f*) The case of an owner claiming under an instrument of title prior in date of registration under this Act, or under the provisions of any law heretofore in force in any case in which two or more grants, or two or more certificates of title, or a grant and certificate of title, are registered under this Act or under any such law in respect to the same land.

What, then, is the scope of "misdescription" within para. (*e*)? I have considerable doubt that the omission from the certificate of the reservation of petroleum can be taken to be a misdescription at all. The registrar's function is not to describe, it is to transcribe or copy what appears on the transfer, and it is on the latter that description, properly so called, appears. The same can be said of an endorsement of a memorandum on the certificate; there are cases in which it would contain a description taken from the transfer. Nor is the word ordinarily applicable to the specification of the content of interests in land as distinguished from the definition of its superficial boundaries. In relation, then, to both the certificate and memorandum the word can be satisfied without extending its meaning to an error or omission such as we have here. But as a different view is taken by other members of the Court, I will assume that we have before us a true case of misdescription and on that footing examine the issue presented.

The argument made involves this, that a person contemplating a purchase of land included in a certificate must not only examine that certificate and make a proper search for the interests to which, by the statute, it is declared to be subject, but must also examine every transfer back to the original grant from the Crown for errors in transcription into the successive certificates. The legislation was designed, obviously, to avoid just such inconvenience and risk, and such a requirement would completely reverse the opinion on which, since its introduction in 1886, conveyancing in the western provinces has proceeded.

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Ss. 105 and 108 throw some light on the question:—

105. After a certificate of title has been granted therefor any person deprived of any land in consequence of fraud or by the registration of any other person as owner of such land, or in consequence of any fraud, error, omission or misdescription in any certificate of title, or in any memorandum thereon or upon the duplicate thereof, . . .

Provided always that except in the case of fraud or error occasioned by any omission, misrepresentation, or misdescription in the application of such person to be registered as owner of such land, or in any instrument executed by him, such person shall, upon a transfer of such land *bona fide* for value, cease to be liable for the payment of any damages . . .

108. Any person sustaining loss or damage through any omission, mistake or misfeasance of the inspector of land titles officers, or a registrar, or any of his officers or clerks, . . . and any person deprived of any land by the registration of any other person as owner thereof or by any error, omission or misdescription in any certificate of title or in any memorandum upon the same or upon the duplicate certificate thereof, and who, by the provisions of this Act, is barred from bringing an action of ejectment or other action for the recovery of the land, may . . . bring an action . . .

The former section covers cases of "fraud, error, omission or misdescription" in either the transfer, the new certificate or a memorandum made on the existing certificate. The section expressly contemplates the case of a person deprived of land in consequence of misdescription, and provision is made for the recovery of damages therefor. S. 108 in which the "error, omission or misdescription" arising in the office of the registrar may be in any certificate or memorandum, likewise includes a misdescription which results in the deprivation of an owner. S. 104(*e*), on the contrary, is directed to cases of misdescription in which an owner is not barred from recovering the land but is limited to those in which his land is included in a certificate of "other land by misdescription of such other land or its boundaries".

By these sections two kinds of misdescription are thus recognized, one which bars the original owner and gives him a right to damages, and the other which leaves his right unaffected even against a bona fide purchaser. The word "deprived" in para. (*e*) cannot be taken in an absolute sense as it would then contradict the effect of the exception; and the rights against individuals and ultimately against the assurance fund given by ss. 105 and 108 are not elective alternatives to a recovery of the land under the exceptions to 104; they assume that that recovery is foreclosed.

Again, neither in the *Territories Real Property Act (supra)* nor in its successor, c. 28, S. of C., 1894, nor in c. 24 of the statutes of Alberta, 1906, was there any obligation on the holder of a grant made prior to January 1st, 1887 to bring his land under the system, and in considering the scope of s. 104(*e*) that situation must be kept in mind. In the case of adjoining land not under the system, the application of the section presents no difficulty. A case would seem to arise also where both parcels are within the statute and the certificate contains an identification of the land followed by misdescription discoverable by reference to the land. And there is finally its application to the certificate in which the misdescription first appears; between transferor and transferee any errors can be corrected.

These considerations are fortified by the fact that the duplicate is intended to furnish the owner with a current record of his title and no transfer can be registered without its delivery for appropriate cancellation. If, in this case, the duplicate had been examined by the Pacific Company, the errors would have been apparent as the scheme of the statute contemplated. The existence of such a protection to the owner is almost conclusive that the provisions of the Act preserving rights against a bona fide purchaser do not extend to a misdescription concealed from him but exposed to the original transferor.

The second contention is that the case comes within para. (*f*) of s. 104 and that the Pacific Company holds a certificate of the petroleum prior in date to that of the respondent Anton Turta. This assumes the cancellation endorsed on certificate No. 424 to have been ineffectual as to the petroleum since it was not authorized by the language of the transfer. But the provisions already quoted make it clear that the omission from the memorandum of cancellation and the new certificate cannot prevail against a subsequent purchaser. That the registrar makes an error is not to the purpose: the statute provides for such occurrences; and it also provides protection against such an error of which the Pacific Company did not avail itself. It is not, then, a case of two competing certificates, whether or not that means certificates in two chains beyond the root title;

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there is only one certificate, that issued to Anton Turta, with interests derived through him to the remaining respondents.

The purported corrections made in 1943 by the registrar were, in my opinion, of no effect. Whatever his powers under s. 104 or 160(2) may be, they do not extend to what was then attempted. The language of 160(2), "so far as is practicable without prejudicing rights conferred for value", means no more than that the rights conferred for value are not in any event to be invaded but that the authorized action of the registrar may end before that point is reached. There was such value given here for rights which the alterations could not prejudice.

It was urged by Mr. Nolan that as Anton Turta had purchased the land for farming purposes only he could not be said to be a purchaser for value of the petroleum rights, and *Pleasance* v. *Allen* (1) was cited as an authority against him. In that case there was a succession of sales of an intended parcel of land containing two buildings under a description which encroached $5\frac{1}{2}$ inches on an adjoining building and the existing certificate was amended. This was on the ground of the common mistake in each sale. But there is nothing of that nature here: Podgorny was to convey to Turta every interest in the land then appearing in his certificate, not everything he might have been entitled to if his certificate had been challenged. I assume that neither man had the particular rights in mind at the time of the sale; but if the courts were to be at liberty to embark upon enquiries into what was then the active thoughts of the parties, no title would be secure.

The remaining question is whether the action is barred by *the Limitation of Actions Act*, c. 133, R.S.A. 1942. On the view which I have taken that the petroleum rights were acquired by Turta and the Pacific Company deprived of them, the possession, in the absence of physical workings and so far as such incorporeal rights can be the subject of possession, must be taken to be an incident of ownership. In the circumstances there has been no legal or physical disturbance of that possession; at the most, certain entries have been made on the certificate claiming rights which do

(1) (1889) 15 V.L.R. 601.

not exist. The action is not, then, one to recover the land but to have those entries expunged and for a declaration of the plaintiff's interest. Since there has been no trespass and since the steps taken have, at the most, raised only a cloud upon the title, the question is whether an owner can be deprived of his land by the mere assertion on the register of unfounded claims. I know of no provision of law which, by the passage of time, raises any right based on that mode of protesting an interest; it would be a novel form of prescription which the law does not recognize. Its true interpretation is that of a continuing assertion against which proceedings of the nature here can be taken at any time, and no question of limitation arises.

I would therefore dismiss the appeals with costs.

KELLOCK J.:—According to the transfer of June 19, 1908, the railway company conveyed to Podgorny all the estate and interest of the former in the parcel, excepting and reserving to the railway company, its successors and assigns, "all coal and petroleum which may be found to exist within, upon, or under the said land". This transfer was, according to s. 22 of the statute, to be deemed registered as soon as a memorandum of it had been entered upon the folio in the register constituted by certificate of title No. 424 held by the railway. By s. 2(*n*) "memorandum" is defined to mean "the particulars of any instrument presented for registration".

According to s. 24, the memorandum was required to state "the nature" of the transfer to which it relates and by s. 25, a like memorandum was required to be made upon the duplicate certificate. S. 25 goes on to provide that the memorandum upon the duplicate shall be received in all courts of law as "conclusive evidence" of its contents and that the instrument of which it is a memorandum has been "duly registered under the provisions of this Act".

S. 135 provides that no person proposing to take a transfer from the holder of a certificate of title is "concerned to inquire" into the circumstances in which such owner or any previous owner was registered. One of such "circumstances" would undoubtedly be the actual contents of the transfer giving rise to any particular memorandum

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endorsed on the certificate of title. Moreover, a transfer forms no part of the register, although the registrar is required by s. 51 to retain it in his office.

It is provided by s. 114(1) that the registrar, on discovering that any duplicate certificate has been issued or any memorandum made in error, may require the holder to produce the same for correction and, in case of refusal, to bring such person before a judge to show cause why such correction should not be made. It is made plain by s-s (2), as added in 1911-12 by c. 4, s. 15 (23), however, that this power may be exercised only where rights conferred for value will not be prejudiced. Accordingly, once Podgorny had conveyed for value, any right of correction on the part of the registrar was gone. I do not consider it necessary, therefore, to refer further to the "corrections" which were attempted to be made to the various instruments. It would, in any event, seem to be a fatal objection to the validity of such corrections that they were not in fact made by the registrar but by some person or persons employed in the Land Titles Office; s. 2(*p*).

The appellants contend, however, that they are entitled to rely upon clauses (*e*) and (*f*) of s. 104, the former relating to "misdescription", the latter to conflicting instruments.

In my view no reliance can be placed, in the present case, upon the provisions of clause (*f*), as I think it clear that in order to come within the language "the case of an owner claiming under an instrument of title" with which the clause begins, it is necessary for such a person to be the holder of a subsisting instrument of title, not one which has been cancelled. On the evidence in the case at bar, which is made conclusive by the statute, certificate 424 was cancelled and the appellants therefore cannot satisfy the language of the clause.

This view is, in my opinion, supported by the provisions of ss. 42 and 44. The exception provided for in each is that of an owner claiming "the same land under a prior certificate". This language clearly contemplates that the claimant is himself either the original grantee of the prior certificate of title or holds a subsisting instrument of title derived through the former.

With respect to "misdescription", clause (*e*) of s. 104(1) is as follows:

> The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the owner of such other land;

An owner of land making application to bring it under *The Land Titles Act*, (s. 27), might include in the description of the land, other land belonging to another person which had not been brought under the statute. On receiving a certificate for his own as well as such other land, such certificate holder would be in a position to deal with it in favour of others, thus depriving the original owner of the land by "misdescription".

The language of clause (*e*), taken alone, may, on its face, be capable of extension to circumstances such as exist in the case at bar, namely, that an interest in the land expressly reserved by the transferor in the transfer, is included by error on the part of the registrar in the certificate issued to the transferee, the endorsement upon the certificate and duplicate certificate of the transferor each containing the same error. However, if the language of the clause be extended to such a case, it would seem from s. 106 that no matter how long the chain of transfers from the original transferee, all such persons are liable to attack. Such a construction would run counter to the scheme exemplified by s. 135, that a person dealing with a registered owner is not concerned with anything other than what is disclosed by a registered certificate. In my opinion, "misdescription" of such a character is not within s. 104(1)(*e*). It is made plain by other provisions that the statute contemplates more than one type of misdescription.

It is provided by s. 105 that after a certificate of title has been granted "therefor", any person deprived of any land.

> (*a*) in consequence of any fraud, or
>
> (*b*) by the registration of any other person as owner, or
>
> (*c*) in consequence of any fraud, error, omission or "misdescription" in any certificate of title or in any memorandum thereon or upon the duplicate thereof,

may bring an action for the recovery of damages against the person upon whose application the erroneous application was made or who acquired title to the land in question through such fraud, error, omission or misdescription.

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Under the proviso to the section, however, upon a transfer of the land bona fide for value "such person" ceases to be liable for the payment of any damages except in the case of fraud or error occasioned by any omission, misrepresentation, or misdescription in the application of such person to be registered as owner of such land, or in any instrument executed by him.

The proviso proceeds on the assumption that a bona fide purchaser of the land, whose title thereto arose "in consequence of . . . misdescription" in any "certificate of title" or in "any memorandum" thereon or upon any duplicate, is protected. It is for this reason that the former owner "deprived" of the land, is given his remedy in damages. The only possible way of reconciling ss. 105 and 106, therefore, is on the footing that there is a type of "misdescription" covered by the former section other than that described in s. 104(1)(*e*), as to which latter type a transferee for value without notice, however long the chain of title through which he claims, would appear by the provisions of s. 106 of the statute, never to be protected.

Moreover, it is in the contemplation of s. 108 that a person deprived of land by "misdescription in any certificate of title or in any memorandum upon the same or upon the duplicate certificate of title thereof" may be barred from bringing an action of ejectment for the recovery of land. This provision is only to be reconciled with s. 106 upon a similar basis.

In my view, the "misdescription" (if that be the correct term) of which the appellants complain, arising as it did from an error on the part of the registrar, is not of the character dealt with by s. 104(1)(*e*). Accordingly, in the language of s-s (2) of that section, the certificate of title held by Turta is "an absolute bar and estoppel" to any such action as is here in question.

I would therefore dismiss the appeal with costs.

LOCKE J.:—(dissenting) The Canadian Pacific Railway Company (hereinafter referred to as the C.P.R.) became the owner of the North West quarter of Section 17, Township 50, Range 26, west of the 4th Meridian, under a grant by letters patent from the Crown in the right of Canada dated July 13, 1901. In accordance with the provisions of

The Land Titles Act of 1894, this patent was filed in the North Alberta Land Registration District and a certificate of title No. 424 issued on March 9, 1903, in the Company's name certifying that it was the owner of an estate in fee simple in the said land and other named parcels.

Upon the constitution of the Province of Alberta in 1905, the Legislature enacted *The Land Titles Act* as c. 24 of the Statutes of 1906 which substantially re-enacted the provisions of the Dominion Statute of 1894.

The transfer from the C.P.R. to Mike Podgorny dated June 19, 1908, is in the form prescribed by *The Land Titles Act* and was a transfer of the land reserving "all coal and petroleum which may be found to exist within, upon or under the said land". The certificate of title dated July 13, 1908, issued to Podgorny, through an error made in the office of the Registrar reserved only "all coal on or under the said land". At the same time, the certificate of title of the C.P.R. was endorsed with a memorandum that it had been cancelled as to the land in question.

The respondent, Anton Turta, purchased eighty acres of the quarter section in question from Podgorny and the other half from one Sitko (to whom a certificate of title had issued) for valuable consideration: the land was transferred to him in accordance with the requirements of *The Land Titles Act* and certificates of title were issued in his name declaring that he was the owner in fee simple of the land reserving unto the C.P.R. all coal on or under it.

It is not suggested that Anton Turta was aware of the error that had been made in the Registrar's office, nor is it sought to impeach the certificate of title which was issued to him on the ground that he was not a bona fide purchaser for value of these lands. The claim advanced on behalf of the C.P.R. is made possible only by the fact that *The Land Titles Act* of Alberta and its predecessors, *The Land Titles Act* of 1894 and the *Territories Real Property Act* (c. 26, S.C. 1886), differed in a material particular from the Manitoba Real Property Act of 1885, from which most of its terms were taken. The claim of the appellants is that even as against a purchaser for value without notice holding a certificate of title in his name under *The Land Titles Act,* the title declared by it may be impeached if, by

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misdescription of the land or its boundaries, it includes lands which are the property of the claimant. As petroleum is admittedly a mineral and as under the definition of land contained in *The Land Titles Act* it includes minerals, the appellants say that the lands transferred to Podgorny and subsequently to Anton Turta which, as described, included all minerals other than coal, thus included by misdescription the petroleum which remained the property of the C.P.R.

Before considering the language of the various sections, it should be said that the statement made by Lord Watson in delivering the judgment of the Judicial Committee in *Gibbs* v. *Messer* (1), cannot be accepted without qualification in considering this matter, owing to a material difference between *The Land Titles Act* of Alberta and the *Transfer of Land Statute* of Victoria of 1866 considered in *Gibbs'* case.

The passage from that judgment, referred to by the late Mr. Justice Parlee in delivering the judgment of the majority of the Appellate Division in the present case, reads:—

> The main object of the Act, and the legislative scheme for the attainment of that object, appear to them to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that every one who purchases, in bonâ fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

The section of the *Transfer of Lands Statute* of 1866 is not quoted either in the judgment of the Judicial Committee or in the report of the trial or of the hearing before the full court of Victoria where the case is reported as *Messer* v. *Gibbs* (2). The point in *Gibbs'* case was not, however, a matter of misdescription. The Act of 1866 is not available to me but the *Transfer of Land Act,* 1890 of Victoria which repealed the earlier statute re-enacted as s. 74, s. 49 of the earlier Act. It is this section which declares the indefeasible nature of the title of those holding

(1) [1891] A.C. 248 at 254. (2) (1887) 13 V.L.R. 854.

land under the Act, subject to certain exceptions. One of these is fraud. The relevant language of the section for the present consideration reads:—

> but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except as regards any portion of land that may by wrong description of parcels or boundaries be included in the grant certificate of title or instrument evidencing the title of such proprietor *not being a purchaser for valuable consideration or deriving from or through such a purchaser.*

The *Real Property Act* of 1885 of the Province of Manitoba introduced for the first time the Torrens system into Canada. Section 62 of that Act which declared the indefeasible nature of the title of the holder of a certificate of title, in so far as it dealt with misdescription, followed the Victoria statute and read:—

> subject to the exceptions and reservations mentioned in section 61, except as far as regards any portion of land that may by wrong description of boundaries or parcels be included in such certificate *when the holder of such certificate is neither a purchaser or mortgagee for value, nor the transferee of a purchaser or mortgagee for value.*

The Dominion Act which introduced the Torrens system into the North West Territories, being the *Territories Real Property Act* of 1886 (c. 26) was taken, in a large part verbatim, from the Manitoba Act. However, in this respect there was an alteration. Section 62 of the Dominion Act was copied from that section in the Manitoba Act but the reference to misdescription omitted the words above underlined. Section 44 of *The Land Titles Act* of Alberta of 1906 is the counterpart of s. 62 and does not contain the words protecting the rights of purchasers for value and those who purchased from them, contained both in the Manitoba and the Victorian sections.

In *Union Bank of Canada* v. *Boulter Waugh Ltd.* (1) in which certain of the provisions of *The Land Titles Act* of Saskatchewan of 1917 were considered by this court, Sir Louis Davies C.J. said in part (p. 387):—

> I think the object and purpose of such statutes as the one here was very well stated by Edwards J. in delivering the judgment of the Court of Appeal in New Zealand in *Fels* v. *Knowles,* (2):
>
> "The object of the Act was to contain within its four corners a complete system which any intelligent man could understand, and which could be carried into effect in practice without the intervention of persons skilled in the law . . . The cardinal principle of the statute is that the register is

(1) (1919) 58 Can. S.C.R. 385. (2) (1906) 26 N.Z.L.R. 604 at 620.

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everything and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world. Nothing can be registered the registration of which is not expressly authorized by the statute. Everything which can be registered gives, in the absence of fraud, an indefeasible title to the estate or interest, or in the cases in which registration of a right is authorized, as in the case of easements or incorporeal rights, to the right registered."

The Saskatchewan statute under consideration in that case differed from the Manitoba Act in the same respect as does the present Alberta Act in dealing with the matter of misdescription. The *Boulter Waugh* case was not concerned with any question of misdescription in a certificate of title, however, and the question raised in the present case was accordingly not argued. The approval by Sir Louis Davies of the statement that the cardinal principle of the statute is that the register is everything cannot be accepted without reservation in relation to the present question, however accurate it may have been in regard to the New Zealand statute and as it would have been had it referred to the Real Property Act of Manitoba.

The following additional facts are to be considered in the present matter. On September 2, 1910, the Registrar issued to the C.P.R. certificate of title No. 2687 to replace the certificate No. 424 which had been issued on March 9, 1903, and for convenience left in the Land Titles Office. The new certificate contained no reference to the lands which had been sold to Podgorny and there was endorsed upon the earlier certificate a memorandum that it was cancelled in full and a new certificate issued. The only reason for the issue of the new certificate was that the earlier one was so covered with memoranda of transfers and other instruments that there was insufficient room for further similar endorsements. There is no evidence that the C.P.R. requested the issue of the new certificate or that the company took delivery of it, though the evidence of Mr. Kinnaird, a former Deputy Registrar in the Edmonton Land Titles Office, is to the effect that the practice would be to notify the owner when this was done. Presumbaly, though the evidence is silent on the point, the new certificate was left in the registrar's office for the same purpose as the earlier certificate. On January 16, 1943, Mr. H. T. Logan, a lawyer

employed in the Land Titles Office apparently for the purpose of checking the titles to minerals in the district, altered the certificates of title which had been issued to Anton Turta by adding after the description which reserved the coal unto the C.P.R. the words "and petroleum." At the same time, apparently under Mr. Logan's direction, the endorsement of the partial cancellation of certificate No. 424 on the transfer to Podgorny was amended by writing in after the description of the land the words "ex. coal and pet." In addition, the certificate which had been issued to Podgorny on July 13, 1908, was amended by adding the words "and petroleum" to the reservation and similar changes were made in the certificates of title which had been issued after the transfer by the C.P.R. to Podgorny and before the issue of the certificate of title to Anton Turta. When the latter transferred the lands to his children, the transfer reserved to the C.P.R. all coal and petroleum in conformity with his certificate of title, as altered. These latter transfers were made in the year 1944. Neither the C.P.R. nor Anton Turta were aware of the action taken in the Registrar's office of amending these various certificates. There was, in my opinion, no power in Logan under the Act either to make or direct the making of these alterations and the rights of the parties are, therefore, unaffected by them.

In my judgment, the alterations made in *The Land Titles Act* of 1906 by later amendments and the differences which exist between that Act and the Act as it appears as c. 205, R.S.A. 1942, do not affect any question to be decided. I, therefore, propose to quote the Act of 1906 which was in effect at the time of the transfer by the C.P.R. to Podgorny and when Turta obtained title. After the number of each section, the number of its counterpart in the Revised Statutes of 1942 appears for the sake of convenience.

The sections of the Act to be considered in deciding the legal effect of the cancellation of certificate of title No. 424, the error made in issuing Podgorny's certificate of title omitting the reservation of the petroleum and of Anton Turta's purchase of the property for value and obtaining a certificate without knowledge of any infirmity in the title of his transferrors if any such existed, are as follows:—

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22. (24) Every grant shall be deemed and taken to be registered under the provisions and for the purposes of this Act so soon as the same has been marked by the registrar with the folio and volume on and in which it is embodied in the register, and every other instrument shall be deemed to be registered as soon as a memorandum of it has been entered in the register upon the folio constituted by the existing grant or certificate of title of such land.

25. (27) Whenever a memorandum has been entered in the register the registrar shall make a like memorandum upon the duplicate when the same is presented to him for the purpose, and the registrar shall sign and seal such memorandum, which shall be received in all courts of law as conclusive evidence of its contents and that the instrument of which it is a memorandum has been duly registered under the provisions of this Act.

39. (49) Every certificate of title shall be made on a separate folio of the register, and upon every transfer of ownership the certificate of title of the transferror and the duplicate thereof shall be cancelled and the certificate of title of the transferee shall thereupon be entered upon a new folio in the register; and the registrar shall note upon the folio of the title of the transferror the number of the folio of the transferee's title and upon that of the transferee the number of the folio of the transferror so that reference can be readily made from one to the other as occasion requires.

42. (60) The owner of land for which a certificate of title has been granted shall hold the same subject (in addition to the incidents implied by virtue of this Act) to such encumbrances, liens, estates or interests as are notified on the folio of the register which constitutes the certificate of title absolutely free from all other encumbrances, liens, estates or interests whatsoever, except in case of fraud wherein he has participated or colluded and except the estate or interest of an owner claiming the same land under a prior certificate of title granted under the provisions of this Act or granted under any law heretofore in force relating to title to real property.

(2) Such priority shall, in favour of any person in possession of land, be computed with reference to the grant or earliest certificate of title under which he or any person through whom he derives title has held such possession.

43. (61) The land mentioned any certificate of title granted under this Act shall by implication and without any special mention therein, unless the contrary is expressly declared, be subject to—

(*a*) Any subsisting reservations or exceptions contained in the original grant of the land from the Crown;

(*b*) All unpaid taxes;

(*c*) Any public highway or right of way or other public easement, howsoever created upon, over or in respect of the land;

(*d*) Any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same;

(*e*) Any decrees, orders or executions against or affecting the interest of the owner of the land which have been registered and maintained in force against the owner;

(*f*) Any right of expropriation which may by statute or ordinance be vested in any person, body corporate, or His Majesty;

(*g*) Any right of way or other easement granted or acquired under the provisions of any Act or law in force in the Province.

44. (62) Every certificate of title granted under this Act shall (except in case of fraud wherein the owner has participated or colluded) so long as the same remains in force and uncancelled under this Act be conclusive evidence in all courts as against His Majesty and all persons whomsoever that the person named therein is entitled to the land included in the same, for the estate or interest therein specified, subject to the exceptions and reservations mentioned in the next preceding section, except so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land; and for the purpose of this section that person shall be deemed to claim under a prior certificate of title who is holder of or whose claim is derived directly or indirectly from the person who was the holder of the earliest certificate of title granted, notwithstanding that such certificate of title has been surrendered and a new certificate of title has been granted upon any transfer or other instrument.

50. (69) If a transfer purports to transfer the transferror's interest in the whole or part of the land mentioned in any certificate of title, the transferror shall deliver up the duplicate certificate of title of the land and the registrar shall make a memorandum thereon and upon the certificate of title in the register cancelling the same, either wholly or partially, according as the transfer purports to transfer the whole or part only of the interest of the transferror in the said land, and setting forth the particulars of the transfer.

51. (71) The registrar, upon cancelling any certificate of title either wholly or partially, pursuant to any transfer, shall grant to the transferee a certificate of title of the land mentioned in the transfer and issue to the transferee a duplicate thereof; and the registrar shall retain every transfer and cancelled duplicate certificate of title; but in the case of a partially cancelled certificate of title the registrar shall return the duplicate to the transferror after the memorandum partially cancelling the same has been made thereon and upon the certificate of title in the register; or may whenever required thereto by the owner of an unsold portion of land in any partially cancelled certificate of title, or where such a course appears to the registrar more expedient, grant to such owner a certificate of title for such portion of which he is the owner, upon the delivery of the partially cancelled duplicate certificate of title to the registrar to be cancelled and retained.

76. (121) Any person registered in place of a deceased owner shall hold the land in respect of which he is registered upon the trusts and for the purposes to which the same is applicable by this Act or by law, and subject to any trusts and equities upon which the deceased owner held the same; but for the purpose of any registered dealings with such land he shall be deemed to be the absolute and beneficial owner thereof.

2. Any person beneficially interested in any such land may apply to a court or judge having jurisdiction to have the same taken out of the hands of the trustee having charge by law of such land and transferred to some other person or persons; and the court or judge, upon reasonable cause being shown, shall name some suitable person or persons as owner of the land; and upon the person or persons so named accepting the ownership and giving approved security for the due fulfilment of the trusts, the court or a judge may order the registrar to cancel the certificate of title to the trustee, and to grant a new certificate of title to the person or persons so named.

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3. The registrar, upon the production of the order, shall cancel the certificate of title to the trustee after making thereon and upon the duplicate thereof a memorandum of the appointment by order of the court or judge of such person or persons as owners, and shall grant a new certificate of title to such new trustee and issue to him a duplicate certificate of title.

104. (171) No action of ejectment or other action for the recovery of any land for which a certificate of title has been granted shall lie or be sustained against the owner, under this Act in respect thereof, except in any of the following cases, that is to say:—

* * *

(*d*) The case of a person deprived of any land by fraud as against the owner of such land through fraud, or as against a person deriving title otherwise than as a transferee bona fide for value, from or through such owner through fraud;

(*e*) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the owner of such other land.

106. (159) Nothing in this Act contained shall be so interpreted as to leave subject to action for recovery of damages as aforesaid, or to action of ejectment, or to deprivation of land in respect to which he is registered as owner, any purchaser or mortgagee bona fide for valuable consideration of land under this Act on the plea that his transferror or mortgagor has been registered as owner through fraud or error or has derived title from or through a person registered as owner through fraud or error, except in the case of misdescription, as mentioned in section one hundred and four.

108. (157) Any person sustaining loss or damage through any omission, mistake or misfeasance of the inspector of land titles offices, or a registrar, or any of his officers or clerks, in the execution of their respective duties under the provisions of this Act, and any person deprived of any land by the registration of any other person as owner thereof or by any error, omission or misdescription in any certificate of title or in any memorandum upon the same or upon the duplicate certificate thereof, and who, by the provisions of this Act, is barred from bringing an action of ejectment or other action for the recovery of the land, may in any case in which remedy by action for recovery of damages hereinbefore provided is barred, bring an action against the registrar as nominal defendant, for recovery of damages; and if the plaintiff recovers final judgment against such nominal defendant the judge before whom such action is tried shall certify to the fact of such judgment and the amount of the damages and costs recovered and the Provincial Treasurer shall pay the amount thereof to the person entitled on production of an exemplification or certified copy of the judgment rendered and shall charge the same to the account of the said assurance fund:

Provided always that notice in writing of every such action, and the cause thereof, shall be served upon the Attorney General, and also upon the registrar, at least three calendar months before the commencement of such action.

121. (169) The Assurance Fund shall not under any circumstances be liable for compensation for any loss, damage or deprivation occasioned by the breach by any owner of any trust, whether expressed, implied or constructive; nor in any case in which the same land has been included in two or more grants from the Crown; nor shall the Assurance Fund be liable in any case in which loss, damage or deprivation has been occasioned by any land being included in the same certificate of title with

other land, through misdescription of the boundaries or parcels of any land, unless in the case last aforesaid it is proved that the person liable for compensation and damages is dead or has absconded from the Province or has been adjudged insolvent, or the sheriff has certified that he is not able to realize the full amount and costs awarded in any action for such compensation; and the said fund shall be liable for such amounts only as the sheriff fails to recover from the person liable as aforesaid.

135. (189) Except in the case of fraud, no person, contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance or lease, from the owner of any land for which a certificate of title has been granted shall be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice direct, implied or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud.

It is contended by the appellant that the partial cancellation of certificate of title 424 without reserving the coal and petroleum and the purported cancellation of the entire certificate, at the time certificate 2687 was issued on September 2, 1910, were nullities and that, accordingly, certificates 424 should be deemed as still in effect, in so far as the coal and petroleum in the quarter section is concerned.

As will be seen, the transfer required by the Act is deemed to be registered as soon as a memorandum of it has been entered upon the folio constituted by the existing certificate of title of such land. Section 25 requires the registrar to make a like memorandum upon the duplicate. In this case, the memorandum made stated that the title to the quarter section had been transferred without any reservations while the instrument, the registration of which it evidenced, reserved the coal and petroleum.

Section 50 requires the registrar to cancel the certificate of title partially if the transfer purports to transfer only part of the interest of the transferror in the land and section 51 authorizes the registrar, if requested, to grant a new certificate of such portion of the land as is retained by the transferror.

I find nothing in these sections or elsewhere in the Act vesting in the registrar any authority to cancel a certificate of title *in toto*, except upon the presentation of a transfer executed in accordance with the Act conveying the entire

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interest of the registered owner. Both the endorsements placed upon certificate of title No. 424 and upon the duplicate certificate were made without authority and the act of issuing to Podgorny a certificate of title for the quarter section, reserving only coal but omitting the reservation of the petroleum, was also unauthorized.

It is, however, in the view that I take of this matter unnecessary to decide whether these unauthorized acts were of no effect, as were the unauthorized acts of Logan and those acting under his direction. It is sufficient for the purpose of this appeal to say that, in any event, the title of the C.P.R. to the petroleum was not thereby extinguished. Whether the legal effect of it, however, is to prevent the owner from asserting his rights against third parties is another question.

It is not an answer to the appellant's claim to say, in the words of Edwards J. in *Fels'* case, that the register is everything. That statement can be made with justification, in my opinion, in regard to the *Real Property Act* of Manitoba but the statutes are in this respect quite different.

Section 44 which declares the certificate of title to be conclusive evidence of the title of the owner, subject to the reservations in s. 43, provides two further exceptions:—

> except so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title and except as against any person claiming under a prior certificate of title granted under this Act or granted under any law heretofore in force relating to titles to real property in respect of the same land;

The concluding words of this section clearly bring within the exception the rights of those claiming under a prior certificate of title, even though it has been surrendered and a new certificate granted. I have pointed out above the difference between this section and s. 62 of the *Real Property Act* of Manitoba of 1885.

Section 104 (*d*) of the Alberta Act protects the rights of a bona fide transferee for value against the claim of a person deprived of his land by fraud in which the transferee has not participated, in this respect being in the same language as the Manitoba section. Clause (*e*) of s. 104, however (which was s. 103 (*e*) of the *Territories Real*

Property Act) as in the case of s. 44 contains no such protection. The concluding words of s-s. (5) of s. 116 of the Manitoba Act were:—

not being a transferee of such other land or deriving from or through a transferee thereof bona fide for value.

These words were omitted in s. 103 of the *Territories Real Property Act* and s. 44 of the 1906 Act.

It is to be noted in passing that ss. 105 and 107 of the Act of 1906 do not appear in the revision of 1942. In the revision of 1922 (c. 133) these sections appeared as s. 149 and 151 and both were repealed by s. 11 of c. 15 of the Statutes of 1935. The subject matter of the sections is dealt with in s. 157 of the 1942 revision and contains the provision that any person suffering loss or damage by the registration of another person as owner by misdescription in a certificate of title and who, by the provisions of the Act, is barred from bringing an action for the recovery of the land may sue the Registrar to recover damages.

The difference between the Alberta Act and that of Manitoba is again made clear in s. 106. The Alberta section, as will be seen, says that nothing in the Act shall be interpreted as to leave subject to an action for damages or deprivation of land any bona fide purchaser for valuable consideration on the claim that his transferror has been registered as owner through fraud or error, *except in the case of misdescription as mentioned in s. 104.* The section of the *Territories Real Property Act* which is reproduced in s. 106 was taken from s. 118 of the Manitoba Act of 1885, which declared the immunity from action of bona fide purchasers whose title was sought to be impeached by reason of fraud on the part of a predecessor in title, but also of such a purchaser against any claim:—

whether such fraud or error shall consist in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.

The subject of misdescription is also dealt with in ss. 108 and 121. It will be seen that the language of the exception with which we are concerned in s. 44 is:—

except so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title.

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The wording of clause (*e*) of s. 104 saves the rights of a person:—

> deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries.

The misdescription referred to in s. 106 is that referred to in s. 104(*e*). In s. 108 the language is:—

> by any error, omission or misdescription in any certificate of title or in any memorandum upon the same or upon the duplicate certificate thereof.

Section 121 which declares the immunity of the Assurance Fund in certain circumstances refers to a case in which damage or deprivation has been occasioned:—

> by any land being included in the same certificate of title with other land, through misdescription of the boundaries or parcels of any land.

These sections are to be read together. The duty of the registrar and the only steps authorized by the statute upon the presentation of the transfer from the C.P.R. to Podgorny was to place the memorandum on the original and duplicate certificate of title and to issue a new certificate of title describing the interest conveyed in that transfer. The certificate of title issued purported to state the nature of that interest but described it as being the land reserving only the coal, whereas the interest conveyed reserved also the mineral petroleum. In my opinion, this was a misdescription of the parcel conveyed. To restrict the meaning of the expression "boundaries or parcels" to the boundaries as defined by a reference to a survey, or simply as a particular quarter section, or to the limits of the property as defined in a description by metes and bounds, is, in my opinion, to fail to give any meaning to the word "parcels." That word, as has been shown, was taken from the Manitoba statute where it appears in conjunction with the word "boundaries" and that statute in turn was taken from the Victoria Statute. The inclusion of the word "parcels" in the Alberta Act and in these statutes cannot have been without the intention that it should be assigned a different meaning than "boundaries."

The further question to be decided is as to whether, by reason of the provisions of *The Land Titles Act*, the claim by the C.P.R. to the minerals can be asserted against Anton Turta and his successors in title. At common law, such

claim would be sustained. The claim of the respondents must be supported, if at all, on the ground that being bona fide purchasers for value the statute protects them against the claim. If the statute were similar to the Real Property Act of Manitoba the claim of the Railway Company would, in my opinion, fail. But, as I have pointed out, from the very outset, when the Dominion by the Territories Real Property Act introduced this system of land holding into the Northwest Territories, the rights of those deprived of land by misdescription have been preserved. We cannot concern ourselves with the reason for this departure from what has long since been understood, at least in the Province of Manitoba, as the principle underlying the Torrens system. That is as it was described in the passage from the judgment in *Fels* v. *Knowles,* referred to by Sir Louis Davies in the *Boulter Waugh* case.

There are, it is true, certain sections of the Alberta Statute which, if considered alone and construed literally, would appear to lend some support to the claim of the respondents, that the statement of the law in *Gibbs* v. *Messer* applies without reservation in Alberta. As an illustration of this, s. 25 says that the memorandum endorsed by the registrar on the duplicate certificate of title shall be received in all courts of law as conclusive evidence of its contents and that the instrument of which it is a memorandum has been duly registered. Read alone, divorced from the rest of the Act, this would mean that as a matter of evidence the unauthorized memorandum endorsed on certificate No. 424 that the land without any reservation had been transferred to Podgorny could not be controverted. But this would render meaningless the reservations in ss. 44, 104 and 106, to which I have referred, and cannot accordingly be so construed. Section 25, it may be noted, in this respect reenacted s. 43 of the *Territories Real Property Act* which was taken from s. 35 of the Manitoba Act of 1885. The section may have fitted into an Act where "the register is everything" but it cannot be construed literally in the Alberta Act.

Again some reliance is placed upon s. 135 which says that, except in the case of fraud (presumably to which such person is party or privy), a person proposing to take a transfer from the owner of any land for which a certificate

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of title has been granted shall not be found or concerned to enquire into or ascertain the circumstances in which, or the consideration for which, the owner became registered. This is another section, the predecessor of which was simply taken from s. 141 of the *Real Property Act* of Manitoba. It can be reconciled for obvious reasons with the provisions of the Manitoba Statute and, if it means that a prospective purchaser is not by virtue of s. 47 concerned to enquire whether the title holder holds as trustee for others and, as stated by that section, is to be deemed the absolute and beneficial owner of the land, it can be reconciled with the rest of the Alberta Act. But I think it cannot be so construed as to defeat the rights of those deprived of their property by misdescription which are expressly reserved to them by the sections to which I have referred and of which they could only be deprived by statute.

It has also been contended that the language of s. 108 lends some support to the position of the respondents in that it refers, *inter alia,* to a person deprived of lands "by any error, omission or misdescription in any certificate of title" who, by the provisions of the Act, is barred from bringing an action for ejectment. The history of this section, however, must be considered. It reproduces s. 108 of the *Territories Real Property Act* which was taken from s. 120 of the Manitoba Act of 1885. In the Manitoba Act, where a person deprived of land by misdescription could not recover it from a bona fide purchaser for value, the meaning of s. 120 was manifest. However, while omitting this protection in the *Territories Real Property Act* and in ss. 42, 104 and 106 of the Act of 1906, the reference to misdescription was not deleted. Unless these three sections are to be ignored, the part of s. 108 to which I have referred is meaningless.

I am further of the opinion that the petroleum was adequately excepted from the operation of the transfer to Podgorny by the language of that instrument and the ownership of that mineral remained in the Railway Company.

I would allow this appeal with costs as against the respondent and the third parties in this Court and in the Appellate Division and dismiss the action with costs, and

direct that judgment be entered in favour of the C.P.R. against the third parties in the terms of the prayer for relief in the third party notice, and for Imperial Oil Company Limited upon its counterclaim, with costs.

CARTWRIGHT J.:—(dissenting) The facts and relevant statutory provisions are fully set out in the reasons of my brother Locke.

I understood all counsel to be in agreement that the appeal should be decided on *The Land Titles Act* of Alberta as it appeared in 6 Edw. VII (1906) c. 24, and in any event the subsequent changes do not affect the point which appears to me to be decisive. I shall refer to sections by the numbers which they bore in the 1906 Statute and to the appellant Railway Company as "the C.P.R.".

For the reasons given by my brother Locke I agree with his conclusion that if the facts of this case fall within clause (*e*) of s. 104 of the Act the appeal must succeed, although the respondent Anton Turta is regarded as a purchaser in good faith and for value who purchased relying on the register and without notice of the appellants' claims. While certain sections of the Act such as 25, 42, and 135, if read alone, would seem to make the certificate of title of such a purchaser conclusive, they must be construed with ss. 44, 104 (*e*) and 106 and the last mentioned group of sections must be read as provisos to the group first mentioned and as incorporated with them. I do not understand any of the learned judges in the courts below to differ from this view, and, if authority for it is required, it will be found in the judgment of the Court of Appeal in New South Wales in *Marsden v. McAlister* (1), particularly at page 306 in the judgment of the Chief Justice and at page 307 in the judgment of Sir G. Innes J.

Section 104 provides:—

104. No action or ejectment or other action for the recovery of any land for which a certificate of title has been granted shall lie or be sustained against the owner, under this Act in respect thereof, except in any of the following cases, that is to say:—

* * *

(*e*) The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries, as against the owner of such other land;

(1) (1887) 8 N.S.W.R. 300

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Does then the claim of the C.P.R. to the petroleum under the N.W. quarter of section 17 fall within clause (*e*)? In my opinion it does.

It will be observed, (i) that the C.P.R. is a person, at present (if the judgments below stand) deprived of the petroleum and claiming it; (ii) that the petroleum is included in Anton Turta's certificate of title as owner of the quarter-section, and (iii) that the C.P.R.'s claim is against Anton Turta. Up to this point the claim falls within the words of clause (*e*).

The next question to arise is whether the petroleum claimed falls within the words "any land" in the first line of clause (*e*). Petroleum is admittedly a mineral. The relevant words in the transfer to Podgorny are:—"excepting and reserving unto the Canadian Pacific Railway Company all coal and petroleum which may be found to exist within upon or under the said land". Whether the effect of these words was to except the petroleum and so to sever it both as to estate and possession from the estate in possession of the lands described in the transfer or whether, as Mr. Manning argues, their effect is not to except the petroleum but only to reserve a *profit à prendre,* the result appears to me to be the same. If the petroleum is regarded as an excepted mineral it is land under the definition of "land" in section 2 (*a*) of the Act. If, on the other hand, the right to the petroleum is regarded as a *profit à prendre* reserved to the C.P.R. then it is an incorporeal hereditament and again falls within the definition of "land" in section 2 (*a*). I can find nothing in the context to make the definition section inapplicable. I conclude therefore that the petroleum, or the right thereto, does fall within the words "any land".

The next question is whether Anton Turta's certificate of title in which the petroleum is included is a certificate of title "of other land", within the words of clause (*e*). I think that it is. Had there been in existence certificates accurately declaring the true state of the title, Anton Turta would have held a certificate of title to the quarter-section less the petroleum thereunder and the C.P.R. would have held a certificate of title to the petroleum under the quarter-section. Each would have been a certificate of title

to land and each would have excluded the land included in the other. The certificate of Anton Turta should have been and was for land other than the petroleum but, wrongly, in addition thereto included the petroleum.

The next question is whether the land consisting of the petroleum, or the right thereto, was included in Anton Turta's certicate of title "by misdescription of such other land or of its boundaries". It is not suggested that the boundaries of the land included in Turta's certificate are misdescribed; but the words of clause (*e*) contemplate a type of misdescription of land which does not involve any misdescription of its boundaries. The two types of misdescription are stated disjunctively. If one takes the word "misdescription" in its ordinary meaning, which is simply wrong description, it appears to me that when the correct description of the land to which title has been acquired and for which a certificate is to be issued is a certain quarter-section without the petroleum thereunder such land is wrongly described if it is described as being the quarter-section including the petroleum.

All the learned judges in the courts below take the view that to bring a case within the terms of section 104 (*e*) there must be "two or more distinct parcels of land". In my respectful view, assuming the proposed test to be a valid one, there are here two distinct parcels of land, one being the quarter-section less the petroleum thereunder, and the other being the petroleum under the quarter-section.

The case of *Hamilton* v. *Iredale* (1), relied upon in the courts below, is distinguishable on the facts. The dispute in that case was as to the ownership of a certain piece of land to which the plaintiff was able to show a good documentary title commencing with a Crown grant dated October 8, 1799, but for which a certificate of title had been issued to the defendant on February 4, 1868. In the Court of Appeal the case was argued and dealt with on the assumption that the certificate was granted to the defendant on proof of a possessory title dating from 1847 or earlier. The Court of Appeal held that the exception contained in s. 115 (5) of the Act there under consideration

(1) 1903) 3 N.S.W. S.R. 535.

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could have no application to such a state of facts. That section provided that no action of ejectment for the recovery of land should lie or be sustained against the person registered as proprietor thereof, except in certain cases of which s-s. 5 was:—

> The case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries as against the registered proprietor of such other land not being a transferee thereof *bona fide* for value.

It would seem obvious that there was no misdescription. The land in question was accurately described. The question was whether the proof of the plaintiff's documentary title could prevail against the defendant's certificate. At page 550 of the report Walker J. says:—"Misdescription is where, intending to describe A, I describe B, or so describe A as to make it include B." On the facts of the case at bar these words appear to me to apply to the act of the Registrar when he issued Podgorny's certificate of title. His intention was, presumably, to perform his duty under the Act and to issue to Podgorny a certificate for the land which had been transferred to him, no more and no less. That land was, and should have been described in the certificate as, "the N.W. quarter of Section 17, excepting and reserving unto the Canadian Pacific Railway Company all coal and petroleum which may be found to exist within upon or under the said land". Instead of this correct description the certificate contained the following description:—"The N.W. quarter of section 17 reserving unto the Canadian Pacific Railway all coal on or under the said land." The result is that the Registrar intending to describe the quarter-section less the petroleum and coal described the quarter-section less the coal but including the petroleum. This was, in my opinion, a misdescription.

I conclude, therefore, that on the facts of the case at bar the claim of the C.P.R. to the petroleum in question is a case falling within the words of clause (*e*) of s. 104 and I am unable to find any other provision in the Act which requires a restriction or modification of the ordinary meaning of the words used in such clause.

The conclusion at which I have arrived on the point dealt with above renders it unnecessary for me to consider the ground on which Clinton Ford J.A. would have allowed

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the appeal or the other points urged by counsel in support of the appeal. In regard to the submissions of the respondents (i) that Anton Turta obtained title to the petroleum by adverse possession and (ii) that the reservation of the petroleum to the C.P.R. was void as offending against the rule against perpetuities, I agree for the reasons stated by Clinton Ford J.A. that these arguments must be rejected.

I would dispose of the appeal as proposed by my brother Locke.

Appeal dismissed with costs.

Solicitor for the C.P.R.: *R. R. Mitchell.*

Solicitors for Imperial Oil Ltd.: *Nolan, Chambers, Might, Saucier, Peacock & Jones.*

Solicitors for Anton Turta and Montreal Trust Co.: *Milner, Steer, Dyde, Poirier, Martland & Layton.*

Solicitors for Nick Turta and Wm. Sereda: *Manning & Dimos.*

IN THE MATTER OF A REFERENCE UNDER THE CONSTITUTIONAL QUESTIONS DETERMINATION ACT, R.S.B.C. 1948, c. 66.

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*Dec. 3, 4, 7.

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*Jun. 21.

AND

IN THE MATTER OF REGINA V. SNIDER

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Privileged documents—Evidence—Production of income tax returns sought in a criminal prosecution—Objection by Minister—Whether contrary to public policy—Income War Tax Act, R.S.C. 1927, c. 97, s. 81.—Income Tax Act, 1948, S. of C. 1948, c. 52, s. 121.—Excess Profits Tax Act, 1940, S. of C. 1940.

At a trial under the *Criminal Code*, the Crown in the right of the Province subpoenaed the Director of Taxation of the District of Vancouver requiring him to give evidence and to produce the income tax returns of the accused. The Minister of National Revenue, in an affidavit, objected to the production of the documents and to the giving of oral evidence, basing his claim that it would be prejudicial

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

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to the public interest on s. 81 of the *Income War Tax Act* and on s. 121 of the *Income Tax Act,* which prohibit such communications to any person other than a person "legally entitled thereto".

Consequent to the ruling of the trial judge that the returns must be produced and, if relevant, given in evidence, the following questions were submitted for the opinion of the Court of Appeal for British Columbia pursuant to the *Constitutional Questions Determination Act,* R.S.B.C. 1948, c. 66:

1. On the trial of a person charged with an indictable offence, where a subpoena *duces tecum* has been served on the appropriate Income Tax official to produce before the Court on such trial returns, reports, papers and documents filed pursuant to the provisions of the *Income Tax Act,* and the *Income War Tax Act* or the *Excess Profits Tax Act, 1940,* and to give evidence relating thereto, and where the Minister of National Revenue has stated on oath that in his opinion such evidence and the production of such returns, reports, papers and documents would be prejudicial to the public interest; ought such Court to order the production of such returns, reports, papers and documents and the giving or oral evidence relating thereto: (*a*) when such subpoena is served at the instance or on behalf of the Attorney General of the Province; (*b*) when such subpoena is served at the instance or on behalf of the accused?
2. Are the documents hereinbefore mentioned in Question 1, for the purposes of a subpoena *duces tecum* directed to an Income Tax Official of the Income Tax Department, in the possession of the said official to the extent that the Court may order them produced in Court pursuant to the said subpoena, or are the said documents in the possession of the Crown?
3. Do Sections 81 and 121 of the *Income War Tax Act* and the *Income Tax Act, 1948,* respectively affect the right of the Minister of National Revenue to object on the ground of prejudice to the public interest to the production of the documents hereinbefore mentioned in Question 1 and to the giving of oral evidence by an Income Tax official relating to returns made under the said Acts?

On appeal to this Court, it was held:

1. (Per Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey and Fauteux JJ.) That the Court may order the production of the documents in question and the giving of oral evidence relating thereto, unless special facts or circumstances appearing in the Minister's affidavit make it clear to the Court that there might be prejudice to the public interest in the disclosure, but only to the extent of the document or documents within the special facts or circumstances.
2. (Per Locke J.) That the Court may order the production of the documents in question and the giving of oral evidence relating thereto to enable the Court to determine whether the facts discoverable by the production of the documents would be admissible, relevant or prejudicial or detrimental to the public welfare in any justifiable sense.
3. (Per Cartwright J.) That the Court may order the production of the documents in question and the giving of oral evidence relating thereto, limited however to a case in which the objection of the Minister is to the production of any documents belonging to the class consisting of returns, reports, papers and documents filed

pursuant to the provisions of the *Income Tax Act*, the *Income War Tax Act* or the *Excess Profits Tax Act, 1940*, on the ground that they belong to that class.

4. (Per Curiam) That for the purposes of a subpoena *duces tecum* directed to an Income Tax Official of the Income Tax Department, the documents in question are in the possession of such official to the extent that the Court may order them produced in Court pursuant to a subpoena.

5. (Per Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey, Cartwright and Fauteux JJ.) That the Minister has no right to object to the production of the documents in question.

6. (Per Locke J.) That neither s. 81 of the *Income War Tax Act* or s. 121 of the *Income Tax Act, 1948*, affect the right of the Minister to object on the ground of public interest to the production of such documents in criminal proceedings and the giving of evidence relating thereto, but the effect of the sections is to render the objections subject to the discretionary jurisdiction and consequent order of the trial judge as set forth in the answer to Question 1.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) in the matter of a reference under the *Constitutional Questions Determination Act*, R.S.B.C. 1948, c. 66, in respect of the production in Court of Dominion Income Tax returns in a criminal prosecution.

F. P. Varcoe, Q.C. and *D. H. W. Henry* for the Attorney General of Canada.

L. Kelley, Q.C. and *J. J. Urie* for the Attorney General of British Columbia.

The judgment of Rinfret C.J. and of Rand J. was delivered by:—

RAND J.:—This reference raises an important question of the right of the Minister of National Revenue to object to the production before a court of the income returns of a person charged in criminal proceedings; and since there are many aspects to the general question of privilege claimed by the Crown in relation to which different considerations must be taken into account, I think it desirable to keep within the boundaries which the facts in this case have set for us. As the matter relates to evidence sought by either the Crown or the accused in a criminal prosecution, it is to be distinguished formally from a similar step in civil proceedings.

As Mr. Varcoe seemed to put it, any document coming into the hands of persons engaged in the work of any branch of the Executive, is ipso facto, on the ground of public

(1) [1953] 2 D.L.R. 9; 8 W.W.R. (N.S.) 1; C.T.C. 136.

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policy, exempt from production on the objection of the departmental minister and for that proposition he cited many authorities concluding with that of *Duncan* v. *Cammell Laird & Company* (1). When these authorities are closely examined, however, it will be found that they cannot be taken to proceed on any principle so broadly stated, and it becomes necessary, then, to enquire into the nature of testimonial privilege against disclosure and the grounds on which it is made effective in legal proceedings.

What is in debate are confidential communications and, for a better understanding of the question, the distinction is to be kept in mind between them and the matter which they deal with or express, that is, there may be confidential or secret matter apart from that of the communications themselves but to which they relate, or the secrecy may exist as to the matters which the communications themselves create or indeed to the fact of the communication alone. It requires as its essential condition that there be a public interest recognized as overriding the general principle that in a court of justice every person and every fact must be available to the execution of its supreme functions. As Lord Chancellor Hardwicke, in speaking against the Bill For Indemnifying Evidence, Cobbett's Parliamentary History 12, 675, 693, 1742, declared:—

> It has, my lords, I own, been asserted by the noble duke that the public has a right to every man's evidence—a maxim which in its proper sense cannot be denied. For it is undoubtedly true that the public has a right to all the assistance of every individual.

And this applies as fully to the private suitor or an accused as to the public. The privilege is one to be asserted by or on behalf of a person or persons including the Crown to whose benefit it enures, and it may be waived only by the beneficiary; if the disclosure is proposed in a proceeding between third parties, the court itself must interpose to safeguard the privilege.

It springs, then, from a confidential communication coupled with a paramount public interest in permitting the secrecy surrounding the communication or its contents to be maintained. This is perhaps best illustrated by the privilege relating to communications between husband and wife or between solicitor and client. The public interest in

(1) [1942] A.C. 624.

the latter relationship lies in securing to every citizen the skill and ability of a professional class to enable him to protect his own interest in life, liberty and property within the law and before its tribunals. If that means were not, in the widest sense, made available to him he would be denied that justice which it is a fundamental object of our political organization to secure to him. The client may, therefore, in absolute freedom, disclose to his solicitor the details of his business or personal matters on which he seeks legal advice or action, and upon that communication the law places the seal of confidence which only the client himself can remove. Of a similar nature are communications by an informer to public enforcement officers and those between officers of state on national or international matters expressing views or making proposals on governmental policy which may affect the peace or safety of the country and which the ministers of the Crown may even be sworn not to disclose. There may also be external matters such as of defence which equally, for the same reasons, must be held to be within that safeguard, the facts of which may, in the discretion of ministers or government, be disclosed as considered desirable. Is there, then, a privilege of that nature here? If so, to whom does it run and what is the public policy supporting it?

It is claimed that the circumstances give rise to such a privilege in the Crown and that the public interest emanates from an undertaking on its part, implied by the *Income Tax Act,* toward all income taxpayers that the contents of the returns of none of them will be revealed beyond the circle of officials concerned in administering the statute. Sec. 121 of that *Act* forbids the disclosure of and information obtained under it to any person "not legally entitled thereto". For the purposes of his argument, however, Mr. Varcoe puts that aside as being irrelevant to the proposition urged.

I am unable to agree with either of these contentions. I can find nothing in the statute indicating such an undertaking. The disclosure of a person's return of income for taxation purposes is no more a matter of confidence or secrecy than that, say, of his real property which for generations has been publicly disclosed in assessment rolls. It is in the same category as any other fact in his life and the production in court of its details obtained from his books or any

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other source is an everyday occurrence. The ban against departmental disclosure is merely a concession to the inbred tendency to keep one's private affairs to one's self. Now that, in this competitive society, is a natural and unobjectionable tendency but it has never before been elevated to such a plane of paramount concern. The most confidential and sensitive private matters are daily made the subject of revelation before judicial tribunals and it scarcely seems necessary to remark on the relative insignificance to any legal or social policy of such a fact as the income a man has been able to produce. I should say, therefore, that the only privilege furnished is that given by the statute and that it is a privilege for the benefit of the individual and not the Crown.

The prohibition of the statute is against disclosure to others than the departmental staff charged with the assessment but since the public interest in the administration of justice transcends that of any individual in the details of his ledger account, the ban is to be taken to be directed against a voluntary disclosure only and has no application to judicial proceedings. The intervention of the minister, as would be that of the person himself, is therefore ineffectual.

The second question of the reference suggests a distinction between possession of the Crown and by departmental officials administering the Act. The "Crown" as used in this sense is assumed to carry with it some mystical character which removes the case from the level on which taxation takes place. Where in constitutional or high governmental functions the prerogative or even statutory power is exercised in relation to the possession of a document whether personally by the Sovereign or by means of secretaries, ministers, or other high officers of state acting themselves or through subordinate officers, there are or may be undoubtedly elements that give the possession a special character. But here is a statute providing for the assessment and collection of taxes by an administrative department which the statute itself sets up. The subject is placed in communication with the officials of that department in immediate relation to a function that directly and individually affects his private financial affairs. Neither the prerogative nor any constitutional or political function is involved. To suggest that either in the case of protecting

or attacking the private interest of the taxpayer the custody of tax returns rendered to the department can be refused production on the ground of the nature of the possession is to attract some vague magic sensed or associated with the prerogative to the routine of administrative government. All governmental and administrative activity may be said to be carried out by the Executive but it is not in these levels of administration, which might extend to every clerk, say, of a government railway, that any degree or shade of possession in the course of executive action is, by a reference to the Crown, to be placed beyond the reach of the courts.

Once the nature, general or specific as the case may be, of documents or the reasons against its disclosure, are shown, the question for the court is whether they might, on any rational view, either as to their contents or the fact of their existence, be such that the public interest requires that they should not be revealed; if they are capable of sustaining such an interest, and a minister of the Crown avers its existence, then the courts must accept his decision. On the other hand, if the facts, as in the example before us, show that, in the ordinary case, no such interest can exist, then such a declaration of the minister must be taken to have been made under a misapprehension and be disregarded. To eliminate the courts in a function with which the tradition of the common law has invested them and to hold them subject to any opinion formed, rational or irrational, by a member of the executive to the prejudice, it might be, of the lives of private individuals, is not in harmony with the basic conceptions of our polity. But I should add that the consequences of the exclusion of a document for reasons of public interest as it may affect the interest of an accused person are not in question here and no implication is intended as to what they may be.

What is secured by attributing to the courts this preliminary determination of possible prejudice is protection against executive encroachments upon the administration of justice; and in the present trend of government little can be more essential to the maintenance of individual security. In this important matter, to relegate the courts to such a subserviency as is suggested would be to withdraw from them the confidence of independence and judicial appraisal that so far appear to have served well the organization of

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which we are the heirs. These are considerations which appear to me to follow from the reasoning of the Judicial Committee in *Robinson* v. *South Australia* (1).

I would therefore answer the questions as follows:—

Question I: (*a*) and (*b*) Yes, unless special facts or circumstances appearing on the minister's affidavit make it clear to the court that there might be prejudice to the public interest in the disclosure, but only to the extent of the document or documents within the special facts or circumstances.

Question II: The documents are in the custody of officials to the extent that the court may order them produced in court pursuant to subpoena.

Question III: The minister has no right to object to the production of the documents.

Subject to the variation indicated, the appeal must be dismissed.

The judgment of Kerwin, Taschereau, Kellock and Fauteux JJ. delivered by:—

KELLOCK J.:—In support of the appeal Mr. Varcoe relied heavily upon the decision of the House of Lords in *Duncan* v. *Cammell Laird* (2): The present questions, however, relate exclusively to criminal proceedings, and it is stated by Viscount Simon L.C., in the above case at p. 591 that

> The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same.

Even in criminal proceedings it has been held, for example, that the usual rule that the channel of information giving rise to a prosecution is not to be disclosed upon the ground of public interest, is not an absolute rule. In *Hardy's* case (3), Eyre C.J. said:

> . . . there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed: if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it.

(1) [1931] A.C. 704.
(2) [1942] 1 A.E. 587; [1942] A.C. 624.
(3) (1794) 24 State Trials 199 at 808.

In referring to the above statement and to others of the same character, Viscount Simon said at the above page:

> Indeed, Eyre, C. J., in the passage referred to appears only to be restricting needless cross-examination.

There is, accordingly, not only a public interest in maintaining the secrecy of documents where the public interest would otherwise be damnified, as, for example, where disclosure would be injurious to national defence or to good diplomatic relations, or where the practice of keeping a class of document is necessary for the proper functioning of the public service, but there is also a public interest which says that "an innocent man is not to be condemned when his innocence can be proved"; per Lord Esher M.R., in *Marks* v. *Beyfus* (1). It cannot be said, however, that either the one or the other must invariably be dominant.

In considering the applicability of the rule as to secrecy of documents in the public interest, it is to be remembered that where it does apply, not even a copy of a document, no matter from what source it may be forthcoming, nor any oral evidence as to its contents are admissible.

In *Chatterton* v. *Secretary of State for India*(2), A. L. Smith, L.J., laid down the rule at p. 195 as follows:

> The cases have gone the length of holding that, even if no objection were taken to the production of such a document by the person in whose custody it was, it would be the duty of the judge at the trial to intervene, and to refuse to allow it to be produced: and it has further been held that, if an attempt were made to get round that difficulty by giving secondary evidence of its contents, the judge ought also to prevent that from being done.

Viscount Simon, L.C., referred to the above with approval in the *Cammell Laird case* at p. 595, where he said:

> The present opinion is concerned only with the production of documents, but it seems to me that the same principle must also apply to the exclusion of verbal evidence which, if given, would jeopardize the interests of the community.

In 1888, in *Hennessy* v. *Wright* (3), Wills J. had said:

> I think the above cases abundantly show that no sound distinction can be drawn between the duty of the judge when objection is taken by the responsible officer of the Crown, or by the party, or when, no objection being taken by anyone, it becomes apparent to him that a rule of public policy prevents the disclosure of the documents or information sought.

(1) (1890) 25 Q.B.D. 494 at 498. (2) [1895] 2 Q.B. 189.
(3) (1888) 21 Q.B.D. 509 at 521.

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It follows that if, in any case, the nature of the information sought to be placed before the court is not of such a nature that by no person or by no means may evidence be given of it, there is no public interest attaching to its non-disclosure. Moreover, as observed by Lord Blanesburgh in Robinson's case (1).

> . . . the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published.

The documents which are involved in the questions presently before the court are all documents which have been "filed" pursuant to the provisions of one or other of the designated statutes, that is, they are all documents emanating from a taxpayer or a person required by the legislation to furnish information. As pointed out by Viscount Simon in the Cammell Laird case at p. 592, the question as to what documents are non-producible on the ground of public interest, may arise with respect to the contents of a particular document or with respect to a *class* of document. The questions presently before the court relate exclusively to a class of document and not to the contents of any particular document within that class.

In considering the proper answers to be given to the questions asked, it is pertinent to consider whether, in the legislation itself, Parliament has indicated whether or not any secrecy, from the standpoint of the state, is to attach to documents of this class. The situation will sufficiently appear if I refer only to the provisions of the *Income Tax Act* (1948) 11-12 Geo. VI, c. 52.

By s. 82(2), which deals with appeals by a taxpayer to the Income Tax Appeal Board from the decision of the Minister, it is not the Crown but the appellant who is given the right to require a hearing in camera. The present form of the section emphasizes the intention of Parliament in that the right formerly given by the previous s. 68 to the Crown to require the hearing to be in camera, no longer exists. It would seem difficult to contend in the light of this legislation that any state secrecy was intended by Parliament to surround the class of document here in question. S. 93, which deals with appeals to the Exchequer Court, is

(1) [1931] A.C. 704 at 718.

similar to s. 82(2). These provisions, in my view, indicate that any secrecy which is in contemplation of the statute is for the benefit of the taxpayer only.

Nor do the sections just referred to stand alone. By s. 120(1) it is made an offence to make, participate in or assent to the making of a false or deceptive statement in a return. Proceedings to enforce the penalty provided for such an offence necessarily involve the production of the offending return in evidence. In fact, by s. 124(8) provision is made for the admission of a sworn copy of any document made by or on behalf of a taxpayer as prima facie evidence of the nature and contents of the document. In *Snell* v. *Haywood* (No. 2) (1), it was held by the Appellate Division of the Supreme Court of Alberta that proceedings of this character by way of summary conviction must be in public.

I respectfully agree with the decision in *Ship* v. *The King* (2), where it was held by the Court of King's Bench, Appeal Side, that s. 121, which deals with the subject-matter of secrecy as to "any information obtained under this Act", or "any written statement furnished under this Act", and which prohibits communication by employees of Her Majesty to anyone except a person "legally entitled thereto", applies in the administrative field only. The statute itself has nothing to say as to the identity of the persons so entitled but leaves that to be determined by the general law. In my opinion, a court of competent jurisdiction issuing its subpoena would, in any event, be within the language of the exception and entitled to enforce the production of any returns or statements filed. It may be observed that in *Ship's case* the Crown did not, on that occasion, even object to the production of such documents.

The decision reached by a divided court in British Columbia in the case of *Weber* v. *Pawlik* (3), is one with which, with respect, I cannot agree. That was a partnership action in which the plaintiff alleged that the defendant, by concealing and mis-stating to him the firm's earnings, had deprived him of his proper share of the profits and

(1) [1947] 3 D.L.R. 586. (2) (1949) 95 C.C.C. 143.
(3) [1952] 5 W.W.R. (N.S.) 49.

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eventually induced him to sell his interest at an undervalue. The plaintiff had left the management of the partnership business to the defendant, the latter making the income tax returns on its behalf, while furnishing the plaintiff with statements as to profits.

After the plaintiff had sold out his interest to the defendant, he was assessed for taxes in respect of periods during which the partnership was in existence, on profits substantially in excess of those which had been reported to him by the defendant. On application to the Income Tax authorities, the plantiff was given full particulars of the returns the defendant had filed, which were, of course, fully as much those of the plaintiff as of the defendant, but at the trial, on objection of the Minister, the returns were excluded. The objection appears to have involved the contention that the returns were not producible in the public interest because "confidential".

This decision, with respect, involves a misconception not only of the effect of the statute itself but also of the scope of the rule purported to be invoked, as, if applicable, no evidence of the contents of the returns could have been given either by production of a copy or by oral evidence. This could scarcely have been contended in such a case as the defendant would be obligated to make full disclosure of the income of the partnership.

Mr. Varcoe refused to take any such position in the case at bar but based the appeal upon the ground of an undertaking on the part of the Crown that tax returns will be kept confidential by the department. Neither in criminal nor in civil proceedings are documents which are merely "official" or "confidential" within the rule as to non-disclosure on the ground of public interest. In *Asiatic Petroleum Company* v. *Anglo-Persian Oil Company Limited* (1), Swinfen Eady, L.J., (with the subsequent approval of the Privy Council in *Robinson* v. *South Australia* (2), said p. 830 that the foundation of the rule

> is that the information cannot be disclosed without injury to the public interests, and not that the documents are confidential or official, which alone is no reason for their non-production: *Smith* v. *East India Co.*, 1 Ph. 60; *Hennessy* v. *Wright*, 21 Q.B.D., 509.

(1) [1916] 1 K.B. 822. (2) [1931] A.C. 704 at 714.

In my view of the statute, there is no provision as to the confidential character of returns filed except that provided for by ss, 82(2), 93 and 121, with which I have already dealt.

It only remains, in this aspect of the matter, to refer to the decision in re *Hargreaves* (1). That case arose under s. 115 of the *Imperial Companies Act,* 1862, which gives the court a discretion as to making an order for production of documents. The liquidator of the company there in question, in order to obtain evidence in support of a misfeasance summons against the directors, applied for an order that the surveyor of taxes should attend for examination and produce certain balance-sheets of the company which had been delivered to him for the purpose of assessment for income tax. The surveyor, who objected to produce on the ground that it would be contrary to the oath he had taken, was supported in his objection to production of the documents by the Board of Inland Revenue on the ground that to do so would be "prejudicial and injurious to the public interests and service".

Wright J., the judge of first instance, referred to the discretionary nature of the jurisdiction conferred by s. 115 and said that if he had sufficient evidence that in the opinion of the Board of Inland Revenue the Public service would suffer by the production of the documents, very strong ground ought to be shown before he would be justified in going behind the certificate of the Board and he refused to do so. His order was upheld on appeal, the court refusing to reverse the exercise of discretion below.

There is no such discretionary statutory provision applicable to the case at bar, but apart from that consideration, there are two matters to be noted. The first is the observation of Romer L.J., at p. 353:

> The question now before us is not necessarily the same as that which may possibly arise upon the hearing of the misfeasance summons if the judge has then to consider the question of a subpoena for the production of these documents.

The other is that the provisions of the statute there in question, namely, the *Income Tax Act* of 1842, 5-6 Victoria, c. 35, are not the same as those of the Canadian statute. Sections 38 and 189, unlike s. 121 of the Canadian statute, contain no exception with respect to communication.

(1) [1900] 1 Ch. 347.

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Apart from the statutory provisions to which I have referred, our attention was not called to any others, federal or provincial, having any relevancy.

For these reasons therefore, I would answer question 1(a) and (b) in the affirmative, unless special facts or circumstances appearing on the minister's affidavit make it clear that there might be prejudice to the public interest in the disclosure, but only to the extent of the document or documents within the special facts or circumstances.

As to question 2, it was held by Wills J. in *Hennessy* v. *Wright, ubi cit,* at p. 523, that whether documents with respect to which the privilege on the ground of public policy exists are the property of the Crown rather than the property of the witness is immaterial. The question remains the same. This is indicated also by Viscount Simon in the *Cammell Laird case* at p. 591, where he said:

> The question which we have to decide can only arise as a matter of law in England in cases where a subpoena is issued to a minister or department to produce a document (usually, but not necessarily, in a suit where the Crown is not a party), or where it intervenes in a suit between private individuals (as is the present case) to secure, on the ground of public interest, that documents in the hands of one of the litigants should not be produced. A similar situation might conceivably arise in litigation between the Crown and a subject where it was considered necessary to prevent the subject from producing a document in his possession on the ground that this would be injurious to public interests.

I would therefore answer that the documents are in the possession of the official to the extent that the court may order them produced in court pursuant to subpoena.

As to question 3, the minister has no right to object to the production of the documents.

Subject to the variations involved in these answers, the appeal should be dismissed.

ESTEY, J.:—The questions are restricted to a trial of an indictable offence, where a subpoena *duces tecum* has been served on the appropriate income tax official to produce before the court returns, reports, papers and documents filed pursuant to the provisions of the *Income Tax Act,* the *Income War Tax Act* or the *Excess Profits Tax Act, 1940,* and to give evidence relating thereto as to which the Minister of National Revenue has stated on oath that in his opinion such evidence and the production of such returns, reports, papers and documents would be prejudicial to the

public interest (a) when such subpoena is served at the instance or on behalf of the Attorney-General of a province and (b) when such subpoena is served at the instance or on behalf of the accused.

That considerations of public safety and security require that the utmost secrecy be maintained with respect to certain documents and information in relation thereto in the possession of the Crown has long been recognized. The courts, in the administration of justice, have accepted, as part of their duty, the maintenance of that secrecy and have not required either be adduced in evidence. The basis of the rule is stated by Lord Blanesburgh in *Robinson* v. *State of South Australia* (1):

> As the protection is claimed on the broad principle of State policy and public convenience, the papers protected, as might have been expected, have usually been public official documents of a political or administrative character. Yet the rule is not limited to these documents. Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production.

and by Viscount Simon in *Duncan* v. *Cammell, Laird & Co.* (2):

> The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld.

We are here concerned only with documents and information associated therewith filed pursuant to the requirements of the above-named statutes. Issues are constantly being tried before our courts relative to the liability of the taxpayer as well as prosecutions for the failure to perform duties imposed by these statutes. Accordingly, such documents and information in relation thereto have been repeatedly before the courts without any suggestion that the public safety or security has been at all imperilled; nor does there appear to be any reason in principle why these documents and information in relation thereto should, under ordinary circumstances, not be disclosed. It must follow that as a class these documents, in the ordinary course, do not involve questions of safety or security and as such their production would not be prevented upon the basis of public interest.

(1) [1931] A.C. 704 at 714. (2) [1942] A.C. 624 at 636.

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There may, however, with respect to one or more of these documents and information in relation thereto, be special circumstances which the minister may consider such as to require his taking the objection in respect of these particular documents. It is, therefore, pertinent to consider, in that event, the procedure to be followed.

We were referred to a great many authorities under which the rule has long been recognized but in which there has been much difference of judicial opinion as to the manner in which the objection to produce such documents ought to be made and the respective functions of the minister and the judge. More recent authorities appear to have established that the objection must be made by the minister presiding over the department, commission, board or other body in whose custody the documents, the production of which is requested, are held. Before making the objection the minister should acquaint himself with the facts and, as a responsible minister of the Crown, decide whether the production of these documents, or evidence in relation thereto, would or would not be detrimental to the public interest. If he comes to the conclusion that their disclosure would be detrimental, it would appear that the more convenient procedure would be that he embody in an affidavit sufficient of the facts to indicate the nature of his objection and that he, as a responsible minister of the Crown, has concluded that their production, or information in relation thereto, in a court of law would be detrimental to the public interest.

The presiding judge, who, upon the affidavit, is satisfied that the production of these documents and information in relation thereto might be detrimental to the public interest, would give effect to the minister's objection.

The different opinions expressed by the authorities as to the right of a presiding judge to examine the documents appear to have been resolved by the observations of Viscount Simon in the *Cammell, Laird case, supra.* There the House of Lords expressly disapproved of the practice followed in *Robinson* v. *State of South Australia, supra,* where the Judicial Committee "remitted the case to the Supreme Court with the direction that it was one proper for the exercise of the court's power of inspecting documents to determine whether their production would be prejudicial to the

public welfare". This view but emphasizes the fact that the documents and information in relation thereto to which the rule applies are such that neither should, by order of a court, be required to pass out of the possession of those officials of Her Majesty who are charged with their custody.

The *Cammel, Laird* was a civil case, but it would appear that the foregoing quotations and observations taken from or founded upon this case are relevant to the trial of an indictable offence.

Sections 81 of the *Income War Tax Act* and 121 of the *Income Tax Act, 1948* would appear to have been placed in the statutes to assure that those charged with the administration of the foregoing statutes would treat as confidential the information contained in or filed in relation to these documents. The reason and basis therefor is quite different and has no bearing on or relation to the above-discussed rule founded upon the necessity of public safety and security.

In my opinion the questions submitted should be answered as phrased by the majority of the Court and set forth in the reasons of my brothers Rand and Kellock.

LOCKE J.:—I respectfully agree with the opinion of the learned Chief Justice of British Columbia and with the answers made by him to the questions referred to the Court of Appeal and would accordingly dismiss this appeal.

CARTWRIGHT J.:—Question No. 1 may, at a first reading, appear to be ambiguous; but when it is considered in the light of the arguments addressed to us by both counsel it becomes clear that it is directed to a case in which the objection to the production of the documents called for in the subpoena *duces tecum* is based not upon any apprehended danger to the public interest from disclosure of the matter contained in the particular returns and other documents of which production is sought but upon the view entertained by the Minister that as a matter of public or departmental policy he ought to object to the production from the custody of the department of any income tax returns or correspondence relating thereto. The reason assigned in support of this view is that, while the returns are made under statutory compulsion, the taxpayers rely in making them upon an implied undertaking

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that the department will treat them as confidential communications and that it would be prejudicial to the public interest that this implied undertaking should be dishonoured.

In my view there is nothing in the acts referred to in the question which affirms the existence of any representation or undertaking on the part of the department that its officials will not produce the returns if called upon to do so by regular process issued from a court in which the trial of an indictable offence is pending. Sections 81 and 121 of the *Income War Tax Act* do not assist the appellant on this point. I agree with the view expressed by Barclay J. in *Ship* v. *The King* (1) that the judicial officer presiding at the trial of a person charged with an indictable offence is a person legally entitled to the information referred to in those sections if the production of such information is duly called for by subpoena and is relevant to the pending charge. For the purposes of the question before us, such relevance is assumed.

It is said for the appellant, however, that once the Minister has stated on oath that in his opinion the production of such returns would be prejudicial to the public interest while it is still the function of the court out of which the subpoena issued to decide whether or not production shall be ordered that court must decide the question by accepting the objection of the Minister as conclusive and giving effect to it. It is argued that this conclusion flows irresistibly from the judgment of the House of Lords in *Duncan* v. *Cammell Laird and Company* (2). In approaching this argument it is necessary to bear in mind the often quoted words of Lord Halsbury in *Quinn* v. *Leathem* (3):

> . . . Now, before discussing the case of *Allen* v. *Flood* and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from

(1) (1949) 95 C.C.C. 143 at 155. (2) [1942] A.C. 624.
(3) [1901] A.C. 495 at 506.

it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

It is at once apparent that the facts with which the Law Lords were dealing in *Duncan* v. *Cammell Laird and Company* were altogether different from the assumed facts upon which the questions before us are based. Moreover, as is pointed out by my brother Kellock, Viscount Simon L.C. was careful to state (at page 633) that the judgment of the House was limited to civil actions.

In the case at bar, in the supposed state of facts, the Minister has not only asserted his objection but has fully informed the Court as to the grounds upon which it is founded and these appear to me to be grounds of the sort which Viscount Simon indicated (at page 642) "would not afford to the Minister adequate justification for objecting to production".

Perhaps unnecessarily, I wish to emphasize that any opinion which I have expressed in the course of these reasons is strictly limited to the supposed state of facts upon which the first question, as I have interpreted it above, is based. Particularly, I do not think we are called upon to express any opinion as to what would have been the result if the objection of the Minister had been based on any other grounds than those indicated above or as to whether, as the answer to Question 1 given by the majority of the Court of Appeal in British Columbia might be thought to suggest, there may be circumstances in which the judge presiding at the trial of a person charged with an indictable offence may privately examine a document sought to be introduced in evidence.

I would answer Question 1 (a) and (b) as follows: Yes. This answer is however limited, as I have interpreted the question to be limited, to a case in which the objection of the Minister is to the production of any documents belonging to the class consisting of returns, reports, papers and documents filed pursuant to the provisions of the *Income Tax Act*, the *Income War Tax Act* or the *Excess Profits Tax Act, 1940* on the ground that they belong to that class.

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I would answer Questions 2 and 3 as proposed by my brother Kellock.

Appeal dismissed.

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

Solicitor for the Attorney General of British Columbia: *E. Pepler.*

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*Mar. 19
*Jun. 26

BETWEEN:

HARRY KOWBEL .....APPELLANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law—Conspiracy—Whether a husband and a wife can conspire together alone to commit the indictable offence of forgery—Criminal Code, ss. 16, 21, 573.

The appellant, charged under s. 573 of the *Criminal Code,* was convicted of having unlawfully conspired with his wife to commit the indictable offence of forgery. His conviction was affirmed by the Court of Appeal for Ontario.

Held (Fauteux J. dissenting), that the appeal should be allowed and the conviction quashed.

A husband and a wife cannot be found guilty under s. 573 of the *Criminal Code* of conspiring with each other alone to commit the indictable offence of forgery, because judicially speaking they form but one person and are presumed to have but one will, and one person alone cannot conspire.

Per Fauteux J. (dissenting): The common law rule that a husband and a wife cannot be guilty of conspiring alone together appears to have stemmed from the doctrine of conjugal unity. But today that doctrine has disappeared and husbands and wives have each an independent legal entity, in both the field of civil and criminal matters. Consequently, it must be concluded that the rule has perished with the disappearance of the reason which gave it life and support.

Assuming that such a conclusion is not justified, the provisions of s. 16 of the *Criminal Code* cannot apply since the rule has been altered by and is, at least, inconsistent with the provisions of the *Criminal Code.*

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*PRESENT: Kerwin, Taschereau, Estey, Cartwright and Fauteux JJ.

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APPEAL from the judgment of the Court of Appeal for Ontario (1), affirming the appellant's conviction on a charge of conspiracy with his wife to commit the indictable offence of forgery.

F. L. O'Donnell for the appellant.

W. C. Bowman Q.C. for the respondent.

The judgment of Kerwin and Taschereau JJ. was delivered by:—

TASCHEREAU J.—The appellant was convicted of unlawfully conspiring with one Beatrice Kowbel to commit the indictable offence of forgery, and sentenced to five months in jail. The Court of Appeal (1) dismissed the appeal, Mr. Justice Hogg dissenting. Beatrice Kowbel is the appellant's wife, and the only point at issue before this Court, is whether or not a husband and wife are capable in law of conspiring together. The Court of Appeal held that they could.

The charge was laid under section 573 of the *Criminal Code*. It is to the effect that *every one* is guilty of an indictable offence, who in any case not otherwise provided for, conspires with any person to commit any indictable offence. It is submitted that these broad terms necessarily include husbands and wives, and that their matrimonial status does not eliminate the essential element of duality in the crime of conspiracy. It has also been urged that the old presumption that a married woman committing an offence, did so under compulsion because she committed it in the presence of her husband, has now been abolished (*Criminal Code* 21), and replaced by a doctrine more in conformity with our modern times.

It is trite law that husbands and wives may invoke not only the defences afforded to them by the *Code*, but also all the other defences known to the common law, which were in force in 1892, unless they are inconsistent with some dispositions of the *Code*. (*Criminal Code*, section 16).

I have reached the conclusion that at common law, a husband and a wife could not be found guilty of conspiracy, because judicially speaking they form but one person, and

(1) [1953] O.R. 761; 106 C.C.C. 65; 17 C.R. 69.

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are presumed to have but one will. Of course, the theory of unity between husbands and wives and the defence of compulsion must not be confused. (Lush, "Husband and Wife" 4th Ed. p. 597). Both are entirely different. And as the defence raised in the present case belongs to the former category, it follows that it stands unaffected by the abolishment of the presumption of coercion. For instance, the doctrine of presumption of coercion was applied when a wife committed a crime in the presence of her husband, but the fiction that they are but one person in law is the underlying principle at the root of the law which says that during cohabitation, one cannot be convicted of stealing the property of the other.

I do not think that the words "every one" found in section 573 (Cr. C) dealing with conspiracy include husbands and wives any more than they include children under 7 years of age or insane persons. These words are defined in section 2(13) (Cr. C.), and they apply only to persons in relation to such acts and things as they are capable of doing. The incapacity to conspire is not statutory, but it is one of those old common law defences, which an accused person is at liberty to raise before the courts of this country. (16 Cr. C.). And far from being inconsistent, I think that it is in harmony with all the other dispositions of the Code dealing with incapacities resulting from marriage.

As far back as 1365, during the reign of Edward II, we find a reported judgment (Year Books, 38 Edward III, Parts 2-3) written in Norman, and of which the Court obtained a translation. In that case, according to the report, it was common ground between the parties that a husband and a wife could not conspire together, but a further question arose because a third party was involved in the alleged conspiracy. "The writ was abated" on the ground that the facts did not reveal any act of conspiracy. Although there was no judicial pronouncement on the main question of conspiracy between husband and wife, this case is most useful to show what was the state of the law at that time, and how it was understood by the lawyers of England over six hundred years ago. As in many other domains,

scientific or historical, in the field of law, tradition is a very accurate medium to convey to other generations what has been the universal "consensus" of the legal minds.

Since then, it has been generally recognized that a husband and a wife were legally incapable of conspiracy. Such a capacity seems to have been considered as repugnant to the common law.

In Hawkin's Pleas of the Crown, Vol. 1, page 448, we find:—

> Sect. 8. It plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the (*a*) acquittal of the rest is the acquittal of that one also. Also upon the same ground it hath been holden, that no such prosecution is maintainable against a (*b*) *husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will.*

After dealing with the legal consequences of marriage, and after enumerating certain incapacities that resulted to the spouses therefrom, Stephen in his "Commentaries on the Laws of England" (Vol. 2, 21st Ed.), indicates those that have been abandoned by the common law, and also those that have been retained. At the foot of page 491, he deals with the very problem before this Court and says that:—

> A husband and wife cannot, with certain important exceptions, be guilty of stealing one another's property, *nor can any agreement to which they alone are parties amount to a criminal conspiracy,* nor can a wife be an accessory after the fact to her husband's felony.

The same author (Vol. 4, page 165) reaffirms the same rule of the common law and writes:—

> The collaboration of two or more persons is essential to the existence of a conspiracy. A man cannot conspire with himself. If, therefore, two persons are indicted for conspiracy and one is acquitted, the other cannot be convicted, even though he may have pleaded guilty. Husband and wife are for this purpose regarded as one person and *cannot be indicted for conspiracy with one another;* though both may be charged with conspiracy with a third person.

Kenny in "Outlines of Criminal Law" (16th Ed. page 340), says:—

> Moreover, the law applies here the old doctrine that for some certain purposes husband and wife can be counted as one person, so that an unlawful combination by him and her alone *does not amount to a conspiration.*

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Archbold in "Criminal Pleading Evidence and Practice" (32nd Ed. page 21):—

A husband and wife *cannot alone be found guilty of conspiracy,* for they are considered in law as one person, and are presumed to have but one will.

Phipson "On Evidence" (9th Ed. page 99):—

At common law, husband and wife, being regarded as one person, *cannot be charged with, or convicted of, conspiracy* together, unless charged with conspiring with a third person.

See also Halsbury, "Laws of England", (Vol. 9, 1st Ed. page 264) where it is said:—

Husband and wife cannot alone commit a crime of conspiracy, as they are deemed but one person in law, but they may commit the crime of conspiring with others.

In Roscoe's Criminal Evidence (16th Ed., at page 749), we find the following statement:—

A married couple *cannot be guilty of conspiracy* (only) with each other.

In Warburton & Grundy, "Leading Cases in the Criminal Law" (5th Ed. at page 167), it is stated:—

It may be mentioned that a man and his wife *cannot be indicted for conspiring together,* because they are in law one person.

In *Director of Public Prosecutions* v. *Blady* (1), Mr. Justice Lush expressed his views as follows:—

The foundation of the rule which prevented a wife from giving evidence against her husband was the fact that they were one person in the eye of the law. No doubt that rule was applied in every case except where it was necessary either for the safety of the wife or for her wellbeing to relax it. The rule shewed itself in strange ways both in the criminal and in the civil law. *Husband and wife being one person could not be indicted or convicted of conspiracy one with the other.*

It is true that Mr. Justice Lush was dissenting, but not on the point of capacity or incapacity to conspire. It has been said during the argument that this statement was merely an "obiter dictum". "Obiter dicta" are not always of equal value. Some are mere casual expressions of opinion, unnecessary for the determination of the case. Some others are of a different nature and carry more weight, if they are not obiter to the view taken of the case by the judge. The part of the judgment that I have cited forms part of the reasoning of the learned Justice, who had to determine whether or not a wife in a certain case, was an

(1) [1912] K.B. 92.

admissible witness for the prosecution against her husband. (Vide The Law Quarterly Review, 1931, Vol. 47, page 318; *Nixon* vs. *Attorney General* (1).

In a New Zealand case, *The King* v. *McKechie* (2), the Court of Appeal of that country decided as follows:—

A husband and wife cannot conspire together so as to be guilty of the crime of conspiracy.

In the *Peel case,* reported in The Times, March 8th, 1922, page 7, Mr. Justice Darling expressed the following opinion:—

Of course, it takes at least two persons to conspire, and the husband and wife being one person in law, *the situation is that they cannot conspire.*

There are no judgments in Canada, dealing with this particular matter, but I think it is well settled that since many centuries, it has been the law of England that a husband and wife cannot alone conspire to commit an indictable offence. These views have been expressed during over six centuries, and I would be slow to believe that the hesitations of a few modern writers could justify us to brush aside what has always been considered as the existing law. (Eversley, Domestic Relations, 5th Ed., page 158). It may very well be amended by legislative intervention, but as long as it is not, it must be applied

Provincial laws which are of a purely local character, dealing with the emancipation of the wife, cannot have any bearing on the present case. Otherwise, there would surely be confusion arising out of a lack of uniformity of provincial enactments, and furthermore, it is only with the Federal Parliament that the sole power to legislate in such matters lies.

I would allow the appeal and quash the conviction.

ESTEY J.:—I agree with the reasons and conclusions of my brother Taschereau.

I would add that in considering the criminal law in respect to conspiracy it is important to keep in mind the statement of Mr. Justice Sedgewick, when speaking for this Court:

It has never been contended that the Criminal Code of Canada contains the whole of the criminal common law of England in force in Canada. Parliament never intended to repeal the common law, except

(1) [1930] A.C. 192. (2) [1926] N.Z.R. 1.

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in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the Code, then unquesionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force. *The Union Colliery Company* v. *The Queen* (1).

See also *Brousseau* v. *The King* (2).

That Parliament did not intend to codify under the Code all of the common law in respect to conspiracy is evident first because no definition of conspiracy is included therein and second because the sections dealing therewith are restricted to specific circumstances (see ss. 78, 79, 218, 266, 444, 496 and 573). The position may be illustrated from the provisions of the last-mentioned section (s. 573) which is restricted to those who conspire "to commit any indictable offence". The house of Lords, in *O'Connell* v. *The Queen* (3), stated:

> The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful.

This and other definitions have been adopted by the courts in Canada. While differing in certain respects, these definitions do not in any way restrict the criminal offence to that of a conspiracy to commit an indictable offence. It follows that the Code does not cover conspiracies to commit summary conviction offences, nor, indeed, any unlawful act which does not constitute an indictable offence. Moreover, the Code does not cover a conspiracy to do "by unlawful means, something which in itself may be indifferent or even lawful". The foregoing, as well as other definitions, indicates the great variety of circumstances in which the offence of conspiracy may arise. This feature is emphasized by Harrison in his book entitled "Law of Conspiracy" where at p. 67 he says:

> The quotations just given show how wide is the scope of the offence of conspiracy, and also how difficult it is to arrive at an adequate definition.

(1) (1900) 31 Can. S.C.R. 81 at 87.
(2) (1917) 56 Can. S.C.R. 22 at 24.
(3) (1844) 11 C. & F. 155 at 233.

It is evident that a portion of the law of conspiracy in Canada must be found in the common law. This fact would be present to the Members of Parliament when enacting the provisions of the Code. In these circumstances, apart from express words which are not here present, it ought not to be concluded that Parliament intended that with respect to those conspiracies specifically dealt with in the Code a husband and wife might be guilty of conspiracy, while with respect to those dealt with at common law the husband and wife could not be guilty of conspiracy.

Moreover, Hawkins states the basis upon which the law is founded to be that a husband and wife "are esteemed but one person in law, and are presumed to have but one will." The judges and authorities quoted by my Brother Taschereau accept this basis, which seems to involve the relationship or status of husband and wife and not merely one of the consequences arising therefrom; viz., that they cannot contract one with another. The statutes which have given to a married woman the right to contract with her husband have been, in the main, directed to her proprietary rights and have not interfered with her status, nor with that confidential and intimate relationship that should always obtain between husband and wife and which has so long been recognized and protected under our law. While, therefore, the gist of a conspiracy is the concluded agreement, it does not follow that a married woman's capacity to contract with her husband constitutes an answer to the common law that a husband and wife, when they are the only parties involved, cannot be guilty of a conspiracy.

The appeal should be allowed and the conviction quashed.

CARTWRIGHT J.:—I agree with the reasons given by my brother Taschereau and those given by Hogg J.A., in the Court of Appeal.

I wish however to add a few words in regard to one of the arguments which found favour with the majority in the Court of Appeal i.e. that the wording of section 573 of the *Criminal Code* is free from any ambiguity, includes within its ambit everyone whether married or unmarried, and so destroys the common law doctrine that a husband

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and wife cannot be guilty of conspiring with each other alone. It will be observed that section 573 deals only with the crime of conspiring to commit an indictable offence. It leaves untouched conspiracies to commit criminal offences which are not indictable and conspiracies in which two or more persons agree to effect something in itself unlawful (though not necessarily criminal) or to effect by unlawful means something which in itself may be indifferent, or even lawful. Such conspiracies are indictable at common law and there are a number of cases, collected in *Tremeear's Criminal Code* 5th Edition, at page 633, in which there have been convictions for such conspiracies in this country. Had it been the intention of Parliament to abolish the common law defence with which we are concerned it would be expected that plain words dealing expressly with such defence would have been used as was done, for example, when the presumption of compulsion was done away with by section 21; and I can find nothing in the general words of section 573 to warrant imputing to Parliament the intention of taking away this ancient common law defence of a husband and wife in a case in which they are charged with having agreed together to commit an indictable offence while leaving the defence available to them in the other types of indictable criminal conspiracies mentioned above. For these reasons as well as for those given by my brother Taschereau and Hogg J.A., I think that this argument of the respondent must be rejected.

I would allow the appeal and quash the conviction.

FAUTEUX J. (dissenting):—This is an appeal from a majority judgment of the Court of Appeal for Ontario dismissing the appeal of Kowbel against his conviction that he did unlawfully conspire with Beatrice Kowbel -his wife- to commit the indictable offences of forgery and uttering a forged document.

The sole defence put forward by the appellant, before the Court of Appeal and in this Court, rests on two propositions:—(i) At common law, a husband and wife cannot be guilty of conspiring together; (ii) This common law principle has been preserved in Canada by the provisions of s. 16 of the *Criminal Code*.

The common law rule. The rule is mentioned by text writers of repute who dealt with the laws of England either generally or with the relevant branches thereof, i.e., criminal law, law on domestic relations or the doctrine of legal unity of husband and wife. Whether they affirm, doubt or deny its application to modern times, they all trace the rule to Hawkins' Pleas of the Crown, on whose authority it rests.

It is remarkable however that, as mentioned by Glenville L. Williams, LL.D., in an article on Legal Unity of Husband and Wife, 10 Modern Law Review 16, there seems to be no case in which the rule has been applied by an English Court. Indeed, and at the hearing before us, no such precedent has been indicated. More remarkable, again, is the fact that the only case upon which Hawkins himself relies -and which dates back to the reign of Edward III, Year Book (1363/4) H., 38 E. 3, 3a- is one where a third party was charged with the husband and the wife, and where the precise question, i.e., whether husband and wife can conspire by themselves alone, does not appear to have been decided or even considered. A previous case, not alluded to by Hawkins and reported in Year Book (1345) 19 E. 3 R.S. 346, is also one where a third party was charged with the husband and the wife; the objection for the defence was that "If this writ were good, for the same reason one would be good if it were brought against a husband and wife alone, and it could not be understood that the wife, who is at the will of her husband, could conspire with him, because the whole would be accounted the act of the husband." The writ in this case was upheld without reasons given.

The rule and its proximate reason are expressed as follows by Hawkins' Pleas of the Crown, vol. 9, 448:—

> Section 8. It plainly appears from the words of the statute, that one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also. *Also upon the same ground it hath been holden, that no such prosecution is maintainable against a husband and his wife only, because they are esteemed but one person in law and presumed to have but one will.*

Thus it appears that the rule rests ultimately on an ancient legal conception of the status of husband and wife who, being then considered as one person were, for that reason, unable to enter an agreement with one another;

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hence the consequential impossibility for either to commit with the other a crime, the essence of which was then, in part at least, the agreement. The rule appears then to have stemmed from the doctrine of conjugal unity.

Relying on Hawkins' proposition and the case he quoted, Staunford, in P.C. 174(a), repeated the same opinion. And from these writers, the rule that husband and wife cannot be guilty of conspiracy together passed into modern text-books, without having received judicial sanction in the case invoked in support thereof.

The origin and the ensuing and changing legal import of the doctrine of conjugal unity has been considered by Williams (supra) whose views, in this respect, may substantially be summarized as follows: The legal maxim that husband and wife are one person in the eyes of the law has a biblical origin. It is found in the earliest English law book, the "Dialogus de Scaccario" and in Bracton. It then passed to Littleton and Coke. When judges came to state its legal aspect, they did it with caution. Thus in *Wenman* v. *Ash* (1), Maule J. said:—"In the the eyes of the law, no doubt, man and wife are for many purposes one; but that is a strong figurative expression, and cannot be so dealt with as that all the consequences must follow which would result from its being literally true." And in *Phillips* v. *Barnett* (2), Lush J. declared: "It is a well-established maxim of the law that husband and wife are one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes it must be understood in its literal sense." In truth, the maxim is a misleading one even as applied to the unreformed common law. Blackstone expressed the equation more soberly in saying: "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband." (1 Commentaries 442). Even so interpreted, the maxim is an imperfect interpretation of the common law. Indeed, until the intervention of equity, according to Pollock and Maitland (2d. ed. E. 485): "The main idea which governs the law of husband and wife

(1) (1853) 13 C.B. 836 at 844. (2) (1876) 1 Q.B.D. 440.

is not that of an 'unity of person', but that of the guardianship, the *mund,* the profitable guardianship, which the husband has over the wife and over her property." And Williams' conclusion is that, with the intervention of equity and later of statute, it became crystal clear that a woman on marriage retained a legal personality distinct from that of her husband and that it seems fairly clear that the alleged common law rule that husband and wife cannot be guilty of conspiracy together, if it exists, owes its origin to the doctrine of unity, or at any rate to the doctrine of the wife's subordination.

Other text-writers, who have specialized in the study of criminal conspiracy or have dealt with this subject matter in relation to domestic relations, have doubted the application of Hawkins' rule to modern times. Thus, reference may be had to Wright's Criminal Conspiracies (1887) p. 59:—

> The ancient writ of conspiracy appears not to have lain against husband and wife alone. It is said to have lain against husband, wife and a third person. (See Yearb. 38 Edw. 3, 3a: 40 Edw. 3, 19: 41 Edw. 3, 29: Fitzh. N.B. 116, 1: Staundf. 174). But the effect of the ancient authorities is doubtful; and it may be questioned whether a husband and wife could not be convicted of conspiracy in any of its modern forms. Proof, however, of coercion by the husband would in such a case have the effect of negativing the fact of conspiracy, since the force would avoid the agreement.

Harrison: Law of Conspiracy, page 76:—

> It is generally stated (for example, by Hawkins, "Pleas of the Crown", i., 72, 8) that husband and wife cannot by themselves be convicted of conspiracy, since in the eyes of the law they constitute one person, and one alone cannot conspire. This was the case as regards the old writ of conspiracy (see Y.B. 38 Edw. 3. 3a; 40 Edw. 3. 3, 19; 41 Edw. 3. 3, 29; Fitz. D.N.B. 116, 1), but it has been doubted whether it would apply to the modern offence, unless coercion could be proved or presumed (Wright on Conspiracies, p. 75). In R. v. Peel (Times, 8th March, 1922), however, Darling, J., said that this rule still obtained: "Of course, it takes at least two people to conspire, and being one person in law the situation is that they" (that is, husband and wife) "cannot conspire". Husband and wife can conspire jointly with another person (see R. v. Whitehouse (1852) 6 Cox C.C. 38.

Eversley on Domestic Relations, 6th ed. page 150:—

> It is said that a husband and wife cannot be indicted for a conspiracy, because they are deemed to be as one person in law, and have but one will (1 Hawk. P.C. c. 72, s. 8); but it is doubtful now whether that proposition would be held to be good law if it were shown that the agency of the wife was as active as that of the husband.

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Whatever, in the past, may have been the legal import and effects of the doctrine of conjugal unity, and whatever influence the doctrine, as modified with time, may claim to have exerted on the body of Canadian law, Hawkins' proposition that husband and wife "are esteemed but one person in law, and are presumed to have but one will" is no longer true. No one disputes that, in both the field of civil and criminal matters, husband and wife have each an independent legal entity.

In civil matters, the remnants of legal subordination of the wife to the husband, which, in either of the two jural systems obtaining in civil matters in this country, the law as to legal capacity may still manifest, assert of themselves the duality of entity.

As to criminal matters, it must be observed that legal capacity is a notion foreign to our criminal law. Indeed, Parliament did not purport to create, define, deal or even be concerned with legal capacity, but rather imposed generally on all people within Canada—without considering at all what the legal capacity of the offender might be, according to either provincial or foreign Legislatures—criminal responsibility and punishment for such commissions or omissions which, by action of Parliament, are declared to be offences. In this respect and as manifested by the all-embracing nature of the opening words of each section, i.e., "Everyone is guilty . . ." the substantive provisions of the *Code* are, with few exceptions in rare cases, uniformly enforceable throughout Canada against anyone who violates them, general exception being made, not by reason of lack of legal capacity, of legal subordination or marital status, or of presumed coercion, but by reason of want of a discretion essential to *mens rea* in the cases of children under seven, children between seven and fourteen, and persons labouring under natural imbecility, disease of the mind or under specific delusions.

Unless they can be found to come within the classes of persons so declared to escape the criminal responsibility for the commission of any offence, husband and wife cannot, on the basis of marital status, claim a defence, save

in the case of these few crimes, which do not include conspiracy, where Parliament, on account of marital status, excluded them from the general application of these particular sections.

In brief, it is clear from such legislation at least, and, particularly, from the general provisions of s. 21 enacting that "no presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband" that the doctrine of conjugal unity has been, by and in criminal law, negatived. And as to these isolated exceptions, excluding husband and wife from the general operation of a few sections of the substantive law—which do not include conspiracy—they, of course, stem from the very nature of domestic relations of those having marital status, but a marital status which, in so far at least as our criminal law is concerned, it is sufficient to say, no longer embodies the legal notion of conjugal unity or subordination as it is said to have had in a far distant past.

Thus the doctrine of conjugal unity, the ultimate substratum of Hawkins' rule, having perished by legal action, the question is whether the rule itself has not perished.

Accepting that the rule formulated by Hawkins must be taken as a true expression of the law as it then existed, the substitution of a different legal concept with respect to marital status calls for different jural conclusions. The rule itself implies that, had the state of the law been then what it is today, i.e., had each spouse had a distinct legal entity, they would have been found to be amendable to justice on a charge of conspiracy. I have, therefore, formed the view that the rule has perished with the disappearance of the reason which gave it life and support.

Assuming that such a conclusion on the first proposition of the appellant is not justified, I adopt respectfully the views expressed by Mr. Justice Laidlaw of the Court of Appeal for Ontario, who, speaking for the majority, reached the conclusion that the provisions of s. 16 of the *Criminal Code* cannot apply since the rule invoked by the appellant has been altered by and is, at least, inconsistent with the provisions of the *Criminal Code*. In this respect, I only want to add a few comments. It cannot be presumed that

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when Parliament enacted the *Criminal Code,* it intended that the actual enforcement of such an important and far-reaching section as s. 573—conspiracy to commit any indictable offence—would not be uniform throughout Canada but would, in principle or measure, be dependent upon such legislation with respect to marital status or legal capacity of the wife, as, from time to time, provincial or foreign Legislatures would, acting within their exclusive legislative competency, choose to adopt.

Furthermore, it has never been suggested that a spouse cannot be charged with inciting the other spouse to commit a crime, and there would seem to be no good reason for distinguishing between incitement and conspiracy; for, in both of the cases, commission of the crime is inconceivable unless there are, at least, two persons.

I have not failed to consider the majority judgment rendered by the New Zealand Court of Appeal in *The King* v. *McKechie* and the *obiter dictum* of Darling J., as he then was, in the *Peel* case.

I would dismiss the appeal.

Appeal allowed; conviction quashed.

Solicitor for the appellant: *F. L. O'Donnell.*

Solicitor for the respondent: *C. P. Hope.*

GOODWIN JOHNSON LIMITED *(Plaintiff)* ..... } APPELLANT;

AND

THE SHIP (SCOW) *AT & B No. 28*
THE SHIP (SCOW) *E S M No. X* } DEFENDANTS.
THE SHIP (SCOW) *MARPOLE II*

1953
*Nov. 17, 18
1954
*June 21

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

BRITISH COLUMBIA ADMIRALTY DISTRICT

Shipping—Action in rem—Tug and tow—Liability of res where negligence that of charterer—Where negligence that of an independent contractor.

In a day of rough weather three unmanned scows, possessing neither motive nor steering power, drifted into and damaged the appellant's booming ground in Vancouver Harbour. In an action *in rem,* brought against each of the respondent vessels, it was established that the scow *AT & B No. 28* was under a charter which placed her in the charterer's sole control but no evidence was given as to how she had drifted into the booming ground. The scow *ESM No. X* had been unmoored by the crew of a tug, an independent contractor, who was employed to tow her elsewhere but abandoned her to pick up other scows that had gone adrift whereupon she drifted into the booming ground. The action brought against the Marpole II was taken in error as the damage alleged to have been done by her was done by the Marpole XII, a scow belonging to the same owners.

Held: 1. There was a prima facie case of negligence against the charterers of the *AT & B No. 28* which was unanswered and, since negligence in the navigation of a ship for which the charterer is liable subjects the ship itself to a maritime lien for the damages caused thereby, she was therefore liable. *The Bold Buccleugh* 7 Moo. P.C. 267 approved in *Currie* v. *McKnight* [1897] A.C. 97, applied.

2. That as the negligence causing the damage done by the *ESM No. X* was solely that of the independent contractor no liability attached to her.

Per: The Chief Justice and Locke JJ.: If the claim was in nuisance, it would fail since the nuisance, if any, resulted from the act of an independent contractor and there was no evidence upon which it could be found that the owner had become aware of it or should have become aware of it and thereafter failed to abate it. *Sedleigh Denfield* v. *O'Callaghan* [1940] A.C. 880 at 904 applied.

3. That the action against the *Marpole II* was not maintainable. She could not be held responsible for damages done by another ship even if the property of the same owners.

Judgment of Smith J., District Judge in Admiralty [1952] Ex. C.R. 226, varied.

*PRESENT: Rinfret C.J. and Rand, Locke, Cartwright and Fauteux JJ.

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APPEAL by the plaintiff from the judgment of Smith J., District Judge in Admiralty of the Exchequer Court of Canada (1), dismissing proceedings *in rem* taken by the plaintiff to enforce a maritime lien against each of the respondent vessels.

H. R. Bray, Q.C. for the appellant.

J. I. Bird for the respondent.

The judgment of Rinfret C.J. and of Locke J. was delivered by:—

LOCKE J.:—It is clear that the action against The Scow *Marpole II* fails since the evidence shows that she was not at the place in question at the time the damage complained of was occasioned.

The *E S M No. X* is a flat deck lumber scow owned by Canadian Forest Products Limited and had been towed to the pool by a tug of the Gulf of Georgia Towing Co. Ltd. prior to December 2. On that date, the tug "Goblin" owned by the latter company went to the scow mooring grounds about 8 o'clock with instructions to tow the scow to a new location. On arrival, Ludgate, a member of the crew of the tug, boarded the scow and let go the lines by which she was tied to another scow moored there. Before a tow line from the tug was made fast, those in charge of the tug seeing some other scows which were breaking adrift, or were adrift, went to attempt to pick them up, and while it was so engaged the scow drifted into the booming grounds of the plaintiff, causing considerable damage before it could be removed. While I think the evidence is not entirely clear on the point, I think this scow was only in the booming ground on one occasion that morning.

It was shown that the Gulf of Georgia Towing Co. Ltd. was employed by the owners of this scow to tow their lumber barges from their mill to the harbour, for which they were paid by the trip, the manner in which the tow was carried out being decided upon by the tug company.

Different considerations affect the claim against the Scow *AT & B No. 28*. This, like the other scows, had neither motive power, steering power or crew. It was

(1) [1953] Ex. C.R. 226.

owned by James Aitken, Jr. and for a number of years had been chartered on a bare boat charter basis to the Vancouver Towing Boat Co. Ltd. and was entirely under the control and direction of that company. The charter was not produced but it was referred to by the trial Judge as a charter by demise.

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According to Ludgate, when the *Goblin* arrived at the mooring grounds shortly after 8 o'clock, an "AT & B" scow was adrift in the plaintiff's booming grounds, and I think it is clear that this was the scow in question. No evidence was given as to how the scow broke loose, or indeed to show that she had been moored on the mooring grounds. The plaintiff's case against this scow must, therefore, be put upon the footing that the fact that she was adrift within the mooring ground unattended raises a prima facie case of negligence or nuisance against the scow, since the proceedings taken are *in rem* only.

The learned trial Judge dismissed the action against the *E S M No. X* on the ground that, as it was shown that the cause of her going adrift was the negligence of the Gulf of Georgia Towing Co. Ltd., an independent contractor under whose control she was at the time she broke loose, there was no liability in proceedings *in rem*. Unless there is some distinction to be made between a case such as this, where the tug had not actually commenced the tow, and the case of a dumb barge such as this, cast adrift during the course of a tow or striking some vessel owing to negligent navigation on the part of those in charge of the tug, the appeal in respect of this scow should fail, in my opinion.

The cases to which we have been referred do not directly decide the question to be determined. In *Union Steamship Co.* v. *The Aracan* (1), the *American*, a screw steamship was towing the *S.S. Syria* in the English Channel and, while so doing, came into collision with the *Aracan*, a sailing ship. Damages were claimed against both of the steam vessels and the *American* was found wholly to blame. The claim that the *Syria* was also liable for the loss, which succeeded in the High Court of Admiralty, failed before the Judicial Committee. For the *Aracan*, reliance was

(1) (1874) L.R. 6 P.C. 127.

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placed upon a portion of the judgment of the House of Lords in *The Cleadon* (1), where upon the facts of that case Lord Chelmsford has said that the *Cleadon* being in tow of the tug it was admitted that she and the tug must be considered to be one ship, the motive power being in the tug and the governing power in the *Cleadon,* the ship that was being towed. As to this, however, Sir Robert P. Collier, delivering the judgment of the Court, said that in the case before them the governing power was wholly with the *American,* the movements of that vessel not being under the direction or control of the *Syria,* and that the reasoning upon which the decision in the *Cleadon* was based was therefore inapplicable. This principle is reaffirmed in the judgment in the House of Lords in *S.S. Devonshire* (*Owners*) v. *Barge Leslie* (*Owners*) (2).

These cases and *The Quickstep* (3), were cases of faulty navigation on the part of those in charge of the tug during the course of the tow. Here, however, the tow had not commenced, since no line had been made fast to the tug when she temporarily abandoned the work for which she was employed and went to attempt to rescue the other scows. The owners of the tug are not parties to this action, the proceedings being *in rem* alone against the scow and nothing should be said, in their absence, to determine the question of their liability to the present appellant. However, upon the evidence before us, it would appear that it was the negligent act of those in charge of the tug which caused the *E S M No. X* to become adrift and to injure the appellant's property and, in so far as the claim may be based upon negligence, I agree with the learned trial Judge that, as the tug owners were independent contractors, the scow is not liable.

It may, however, be contended that there is some liability in the scow on a claim in nuisance. It is undoubted that a scow of the size of the *E S M No. X* adrift in the Harbour of Vancouver would constitute a menace to booming grounds or other adjacent property, and it may be contended that such nuisance was created by the failure of the owner of the scow to see that she was properly moored. As pointed out by Lord Wright in his judgment in

(1) (1860) Lush. 158. (2) [1912] A.C. 634.
(3) (1890) 15 P.D. 196.

Sedleigh Denfield v. *O'Callaghan* (1), negligence is not a necessary condition of a claim for nuisance. Here, however, assuming the scow adrift in the harbour constituted a nuisance, I think what was said further by him at p. 904 in the *Sedleigh Denfield* case applies. He there said in part:—

> Though the rule has not been laid down by this House, it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it.

The nuisance referred to in this passage was one created by the act of a stranger, but what was said by Lord Wright is of wider application and, in my opinion, should be applied where it results from the act of an independent contractor, as in the present case, whether, as here, the action is *in rem* or *in personam* against the owner on this footing.

As to the claim against the Scow *AT & B No. 28*, the position taken by the respondent is that, in order to impose liability *in rem* for the damage caused by it when it was adrift in the booming ground, it is necessary to show that the owners were personally liable and that since there was a charter by demise in favour of the Vancouver Towing Boat Company Limited and the scow was under the control of that company no lien attached.

The question is one of great importance. It is necessary at the outset to consider the nature of the maritime lien which may attach to a ship which, through the negligent management of those in charge of it, has occasioned damage to others.

(1) [1940] A.C. 880 at 904.

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In the case of *Harmer* v. *Bell* (1), which arose over damage caused by *The Bold Buccleugh* and which is commonly referred to by that name, the Judicial Committee, on appeal from the High Court of Admiralty, stated the nature of such a lien in the following terms (pp. 284-5):—

> A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, 78) explains that process to be a proceeding *in rem,* and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem,* and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem,* a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem,* relates back to the period when it first attached. This simple rule, which, in our opinion, must govern this case, and which is deduced from the Civil Law, cannot be better illustrated than by reference to the circumstances of The Aline (1 W. Rob. 111), referred to in the argument, and decided in conformity with this rule, though apparently upon other grounds. In that case, there was a bottomry bond before and after the collision, and the Court held, that the claim for damage in a proceeding *in rem,* must be preferred to the first bond-holder, but was not entitled against the second bond-holder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bond-holder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction.

(1) (1850) 7 Moo. P.C. 267.

In *Currie* v. *McKnight* (1), the decision in *The Bold Buccleugh* was approved and adopted. Lord Halsbury L.C., referring to the circumstances under which the lien attaches, said in part (p. 101):—

> . . . the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage.

Lord Watson said in part (p. 105):—

> *The Bold Buccleugh,* which was decided by the Judicial Committee of the Privy Council affirming the judgment of Dr. Lushington, is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. The principle of that decision has been adopted in the American Courts; and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage and seamen's wages, and upon bottomry bonds.

Continuing, Lord Watson, after saying that *The Bold Buccleugh* was, in his opinion, properly decided, said (p. 106):—

> And in my opinion it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her and may be without the means of making due compensation.
>
> The other point as to which the learned judges of the Second Division were unanimous relates to the limits of the shipping rule which was followed in the case of *The Bold Buccleugh.* I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage.

In *The Ticonderoga* (2), Dr. Lushington, while not referring to the decision in *The Bold Buccleugh* said that, if a vessel was chartered so that the owners have divested themselves of all authority over the vessel and that vessel does damage, those injured had by the maritime law of

(1) [1897] A.C. 97.

(2) (1857) Sw. 215.

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nations a remedy against the ship itself. He said further that, so far as he was aware, there was only one exception to this, that is, where a pilot was taken on board by compulsion, being required by the provisions of an Act of Parliament.

In *The Lemington* (1), Sir R. Phillimore, after hearing a lengthy argument in which the effect of *The Bold Buccleugh* was fully discussed, adopted the statement of the law by Dr. Lushington in *The Ticonderoga.*

In *The Ripon City* (2), Gorell Barnes J. reviewed the authorities, including *The Parlement Belge* (3), *The Castlegate* (4) and *The Utopia* (5), which are those principally relied upon in support of the contention of the respondent in the present case and distinguished them. His conclusion in the matter reads as follows (p. 244):—

> As maritime liens are recognized by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted towards each other that the party asserting the lien is not entitled to rely on such presumed authority.

In my opinion, this statement expresses the true principle to be deduced from *The Bold Buccleugh* and *Currie* v. *M'Knight* and should be applied in determining the present question. Upon the evidence in this case there was a *prima facie* case of negligence against the charterers of the Scow *AT & B No. 28* which was unanswered and she is liable for such damage as she occasioned when adrift in the booming ground.

I would accordingly dismiss the appeal as to the Scows *Marpole II* and *E S M No. X*, with costs, and allow the appeal as to the Scow *AT & B No. 28* and direct a reference to the proper officer of the Exchequer Court to assess the damages. The appellant should have its costs throughout in respect of the claim against the *AT & B No. 28*, including the costs of the reference.

(1) (1874) 2 Asp. M.L.C. 475.
(2) [1897] P. 226.
(3) (1880) 5 P.D. 197.
(4) [1893] A.C. 38.
(5) [1893] A.C. 492.

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RAND J.:—A question of importance is raised by this appeal. The action arises out of damage done to a booming ground of the appellant by three "dumb barges". These are rectangular in form without motive power, without steering power and without crew. They are towed by tugs from place to place. In a day of rough weather they broke or were let loose from their moorings in Vancouver harbour and drifting into the booming ground did the damage complained of. One of the barges was under the supervision and control of a towing company for all uses of navigation. Another was under a charter which placed the charterers in complete charge and responsibility. In the case of the third, the barge actually arrested was not that which did any mischief; there was a mistake in reading the name and although the ownership is the same it is not seriously contended that the action *in rem* can be maintained. In the other cases, the question is whether such an action lies where the owner of the scows cannot be fixed with personal liability.

As a preliminary to that question, I think it desirable to review briefly the broad principles and rules of maritime law from which the rule applicable to the circumstances must be deduced. That law, constituting the customs of the sea enforced generally by the maritime states of Europe, conceived a voyaging ship to be a venture in which all interests, ownership, bond or other liens, cargo, wages and material, under the superintendence of the master, in many cases a part owner, were committed to the risks of the voyage. Among them was that of collision and from the earliest times damage caused by negligent navigation resulting in collision gave rise to a lien against the offending vessel that took precedence over all existing interests. The lien was enforceable in an action *in rem*. Through that procedure the Court of Admiralty exercised a jurisdiction which dealt with ownership in an absolute sense and by its decree bound all persons and interests, foreign or domestic. The jurisdiction was limited obviously to the value of the *res* before the court and in the earlier proceedings, at least, even though the owner appeared, the limit of his responsibility was that of the interest which he intervened to protect. There was always a jurisdiction exercised *in personam* but its basis was an assumed disciplinary

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authority. Later on this jurisdiction was extended until in the *Dictator* (1), Sir F. Jeune held that the court could make an order against the owner based on his personal liability for the amount of damages beyond the value of the *res*. The action *in rem* was essentially different from that *in personam* even when the vessel was seized by way of collateral attachment, and a judgment *in personam* did not preclude an action *in rem*, though there could be only one satisfaction for the total damages. That seizure to enforce the lien was not analogous to the foreign attachment followed by the courts of the City of London seems self-evident when we consider the effect of the decree in the one case and of the judgment in the other: the courts of London had no jurisdiction *in rem* and what they exercised their authority against were the interests in the property attached of the persons over whom they possessed personal jurisdiction.

Since the ship and the freight were the assets to which all interests looked for recoupment, they were bound to those interests and the interests were bound to the assets. So we had and still have the lien, among others, for seamen's wages, of bottomry bonds, for salvage and for collision, and their order of precedence is well established.

The commercial conditions out of which these accepted customs grew are not difficult to visualize. Ships from the most remote times have ploughed the known and the unknown seas. They were engaged in a commerce of what were then great distances and with peoples of foreign lands. There were no means of communication such as we now have and the risks which produced unexpected situations or emergencies were many. It can be seen to have been necessary by the nature of the ventures that the fullest authority be exercisable by the master for the benefit of the interests in his safekeeping. This emphasized the notion of the ship as a self-controlled agency, itself responsible for obligations bound up with its actions.

But not all the maritime nations accepted and in their courts enforced all of these customs according to their general formulation. For instance, neither England nor the United States recognized the rule that the owner was

(1) [1892] P. 304.

liable only to the extent of the value of his ship and upon abandoning it discharged himself of liability; they enforced, though not at first in the Admiralty Court, in addition to the lien, the collateral personal responsibility arising from the rule of *respondeat superior* which the civil law had long before settled. But the proceedings *in rem* in the Court of Admiralty did not differ in character or underlying basis from those of other national courts enforcing maritime law. Then again, England did not recognize the lien of the material man, nor that for the wages of the master nor for his disbursements. These were modifications in the general maritime law made not because of any incompatibility with municipal law but because of their supposed inconsistency with the general principles of the law merchant: *The Henrich Björn* (1), Lord Watson, at 279. In a number of instances Parliament has intervened to restore in whole or part the maritime law, as in the cases of limitation of liability and of liens for wages and disbursements of the master. But these qualifications and subsequent modifications were of rules which clustered around the general idea of a vessel and its embodiment of interests and cargo as a subject of rights, duties and liabilities.

This basic conception is, in large measure, implied in the judgment of the Judicial Committee in the *Bold Buccleuch* (2). In that case there had been a collision between two vessels in the river Humber. The offending vessel sailed before a warrant of arrest could be executed. An action *in personam* was commenced in Scotland and the vessel there arrested on attachment. Subsequently she was taken in England under proceedings *in rem*. It was held, first, that the plea of *lis alibi pendens* was bad since the two actions were essentially different, and secondly, that upon the damage occurring from the collision a lien arose which was good against a subsequent purchaser in good faith. The Committee, speaking through Sir John Jervis, used language which is too precise to admit of any doubt

(1) (1886) 11 App. Cas. 270.

(2) (1851) 7 Moo. P.C. 267; 13 E.R. 884.

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in meaning. Dealing with the argument that the arrest of a vessel in Admiralty is only a means of compelling the appearance of the owner he said:—

> It is admitted that the Court of Admiralty has jurisdiction in a case of collision by a proceeding *in rem* against the ship itself; but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners . . . In the *Johann Friederich* (1 W. Rob. 37) Dr. Lushington is reported to have said that proceedings *in rem* in the Court of Admiralty were analogous to those by foreign attachment in the courts of the City of London. For the purpose for which that allusion was made, viz., the liability of the property of foreigners to be arrested by process out of the Court of Admiralty and the courts of the City of London, the two proceedings may be analogous, but in other respects they are altogether different. The foreign attachment is founded upon a plaint against the principal debtor, and must be returned *nihil* before any step can be taken against the garnishee; the proceeding *in rem,* whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. In the former case, the proceedings are *in personam,* in the latter they are *in rem.* . . . A maritime lien is the foundation of the proceeding *in rem,* a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists which gives a privilege or claim upon the thing to be carried into effect by legal process.

Speaking of the case of *The Aline* (1), in which there was a bottomry bond before and after the collision, and in which the court had held that the lien for damage is to be preferred to the first bondholder, he observed:—

> The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction.

This judgment was approved and followed by the House of Lords in *Currie* v. *M'Knight* (2).

The general statement is to be deduced also from two judgments of Ware J. of the United States District Court. In *The Brig Spartan* (3), in which it was held that seamen have a lien for wages against freight, assuming that the

(1) (1839) 1 Wm. Rob. 111; 166 E.R. 514.

(2) [1897] A.C. 97.

(3) (1828) Ware 130.

lien extended to the vessel, and in *The Rebecca* (1), in which a lien against the vessel for supplies was maintained, full references are made to the early law. Elaborating the conception of the total interests being responsible for the incidents of the venture, and after observing,

> In the jurisprudence of The Consulate, in addition to the direct liability of the master himself, the vessel was tacitly hypothecated for the obligations contracted by him, both *ex contractu* and *ex delicto*, but there resulted from either no personal liability on the owners.

he quotes, in *The Rebecca*, at p. 195, from *Consulate de la Mer* (Boucher's Translation) cap. 72.

> In all damages which are here and shall be mentioned in the chapters of the sea, the master supports his part of what the ship pays, and each part owner his part, for the ship pays the whole.

The rule of abandonment of the ship by the owners was recognized in Sweden, Hamburg and generally throughout northern Europe, but not in England: there, under the rule of *respondeat superior*, the liability *in personam* ran parallel to the lien, although, as I have already remarked, it was not originally enforced in the Admiralty Court. The *Ordonnance de la Marine* provided that:—

> The proprietors of vessels shall be responsible for the acts of the master, but they shall be discharged by abandoning the ship and freight.

to which Ware J. adds:—

> And this article is merely a confirmance of the pre-existing law (p. 196).

The same statement is said to appear in *Pardessus, Collection des Lois Maritimes*, Vol. 2, p. 235 and in *The Phebe* (2), at p. 272 he remarks:—

> He (the master) was the agent or representative of the other owners, only so far as they had confided their capital to his administration. If the vessel was lost before the creditors were paid, they had no remedy except against the master. The other part owners were discharged from all responsibility . . . The master could not, therefore, in the proper sense of the word, bind the owners, personally, at all, because they could always withdraw themselves from their personal responsibility by abandoning the ship and freight.

Further on at p. 272 he says:—

> It was for this reason that Emerigon, whose mind was deeply imbued with the maritime traditions of the middle ages, says that the liability of the owners to answer for the acts of the master is rather *real* than *personal*. The legal power of the captain, says he, does not extend

(1) (1831) Ware 187 at 195. (2) (1834) Ware 265.

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beyond the limits of the vessel of which he is *master*, that is, *administrator*. He cannot bind the other property of the owner, unless he have a special power for that purpose.

and finally:—

Thus we find, when the principle is traced back to its source, that it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner. On the contrary, in the origin of the custom the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor.

The law administered in the Admiralty court is the law of the sea unless municipal legislation expressly applicable, or the limitations placed upon the Court of Admiralty in the early days by the common law courts, or the general principles of the law merchant conflict with it. In *Nostra Signora de los Dolores* (1), where it was held that an Act of Parliament requiring the name of the owner of a vessel to appear on the register did not apply to a claim by a foreigner for wrongful seizure under letters of marque against an owner whose name did not so appear, Lord Stowell said:—

But I am yet to learn that this rule of law is applicable to foreigners, who are not bound by the municipal regulations of this country. This is a question of the law of nations; and the party complainant, being a foreigner, comes to a court which has to administer that law.

Similarly in the case of the *Carl Johan* mentioned in the judgment of Sir John Nicholl in the *Girolamo* (2). In a claim against the vessel for collision, she was condemned and the amount referred to the registrar for determination. There was an objection to the registrar's report on the ground that the amount of the damage exceeded the value of the ship and freight contrary to 53 Geo. III, c. 159, s. 1 which provided for the limitation of damages. On this question, Lord Stowell held:—

That the new rule introduced by the 52 Geo. III was one of domestic policy and that with reference to foreign vessels, it only applied in cases where the advantages and disadvantages of such a rule were common to them and to British vessels; that if all states adopted the same rule, there would be no difficulty, but that no such general mutuality was alleged; that if the law of Sweden adopted such a rule it would apply to both countries, but that Sweden could not claim the protection of that statute without affording a similar protection to British subjects in similar cases.

(1) (1813) 1 Dodds 290; 165 E.R. 1315.

(2) (1834) 3 Hagg 169 at 186; 166 E.R. 368 at 375.

In this background, then, the question here lends itself to a more confident determination. In three English decisions it has been held that the lien arises when the damage occurs while the ship is under charter or its equivalent. There is, first, *The Ticonderoga* (1). In that case, decided in 1857, an American ship was under a demise charter to the government of France during the Crimean war; in course of being towed by a steamer which she was directed to employ, across the hawse of H.M.S. "Melampus", considerable damage was done the latter, and Dr. Lushington held the fact of being chartered to be no defence by the owner. In the course of the judgment he says:—

> We must recollect that this is a proceeding *in rem*. I am not aware, where there has been any proceeding *in rem*, and the vessel so proceeded against has been clearly guilty of damage, that any attempt has been made in this court to deprive the party complaining of the right he has by the maritime law of the world of proceeding against the property itself. . . . Let us see what cases there are in which the Court does not hold a vessel responsible for the damage done. There is one case and one only that I am aware of, and that is where a pilot is taken on board by compulsion . . . What species of compulsion is it which is averred on behalf of this American vessel that is to relieve her from the responsibility which the maritime law of the world attaches to the wrongdoer?—Entering into a stipulation with the French government. It is impossible to contend that because a person has entered into a voluntary contract by which he is finally led into mischief, that that can relieve him from making good the damage he has done.

In *The Ruby Queen* (2), the same judge held the ship liable though its control had been handed over to agents for sale who had left it improperly moored. These persons, it was contended by the defendant, were independent contractors; but that question with its consequences was not argued because the ground was not taken in the plea; and the reference to the merits is so cursory that its authority is, at least, doubtful.

In the *Lemington* (3), the defendant owner pleaded a charter by demise. A motion to reject the plea was, after a most elaborate argument, allowed by Sir Robert Phillimore, who, in the course of his reasons and after quoting the foregoing passage from the *Ticonderoga* says:—

> It is true that in *The Druid* Dr. Lushington said, "The liability of the ship and the responsibility of the owners are convertible terms, the ship is not liable if the owners are not responsible. And vice versa no

(1) (1857) Swab. 215; 166 E.R. 1103. (2) (1861) Lush. 266; 167 E.R. 119.
(3) (1874) 2 Asp. M.L.C. 475.

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responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against"; in that case, however, it should be remembered that the learned judge was dealing with damage done by the ship through the act of a mere servant or agent acting not only without authority but unlawfully. And moreover the true interpretation of the general proposition of law there laid down depends very much upon the sense in which the word "Owners" is used. A vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as pro hac vice owners . . . Vessels suffering damage from a chartered ship are entitled prima facie to a maritime lien upon that ship and look to the res as security for restitution. I cannot see how the owners of the res can take away that security by having temporarily transferred the possession to third parties.

In the *Tasmania* (1), a tow was damaged by its tug. The latter was chartered on terms that the charterer would be liable for all damages. The contract of towage provided that the tug would not be liable for damage to the tow caused by negligence. On these facts, Sir J. Hannen held that no lien attached. After repeating the passage from the *Ticonderoga,* already mentioned, he adds:—

There is nothing in this judgment which leads to the conclusion that Dr. Lushington intended to retract what he had said in *The Druid.* It amounts only to this, that he thought that whatever might be the case at common law, by the maritime law of nations, charterers to whom the government of the ship is voluntarily handed over, represent the owners so as to bind the ship in cases of collision, and the generality of his remarks must be controlled by the particular circumstances of the case before him . . . The result of the authorities cited appears to me to be this, that the maritime lien resulting from collision is not absolute. It is a prima facie liability of the ship, which may be rebutted by showing that the injury was done by the act of some one navigating the ship not deriving his authority from the owners; and that, by the maritime law, charterers, in whom the control of the ship has been vested by the owners, are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers who are pro hac vice owners.

Against these authorities are *dicta* in three cases, the *Parlement Belge* (2), the *Castlegate* (3), and the *Utopia* (4). The first decided that a public vessel belonging to the Belgian Souvereign was not subject to the jurisdiction of the English Court of Admiralty, but in the course of dealing with the contention that the owner in that case was not directly or indirectly implicated by proceedings *in rem* against the ship Brett L. J. said:—

In a claim made in respect of a collision, the property is not treated as the delinquent per se. Though the ship has been in collision and has

(1) (1888) 13 P.D. 110.
(2) (1880) 5 P.D. 197.
(3) [1893] A.C. 38 at 52.
(4) [1893] A.C. 492 at 499.

caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed not merely on the property but also on the owner through the property. If so, the owner is at least indirectly impleaded to answer to, that is to say, to be affected by, the judgment of the Court.

In the *Castlegate* the question was whether a lien arose under the Merchant Shipping Act of 1889 for disbursements for which the master had no authority to pledge the owners' credit, and it was held that it did not. In the course of his speech, Lord Watson, alluding to the argument that the case of lien for damages by collision furnished another exception to the general rule that a maritime lien must have its root in the personal liability of the owner, refers to the judgment of Dr. Lushington in the *Druid* and to what was said in the *Parlement Belge.* As has been seen, the language of Dr. Lushington in the *Druid* had already been explained by Sir J. Hannen in the *Tasmania,* and it lends itself certainly without difficulty to the interpretation there given.

In the *Utopia* the Judicial Committee dealt with the case of a wreck in the harbour of Gibraltar which had been taken over by the port authority but which, owing to inadequate lighting, had been the cause of damage to a ship navigating in its vicinity. It was held that neither the wreck nor the owners were liable for the collision. The control and management had been legitimately transferred by the owners to the port authority, acting within the apparent scope of its powers, and in the absence of negligence by the owners no maritime lien arose. Answering the contention that as the action was *in rem* the ship might be held liable without liability of the owners, Sir Frances Jeune said:—

> Such a contention appears to their Lordships to be contrary to principles of maritime law now well recognized . . . But the foundation of the lien is the negligence of the owners or their servants at the time of the collision and if that be not proved no lien comes into existence, and the ship is no more liable than any property which the owners at the time of collision may have possessed.

and he adds a reference to the dictum in the *Castlegate* which I have mentioned. But I think it clear that his observations, so far as they may be extended to the question before us, were obiter. That the entire control and

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management had been delivered out of the hands of the owners is assumed; the port authority was acting in its public capacity, given by law, in accordance with its regulations and in the performance of its public duty. To this scope of action the owner was a stranger: there was no commitment of his interest to a person upon whom he could place contractual obligations: when the wreck was handed over, a new control, not derived through him, arose.

It is undoubtedly the case that in the generality of collisions the guilty persons are servants of the owner, and it is clear that the remarks of the judges whom I have quoted were addressed to that ordinary situation. The very distinction drawn by Brett L. J. in citing the case of the compulsory pilot indicates that he had not in mind the situation where the control of the vessel is by agreement entrusted to another for services from which the owner as well as the charterer is to benefit, a means of profiting from the operations of the vessel preferred by the owner to that of engaging in those operations himself. Neither the *Ticonderoga* nor the *Lemington* is mentioned in the *Castlegate* or the *Utopia* judgments, a circumstance which it is difficult to assume would have happened if the intention to dissent from them had been intended.

The settled scope of the collision lien confirms this view. In the *Elin* (1), the lien, in the case of a foreign ship, was held to be superior to all other existing liens, as well as those of seamen's wages earned after the collision; and the statement of 30 Halsbury, 956, of the law on this point is to the same effect.

Concluding this consideration of the English authorities, one decision remains: *The Ripon City* (2). The question involved was the right to a statutory lien by the master for disbursements on account of the ship where the vessel was under a demise charter which provided that the particular supplies involved were to be furnished by the charterers. The case came before Gorell Barnes J., whose competence in matters of this nature was universally acknowledged. After a review of the cases mentioned, at p. 239 he states his view of the law in this language:—

> That maritime liens arise in certain well-known classes of claims is now firmly established. Though none of the texts of the Roman law

(1) (1883) 8 P.D. 129. (2) [1897] P. 226.

appear to confer, upon the classes who now possess it, what we call a maritime lien, yet the principles of maritime law in relation thereto have possibly been developed to a large extent from the rules of the civil law: see the learned judgment of Curtis J. in *The Young Mechanic,* (1). So far as I can trace the origin of the modern doctrines on the subject of maritime liens, it is not so difficult to follow this development in cases arising out of contractual relations between the parties as it is in cases of injuries done to vessels.

After mentioning the theory of Holmes J. which traces the source of lien to the ancient law of deodand, and the views expressed by Mr. Marsden that liens had sprung from a practice of arrest to compel appearance and security, which the *Bold Buccleuch (supra)* had rejected, and reviewing the exhaustive judgment of Sir Francis Jeune in the *Dictator (supra),* he proceeds to his conclusion:—

> The law now recognizes maritime liens in certain classes of claims, the principal being bottomry, salvage, wages, masters' wages, disbursements and liabilities, and damage. . . . It is a right acquired by one over a thing belonging to another, a jus in re aliena. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person who has acquired the right cannot be deprived of it by alienation of the thing by the owner. It does not follow that a right to a personal claim against the owner of the res always exists with a right against the res. The right against the res may be conferred on such terms or in such circumstances that a person acquiring that right obtains the security of the res alone, and no rights against the owner thereof personally. A simple illustration of this is the case of bottomry.

After referring to the *Ticonderoga, supra,* the *Lemington, supra,* and the *Ruby Queen, supra,* he says:—

> Again, a mortgagee of a vessel is the owner of an interest in the vessel, and if he leaves the mortgagor in possession, his interest will become subjected to maritime liens arising in the course of the employment of the vessel, although he is not personally liable for the claims in respect of which the liens arise.

Finally, he states the principle:—

> The principle upon which owners have handed over the possession and control of a vessel to charterers, and upon which mortgagees and others interested in her who have allowed the owners to remain in possession are liable to have their property taken to satisfy claims in respect of matters which give rise to maritime liens, may, in my opinion, be deduced from the general principles I have above stated and thus expressed. As maritime liens are recognized by law, persons who are allowed by those interested in a vessel to have possession of her for the purpose of using or employing her in the ordinary manner, must be

(1) (1855) 2 Curt. C.C. 404.

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deemed to have received authority from those interested in her to subject the vessel to claims in respect of which maritime liens may attach to her arising out of matters occurring in the ordinary course of her use or employment, unless the parties have so acted toward each other, that the party asserting the lien is not entitled to rely on such presumed authority.

This presumed authority is the converse expression of the view of venture in which all interests were put at the common risks under commitment to the administration of the master.

From the beginning that has been the accepted principle in the Supreme Court of the United States. In the *Barnstable* (1), Brown J., delivering the opinion of the court, says at p. 467:—

> Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt, . . . the law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the *negligence of any one who is lawfully in possession of her, whether as owner or charterer.*

In the *Eugene F. Moran* (2), the court, speaking through Holmes J., held that where two tugs and two scows in tow of one of them were all at fault in a collision, each was liable for an equal share of the damage although both scows were owned by one person, on the principle that each vessel must contribute regardless of ownership.

From all of this I see no reason to reject the considered judgments of such eminent Admiralty judges as Dr. Lushington and Sir Robert Phillimore. The dicta to the contrary, as in most cases of dicta, are contained in general statements employed in the determination of the other questions of law or statutory interpretation to which they are relevant but in the application of which the special instances of the general proposition are not significant. The actual decisions place the risks of the solvency of the charterer on the owner; the dicta would place them on the victims of the charterer and the owner goes free. As a consideration or principle of maritime commercial law, keeping in mind the degree to which it is in large measure a law concerned with a commerce between peoples of foreign states, I am unable to appreciate the legal propriety of a rule that would bring about such a result.

(1) (1901) 181 U.S. 464. (2) (1909) 212 U.S. 466.

But for the conclusion at which I have arrived, I cannot see the necessity for any such conception as that of the ship's being deemed to be a legal person. The oldest understanding of the position of the ship, adverted to in the cases mentioned, is, in my opinion, the soundest because, certainly in the early days and to a great extent even today, there is present the idea of venture and risk and that all of the interests in the vessel face them under the administration of the master. His absolute authority on board ship derives from that conception. So long as there is the voluntary entrustment of interests to the administrator or person in complete control of the vessel, what that vessel does through its fault to damage another is chargeable against those interests, and only when there is a breach in authority from the owner can they claim exemption.

There remains the third case in which the barge was unmoored and then left unattended by a towing company acting as an independent contractor. It is clearly established that where such a barge is in tow of a tug and is brought into collision, the tug alone is liable. This is on the ground that the barge is a wholly passive instrument in the hands of the tug and that the collision is solely the act of the latter. When the barge, negligently left unmoored, drifts into collision is it likewise such an act of the tug? The work of towing is an ordinary marine operation with no special risk or danger to others such as would create a continuing duty in the owner toward anyone who might be damaged in the course of it. That operation here included the unmooring of the barge and once it was undertaken, the liability for damage done in the course of it became that of the contractor only. The barge does not cease to be passive when allowed to drift, and I am unable in principle to distinguish between such a situation and that of damage done in the course of towage. In each case the negligent direction to the barge is the work of the towing contractor. The distinction between the charterers and the contractor in its result may appear to be a bit unreal; but the law of the independent contractor, though it has been whittled away in a substantial degree by the conception of duty running from the owner to the victim, retains a residue of validity in the taking of

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ordinary measures or services which toward the person damaged are indifferent as to the actor in them, and in relation to which the balance of policy would appear to be against extending the liability of the owner. In addition there is here both the special character of the "dumb" barge which gives added weight to the general considerations, and the fact that there is no such commitment of interest as is present in the case of the charterer.

I would accordingly dismiss the appeal as to the Scows *Marpole II* and *E S M No. X*, with costs, and allow the appeal as to the Scow *AT & B No. 28* and direct a reference to the proper officer of the Exchequer Court to assess the damages. The appellant should have its costs throughout in respect of the claim against the *AT & B No. 28*, including the costs of the reference.

The judgment of Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—On December 2, 1949, damage was done to the booming ground of the appellant in Vancouver Harbour by three dumb barges. On November 28, 1951 the appellant took proceedings *in rem* in the British Columbia Admiralty Division to enforce a maritime lien against each of the respondent vessels. The action was tried before the Honourable Mr. Justice Sydney Smith, District Judge in Admiralty, and was dismissed with costs.

It is necessary to consider each claim separately.

The proceedings against the respondent *Marpole II* were taken in error. Damage was done not by *Marpole II* but by *Marpole XI* another barge belonging to the same owners. For the reasons given by the learned trial judge I agree with his conclusion that the action against *Marpole II* fails.

The *E S M No. X* was owned by Canadian Forest Products Ltd. who had a contract with Gulf of Georgia Towing Co. Ltd. to perform towage services as required. On the morning of December 2, 1949 the tug *Goblin*, owned by the last mentioned company, proceeded to a scow pool in Vancouver Harbour at which the *E S M No. X* was moored to tow her, pursuant to her owners' instructions, to another location. The finding of the learned trial judge that the Towing Company was acting as an independent contractor

and that the relationship of master and servant did not exist between the owners of the barge and the Towing Company is fully supported by the evidence and indeed was not questioned before us. The engineer of the *Goblin* cast off the mooring lines of the *E S M No. X* and was about to make fast the tug's towing hawser when the Master of the tug abandoned the *E S M No. X* for the purpose of towing another scow which was loaded with ties and which he saw drifting in the harbour. So abandoned, the *E S M No. X*, having no motive power and no means of steering, drifted into the appellant's booming ground with the *Goblin's* engineer on board. It is clear from this brief summary of the facts that the negligence causing the damage done by the *E S M No. X* was solely that of the Master of the tug and the servants of the tug's owners. The barge was thus in the position of an innocent tow which is the instrument of damage caused by the negligence of the vessel towing her. The judgment in *The Quickstep* (1), a decision of Sir James Hannen and Butt J., delivered by the latter, appears to be conclusive against the appellant. This judgment was approved in *The Seacombe, The Devonshire* (2), affirmed *sub nom s.s. Devonshire (Owners)* v. *Barge Leslie (Owners)* (3). In the last mentioned case Fletcher Moulton L. J., referring to the towing of barges or other craft of like kind, said, at pages 49 and 50:—

> . . . In such cases the tow has no control over those navigating the tug. The tug is in the position of an independent contractor who performs the service of towing the barge to its destination, and who chooses for himself how he shall perform that service. I can see no reason why the misconduct of such an independent contractor should be imputed to the innocent tow, who is, in fact, no party to the wrongful act. So to impute it would be inconsistent with the general principles of our common law, and I should decline to do so unless I found a well-settled principle of admiralty jurisprudence evidenced by a course of consistent decisions which required me to do so. When the decisions are examined, the contrary is found to be the case.

This statement was quoted with approval in this Court in The *Ship Robert J. Paisley* v. *Canada Steamship Lines Ltd.* (4) (reversed on the facts *sub nom Richardson* v. *Robert J. Paisley*) (5).

(1) (1890) 15 P.D. 196.
(2) [1912] P. 21.
(3) [1912] A.C. 634.
(4) [1929] S.C.R. 359 at 382.
(5) [1930] 2 D.L.R. 257.

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GOODWIN JOHNSON LTD. v. THE SHIP (SCOW) AT & B No. 28 *et al.*

Cartwright J.

The fact that the barge *E S M No. X* was not actually being towed at the moment of doing the damage cannot, I think, have any effect on the question of liability. She was in the control of the tug and, in principle, I find no difference, relevant to the question of responsibility, between towing her negligently and negligently setting her adrift in the course of carrying out the contract to tow her across the harbour.

I agree with the learned trial judge that the claim against the *E S M No. X* fails.

The *AT & B No. 28* was, at all relevant times, owned by one Aitkin and chartered by way of demise to Vancouver Tug Boat Co. Ltd. I agree with the learned trial judge that her owner Aitkin was not personally liable for the damage done by her. In my opinion the proper finding on the somewhat scanty evidence is that the charterer, Vancouver Tug Boat Co. Ltd., was guilty of negligence causing the damage done to the appellant's booming ground by this barge. At a time when she was under the charterer's sole control she drifted unattended into the booming-ground and it has offered no explanation of this; *res ipsa loquitur*.

The question is whether the appellant has a maritime lien on the barge *AT & B* for the damage done by her when the personal liability for the negligence causing such damage rests not upon her owner but upon her charterer by way of demise. I agree with my brothers Rand and Locke that the answer to this question should be in the affirmative and I am in general agreement with the reasons which bring them to that conclusion.

In my view the conflict between the statement of Brett L.J. in *The Parlement Belge* (1), quoted by my brother Rand, and which was approved by Lord Watson in *The Castlegate* (2) and by Sir Francis Jeune in *The Utopia* (3), on the one hand, and the statements of Dr. Lushington in *The Ticonderoga* (4), of Sir Robert Phillimore in *The Lemington* (5) and of Gorell Barnes J. in *The Ripon City* (6), all also quoted by my brother Rand, on the other

(1) 5 P.D. 197 at 218.
(2) [1893] A.C. 38 at 52.
(3) [1893] A.C. 492 at 499.
(4) Sw. 215.
(5) 2 Asp. M.L.C. 475.
(6) [1897] P. 226.

hand, is apparent rather than real. The statements mentioned, when sought to be related to a claim for a maritime lien on a vessel causing damage, can be reconciled by reading the expression "owner" as used in such phrases as, "the liability to compensate must be fixed, not merely on the property, but also on the owner through the property", as including "charterer by way of demise". To so construe it would be in accordance with the judgment of the House of Lords delivered by Lord Tenterden in *Colvin* v. *Newberry and Benson* (1) in which he speaks of "the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore,* during the voyage for which the ship is chartered". It may be observed also that in *Jackson (Sir John) Ltd.* v. *Blanche* (owners) (2), the House of Lords decided that the charterer of a ship by way of demise who has control over her and navigates her by his own Master and crew is "owner" of the ship within ss. 503 and 504 of the *Merchant Shipping Act, 1894,* and entitled to the limitation of liability to damages conferred upon "owners" by those sections. In *The Utopia* no question arose as to whether the charterer of a ship by way of demise is to be regarded as owner *pro tempore* or owner *pro hac vice* so that negligence in the navigation of such ship for which the charterer is liable will subject the ship to a maritime lien for damage caused by such negligence.

I would dismiss the appeal as to Barges *Marpole II* and *E S M No. X* with costs. I would allow the appeal as to Barge *AT & B No. 28* and direct a reference to the proper officer of the Exchequer Court to assess the damages. Such damages will, of course, be limited to the damage done by the *AT & B No. 28* herself. The appellant will be entitled to its costs of such reference and to its costs in this Court and in the Exchequer Court in so far as the claim against the *AT & B No. 28* is concerned.

Appeal dismissed as to Scow Marpole II and Scow E S M No. X and allowed as to Scow AT & B No. 28.

Solicitor for the appellant: *H. R. Bray.*

Solicitor for the respondents: *J. I. Bird.*

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(1) (1832) 1 Cl. & Fin. 283 at 297.

(2) [1908] A.C. 126.

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*Jun. 14, 15,16, 17. *Oct. 5.

DAVID H. ARNOTT (*Plaintiff*) .....APPELLANT;

AND

THE COLLEGE OF PHYSICIANS AND SURGEONS OF THE PROVINCE OF SASKATCHEWAN (*Defendant*) .....} RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Libel and Slander—Defamatory statement in Journal of Medical Society reporting minutes of meeting—Certain treatment referred to as quackery—Plaintiff closely identified with treatment—Plaintiff not mentioned by name—No malice found—Defence of qualified privilege —Whether publication proved—Whether plaintiff identified with innuendo.

The appellant, who practised medicine in Ontario, but not actively since 1940, and who was the licensor and president of a company having the exclusive right to manufacture and distribute in Canada the basic substance entering into the Koch treatment for cancer, sued the respondent for a libel allegedly published in its Medical Quarterly of December, 1951. The article in question referred disparagingly to the medical practitioners using the Koch treatment and stated, inter alia, "We know the Koch treatment is quackery . . . ".

The jury found that the words were defamatory of the appellant but had not been published maliciously. The trial judge held that the publication had not been made on a privileged occasion and maintained the action. The Court of Appeal held that the occasion had been privileged and dismissed the action.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Estey J.: Entertaining honestly and in good faith as it did, a conviction that as a remedy for cancer the Koch treatment was without merit and possessing knowledge that the treatment was being prescribed by some of its members to the citizens of the Province, the respondent owed a duty to make that fact known, not only to its own members, but also to the public in the Province. The publication was, therefore, made upon a privileged occasion and in the absence of malice, the appellant could not succeed, even if, as found by the jury, the words were defamatory. The language used was at the most an exaggeration or an extreme statement but was not unconnected with or irrelevant to the performance of the duty which gave rise to the privilege.

Per Kellock J.: The appellant had no cause of action in respect of his relationship to the treatment as a person qualified to practise medicine in Ontario, since the practitioners referred to in the article could include only the practitioners of Saskatchewan and could not be taken to include him. Even if it could be said that the article referred to all the practitioners in Canada, this also would not help him as by his own admission he had not practised since 1940, and, therefore, the

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

words could not lead any person acquainted with him to believe that they referred to him. Furthermore, as a licensee of the right to "make, use and vend" the substance involved in the treatment or as a licensor of those rights, the appellant was not within the situation contemplated by the article of a practitioner who prescribes the Koch treatment for his patients.

Per Locke J.: Since the article contained no reference to the appellant and since there was nothing in the evidence of the witnesses to whom publication was proven to suggest that they understood it as reflecting upon him in any way, there was no evidence of publication (*Capital and Counties Bank* v. *Henty* (1882) 7 A.C. 741), and the action should have been withdrawn from the jury at the conclusion of the appellant's evidence.

Per Cartwright J.: The report was published on an occasion of qualified privilege and the words used did not go beyond what was reasonably germane to the performance of the duty giving rise to the privilege. That protection extended to the publication which was made to persons outside the college, as these persons had in receiving the publication an "interest" in the sense in which that word was used in *Harrison* v. *Bush* (1855) 5 E. & B. 344. Consequently, the finding of the jury that the words had not been published maliciously was fatal to the action.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment at trial in a libel action.

R. N. Starr Q.C. and *W. Hall* for the appellant.

G. H. Yule Q.C. and *G. L. Robertson* for the respondent.

The judgment of Kerwin C. J. and Estey J. was delivered by:—

ESTEY J.:—The appellant, a licensed medical practitioner in the Province of Ontario, where he practised in London until 1940, alleges that the respondent's published report of its annual meeting at Moose Jaw in September, 1951, in so far as it dealt with the Koch treatment for cancer, constituted a libel with respect to himself as a practitioner. The publication was made by respondent in its Medical Quarterly, Vol. 15, No. 3, December, 1951, and read as follows:

Moved by Dr. F. H. Wigmore, seconded by Dr. F. E. Werthenbach, that the following matters be proceeded with

1. Amendment to Cancer Control Act to include a paragraph for control of irregular practitioners.
2. Publicity of the attitude of the organised medical profession towards the Koch treatment.

CARRIED.

(1) [1954] 10 W.W.R. (N.S.) 446; 1 D.L.R. 529.

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Estey J.

Discussion

No body more suitable than the Council of the College to stop these medical practitioners from using the Koch treatment.

Registrar: The Medical Profession Act states that no doctor can have his license taken away because he holds to one specific treatment. Correspondence has been had with the Deputy Minister of the Department of National Health and Welfare and the Food and Drugs Department but nothing satisfactory has evolved. We know the Koch treatment is quackery but the Council cannot remove a license unless a patient voluntarily gives evidence of promise of cure by the doctor and none of these patients will do that. Only solution is to get the Department of Public Health and College to make a joint statement condemning it.

The problem is one of education with both the doctors and the people.

Problem is much broader than just prosecuting one man. Across the whole country it is a big problem. We have to make some statement and I agree it should be in conjunction with the Department of Public Health, in regard to the Koch treatment.

Moved by Dr. F. H. Wigmore and seconded by Dr. N. L. Brown, THAT the cancer Committee Report be adopted as amended—CARRIED.

The jury found the words were defamatory of the appellant, but not published maliciously. The learned Chief Justice presiding at trial held that this publication was not made upon a privileged occasion and directed judgment for the appellant. The learned judges in the Court of Appeal (1) were unanimously of the opinion that the occasion was privileged. They, therefore, reversed the judgment at trial and directed that the action be dismissed.

The College of Physicians and Surgeons in Saskatchewan has been an incorporated body since 1888 (N.W.T. Ordinance 1888, No. 5) and its powers and duties at all times material hereto are set forth in c. 210, R.S.S. 1940. The respondent, under the foregoing statute, is required to register and license as physicians and surgeons all persons who produce the qualifications called for under s. 29. It also gives to the respondent disciplinary powers with respect to those who are so registered and in s. 40 provides:

> The council may make, alter or amend and repeal rules and regulations for the well being and discipline of the council, the conduct of its affairs, the promotion of medical and surgical knowledge and the disposition of the funds of the council, provided such rules and regulations are not repugnant to this Act.

The respondent in 1926 set up, and has since maintained, a Cancer Committee, as Doctor Ferguson stated, "to discuss the existence and treatment of cancer, and the

(1) [1954] 10 W.W.R. (N.S.) 446; 1 D.L.R. 529.

general position of the people of Saskatchewan in respect to cancer." In 1951 the Cancer Committee reported to the annual meeting of the respondent in the City of Moose Jaw and the disposition thereof, as published by the College, is quoted above.

I respectfully agree with the judgment of the Court of Appeal that this publication was made upon an occasion appropriately described as one of qualified privilege.

The defence of qualified privilege is fully discussed in *Halls* v. *Mitchell* (1), where, after referring to certain of the English authorities, Sir Lyman Duff, speaking for the majority of this Court, stated:

> The defamatory statement, therefore, is only protected when it is fairly warranted by some reasonable occasion or exigency, and when it is fairly made in discharge of some public or private duty, or in the conduct of the defendant's own affairs in matters in which his interests are concerned. The privilege rests not upon the interests of the persons entitled to invoke it, but upon the general interests of society, and protects only communications "fairly made" (the italics are those of Parke B. himself) in the legitimate defence of a person's own interests, or plainly made under a sense of duty, such as would be recognized by "people of ordinary intelligence and moral principles."

Lord Lindley, speaking with respect to the duty, stated as follows:

> I take moral or social duty to mean a duty recognized by English people of ordinary intelligence and moral principle, but, at the same time, not a duty enforceable by legal proceedings, whether civil or criminal. Stewart v. Bell (2)

It is, therefore, essential to determine whether this publication by the respondent was "fairly warranted by some reasonable occasion or exigency" and "fairly made in discharge of some public or private duty." This can only be determined upon examination of the facts leading up to and those surrounding the publication.

As stated by Lord Buckmaster: "the circumstances that constitute a privileged occasion can themselves never be catalogued and rendered exact." *London Association for Protection of Trade* v. *Greenlands, Limited* (3). The respondent is a statutory body charged with registration, supervision and discipline of the practice of physicians and surgeons in Saskatchewan and empowered to undertake "the promotion of medical and surgical knowledge." I

(1) [1928] S.C.R. 125 at 133. (2) [1891] 2 Q.B. 350.
(3) [1916] 2 A.C. 15 at 22.

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respectfully agree with the statement of Chief Justice Martin that the College so constituted "does not exist merely for the protection of its members in their professional capacity, but also for the purpose of safeguarding the health and welfare of the people of the Province." It is at least, as he describes it, "a quasi public institution." See to the same effect the language of Mr. Justice Hyndman in *Palmer School and Infirmary of Chiropractic* v. *City of Edmonton* (1).

Cancer, over a long period of time, has been a dreaded and prevalent malady. Its cause, as well as its nature, character and treatment, has been the subject of constant scientific investigation by medical associations, governments and philanthropic organizations. In Saskatchewan the Government, prior to the events with which we are here concerned, set up in the Province a cancer commission which maintains two cancer clinics, one in Regina and the other in Saskatoon, all to the end and purpose that the public of that Province may have the benefit of the best diagnosis and treatment of cancer that science has so far made available. The creation of a cancer committee by respondent would be well within the exercise of its powers for "the promotion of medical and surgical knowledge" and the evidence indicates that this committee works in close co-operation with the Cancer Commission.

The members of the Cancer Committee, after a study of the Koch treatment, entertained a conviction that as a remedy for cancer it was without merit. Their report to this effect was affirmed at respondent's annual meeting, after an open discussion in which no member spoke in favour of the treatment. The report, as published in the quarterly, was mailed to respondent's members, similar bodies in other provinces, as well as libraries and persons or organizations particularly interested in the promotion of public health. A citizen who called at respondent's office received, upon his request, a copy of the quarterly. In considering the scope and extent of the publication that might be justified, it is important to observe that the respondent knew, prior to this publication, that a few of

(1) 61 D.L.R. 93.

its members were recommending or prescribing this treatment. In fact, at least one member of the public, having heard of it, wrote to one of respondent's members asking that the treatment be forwarded c.o.d. Under such circumstances it is impossible to even estimate how many citizens may have heard of the Koch treatment throughout Saskatchewan. No evidence was adduced relative to what representations were made with respect to its efficacy. One, however, can readily appreciate what might be accomplished among many people with respect to a remedy of such long standing and what it has allegedly achieved.

A statutory body such as the respondent, in possession of knowledge that a few of its members are prescribing such a treatment, owes a duty to make that fact known, not only to its own members, but to the public in the province in which it functions, who are led to believe it has merit and are called upon to pay therefor. In bringing this information to the public it is discharging a duty it owes to the people and serving "the common convenience and welfare of society." In this connection it is important to observe the concluding words in the statement of Baron Parke already quoted that "the law has not restricted the right to make" such statements "within any narrow limits."

The learned Chief Justice, who presided at the trial, stated the respondent "took no reasonable steps to verify the charges made in the libel" and that in his opinion "in stating that the Koch treatment was quackery and that it knew it was quackery, it was wholly wrong in both respects." The learned Chief Justice accepted these as factors leading to the conclusion that the occasion was not one of qualified privilege. Respondent's President deposed that his knowledge of the treatment was confined to reading medical texts and journals of recognized medical associations, and that he had found nothing favourable except that which "came from the instigators of the Koch treatment." The record discloses that the knowledge possessed by the personnel of the Cancer Committee, as well as that of the other respondent members, was based upon a reading of similar texts and of official publications such as that of the Gillanders Commission. The latter was presided over by the late Mr. Justice Gillanders of the

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Court of Appeal of Ontario, but had as its members physicians and surgeons. The report of this commission was published in Vol. 47 of the Canadian Medical Association Journal in 1942.

The members of the College, and particularly those of the Cancer Committee, with their knowledge and experience, would appear to be competent to read and study such publications and to form their own opinion with respect to the efficacy of the Koch treatment. Such publications constitute the recognized media through which the members of the profession are kept informed of what is being accomplished by research and study. In this particular case it is doubtful if any further information could have been obtained, unless the College was prepared to accept the type of experiment and investigation that the appellant would permit. In this connection it is pertinent to observe the history of the Koch treatment and the appellant's association therewith, so far as that is disclosed in the record of this litigation.

The treatment, as the appellant stated, consists of an injection by a hypodermic needle of a substance called glyoxylide and a prescribed course of diet. He described glyoxylide as "an aqueous solution of a chemical compound discovered by Dr. William F. Koch, in a highly diluted state. It is not a serum,—a chemical in solution." The record discloses that Dr. Koch had a great deal of trouble with the authorities in the United States and, as the appellant deposed, he has been, since 1948, a resident of Brazil because "he was driven out of the United States, he just got tired being pestered by the federal authorities."

Appellant heard of the Koch treatment in November, 1928, and that month visited Dr. Koch at Detroit. He thereafter continued to visit him once a month, for a period of from one to four days, for at least eight months. As a result of these visits and his association with Dr. Koch at that time he states:

> "I came to the conclusion that undoubtedly he had cured cases of cancer, the diagnosis of which had been made in a proper manner and that he was influencing the available cases that came during that eight months that I was frequently at his clinic. Pardon me—influencing many.
>
> "Q. Do you believe in the efficacy of the Koch treatment? A. I do.
>
> "Q. Does it work in every case? A. No. sir.

"Q. Are you entitled to expect anything when you administer the Koch treatment? A. Yes sir.

"Q. What? A. That we can honourably as family physicians bring to a patient—believing that we will bring relief generally and an absolute cure sometimes."

In his subsequent evidence he pointed out that relief of pain would be realized in 90 per cent of the cases treated and that 50 per cent or more of patients suffering from brain cancer "have been rapidly relieved and permanently cured. Cancer in other parts of the body, perhaps one case in five."

In 1936 appellant and Koch took steps to have William F. Koch Laboratories of Canada Limited incorporated, not, as appellant explained, to distribute Koch products, but "to provide an embracing vehicle to turn this over to some strong organization worthy of the responsibility, if events so transpired—to take it away from me as a person dealing with it."

Dr. Koch patented his discovery in Canada in 1939. Then on April 11, 1944, by agreement in writing between Dr. Koch and appellant, it was agreed

1. Koch hereby licenses and empowers Arnott to manufacture Glyoxylide, the subject of a Patent of Invention filed in the Patent Office of Canada as No. 430891 together with any improvement or improvements, re-issue or re-issues thereof including the use of all methods of manufacture of the same subject to the conditions hereinafter named.

2. The term of this license shall be for nine years from the date hereof and such right and license shall be exclusive to make, use and vend the said invention within the Dominion of Canada.

3. Arnott covenants and agrees with Koch that he will not divulge to any third party the process of manufacture in any of its details.

4. This license shall be personal to the said Arnott and immediately upon his death or disability this license shall cease to have any effect and shall thereafter be null.

5. This license may be assigned by Arnott upon obtaining the written consent of Koch.

It was explained that the agreement of April 11, 1944, was made because Dr. Koch was having difficulty with the authorities in the United States. On April 28, 1944, appellant entered into an agreement with William F. Koch Laboratories of Canada Limited which provided in part:

1. The Licensor hereby licenses and empowers the Licensee to manufacture Glyoxylide, the subject of Canadian Patent No. 430891, subject to the conditions hereinafter expressed.

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2. The Licensee covenants and agrees with the Licensor that it will not manufacture Glyoxylide except under the exclusive and personal supervision of the Licensor and that it will not require the Licensor to disclose the method or methods of manufacture of the same.

Since the date of that agreement, April 28, 1944, that company has exclusively manufactured and distributed the Koch treatment in Canada. It is not sold through drug stores. When appellant was asked if a doctor in Saskatchewan, who wrote to the company, would receive the glyoxylide he replied:

> In the interests of truth and his patients, I think he should be instructed as to the best way of getting good results and introduced to the use of this therapy; he should write to me and I would tell him whether or not in my opinion it might be used with success in helping that particular person. If a doctor has used it successfully two or three times he has a free hand.

In 1928 appellant interviewed the then Minister of Health in Ontario, Honourable Forbes Godfrey, who was sufficiently impressed at the interview to join with appellant in a visit to Dr. Koch at Detroit. Dr. Godfrey "took home supplies and used it in his own practice and three months later at his request I accompanied him to see Dr. Koch again and after that he made several visits, and after Dr. Godfrey left the service as Minister of Health I presented this knowledge I had gained of the Koch treatment to every Minister of Health of Ontario except the present incumbent." The appellant does not suggest that either Dr. Godfrey or any subsequent Minister of Health was sufficiently impressed to lend his assistance to the introduction of the treatment in the Province of Ontario.

In the spring of 1936 Dr. Koch published a booklet entitled "Natural Immunity, Its Curative Chemistry in Neoplasia, Allergy, Infection." Appellant gave copies of this book to the directors of the London Academy of Medicine and requested that a general meeting of the members might be called "that I might relate my experience of the last nine years, and receive their advice as to how I should conduct myself. That meeting was refused me."

Appellant has written articles and requested the publication thereof in the Canadian Medical Association Journal, but these have never been published.

In 1936, when the Canadian Medical Association met in Victoria, appellant requested that he might appear and be heard before its Cancer Committee. He was informed that if he went he would not be heard.

The appellant apparently adduced the foregoing evidence to suggest that he had been unfairly treated. Why these bodies adopted their respective courses is not disclosed, but it is difficult to conclude, without hearing the evidence on both sides, that professional bodies would assume such an attitude without cause. More particularly is this so because of the appellant's attitude toward the Gillanders Commission and the requests made by the Minister of Health in Saskatchewan.

The Government of Ontario, in 1938, appointed a commission presided over by the late Mr. Justice J. G. Gillanders to investigate cancer remedies. The report of that commission indicates that the appellant first appeared before it with his counsel on November 30, 1938. He then sought to enter into an agreement with the commission under which he would co-operate to satisfy the commission that the Koch treatment had a definite therapeutic value in the treatment of cancer and, in the event of such approval being given by the said commisison, he would "use his best efforts to have the formula and methods of treatment revealed." As under this agreement neither the commission nor its experts would be permitted to use the substance for its own investigation, nor would it have the formula, the commission declined to enter into an agreement. Later the appellant approached the commission and desired that certain clinical evidence might be given. The commission acceded to this request, but indicated that it would then require "to have the substance investigated to its satisfaction both on the clinical and laboratory side." The commission held a meeting in London in 1939 and there took the evidence which the appellant offered. Later the appellant and his counsel attended before the commission at Toronto and presented further evidence. Still later one of the commissioners, Dr. Valin, arranged for the

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appellant to treat ten cases in Ottawa, which he did. The following statements in the commission's report are relevant:

> Although it is said that Glyoxylide has been used extensively in the United States, inquiry failed to elicit any report made there by any recognized authority of assistance to the Commission.
>
> .....
>
> As intimated, it was pointed out to the sponsor early in the proceedings that the Commission desired both clinical and laboratory investigations. The Commission has repeatedly asked for some co-operation in this respect, and although Dr. Arnott has from time to time voiced his desire to co-operate, the Commission has never been able to obtain a sample of the substance in question or to observe or learn its exact method of preparation.
>
> .....
>
> A careful review of all the evidence presented at this date, fails utterly, in the opinion of the Commission, to support the claim on behalf of the Koch treatment that it is either a remedy or cure for cancer.

That such an attitude persisted on his part, and I do not overlook nor discount, so far as the record discloses, what took place in British Columbia, is established by his disposition of the request made by the Hon. Mr. Bentley, Minister of Health in Saskatchewan.

In 1947 Mr. Douglas, Premier of Saskatchewan and who was then Minister of Health, had an interview with appellant in Regina and, while the latter describes the interview as "courteous" and providing "adequate time" for him to present his "research activities and other experiences in connection with the Koch therapy as they then stood," the evidence does not indicate what, if anything, resulted from this interview.

The appellant deposes that he was again in Regina in 1950 when he met Hon. Mr. Bentley, Minister of Health, and Drs. Hames, McKerracher and Mott. The record does not disclose that anything resulted from that meeting.

In the summer of 1951 Hon. Mr. Bentley was requested by a panel group at a convention to make inquiries relative to the Koch treatment. As a consequence he wrote a letter to the appellant which reads as follows:

> As you are aware, there is some interest in the Koch treatment in this province and I have been requested by the interested parties to try to arrange to obtain sufficient quantities of the product to enable the University of Saskatchewan to make an analysis of the product for the purpose of determining the nature and results to humans and animals when treated

with the Koch therapy treatment. This letter is a formal request to you to provide us with sufficient quantities of this product to enable us to carry out this project.

I trust I will hear from you in the very near future in this regard.

On August 29, 1951, appellant replied, setting forth his interview of November 29 with Premier Douglas and others and stating that "any effort to demonstrate the Glyoxylide in Saskatchewan must be based upon the recognition of the work carried out in British Columbia by the Department of Agriculture during 1944, 1945, 1946 and 1947." He then stated that Hon. Mr. Bentley's letter "ignores my position in regard to the official investigation and favourable finding recorded in British Columbia" and listed five points that he required Mr. Bentley to deal with before he could accept or refuse his "official demand." The letter concludes:

Therefore, in the activities in which you invite me to engage with undisclosed members of the services provided by the University of Saskatchewan, do you expect me to turn over any part of your program to the medical men responsible for the misleading and libelous article reprinted in the Medical Quarterly referred to above?

The investigation in British Columbia was by the Department of Agriculture, when it was apparently found that this treatment had merit in respect to the treatment of animals. While that may have some relevance and would no doubt be taken into consideration in any investigation, there is no basis in this record for the conclusion that it ought in any way to curtail, limit or restrict the studied examination thereof in relation to cancer in the human body.

The attitude of the appellant is further illustrated by his replies when his attention was directed to a paragraph in the Code of Ethics of the Canadian Medical Association, which directed the attention of physicians to the fact that there were "well recognised methods by which physicians can place their work and discoveries before those who are fitted by education and experience to judge them." He replied: "There is no such person, no such organisation, to pass upon cancer treatments in Canada . . . ."

Q. You are referring to the Koch treatment? A. Yes, there is nobody qualified in Canada. There is nobody in Canada authorised to examine and pass upon such. There is no such committee in Saskatchewan to do it.

Q. What about the rest of Canada? A. There is no such committee anywhere in Canada. There is nobody in Canada competent to pass upon it.

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The foregoing evidence indicates at least some of the difficulties, many of which were known to the respondent, that it would have encountered in any endeavour to obtain glyoxylide, or the formula for the preparation thereof, in order that it might make an investigation. The basis for these difficulties may well be found in the terms of the agreement between appellant and Dr. Koch dated April 11, 1944, hereinbefore quoted.

Moreover, under the defence of qualified privilege, it is not whether the words are true in fact, but rather were they spoken honestly and made in the discharge of some public or private duty, and fairly warranted by some reasonable occasion. In *London Association for Protection of Trade* v. *Greenlands, Limited* (1), the statements made were not true. Lord Loreburn described them as having "cruelly defamed" the company. The secretary of the association had, however, acted honestly and in the discharge of his duty and the occasion was held to be privileged. Lord Buckmaster at p. 27 stated:

> . . . the fact that the information was capable of being corrected by reference to the Register of Companies, and that this was not done . . . is relevant only on the question of malice.

In *Jenoure* v. *Delmege* (2), while the facts were quite different, the defence of qualified privilege was raised. Lord Macnaghten, speaking on behalf of the members of the Judicial Committee, stated that the learned trial judge had instructed the jury that the plaintiff was required to prove "that he honestly believed the statements contained in the alleged libel to be true, and that, unless and until that was made out by him to their satisfaction, it was not incumbent on the respondent to prove express malice." This direction was held to be in error in that the law does not cast upon the defendant the onus of proving that he honestly believed the statements made to be true in order to avail himself of the defence of qualified privilege.

The respondent, in this publication, was but stating the considered opinion of its committee and of its members assembled in annual meeting. The members of the committee had arrived at their conclusion after a study of the articles in recognized medical periodicals and public documents. There can be no doubt that the members outside of

(1) [1916] 2 A.C. 15. (2) [1891] A.C. 73.

the committee had studied at least some of these publications. While there is evidence on the part of the appellant to the effect that the conclusions in the publications are in error in respect to the Koch treatment, there is nothing to reflect upon the ability of the authors, nor the intent and purpose of these publications. There may be cases where the conduct of the party is such that the failure to make further investigation or inquiry might be evidence of lack of honesty, or even of actual malice. This is not such a case. The available material supports the conviction entertained by the respondent's members and the evidence in this litigation does not suggest other than that the respondent itself acted honestly and bona fide. The jury found it acted without malice.

It is, on behalf of the appellant, contended that even if the occasion were privileged the language used was unnecessarily severe and in excess of what was necessary to express the view held by the College and its Cancer Committee. The sentence particularly referred to is: "We know the Koch treatment is quackery." "Quackery" is defined in the Oxford Dictionary to mean "The characteristic practices or methods of a quack; charlatanry." The same dictionary describes a quack as "an ignorant pretender to medical skill; one who boasts to have a knowledge of wonderful remedies; an empiric or imposter in medicine." While, therefore, no one could properly suggest the appellant is ignorant of medical skill, it is possible that he be in error, and those who honestly believe him to be so may find some similarity in his practices and methods in respect to the Koch treatment and the characteristic practices or methods of a quack. However that may be, the sentence here complained of was used to describe the prescription or administration of the treatment. It was, therefore, not an expression unconnected with or irrelevant to the performance of the duty which gives rise to qualified privilege. At the most it was an exaggeration, or an extreme statement, which could be evidence of malice, but, apart from an express finding that it did constitute malice, would not, of itself, remove the privilege. In *Warren* v. *Warren* (1), it is stated:

> But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice.

(1) 1 C.M. & R. 250.

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This statement is quoted with approval by Lord Dunedin in *Adam* v. *Ward* (1).

Lord Atkinson, in *Adam* v. *Ward* at p. 334, stated:

> It was, however, strenuously contended on the part of the appellant, as I understood, that the language used in a communication made on a privileged occasion must, if it is to be protected, merely be such as is reasonably necessary to enable the party making it to protect the interest or discharge the duty upon which the qualified privilege is founded. It has long been established by unquestioned and unquestionable authority, I think, that this is not the law.

He then continues as follows:

> These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege; but that, on the contrary, he will be protected, even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believed that what he wrote or said was true and necessary for the purpose of his vindication, though in fact it was not so.

The appropriateness of the language used must always be determined by a consideration of all the relevant facts. In this case the conclusion seems, upon the record, unavoidable that the Koch treatment, which has been known in Canada at least since 1928 and in the United States prior thereto, has never been approved by any recognized medical authority.

It would appear that the members of the respondent's Cancer Committee honestly and in good faith entertained a conviction that the Koch treatment was without merit. The respondent, at its annual meeting, in adopting this report, acted with equal honesty and good faith. Entertaining this view and possessing knowledge that this treatment was being prescribed by some of its members to the citizens of Saskatchewan, it was acting within the scope of its duty to the public in publishing the report in its quarterly and not restricting its communication to its own members. Moreover, the respondent owes a duty to similar bodies and to libraries and individuals who are outside of the province and particularly associated with the work of public health. It was but serving the common or general interests of the people of Saskatchewan and co-operating with other bodies outside of the province interested in

(1) [1917] A.C. 309 at 328.

public health in making its views known through the medium of this publication. Throughout, as the jury found, the respondent acted without malice. It follows that the publication, even if it were defamatory, as the jury found, was made upon a privileged occasion and, therefore, in the absence of malice, the appellant cannot recover.

The appeal should be dismissed with costs.

KELLOCK J.:—In the consideration of this appeal it is important to bear in mind the twofold relationship of the appellant to the "Koch treatment", namely, (1) as a person qualified to practise medicine in the Province of Ontario, and (2) as licensor, shareholder and president of the William F. Koch Laboratories of Canada, Limited, which company, as the appellant deposed, had exclusively manufactured and distributed "glyoxilide" in Canada since April, 1944. In my view, some confusion has crept into the case and into the arguments because of a failure to keep these two relationships separate and distinct.

It is quite clear in my opinion that in the circumstances here existing, the appellant has no cause of action in respect of the second. In so far as the alleged libel disparages glyoxilide, it constitutes a trade libel only, a cause of action which cannot be maintained by the appellant as he is not the trader but rather the company. Even if the words complained of involve also a reflection upon the distributor of the product so as to amount to a reflection upon him in the way of his trade; *Linotype Company Limited* v. *British Empire Type-setting Machine Co. Ltd.*, (1); this principle has no application in the present case for the same reason, namely, that the trade in glyoxilide is not the trade of the appellant but of the incorporated company. Accordingly, it is only the relationship first above mentioned which can have relevance to the cause of action alleged by the appellant. As put by the statement of claim itself,

> By reason of the said libel the Plaintiff has been injured in his character and in his reputation as a medical practitioner.

An essential element of such a cause of action is that the words complained of should be published "of the plaintiff", and it is objected by the respondent that

> there is no proper evidence to identify the Plaintiff with the alleged libel; he was not mentioned therein by name or description.

(1) 81 L.T. 331.

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The appellant attempts to meet this objection as follows (I quote from his factum):

> At the time of the action it was contended on behalf of the Appellant that the libel was a libel of each member of that class of medical doctors who *used* the Koch Treatment and who were described as irregular practitioners. The innuendo was that those practitioners who *used* the Koch Treatment practised quackery and were quacks.

The italics are mine.

As in *Knupffer* v. *London Express* (1), there are two questions involved in the attempt of the appellant to identify himself as a person defamed by the words here complained of. The first question is one of law, namely, in the words of Viscount Simon L.C., in the above case, at p. 121,

> can the article, having regard to its language, be regarded as capable of referring to the appellant?

It is only when that question is answered in the affirmative that the second question, one of fact, arises, namely,

> does the article, in fact, lead reasonable people, who know the appellant, to the conclusion that it does refer to him?

With respect to the question of law, in my opinion the "irregular practitioners" referred to in the article complained of cannot be taken to include the appellant if for no other reason than that the practitioners referred to are those only with respect to whom the respondent could be said to have any jurisdiction, namely, those practising within the Province of Saskatchewan. The article in question is replete with intrinsic evidence of this. The "Cancer Control Act" mentioned is a provincial statute, the present Act being R.S.S. 1953, c. 234. Only "irregular practitioners" within Saskatchewan are amenable to the provisions of this statute. The *Medical Profession Act* is also a provincial statute, being R.S.S. 1953, c. 273. It is only under this last mentioned statute that the respondent had any authority to take steps to "stop these medical practitioners from using the Koch treatment". Again, the proposal for a joint statement by "the Department of Public Health and College" has reference to the provincial Department of Public Health. I refer to R.S.S. c. 29. When

(1) [1944] A.C. 116.

the Dominion department is intended, it is referred to as the "Department of National Health and Welfare." Mr. Starr points to the sentence "across the whole country it is a big problem", as enlarging the scope of the words complained of, but I do not consider that the use of this sentence extends the words "irregular practitioners" to practitioners who practice outside the province.

If it could be said that all members of the medical profession in Canada who employ the "Koch treatment" professionally are referred to by the article, and in my opinion they are not, this, again, would not help the appellant. To employ the language of Viscount Simon in the *Knupffer* case:

> Where the plaintiff is not named, the test which decides whether the words used refer to him is the question whether the words are such as would reasonably lead persons acquainted with the plaintiff to believe that he was the person referred to.

The "Koch treatment", according to particulars of his pleading furnished by the appellant, consists not only in the administration of the patent substance, glyoxilide, but also therewith of

> dietary and other restrictions on the part of the patient.

In his statement of claim the appellant alleged not only that he was a duly qualified medical practitioner but that he was "practising" in the City of London, Ontario. This allegation was not denied by the respondent, and may have therefore been admitted. But the allegation was disproved by the appellant himself, who testified in chief that he commenced practising medicine in the year 1900 as a family physician and

> Q. How long did you continue that practice afterwards?
> A. Forty years.
> Q. That would bring us up to 1940?
> A. Yes.

In paragraph 5 of the statement of claim it is pleaded that the appellant is sole owner in Canada of the right to manufacture glyoxilide, "the basis of the Koch Treatment" and that he is and was at the time of the publication of the alleged libel a "user" of the Koch treatment. This might have meant that the appellant was personally in the habit

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of taking the treatment or that he administered it professionally to patients, but the particulars given by the appellant negative both these meanings. It is stated by these particulars that the allegation in paragraph 5 means simply that

> The Plaintiff is the Canadian owner of a license for the manufacture of a substance called Glyoxilide, which license is dated April 28th, 1944, issued by William F. Koch, the patentee under Canadian Patents Nos. 381496 and 430881.

The subsequent license granted by the appellant I have already dealt with.

In particulars of paragraph 7 of the statement of claim, which alleges that the words complained of were defamatory "of the Plaintiff", the appellant makes it clear that this is an allegation that he was defamed as one of the class of medical practitioners employing the Koch treatment. As already pointed out, however, the evidence of the appellant himself removes him from this class. The remainder of the record is consistent with this evidence of the appellant for it contains no suggestion that the appellant practised his profession in Ontario or elsewhere since 1940 whether by prescribing the "Koch treatment" or otherwise. The only evidence connecting the appellant with the "Koch treatment" since 1940 relates exclusively to his connection with the business of the company in the manufacture and supply of glyoxilide, and the receipt by him of royalties. In this aspect the appellant is described by his counsel as the "sponsor" in Canada of the Koch treatment.

Accordingly, as the appellant had not employed the "Koch treatment" professionally since the year 1940, it cannot, in my opinion, reasonably be said that the use in 1951 of the words "irregular practitioners" could lead any person acquainted with the appellant to believe that they referred to him. No witness said so and none of those who testified on the point had, so far as appears, any knowledge of the appellant except as "sponsor" of the treatment as above mentioned.

I am also of the opinion that it would not be a proper construction of the article complained of, (and this contention was not specifically put forward by Mr. Starr) to allow the appellant to lift out of their context the words which designate the "Koch treatment" as "quackery", and then

to make out a cause of action for defamation of the appellant as an individual by having regard to him solely as licensee from Koch and licensor of the company.

As already pointed out, the "Koch treatment", according to the statement of claim, consists not only of the injection of the product "glyoxilide" but also of "dietary and *other* restrictions on the part of the *patient*". It is therefore evident that the "treatment" normally calls for the services of someone, apart from the "patient", who possesses the requisite skill and knowledge both as to the injection and the "restrictions", in other words, for a "practitioner" of some sort. This is the situation contemplated by the article published by the respondent council which has reference only to "irregular practitioners" who employ the Koch *treatment* for their patients. It is obvious that, merely as licensee from Koch of the right to "make, use and vend" "glyoxilide" or as licensor of the rights so acquired, the appellant is not within the class described in the article.

In these circumstances the appeal should be dismissed with costs.

LOCKE J.:—This is an appeal by the plaintiff in a libel action from the unanimous judgment of the Court of Appeal of Saskatchewan (1) which set aside a judgment of Brown, C.J. Q.B., entered in favour of the appellant following the verdict of a jury.

The appellant is a medical doctor who practised his profession in London, Ont. from the year 1900 to 1940. The defendant is a body corporate originally incorporated by an ordinance of the North West Territories in 1888 which now, as reenacted by the Legislature of the Province, appears as chapter 168 of the Revised Statutes of Saskatchewan of 1940.

At the annual meeting of the respondent, which I will hereafter refer to as the College, held at Moose Jaw in September 1951, a report of what was designated as The Cancer Committee, composed of members of the College and which had been originally established in 1929, was read and discussed. Following this, a discussion between the members present ensued, of which a record was kept, and

(1) [1954] 10 W.W.R. (N.S.) 446; 1 D.L.R. 529.

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thereafter the report and the discussion were included in a report of the proceedings of the meeting published in the Saskatchewan Medical Quarterly of December, 1951, a publication of the respondent. The alleged libel appears in the report of the discussion.

The language complained of read:—

Moved by Dr. F. H. Wigmore, seconded by Dr. F. E. Werthenbach, That the following matters be proceeded with

1. Amendment to Cancer Control Act to include a paragraph for control of irregular practitioners.
2. Publicity of the attitude of the organized medical profession towards the Koch Treatment.—Carried.

Discussion

No body more suitable than the Council of the College to stop these medical practitioners from using the Koch treatment.

Registrar: The Medical Profession Act states that no doctor can have his licence taken away because he holds to one specific treatment. Correspondence has been had with the Deputy Minister of the Department of National Health and Welfare and the Food and Drugs Department but nothing satisfactory has evolved. We know the Koch treatment is quackery but the Council cannot remove a licence unless a patient voluntarily gives evidence of promise of cure by the doctor and none of these patients will do that. Only solution is to get the Department of Public Health and College to make a joint statement condemning it.

The problem is one of education with both the doctors and the people.

Problem is much broader than just prosecuting one man. Across the whole country it is a big problem. We have to make some statement and I agree it should be in conjunction with the Department of Public Health, in regard to the Koch treatment.

Moved by Dr. F. H. Wigmore, seconded by Dr. N. L. Brown, That the Cancer Committee Report be adopted as amended.—Carried.

The issue of the Saskatchewan Medical Quarterly in which the above statements appeared was sent to all of the members of the respondent College and, in addition, to certain other people, including the Honourable T. H. Bentley, the Minister of Health for the Province.

The reasons assigned in the Statement of Claim, as originally drawn, for the contention that these words reflected upon the plaintiff were that he was "the sole owner in Canada of the right to manufacture Koch's Glyoxilide, the basis of the Koch treatment referred to in the said libel, and the plaintiff is and was at the time of the publication of said libel a user of the Koch treatment." By paragraph 7 it was alleged that the words in their plain and obvious meaning were defamatory of the plaintiff. By paragraph 8 it was alleged that the words "meant and were understood to

refer to the plaintiff" and by paragraph 9 that they meant and were understood to mean that he had been guilty of professional misconduct and was incompetent in the practice of his profession, an unfit person to carry on the said profession and had been dishonest in his relations with the public, including the medical profession.

Before pleading the respondent demanded particulars. In reply to the demand for particulars of the publication of the libel alleged in paragraphs 3 and 4 of the Statement of Claim, the appellant said that it had been circulated to the medical profession in Saskatchewan, to "the Parliament Buildings, Toronto, Ont." (sic), the Ontario Medical Association, the Department of Health and Welfare of Canada, Dr. W. H. Setka of Prince Albert and D. H. Crofford of the last mentioned place. Answering the demand for particulars of the allegation that the plaintiff was the sole owner in Canada of the right to manufacture Koch's Glyoxilide, the appellant said that he was the "Canadian owner" of a licence for the manufacture of Glyoxilide issued by William F. Koch, the patentee under Canadian Patents Nos. 381496 and 430881.

In answer to the demand for particulars of the Koch treatment, he said that it was an injection of the substance known as Glyoxilide, together with dietary and other restrictions on the part of the patient, adding that the treatment had been effective in the treatment of certain named diseases of human beings, including neoplasia, which word, as was disclosed by the evidence, was intended to mean malignant tumors, and of certain diseases of animals.

In reply to the demand for particulars of paragraphs 7 and 9 of the Statement of Claim, the only answer made was that their meaning was clear and further particulars were refused.

The respondent moved before McKercher, J. for an order for further and better particulars and an order was made directing that certain further particulars be given. In obedience to this order the appellant said that the words "We know the Koch treatment is quackery" defamed the plaintiff as an individual, a person and a medical practitioner, because the plain and ordinary meaning of the word "quack", when applied to a medical practitioner, holds him

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up "to ridicule in the eyes of the medical profession and of the public." Further, it was said that the reference to "removal of licence" defamed the plaintiff by indicating that he was not a fit and proper person to hold a licence and practise medicine and that the words:—"The problem is much broader than just prosecuting one man. Across the whole country it is a big problem" defamed the plaintiff since:—"No medical practitioner in Canada other than the plaintiff prepares, distributes and authorizes the use of the Koch treatment." and suggested that the plaintiff, by reason of his adherence to the Koch treatment, was likely to become an accused person in criminal proceedings.

Giving further particulars of paragraph 7, the appellant said that he had been "the sole source of the Koch treatment in Canada for a period exceeding ten years, either personally or through those directly under his authority" and that the use of the Koch treatment by the plaintiff or by others on his behalf under his authority had become "synonymous with his name across Canada wherever the Koch treatment is known." The answer further said:—

> The plaintiff is the President and majority shareholder in the William F. Koch Laboratories of Canada Limited, a company incorporated under the Companies Act (Ontario) which laboratory company manufactures and prepares the Koch treatment under the direction of the plaintiff.

Giving further particulars of paragraph 8 of the Statement of Claim, the appellant further amplified his contention that the words complained of referred to him and said that they implied that he was an unfit person to carry on his profesion but did not explain why they would be so understood by anyone. As to this, the appellant appeared to have been satisfied to rely upon the particulars given of paragraph 7.

In furnishing further particulars of paragraph 9, the appellant repeated that the words "meant and do mean to the public in general and those persons to whom the libel was published in particular and every ordinary right thinking person would understand and believe that the plaintiff had been held up to ridicule and contempt" and that the libel was so worded that it would be understood as implying that he was a quack.

The Statement of Defence, as amended and upon which the respondent went to trial, denied the publication of the article which was alleged in paragraph 3 of the Statement of Claim but did not deny that the defendant had published the article complained of in its Medical Quarterly of December 1951 and said that it was a true and accurate report of the proceedings at its annual meeting at which there were present only members of the respondent, that it had an interest in publishing to those to whom the Quarterly was sent a report of the said proceedings and those to whom it was sent had a corresponding interest in receiving it and that the publication was bona fide and without malice and the occasion of its publication was privileged.

The action came on for hearing before the Chief Justice of the Queen's Bench and a jury. In the view that I take of the matter, it is unnecessary to review the evidence given as to the merits or demerits of Glyoxilide which the appellant alleged in the particulars of paragraph 7 of the Statement of Claim to be the Koch treatment. If the meaning to be assigned to the expression "quack treatment" or "quack medicine" is that it is treatment which is worthless in dealing with cancer, it was demonstrated at the trial that, in the opinion of those directing the publication of the Journal of the American Medical Association, of the Commission for the Investigation of Cancer Remedies set up by the Ontario Government, as expressed in its report of February 27th, 1942, of the Saskatchewan Cancer Commission, of the medical practitioners of Saskatchewan generally and of the Deputy Minister of National Health for Canada, the term might properly be applied to the product Glyoxilide.

At the trial it was shown on the cross-examination of the appellant that the allegation in paragraph 7 of the Statement of Claim that he was the sole owner in Canada of the right to manufacture Koch's Glyoxilide was inaccurate since in 1944, shortly after obtaining in his own a licence from Dr. Koch, he had granted a licence to manufacture the substance to William F. Koch Laboratories of Canada Limited in return for shares of stock in that company which, apparently, was organized and controlled by him. There is no evidence that the appellant ever manufactured or sold Glyoxilide in Canada or elsewhere. It was apparently,

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however, in view of this circumstance that in giving particulars of paragraph 7 the appellant changed his ground and said that he was the sole source of the Koch treatment in Canada, either personally or "through those directly under his authority." This, apparently, was intended as a reference to the company.

Evidence was given that the Medical Quarterly had been published to certain other persons in addition to those mentioned in the answer to the first demand for particulars, these persons being the Honourable Mr. Bentley, six medical doctors, members of the College living elsewhere than in Saskatchewan, and the librarians of the Public Health Library in Regina and of medical libraries in Victoria and Vancouver and the Manager of Medical Services Incorporated, an organization which operated a hospital plan.

The plaintiff, as stated, had alleged in a variety of manners that the references made to the Koch treatment were in effect references to him and were so understood. The plain meaning of the case set up was that the words complained of conveyed this meaning to the persons to whom it was published. As the article contained no reference to the appellant, it was necessary that this fact be established by evidence and there was no such evidence given. Of the persons to whom publication was proven, only two were called by the plaintiff as witnesses, these being the Honourable Mr. Bentley and Crofford, an employee of the Canadian Pacific Railway Company at Saskatoon, who had become interested in the use of Glyoxilide and said he had taken it for the Treatment of an Ulcerated stomach and obtained some benefit. The Quarterly had been sent to Mr. Bentley, as above stated, but Crofford had obtained a copy simply by going to the office of the respondent in Saskatoon, where it was given to him at his own request. Neither of these witnesses were asked by counsel for the appellant as to what they understood from the language complained of and there is nothing in the evidence of either of them suggesting that they understood from it that the appellant was a quack doctor, or that the article reflected upon him in any way.

The appellant, however, called certain other witnesses to whom the appellant was known and who had varying degrees of knowledge of his professional activities. To none

of these had the Medical Quarterly been published by the respondent. One of them, an Ontario County Court Judge, who had acted professionally for the appellant when in practice, was asked the following question:—

> Q. I want to read to you certain words in the libel complained of: 'We know the Koch treatment is quackery.' Can you tell me from your knowledge of the circumstances whether or not in your opinion those words refer to any particular man?

to which he answered:—

> Dr. Arnott is *the* Koch treatment as far as Canada is concerned.

As the plaintiff had pleaded that the Koch treatment was Glyoxilide, presumably this answer should be construed as meaning that words reflecting unfavourably on this patent medicine defamed the plaintiff, in the opinion of this witness. Another witness, a retired Deputy Minister of Agriculture for British Columbia, when asked to whom, in his opinion, the words "Koch treatment" referred, replied that they referred to Dr. Arnott. Asked to explain why, he said: —"Well, it stands on fact." and said that Arnott was the manufacturer in Canada of the Koch treatment and that no other doctor was giving it. Both of these statements were shown by the evidence to be inaccurate. In answer to further questions addressed to him by the learned trial Judge, he said that the Koch treatment was a well known treatment in London, Ont. and that Arnott was the representative of the Koch Company. A veterinary surgeon from Victoria, B.C. to whom the words were read and who was asked the question:—

> Does that, in your opinion, refer to any particular man?

replied:—

> Well, Dr. Arnott comes in to my mind.

A veterinary surgeon from Chilliwack, B.C. said that the words referred to Dr. Arnott. It was not shown that any of these witnesses had either seen or read the report complained of.

The appellant rested his claim that the words bore the meaning which is assigned to them upon this evidence. At the conclusion of the appellant's case, counsel for the respondent moved that the case be withdrawn from the jury on three grounds, namely, that the publication of the Quarterly was on a privileged occasion, that there was no

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evidence of malice to be submitted to the jury and no evidence identifying the plaintiff with the alleged libel. The motion was refused and evidence was given on behalf of the respondent. Questions were submitted to the jury which read and were answered as follows:—

1. Were the words published defamatory? Answer—Yes.
2. Were they defamatory of Plaintiff? Answer—Yes.
3. Were they published maliciously? Answer—No.
4. What damage if any do you allow? Answer—$7000.00.

All of the learned judges of the Court of Appeal were of the opinion that there was no evidence that the words complained of conveyed to any person to whom publication was made by the respondent any meaning defamatory of the plaintiff and all agreed that the publication of the report to the persons to whom it was published by the respondent was made upon a privileged occasion.

The question as to whether the writing complained of was capable of a libellous meaning was one to be determined by the learned trial Judge *Tolley* v. *Fry,* (1). However, words which merely disparage a man's goods or property but do not reflect upon his personal or trading character do not give ground for an action for libel (Gatley, 4th Ed. 43). The statement that the Koch treatment was quackery, in the context, clearly meant that the use of Glyoxilide was useless in the treatment of cancer and the text of the discussion shows that it was the opinion of the doctors assembled at the meeting that its use in Saskatchewan for that purpose should be prevented. Dr. Arnott was not the manufacturer of Glyoxilide and apparently, from his own evidence, he had not actively practised medicine since 1940. He was, however, the President of the company which manufactured the preparation, which was carried out under his supervision. While an action for libel would not lie for words defamatory of the preparation unless they implied something in the nature of carelessness, misconduct or want of skill, an action on the case would lie at the suit of the manufacturer or dealer if the falsity of the statement complained of that the statements were made maliciously, and special damages had been proven (*South Hetton Coal Co.* v.

(1) [1931] A.C. 333 at 342.

North-eastern News Association (1)). This is not such an action. If it were, it would of necessity fail as the jury found there was no malice.

It was disclosed by the evidence of Dr. Arnott at the trial that he had not practised medicine in Ontario since 1940 and it is not suggested that he, at any time, practised his profession in Saskatchewan. The references in the article complained of to irregular practitioners and to taking away a doctor's licence, referring as they did of necessity to such persons in the Province of Saskatchewan, therefore could not have referred to him. The appellant's case must, therefore, be that since he was associated with a company which manufactured and sold this patent medicine, to brand it as a quack remedy defamed him.

There can be no cause of action in libel unless the writing complained of is published. Mr. Justice Gordon has referred to certain passages in the judgments delivered in the House of Lords in *Capital and Counties Bank* v. *Henty* (2), an action for libel in which the words in their natural meaning were not libellous but in which an innuendo in which a libellous meaning was assigned to them was pleaded. The judgments delivered by Lord Selborne, Lord Blackburn and Lord Watson and Lord Bramwell are all to the effect that in such circumstances the onus lies upon a plaintiff to prove facts and circumstances leading to the conclusion that the language was understood in a libellous sense by those to whom the publication was made. Lord Selborne said (p. 745):—

> The test, according to the authorities, is whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense.

Lord Blackburn said in part (p. 771):—

> A libel for which an action will lie is defined to be a written statement published without lawful justification, or excuse, calculated to convey to those to whom it is published an imputation on the plaintiffs, injurious to them in their trade, or holding them up to hatred, contempt or ridicule.

and further: (p. 775):—

> The onus always was on the prosecutor or plaintiff to shew that the words conveyed the libellous imputation, and if he failed to satisfy that onus, whether he had done so or not being a question for the Court, the

(1) [1894] 1 Q.B. 133 at 139. (2) (1882) 7 A.C. 741.

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Locke J.

defendant always was entitled to go free. Since Fox's Act at least, however the law may have been before, the prosecutor or plaintiff must also satisfy a jury that the words are such, and so published, as to convey the libellous imputation. If the defendant can get either the Court or the jury to be in his favour, he succeeds. The prosecutor, or plaintiff, cannot succeed unless he gets both the Court and the jury to decide for him.

Lord Watson said in part (p. 788):—

> I am accordingly of opinion that, whilst the language of the circular is, in the sense which I have indicated, capable of suggesting the injurious imputation of which they complain, the appellants have failed to prove facts and circumstances leading to the conclusion that it must have been so understood by those who received it, or in other words have failed to shew that it had a libellous tendency.

Lord Bramwell, after saying that no evidence had been given in support of the innuendo, pointed out that no witness who received the circular said what he understood by it.

In the absence of any evidence by anyone who received the Medical Quarterly that they understood the language complained of in a sense defamatory of the plaintiff, there was, in my opinion, no evidence of publication (Gatley, 4th Ed. 90). If it were to be conceded, contrary to what appears to me to be the law, that such evidence to be admissible must of necessity be given by some person to whom the respondent published the Quarterly, there was no evidence that the publication had been received by any of the four witnesses relied upon by the appellant to support the innuendoes. In my opinion, if it be conceded for the purpose of argument that the words were capable of a meaning defamatory of the plaintiff, the action should have been withdrawn from the jury by the learned trial Judge at the conclusion of the appellant's evidence, on the ground that there was no evidence upon which the jury could find that the language was so understood by anyone to whom it was published. I respectfully agree with the reasons for judgment delivered by Mr. Justice Gordon on this aspect of the case, as well as with his opinion as to the extent of the admission of publication made by the respondent's counsel at the trial.

I would dismiss this appeal with costs.

CARTWRIGHT J.:—The relevant facts are sufficiently set out in the reasons of other members of the Court.

I agree with my brother Estey that the report complained of was published on an occasion of qualified privilege and that the words used did not go beyond what was reasonably germane to the performance of the duty giving rise to the privilege. I wish however to add some observations as to the argument that the protection afforded by the privileged occasion did not extend to publication to persons other than members of the respondent College.

On the state of the pleadings when the action was tried, what the defendant was required to meet was an allegation that it had published the words complained of not to the public at large but to the members of the medical profession in Saskatchewan, to the Parliament Buildings, Toronto, Ontario; the Ontario Medical Association, 135 St. Clair Avenue West, Toronto, Ontario; the Department of Health and Welfare of Canada, Ottawa, Ontario; Dr. W. H. Setka, Prince Albert, Sask., and D. H. Crofford, Prince Albert, Sask.

At the hearing of the appeal in the Court of Appeal the appellant asked leave to add to his particulars the names of the following persons to whom it was alleged the defendant had published the alleged libel:—

Dr. C. H. Stapleford of Ottawa
Dr. G. P. Peterson of Vancouver
The Hon. T. H. Bentley, Minister of Health of Regina.
Miss Genevieve Bartole, Public Health Librarian, Regina.
Dr. D. P. Miller, Victoria.
Mrs. Edith C. Gould, Librarian, Victoria Medical Society, Victoria.
Dr. F. D. Mott, Washington, D.C.
Dr. M. G. Taylor, University of Toronto.
Dr. C. T. Wolan.
Mrs. Patricia Holmgren, Librarian, Vancouver Medical Society.
Dr. A. C. Scott, Victoria.
Miss Margaret Martin, Librarian, Medical Centre Library.
Mr. C. H. Shillington, Manager, Medical Services, Inc.

The Court of Appeal allowed this amendment.

I have not been able to find any evidence to support or explain the allegation that publication was made to "the Parliament Buildings, Toronto, Ontario". If read literally the allegation is meaningless as the words quoted do not refer to a person, corporation or entity to which publication could be made.

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Cartwright J.

I have reached the conclusion that not only the members of the respondent College but also the Ontario Medical Association, The Department of Health and Welfare of Canada and all the other persons named in the amended particulars as being those to whom publication was made had a sufficient interest in receiving the report complained of to cause the protection of the privileged occasion to extend to publication to them.

Of those named, Dr. W. H. Setka, Dr. C. H. Stapleford, Dr. G. P. Peterson, Dr. D. P. Miller, Dr. F. D. Mott, Dr. C T. Wolan and Dr. A. C. Scott, are all members of the respondent College.

In my opinion the Ontario Medical Association, the Department of Health and Welfare of Canada, the Minister of Health of Saskatchewan, and Miss Bartole, Mrs. Gould, Mrs. Holmgren and Miss Martin as librarians of medical bodies had a sufficient interest by reason of the nature of their duties in receiving the report.

Dr. Taylor, while not a doctor of medicine, had been in the Saskatchewan Department of Public Health and is stated to be now engaged in social work in Toronto and to take a great interest in the matter of cancer prevention and treatment with which the report is concerned. While the evidence in regard to Dr. Taylor is somewhat scanty it is in my opinion sufficient to show that he had an interest in receiving the publication.

Mr. Shillington as manager of Medical Services Incorporated, a plan for prepaid medical services, was said by Dr. Ferguson to require the information in the report in the course of administering the plan and there is no contradiction of this evidence.

D. H. Crofford had used Glyoxilide himself and was engaged in buying and reselling it for use in Saskatchewan. He obviously had an interest in knowing what was said in the report about the substance in which he was dealing.

In what I have said above I am of course using the word "interest" in the sense in which it was used by Lord Campbell C.J. in *Harrison* v. *Bush* (1):

> A communication made bona fide upon any subject-matter in which the party communicating has an *interest,* or in reference to which he has

(1) (1855) 5 E. & B. 344 at 348.

a *duty*, is privileged, if made to a person having a corresponding *interest* or *duty*, although it contained criminatory matter which, without this privilege, would be slanderous and actionable.

Having reached the conclusion that the report complained of was published on an occasion of qualified privilege and that for the reasons above set out the protection afforded extended to the publication to all those to whom publication was pleaded and proved, the finding of the jury that the words were not published maliciously is fatal to the success of the action. It accordingly becomes unnecessary to consider Mr. Yule's argument, that as every member of the public may become a victim of cancer the public at large were interested in the contents of the report and its publication was information to which the public were entitled, or any of the other points which were so fully and ably argued before us. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Jackson and Cuttell.*

Solicitor for the respondent: *G. H. Yule.*

THE CORPORATION OF THE CITY OF HAMILTON ..... APPELLANT;

AND

THE CHILDREN'S AID SOCIETY OF THE CITY OF HAMILTON ..... RESPONDENT.

1954
*Mar. 25
*Oct. 5

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Infants—Neglected Children—Municipal Liability for upkeep where before permanent custody granted Children's Aid Society, child attains age of 16 years—The Children's Protection Act, R.S.O. 1950, c. 53—The Interpretation Act, R.S.O. 1950, c. 184, ss. 1 and 2.

In proceedings taken under *The Children's Protection Act,* R.S.O. 1950, c. 53, a boy born Dec. 22, 1936 was by a judge's order made on Nov. 8, 1951, committed to the temporary custody of the respondent for three months. On Feb. 13, 1952 the judge having found the boy to be a "neglected child" within the meaning of the Act and a resident of the appellant municipality and the latter liable for

*PRESENT: Kerwin C.J. and Taschereau, Estey, Locke and Cartwright JJ.

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maintenance, renewed the temporary wardship for twelve months. On Feb. 11, 1953, the case was again brought before the judge who adjourned the hearing to Feb. 25 on which date he made an order wherein he again found that the boy was a neglected child, ordered that he be permanently committed to the custody of the respondent and that the appellant pay for his maintenance. The appellant appealed on the ground that under s. 1 (*c*) of the Act a "'child' means a boy or girl who actually or apparently is under the age of 16 years of age" and since the child had attained that age, such last mentioned order was made without jurisdiction.

Held: That the order was made in proceedings commenced in 1951 when the boy was under 16 years of age and was, as was the order of Feb. 13, 1952, a continuation of the original proceedings. The definition of "child" contained in s. 1 (*c*) of the Act read in the light of ss. 1 and 2 of *The Interpretation Act,* R.S.O. 1950, c. 184, would make it inconsistent with the intent and object of the former to hold that the judge did not have jurisdiction to make the order. In *Re* Van Allen [1953] O.R. 569 approved.

Decision of the Ontario Court of Appeal [1953] O.W.N. 699, affirmed.

APPEAL from an order of the Court of Appeal of Ontario (1) dismissing the appellant's motion to set aside an order of Burbidge J., Judge of the Family Court of the City of Hamilton and County of Wentworth.

J. T. Weir, Q.C. for the appellant.

Brendan O'Brien, Q.C. for the respondent.

The judgment of the Chief Justice and of Taschereau, Estey and Locke JJ. was delivered by:—

The CHIEF JUSTICE:—The question in this appeal is whether the appellant, the Corporation of the City of Hamilton, must pay the respondent, the Children's Aid Society of the City of Hamilton, the sum of $1.65 per day for the maintenance of a boy, directed to be paid by an order, dated February 25, 1953, of the Judge of the Juvenile and Family Courts of the City of Hamilton and the County of Wentworth. This order was made under the provisions of *The Children's Protection Act,* R.S.O. 1950, c. 53, s. 1 (*c*) of which enacts:—

> 1. In this Act,
>
> (*c*) "child" means a boy or girl actually or apparently under 16 years of age;

The boy was born December 22, 1936, and, therefore, on February 25, 1953, was not "under 16 years of age", and the appellant contends that there was no jurisdiction in

(1) [1953] O.W.N. 699.

the judge to direct it to pay. If it is right, the Society also loses its right of permanent custody and control which was given by the same order.

While it does not appear in the printed case, apparently an order was made under the Act by the judge on November 8, 1951, temporarily committing him to the care and custody of the Society for three months. Pursuant to s-s. 9 of s. 7, he was brought before the judge on February 13, 1952, for further and other consideration and action whereupon, by order, the judge found him to be a neglected child within the meaning of the Act. By the same order the child was temporarily committed to the care and custody of the Society for a period of twelve months, commencing on that date; he was found to be a resident of the City, which was declared to be liable for his maintenance and ordered to pay the sum of $1.35 a day therefore. At this time the boy was still under 16 years of age.

In accordance with the same subsection, the Society applied to the judge, on February 11, 1953, for an order committing the child temporarily or permanently to the care and custody of the Society and ordering the City to pay for his maintenance. On that date the judge made an order, which, following a printed form, stated "This case was again brought before the judge for further consideration and action pending the hearing or determination as to whether or not the child" was a neglected child, and ordered that he be placed in the temporary custody and care of the Society and directed the City to pay $1.65 a day for the child's maintenance. It is apparent that the child having been declared to be a neglected child the previous year, that part of the printed form italicized should have been stricken out; but that cannot have any effect upon the prior determination.

On February 25, 1953, the order in question was made, again following a printed form. It states that the judge finds the child to be a neglected child but it may be pointed out again that the same finding had been made on February 13, 1952. By it the judge also permanently commits the boy to the care and custody of the Society and orders the City to pay $1.65 a day maintenance. This

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Kerwin C.J.

order was affirmed by the Court of Appeal for Ontario and by leave of that Court is now before us for consideration.

The scheme of the Act is that by s-s. 1 of s. 7 an authorized person may apprehend any apparently "neglected child", which has been previously defined by s. 1 (*j*). It was in pursuance of s-s. 2 of s. 7 that the boy was brought before the judge for examination and thereupon, according to the subsection, "the judge shall investigate the facts of the case and ascertain whether the child is a neglected child and his age, and the name, residence and religion of his parents." Subsection 7 provides:—

(7) Pending the hearing or determination of any such case the judge may make such order for the temporary custody and care of the child as he may deem proper.

and it was under that provision that the order of November 8, 1951, was made. Subsection 9 enacts in part:—

where a child has been temporarily committed to the care and custody of the society, the society may at any time during the period of temporary commitment bring the case again before the judge for further and other consideration and action under this section, and if the temporary commitment has not been earlier terminated, the case shall, at the expiration of the specified period, again come before the judge and the judge shall thereupon further inquire and determine whether the circumstances justify an order returning the child to the parent or guardian or making a further order under subsection 8.

The relevant part of s-s. 8, referred to above, enacts:—

(8) If the judge finds the child to be a neglected child he may make an order,

* * *

(*b*) that the child be temporarily committed to the care and custody of the children's aid society for such specified period as in the circumstances of the case he may deem necessary, provided that such period shall not exceed 12 months; or

(*c*) that the child be committed permanently to the care and custody of the children's aid society.

It was under this subsection, on February 13, 1952 (when the boy was still under 16 years of age), that the judge found him to be a neglected child, committed him temporarily to the care and custody of the Society, found him to be a resident of the City of Hamilton, and ordered it to pay the Society $1.35 per day for his maintenance. Subsection 11 of s. 7 provides:—

(11) The inquiry may be made at the hearing directed under subsection 2 or at any subsequent time as the judge may determine.

February 13, 1952, was a "subsequent time", as was also February 11, 1953, and February 25, 1953. The order for maintenance made by the judge is authorized by s. 10. Under s. 13, the society thereupon became the legal guardian of the child until he attained the age of twenty-one years or was adopted.

The order in appeal was thus made in proceedings that had commenced in 1951 when the boy was under 16 years of age, and the order of February 13, 1952, was also made when he was under that age. These orders having been so made, I agree with the Court of Appeal that the proceedings on February 11 and 25, 1953, were a continuation of the original proceedings. Section 1 (*c*) defining "child" must be read in the light of ss. 1 and 2 of the Ontario Interpretation Act, R.S.O. 1950, c. 184:—

1. The provisions of this Act shall apply to every Act of the Legislature contained in these Revised Statutes or hereafter passed, except in so far as any such provision,

(*a*) is inconsistent with the intent or object of the Act; or

(*b*) would give to any word, expression or clause of the Act an interpretation inconsistent with the context; or

(*c*) is in the Act declared not applicable thereto.

2. Where an Act contains an interpretation section or provision, it shall be read and construed as subject to the exceptions contained in section 1.

Reading the definition of "child" in accordance with these directions, it would be inconsistent with the intent or object of the Children's Protection Act to hold that under the present circumstances the judge did not have jurisdiction to order the City to pay the $1.65 per day for the boy's maintenance. This is the same conclusion to which the Court of Appeal had previously arrived in *Re Van Allan* (1), where the same point had arisen.

The appeal should be dismissed with costs.

CARTWRIGHT J.:—The question raised on this appeal is stated in the reasons of my Lord the Chief Justice.

It appears from the evidence of Mr. Judd that on November 14, 1951, Charles William Harris, hereinafter referred to as "the child", and his two sisters were made temporary wards of the respondent for a period of three months. On February 13, 1952, this temporary wardship

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was by order of His Honour Judge Burbidge continued for a period of twelve months commencing on the date of the order. On December 22, 1952, the child attained 16 years of age. On February 11, 1953, the case was again brought before the same learned judge. Counsel for both parties to this appeal were present. Counsel for the respondent requested an adjournment of the hearing to February 25, 1953, and added:—"As the existing order expires the day after to-morrow we are asking for an interim order." Counsel for the appellant is not reported as having said anything. The adjournment was granted and an interim order signed. In reproducing this interim order in the printed case there has been an error in punctuation. The original order so far as relevant reads as follows:—

Date of order—February 11, 1953.

On the 11th day of February, 1953, Pursuant to Sub-section 9, Section 7, this case was again brought before the Judge for further and other consideration and action.

Pending the hearing or determination as to whether or not the children are neglected children, it is ordered that they be in the temporary custody and care of The Hamilton Children's Aid Society.

Names of Children

Sharon Gail Harris
Florence Isobel Harris
Charles William Harris
FATHER—John Robert Harris,
MOTHER—Lillian Ellen (Lewens) Harris

It is further ordered that the corporation of the municipality of The City of Hamilton pay the sum of $1.65 a day from and including the 11th day of February, 1953, for the maintenance of each child by the Society in a temporary home, an institution, a foster-home, or elsewhere where children are not cared for without compensation.

On February 25, 1953, the hearing proceeded. The opening statement made by counsel for the respondent was:—"This is a renewal on adjournment today Your Honour, and we should like to proceed." At the conclusion of the hearing His Honour made an order dated February 25, 1953, providing that the child be permanently committed to the care and custody of the respondent "commencing the 25th day of February, 1953," and ordering the appellant to pay the sum of $1.65 a day from and including the 11th day of February, 1953, for his maintenance.

Pursuant to leave granted by His Honour the appellant appealed to the Court of Appeal for Ontario. That Court dismissed the appeal, following its earlier decision in *Re Van Allen* (1), but granted leave to appeal to this Court.

Counsel for the appellant seeks to distinguish the case at bar from *Re Van Allen* and, alternatively, asks us to over-rule that decision.

The ground of attack upon the order of His Honour Judge Burbidge is that it was made without jurisdiction by reason of the fact that the child had attained the age of 16 years before it was made. There is only one possible ground of distinction between the facts in the case at bar and those in *Re Van Allen.* In both the order committing the child permanently to the care of the respondent society was made after the child had attained 16 years of age but in *Re Van Allen* in the view of Hogg J. A. such order was made immediately before the expiration of the order, which had been made before the child attained the age of 16 years, committing her temporarily to the care of the Society for a period of twelve months while in the case at bar such order was made some twelve days after the expiration of the corresponding order. This difference in the facts does not appear to me to render the *ratio decidendi* of *Re Van Allen* inapplicable to the case at bar. In the case at bar the application to His Honour was made and came on for hearing before the temporary order had expired, but, presumably for the convenience of the parties or their counsel, the actual hearing and determination were adjourned for two weeks. In my view the learned Judge had jurisdiction to make the order complained of in this appeal on February 11, 1953, and did not lose jurisdiction by reason of adjourning the hearing for two weeks, or by reason of making the interim order of February 11 which seems to have been regarded as necessary to preserve matters in *statu quo* during the period of the adjournment. As was held in *Re Van Allen,* it was not a new "case" that came before the judge on February 25, 1953.

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Cartwright J.

For the reasons given by my Lord the Chief Justice and for those given by Hogg J. A. in *Re Van Allen* (1), which in my opinion was rightly decided, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *A. J. Polson.*

Solicitors for the respondent: *Phelan, O'Brien, Phelan & FitzPatrick.*

1954

*May 25, 26

*Oct. 5

THE CORPORATION OF THE CITY OF TORONTO (*Defendant*) ..... APPELLANT;

AND

CANADA PERMANENT MORTGAGE CORPORATION (*Plaintiff*) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporations—Contracts—Debenture Issue—Validity of variation in terms thereof by letter under corporate seal—The City of Toronto Debt Consolidation Act, 1889 (Ont.) c. 74—An Act respecting the City of Toronto, 1910 (Ont.) c. 135—The Municipal Act, R.S.O. 1950, c. 243, s. 334.

By a by-law passed under the authority of the Toronto Debt Consolidation Act, 1889 (Ont.) c. 74 as amended, it was provided that the mayor and city treasurer be empowered to raise money by way of loan upon the security of debentures. The debentures were to bear date July 1, 1909, and be payable July 1, 1948, either in currency or sterling in Canada, Great Britain or elsewhere and to have attached coupons for the payment of interest at 4% per annum payable half-yearly at the place where the debentures were made payable. The taking of the debentures as a temporary or permanent investment of the appellant's sinking fund was authorized by the by-law. Debentures were subsequently prepared in compliance with the terms of the by-law payable in sterling at London both as to principal and interest. By 1910 (Ont.) c. 135 the by-law and the debentures were validated and confirmed. On Dec. 31, 1909 the debentures were taken in at par as a temporary investment of the appellant's sinking fund and in 1911 sold at a discount to a broker although the city paid par to the sinking fund. The broker requested that the place of payment be made New York instead of London

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

(1) [1953] O.R. 569.

and the city treasurer under authority of the appellant's Treasury Board, of which the mayor was a member, by letters dated Nov. 18 and Dec. 9, 1911, written under the appellant's seal, advised payment would be made in New York at the par of exchange (9½%). In 1936 the respondent purchased the debentures from another broker. The interest coupons from July, 1936 to January, 1940 were paid the respondent at London in pounds sterling and at New York in U.S. dollars at the par rate of $4.86⅔ but from that date the appellant refused to pay the interest coupons, and on maturity the principal, other than in accordance with the terms appearing on the face of the debentures.

Held: The appellant was authorized to pay the principal and interest of the debentures only in accordance with the terms appearing thereon.

Per: Kerwin C.J.: The debentures were issued when they were taken as an investment of sinking fund monies. Once issued they could not be re-issued with or without the changes purporting to have been made by the City Treasurer or Treasury Board. *Re Perth Electric Tramways* [1906] 2 Ch. 216.

Per: Rand J.: The issued documents could not be modified by letter as the City Treasurer under the seal of the Corporation purported to do.

Per: Kellock, Locke and Fauteux JJ.: Whatever authority the mayor and treasurer may have had to amend the terms of the debentures ceased when the bonds were taken into the sinking fund.

APPEAL from the judgment of the Court of Appeal for Ontario (1) allowing the respondent's appeal from the judgment of LeBel J. (2) dismissing the action.

J. J. Robinette, Q.C. for the appellant.

C. F. H. Carson, Q.C., R. N. Starr, Q.C. and *Allan Findlay* for the respondents.

THE CHIEF JUSTICE:—The substantial point for determination in this appeal is whether the respondent, as holders of debentures of the appellant, the City of Toronto, for £500 each, is entitled to have them redeemed at the rate of exchange ($4.86⅔) prevailing in 1909, or, as the city contends, at the rate of exchange ($4.02) in July, 1948, when the principal of the debentures fell due. The answer to that question will determine the matters in dispute between the parties as to the rate of exchange to be applied to the interest coupons which were payable (and have been paid) half-yearly from January 1, 1941 to January 1, 1948, inclusive.

(1) [1953] O.R. 966; [1953] 4 D.L.R. 816.

(2) [1953] O.R. 81; [1953] 1 D.L. 836.

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CITY OF TORONTO v. CANADA PERMANENT MORTGAGE CORP.

Kerwin C.J.

The debentures were issued pursuant to By-law 5338 of the City, which had been passed in accordance and with the authority conferred upon it by Ontario statute c. 74 of 1889, as amended by c. 89 of 1895. That statute authorized the city to pass by-laws to provide for the issue of debentures to be known as City of Toronto General Consolidated Loan Debentures "and the said debentures may be payable at any place in Canada, Great Britain, the United States of America, or elsewhere, and may be in sterling money of Great Britain, or currency of Canada or the United States of America, and such debentures shall be in sums of not less than $100 currency or £20 sterling".

The by-law was passed July 16, 1909, and, after providing that the Mayor and Treasurer might raise money by way of loan upon the security of the debentures, enacted that the Mayor and Treasurer might cause any numbers of debentures to be made as required. The debentures were to bear date July 1, 1909, and to be payable July 1, 1948, either in currency or sterling in Canada, Great Britain, or elsewhere, with coupons attached for the payment of interest at the rate half-yearly of 4% per annum. The debentures were printed bearing date July 1, 1909, and payable July 1, 1948, and by them:—

> The Corporation of the City of Toronto promises to pay to the bearer at Lloyds Bank Limited, London E.C., England, the sum of Five Hundred Pounds sterling on the 1st day of July, A.D. 1948, and the half-yearly coupons thereto attached as the same shall severally become due.

The interest coupons were payable in sterling.

By c. 135 of the Ontario Statutes of 1910, by-law 5338 "and all debentures issued, or to be issued thereunder, and all assessments made or to be made, and all rates levied, or to be levied, for payment thereof, are validated and confirmed, and the said Corporation is declared to have had power to pass, issue and levy the same". At all relevant times the Municipal Act in force in Ontario was c. 19 of the statutes of 1903. We need not concern ourselves with s-s. (1) of s. 420 of that Act which authorized the Council to invest monies at the credit of the sinking fund account in local improvement debentures of the municipality, or in any other debentures of the municipality which might be approved by the Lieutenant-Governor-in-Council,

because the special statute of 1910 confirming by-law 5338 is sufficient authority for the taking of the debentures, issued under the by-law, as a temporary investment of the sinking fund, in view of Clause VI of the by-law:—

> The said Mayor and Treasurer may cause the said debentures, or a sufficient amount thereof, to be sold or hypothecated, or may authorize the said debentures, or any portion thereof, to be purchased or taken as and for a temporary or permanent investment of the sinking fund of the City of Toronto, and the proceeds thereof, after providing for the discount (if any) and the expenses of the negotiation and sale thereof, shall be applied for the purposes above specified and for no other purpose.

On December 31, 1909, a meeting of the Treasury Board was held, at which the Treasurer submitted a statement of debentures which he recommended be taken for temporary investment of sinking fund monies, and included in that statement were the debentures issued under by-law 5338. The debentures being dated July 1, 1909, the first payment of interest was due January 1, 1910. By Clause V of the by-law, during thirty-nine years, the currency of the debentures, the sum of $10,000 was to be raised annually for the payment of interest and the sum of $3,461 was to be raised annually for the purpose of forming a sinking fund for the payment of the principal. The debentures remained as a temporary investment of the City's sinking fund until 1911, when they were sold through brokers.

The important question is whether the debentures were issued in December, 1909, when they were taken as a temporary investment of sinking fund monies, or whether they were issued only when the sale through the brokers occurred in 1911. In my opinion they were issued in December, 1909. If they were not issued then, there was no debt on the part of the City and there would have been no power to levy a rate to provide for the interest and for the sinking fund to retire the principal: *Bogart* v. *Township of King* (1). Once issued they could not be re-issued with or without the changes purporting to have been made by the City Treasurer or Treasury Board: in *re Perth Electric Tramways* (2); and this notwithstanding the facts

(1) (1901) 1 O.L.R. 496. (2) [1906] 2 Ch. 216.

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that the debentures were taken into the City's sinking fund at par and, while they were sold to the brokers in 1911 at a discount, the City paid par to the sinking fund.

The special act of 1910 validated the by-laws and debentures, but not something done by officials of the municipality without statutory authority. Similarly, the matter is not affected by the general provisions of s. 334 of the present Municipal Act (1950) R.S.O., c. 243:—

> Where the interest for one year or more on the debentures issued under a by-law and the principal of any debenture which has matured has been paid by the corporation, the by-law and the debentures issued under it shall be valid and binding upon the corporation.

By-law 5338, and the debentures issued under it, are valid and binding upon the Corporation, but they, including the interest coupons, were to be paid in accordance with the terms of the documents (printed and issued pursuant to the by-law) at whatever the pound was worth upon the respective due dates.

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

RAND J.:—The by-law authorized the mayor and the city treasurer to "raise by way of loan on the security of the debentures hereinafter mentioned" a sum of money not exceeding $250,000. The debentures were to be issued "either in currency or in sterling money, payable in gold coin for not less than $100 currency or £20 sterling each"; they were to be "sealed with the seal of the said Corporation and be signed by the mayor and treasurer" and were to be payable either "in Canada, Great Britain, or elsewhere".

Under this authority the instruments dated July 9, 1909, were prepared payable in sterling at London. Evidently the market in London at that time was not favourable to such financing because in November, 1911 an offer was made by G. A. Stimson & Co., acting for a principal in the United States, to the city, to purchase £46,800 out of the total issue of £51,369 12s., 3d. The offer apparently requested the place of payment to be New York instead of London. Under date of November 18, 1911 the treasurer of the city, R. T. Coady, wrote to Stimson & Co. "with

reference to the following debentures which you purchased from the City of Toronto", the description of which included £46,800 mentioned. The letter concluded:—

> In compliance with your request and in order to suit the convenience of your client, this Corporation will make payment of principal and interest either at the Canadian Bank of Commerce, New York City or the Bank of Toronto at Toronto (your clients to decide which bank), instead of at London, England. Payment will be made at the par of exchange (9½%).

On November 13 Coady, in a letter to the Treasury Board of the city, had recommended the sale of the debentures on two conditions:—

> (*a*) That they should be held in Canada with interest and principal payable "here or in New York", as arranged with the City Treasurer;
>
> (*b*) And that they be sold on the distinct understanding that they would not be negotiated in Great Britain in order that they might in no way conflict with a contemplated loan to be made in London early the next year, 1912.

A further letter dated December 9, 1911 from Coady to Stimson & Co., after a reference to the "debentures purchased" by that company in the sum of £46,800, the last paragraph of the letter of November 18, slightly modified, was repeated:—

> In order to suit the convenience of your client, this Corporation will make payment of the principal and interest of these debentures at the Canadian Bank of Commerce, New York City, instead of at London, England. Payment will be made at the par of exchange (9½%).

It was signed by Coady, described as "City Treasurer, Keeper of Civic Seal". The letter of November 18 was authorized by the Treasury Board of the city of which the mayor was a member at a meeting at which he was present. Both letters to Stimson & Co. were impressed with the corporate seal but neither was signed by the mayor.

Apparently on May 19, 1936 the respondents purchased £20,000 worth of the debentures, and in the letter from the brokers of that date confirming the purchase the amount payable is calculated on the exchange rate of $\$4.86\frac{2}{3}$ at the price of $107.40, and the securities are said to be "payable Canada, New York and London". On June 1, 1936 the respondents were furnished with a copy of the letter of November 18, 1911 and their cheque for the price of the debentures is by memorandum on the letter of confirmation said to have been issued on the same day.

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The first, and in my opinion, the determining question is whether the letters of November 18 and December 9 were valid as modifications of the documents. What the mayor and treasurer were authorized to do was to borrow money upon the security of "debentures". Now that term for the purposes here is well known; although somewhat elastic in meaning, in municipal financing it is, ordinarily, as here, a promise under seal to pay the bearer a principal sum and interest at certain times, and is an instrument transferable on the markets by delivery. Obviously the letter could not be made a constituent part of the documents themselves; only by alterations in their language itself could such a change be made. It is elementary as well as basic that a negotiable instrument must be and remain unaffected by any agreement *dehors* itself. The letter at most would be a collateral undertaking which by its nature could be effective not otherwise than as an ordinary contract between the immediate parties to it. The debenture is itself a self-contained obligation, in the hands of third persons enforceable according to its terms; and that the authority to issue a security of that nature and in that form includes authority to modify its terms in relation to subsequent holders by means of letters scattered among bond houses is, in my opinion, a contradiction in terms. The result of any such dealing is exemplified here by the cashing of interest coupons in London when sterling was at a premium, and now that the pound is at a discount, by claiming payment in New York. That is beyond what the by-law contemplated as the issue of debentures.

On the surface this appears to be a harsh result, but the slightest appreciation of the nature of municipal action and of authority conferred on municipal officers shows it to be inevitable. The power to incur debts binding the citizens and their property within a subordinate administration of government must be found in the legislation conferring it. That legislation is published at large. If the specification of the authority is ignored, then the victims must suffer the consequences they have brought down upon themselves. That persons engaged in large scale investments could, to any extent, act upon such a loose

and irregular mode of civic financing as that exhibited here is something over which the veil of charity had best be drawn.

The Court of Appeal viewed the confirming legislation, 10 Edw. VII, c. 35, s. 6 as supplying any deficiency of authority and assumed the certificates and the debentures declared to be legally issued to include the letters of the treasurer. If this had been intended, the confirmation would have used the clearest language to make that extraordinary fact evident. It is not the usual meaning of the words to embrace what are in effect circular letters spread around bond markets, especially when they are written after the legislation is enacted. Nor is s. 334 of the Municipal Act any more effective to bring that result about; the same objection applies and it strengthens the view that no such slipshod mode of issuing securities was contemplated. To treat the operation of these statutory provisions as converting the sterling obligation into one of United States dollars would work a virtual fraud on any purchaser who bought the debentures on the security of the pound.

I would, therefore, allow the appeal and dismiss the action with costs throughout.

The judgment of Kellock and Fauteux JJ. was delivered by:—

KELLOCK J.:—The material parts of by-law 5338 passed on the 16th of July, 1909, by the appellant are as follows:

I

It shall be lawful for the Mayor of the City of Toronto and the City Treasurer to raise by way of loan, upon the security of the debentures hereinafter mentioned from any person or persons, body or bodies corporate, who may be willing to advance the same upon the credit of such debentures, a sum of money not exceeding in the whole the sum of $250,000.00, and to cause the same to be paid into the hands of the Treasurer of the said City, for the purposes and with the objects above recited.

II

It shall be lawful for the said Mayor and Treasurer to cause any number of debentures to be made for such sums of money as may be required for the purposes aforesaid, either in currency or sterling money, payable in gold coin, for not less than one hundred dollars currency, or twenty pounds sterling each, and not exceeding in the whole the said sum at $250,000.00, and that the said debentures shall be sealed with the seal of the said Corporation, and be signed by the Mayor and the Treasurer.

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III

The said debentures shall bear date the first day of July, 1909, and shall be made payable on the first day of July, 1948, either in currency or sterling, in Canada, Great Britain, or elsewhere, and shall have attached to them coupons for the payment of interest.

IV

The said debentures shall bear interest at the rate of four per cent per annum from the date thereof, which interest shall be payable half-yearly, on the first days of the months of January and July in each year, at the place where the said deventures are made payable.

VI

The said Mayor and Treasurer may cause the said debentures, or a sufficient amount thereof, to be sold or hypothecated, or may authorize the said debentures, or any portion thereof, to be purchased or taken as and for a temporary or permanent investment of the sinking fund of the City of Toronto, and the proceeds thereof, after providing for the discount (if any) and the expenses of the negotiation and sale thereof, shall be applied for the purposes above specified and for no other purpose.

Paragraph *V* provides that during the thirty-nine years of the currency of the debentures, the sum of $13,461 should be raised annually to provide for the interest and sinking fund by a special rate "from the year 1910 to the year 1948", both years inclusive.

Acting under the authority of this by-law, bonds were duly executed under the corporate seal providing for payment in pounds sterling "at Lloyd's Bank Limited, London E.C., England" on the 1st day of July, 1948, with half-yearly coupons for interest in the appropriate amounts. The bonds not having been sold, they were, in the following December, "taken for temporary investment of sinking fund moneys" by the appellant corporation and the proceeds applied to the purposes for which the by-law had been passed.

On November 13, 1911, at a meeting of "the Treasury Board" of the municipality, the treasurer reported that he had received an offer from a firm of brokers on behalf of American clients "to purchase" the bonds at £96.5.0 per £100 and interest from July 1, 1911, and he recommended acceptance subject to the following conditions:

1. That the Debentures will be held in this Country with interest and principal payable here or in New York, as arranged with the City Treasurer.
2. That the Debentures be sold on the distinct understanding that they will not be negotiated in Great Britain, in order that they may in no wise conflict with our forthcoming large loan in London, early next year.

The board approved of this recommendation and the bonds were sold accordingly. On November 18, the treasurer wrote the brokers, the letter containing the following paragraph:

> In compliance with your request and in order to suit the convenience of your client, this Corporation will make payment of principal and interest either at The Canadian Bank of Commerce, New York City, or the Bank of Toronto at Toronto (your clients to decide which Bank), instead of at London, England. Payment will be made at the par of exchange (9½%).

The treasurer signed under the corporate seal of the municipality.

On December 9, 1911, the treasurer, again under the seal of the corporation, wrote in acknowledgment of a letter dated the previous day, stating that

> In order to suit the convenience of your client, this Corporation will make payment of the principal and interest of these Debentures at the Canadian Bank of Commerce, New York City, instead of at London, England. Payment will be made at the par of exchange (9½%).

It is common ground that the last sentence means payment on the basis of $\$4.86\frac{2}{3}$ to the pound sterling.

The bonds thus disposed of were registered in the name of the Receiver General of Canada in trust for the purchaser, a life insurance company. On January 31, 1934, this registration was cancelled, the bonds again becoming bearer bonds. It is not known through how many hands they may have passed, but eventually, on May 19, 1936, they were purchased by the respondent from another firm of brokers.

At the time of this purchase, the respondent had some knowledge of a letter having been written by the City Treasurer with relation to payment of the bonds and, on June 1, 1936, at the request of the respondent, the Deputy City Treasurer sent it a copy of the letter of November 18, 1911. No mention appears to have been made of the subsequent letter. On maturity, the respondent claimed payment in American funds on the basis of a conversion rate for sterling of $\$4.86\frac{2}{3}$.

The main contention for the respondent is that the bonds, as originally printed and executed, were amended by the two letters above referred to, and that by reason of the provisions of 10 Edward VII, c. 135, s. 6, and R.S.O.

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1937, c. 266, s. 335 and related sections, which validated the "debentures", the appellant was bound to redeem the bonds in accordance with the second letter.

It is also contended for the respondent that by reason of the appellant having paid interest for a number of years in accordance with the terms of the letter of December, the appellant was estopped from now taking any other position.

On behalf of the appellant a number of contentions were put forward, with all of which, in the view which I have formed, it is not necessary to deal. The appellant contends that there was no authority conferred upon either the mayor or the treasurer or both acting together to bind the city by either of the letters relied upon by the respondent and that there is nothing in the terms of the by-law or of the debentures which confers upon the respondents the right of action which it asserts. The appellant further contends, in any event, that by reason of the bonds having been taken into the sinking fund and the proceeds applied to the purposes for which the by-law was passed, any authority on the part of the mayor and the treasurer to amend the terms of the debentures, assuming there ever was any such authority, ceased at that time. In my opinion this contention is sound.

Section 420, s-s. (1) of the Consolidated Municipal Act, 3 Edward VII, c. 19, authorizes the council to invest moneys "at the credit of the sinking fund account" in certain securities, including "local improvement debentures of the municipality" or "in any other debentures of the municipality which may be approved of by the Lieutenant-Governor in Council". By s-s. (2) the Council is authorized to "regulate, by by-law, the manner in which such investments shall be made". S-s. (3) reads as follows:

> It shall not be necessary that any local improvement or other debentures of the municipality referred to in this section shall have been disposed of by the council, but the council may apply the sinking fund to an amount equal to the amount of such debentures towards the purposes to which the proceeds of such debentures would properly be applicable, and the council shall thereupon hold the debentures as an investment on account of the sinking fund, and may deal with the same accordingly.

No order of the Lieutenant-Governor in Council was produced authorizing the placing of the debentures in the sinking fund, but paragraph VI of the by-law authorized the mayor and treasurer to cause the debentures to be "taken as and for a temporary or permanent investment of the sinking fund", and to apply the proceeds for the purposes of the by-law. The by-law, including this provision, was validated by s. 6 of 10 Edward VII, c. 135, passed on the 19th of March, 1910.

Accordingly, assuming the mayor and treasurer would otherwise have been authorized to "amend" the bonds in the terms of either of the letters here in question, I think it clear that any such authority ceased upon the bonds being placed in the sinking fund. The special rate for the first year had been levied and the proceeds presumably paid into the sinking fund, as well as the first year's interest. The sale in 1911 could only have been a sale of the bonds as they existed at that time and the terms contained in the letters were merely terms of the contract of sale. It is not contended that these terms are enforceable against the city unless supported by the by-law here in question. In this view they, of course, are not.

I would allow the appeal with costs here and below.

LOCKE J.:—The debentures in question were issued by the Corporation of the City of Toronto under the powers vested in it by c. 74 of the Statutes of Ontario for 1889, as amended by c. 89 of the Statutes of 1895. They were dated July 1, 1909, and, when delivered, obligated the Corporation to pay the face amount of each of them in pounds sterling at Lloyd's Bank Limited, London, England, on the 1st day of July, 1948, and interest at four per centum per annum, payable half yearly.

By s. 420 of the Consolidated Municipal Act (c. 19, S.O. 1903), a municipality was empowered to purchase its own local improvement debentures and any other of its own debentures which might be approved of by the Lieutenant-Governor in Council, as an investment for the purpose of its sinking fund. By-law No. 5538 which authorized the issue of these debentures was passed on July 16, 1909, and authorized the Mayor and the Treasurer to cause the said debentures to be sold or hypothecated or purchased or

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taken as a temporary or permanent investment of the sinking fund of the City. After they had been issued, they were purchased for the purposes of the sinking fund at par and delivered in the month of December, 1909.

No question arises as to the validity of the by-law which was validated and confirmed by c. 135 of the Statutes of 1910.

From the time of their delivery as authorized, these debentures were binding obligations of the Corporation in accordance with their tenor. In this respect, the liability was the same as if they had been purchased by some third party.

Whatever may be said in support of the contention that by the terms of the by-law the Mayor and Treasurer were empowered to cause the debentures to be issued payable either in sterling or Canadian or American currency, or in all of these mediums of exchange, and to determine the place of payment, those powers were, in my opinion, exhausted when the debentures were actually issued and delivered by the Corporation in the year 1909, and the change in their terms, said to have been made by the letters addressed to Stimson and Company of November 18, 1911, and December 9, 1911, signed by the City Treasurer under the seal of the Corporation, was wholly unauthorized and not binding upon the appellant. While the terms of the letter of November 18 were shown to have been approved by a resolution of the Treasury Board, a body set up by the Council to advise the Treasurer in regard to sinking fund matters, it is not contended that that body was vested with power to alter the terms of debentures of the respondent corporation and there is nothing in the evidence to suggest that it possessed any such power.

In view of my conclusion upon this aspect of the matter, it is unnecessary for me to deal with the other questions which were so fully argued before us.

I would allow this appeal and direct that the action be dismissed with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *W. G. Angus.*

Solicitors for the respondent: *Sinclair, Goodenough, Higginbottom & Brocklesby.*

BOARD OF TRUSTEES OF ROCKY MOUNTAIN SCHOOL DIVISION No. 15 *(Defendant)* ..... APPELLANT;

1954

*May 6

*Oct. 5

AND

ATLAS LUMBER COMPANY LIMITED *(Plaintiff)* ..... RESPONDENT.

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

Mechanics' Liens—Materialman's—Whether materials furnished under one continuous contract when contract abandoned and work completed by owner—The Mechanics' Lien Act, R.S.A. 1952, c. 236.

Where materials are furnished a contractor for the erection of a school but, due to the contractor's death, the contract with the school board is abandoned by his estate, and further materials are supplied on the owner's (the school board's) order and charged to it, the two contracts cannot be tacked together to enlarge the time specified in *The Mechanics' Lien Act,* R.S.A. 1952, c. 236, s. 24, for registering a lien for materials furnished under the first contract.

Held: (Reversing the judgment of the Appellate Division of the Supreme Court of Alberta, (1953) 8 W.W.R. (N.S.) 513) that the materials furnished after the contractor's death were not supplied under the contract entered into by him with the appellant Board of Trustees.

Per: Locke and Cartwright JJ.: *Union Lumber Co. v. Porter* (1908) 8 W.L.R. 423 not followed; *Whitlock v. Loney* (1917) 3 W.W.R. 971, 10 Sask. L.R. 377 and *Fulton Hardware Co. v. Mitchell* (1923) 54 O.L.R. 472, approved.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) by which the judgment of the trial judge, McLaurin J. (now Chief Justice of the Trial Division) which dismissed the respondent's claim to a lien under *The Mechanics' Lien Act* upon a school building erected for the appellant was set aside.

C. W. Clement, Q.C. and *D. C. Bury* for the appellant.

S. J. Helman, Q.C. for the respondent.

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

THE CHIEF JUSTICE:—The Appellate Division of the Supreme Court of Alberta unanimously reversed the judgment at the trial and, as I find myself in disagreement with that result, I propose, as shortly as may be, to state my reasons for this conclusion.

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

(1) (1953) 8 W.W.R. (N.S.) 513; [1953] 3 D.L.R. 45.

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BOARD OF TRUSTEES ROCKY MOUNTAIN SCHOOL DIV. No. 15 v. ATLAS LUMBER CO.

Kerwin C.J.

In my opinion, the main point to be determined is one of fact. Much was made by the respondent of the difference between the evidence of Whaley at the first sittings and when the trial was re-opened. While on both occasions he was positive that the delivery of most of the lumber sold on November 22, 1949, was to the old school (part having been taken by him from the respondent's yard), he had stated at the first trial that all the materials had been used for toilet doors, catwalk and coat racks in the latter, while on the second occasion he admitted that in the old school the lumber was therein made into bookcases and cabinets which were then taken to the new school where they were installed. It also appeared that when Whaley's own claim for lien was filed a mistake was made as to the dates upon which he had worked for Matatall. The trial judge, having heard both stories, believed that Whaley had been honestly mistaken at the first trial as to what had happened to the lumber and that the error in his claim for lien was due to carelessness. The trial judge preferred the evidence of Whaley where it was in conflict with that of others, and I can find no ground for disagreeing with him.

I also agree that Matatall's contract with the appellant had been abandoned by his executrix prior to November 22, 1949. Moreover, there is no doubt that the order for lumber on that date was given by Whaley, nor that he was then employed by the appellant Board and not by Matatall's executrix. That is made clear not only by Whaley, but also by James Heron, the respondent's retail manager at Rocky Mountain House. The yard slip was made out in the name of the appellant and the items were charged to it in the respondent's books and payment therefor was made by the appellant to the respondent. At least part of the respondent's account against Red Deer Construction Co. (under which name Matatall had carried on business), which included the item of November 22nd, was compiled after the commencement of the proceedings, since there is an entry under date of December 1, 1949, of $5 filing fee. That is the date of the claim for lien filed by the respondent, in which document it is stated that all materials were furnished "on or before the 2nd day of November A.D. 1949. The claimant ceased to furnish materials on the 2nd day of November, 1949."; and, while an attempt was made to explain this, I

agree with the trial judge that the explanation is not satisfactory, particularly when it is borne in mind that the amount of the claim, $7,402.48, did not include the item of November 22, 1949. The account sent by the respondent to the appellant shows an item of $26.55, represented by the yard slip of November 22, 1949, which includes $21.20 for the lumber in question and the balance for lumber for two different schools of the appellant.

Under these circumstances the transaction of November 22nd does not support the respondent's claim for a lien. While section 6(1) of *The Mechanics' Lien Act,* R.S.A. 1942, c. 236, gives a lien for materials furnished for any owner, contractor, or sub-contractor, the enactment does not mean, as contended by counsel for the respondent, that the materials may in any case be furnished to any one of these three without regard to the contract under which they were so furnished. Nor can there be any presumption under s. 6(2) of the Act:—

> Materials shall be considered to be furnished to be used within the meaning of this Act when they are delivered either upon the land upon which they are to be used or upon some land in the vicinity thereof, designated by the owner.

because, while the appellant was, on November 22, 1949, the owner of the new school and the respondent might have a lien thereon if it was not paid, there was no agreement between the respondent and Matatall, or his executrix, for the delivery of this lumber so as to keep in force any lien it might have by virtue of the original contract. S. 22(1) was also relied upon, which section is in these terms:—

> A lien in favour of a contractor or sub-contractor in cases not otherwise provided for, may be registered before or during the performance of the contract or sub-contract, or within thirty-five days (or in the case of oil or gas wells or oil or gas pipe lines within one hundred and twenty days) after the completion or abandonment of the contract or sub-contract, as the case may be.

As applied to the present appeal, the respondent's sub-contract with Matatall was not abandoned, as it was merely a contract for the supply of materials as ordered by him from time to time. The section has no application to the abandonment by the executrix of Matatall of the contract between the latter and the appellant.

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It is unnecessary to consider the cases cited as, in my view, they have no relation to the facts of the case. The appeal should be allowed, the judgment of the Appellate Division set aside, and that of the trial judge restored with costs throughout.

RAND J.:—I think it the clear intention of the statute that the liens created shall be related to the mediate or immediate contracts under which the particular work is done or the particular materials furnished. S. 14(3) is explicit on this:—

(3) The lien shall be a charge upon the amount directed by this section to be retained in favour of lienholders whose liens are derived under persons to whom such moneys so required to be retained are respectively payable.

Although the date shown on the claim of lien as that of the last delivery of materials is November 2nd, evidence accepted by the trial judge puts that date as October 26th and establishes the fact that the materials delivered thereafter were ordered by and charged to the School Division. Assuming that they were used for the purposes within the construction contract, there would be no statutory holdback because the district was the purchaser and the work was done by its own employees. So far as the respondent Lumber Company was entitled to a lien, it would rank with those under the main contract.

In ordering the materials, the School Division was not acting under any contractual power to engage the credit of the main contractor; it was acting either independently of the contract, by way of making an addition to the building, or as an owner to complete work which the contractor had abandoned or in relation to which he had committed a breach of his obligation. In either view, the capacity of the company was not that in which the goods were supplied to the contractor and their delivery cannot be incorporated with those to the latter.

It is then argued that by sending a copy of the invoices to the School Division as the materials were delivered there was given a notice in writing of the lien within the meaning of s. 14(4) of the statute. But s. 6 provides for a lien "unless he (the contractor) signs an express agreement to the

contrary". The delivery of goods does not, then, necessarily raise a lien nor does the fact that the goods are furnished on credit constitute notice that a lien is claimed.

The Act undoubtedly is to be interpreted to further its purposes which are to provide security for those who contribute work or materials to the construction of an improvement. But the legislature has made it clear that that security may, in the absence of a notice, be limited to the amount of the contract price unpaid and that the lien must be registered within a specified time. To declare that it shall "absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof" (s. 24(1)) leaves no room for judicial indulgence. The lien can be registered before or during the supplying of material or within thirty-five days after the last material has been furnished; and the notice of the claim of lien to the owner affecting his payments to the contractor may be given at any time after the lien arises. With this ample time within which a supplier may act, it would be a distortion of the statute to stretch the interpretation of its provisions to the extent argued by Mr. Helman.

For these reasons the appeal must be allowed and the judgment at the trial of the issue restored with costs throughout.

The judgment of Locke and Cartwright JJ. was delivered by:—

LOCKE J.:—This is an appeal by the Board of Trustees of Rocky Mountain House School Division No. 15 from a judgment of the Appellate Division of Alberta by which the judgment rendered at the trial by McLaurin J. (now Chief Justice of the Trial Division) which dismissed the respondent's claim to a lien under *The Mechanics' Lien Act* upon a school building erected for the appellant at Rocky Mountain House was set aside.

On January 6, 1949, the School Division entered into a contract with Hugh Matatall, a contractor carrying on business under the name of Red Deer Construction Company, for the erection of a school-house on a portion of its property at Rocky Mountain House. By the contract, Matatall agreed to provide all the materials and perform all the work shown on the drawings and described in the specifications

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prepared by Mr. Campbell-Hope, an architect, for the sum of $54,900. Payments were to be made upon the architect's certificate on or before the 10th day of each month for eighty per cent of the value, proportionate to the amount of the contract, of labour and materials incorporated in the work or delivered at the site up to the first day of that month as estimated by the contractor and approved by the architect, less the aggregate of previous payments.

The general conditions forming part of the contract provided, *inter alia,* that the work should be done under the general supervision and direction of the architect, that the owner might require the contractor to furnish a bond covering the faithful performance of the contract in such form as the architect might prescribe, that the owner or the architect might make changes by altering or adding to the work the contract sum to be adjusted accordingly, but, except in case of emergencies, no change should be made unless in pursuance of a written order from the architect and no claim to an addition to or deduction from the contract price should be valid unless so ordered. It was further provided that if the contractor should neglect to prosecute the work properly, the owner, after three days' written notice, might make good such deficiencies and deduct the cost from the moneys due or to become due under the contract, provided that the architect approved such action and the amount charged to the contractor. There was further reserved to the owner the right to terminate the contract upon written notice in certain enumerated circumstances and the right to let other contracts in connection with the undertaking of which the work described in the contract should be a part.

Matatall, who apparently had done business with the respondent company for some years in connection with other of his construction operations, arranged with Carl Paulsen, then the respondent's manager at Rocky Mountain House, for the supply of lumber and certain other materials for the work. There was no arrangement made binding either upon the respondent to supply or Matatall to purchase all the materials required, but the evidence is sufficient, in my opinion, to show that both parties contemplated that all the required material of the kind handled by the respondent should be purchased from it.

Deliveries of material were made on the site commencing on April 5, 1949. While payments had been made to Matatall on account of the contract price prior to June 7, 1949, he had not made any payment to the respondent and on that date, at the request of the latter, he gave a written order, directed to the secretary of the School division, directing it to pay all accounts as submitted by the lumber company and to charge the same to his account. On July 5, 1949, Matatall gave a further order in writing, directed to the School Division, authorizing it to pay to the respondent a sum of $8,936.50, stated to be the amount due for the materials supplied by that company for the new school and saying that further deliveries made were to be paid according to statements rendered to the School Division by the lumber company after being approved by Matatall. Pursuant to these orders, payments totalling $8,846.64 were made prior to the date of Matatall's death.

On November 11, 1949, Matatall was killed in an automobile accident. His widow, in her capacity as executrix of his last will, employed a solicitor, Mr. W. J. C. Kirby, to advise her as to what should be done in relation to the construction contract with the School Division, and on November 17th, Mr. Kirby went to Rocky Mountain House and, after discussing the situation with Mr. Stronach, the secretary-treasurer of the School Division, informed the latter that he did not think the estate would be in a position to complete the contract. On the following day, Mr. Kirby wrote to Stronach informing him that he had been instructed by the executrix to say that the estate was not in a position at that time to finance the completion of the school.

The claim of lien filed by the respondent in the Land Titles Office for the North Alberta Land Registration District on December 3, 1949, claimed a lien upon the estate of the Red Deer Construction Co. and the appellant in the land in question in respect of materials which:—

were furnished (or which materials are to be furnished) for RED DEER CONSTRUCTION CO. and the BOARD OF TRUSTEES OF THE ROCKY MOUNTAIN HOUSE SCHOOL DIST. No. 2590 (sic) on or before the 2nd day of November A.D. 1949. The claimant ceased to furnish materials on the 2nd day of November 1949.

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It is the contention of the appellant that the last delivery of materials pursuant to the arrangement made between Matatall and the respondent was on October 26, 1949, and that as this was more than thirty-five days prior to the date upon which the claim of lien was registered, the lien had ceased to exist prior to the registration of the claim in accordance with the terms of s. 24 of *The Mechanics' Lien Act* (R.S.A. 1942, c. 236).

In the statement of claim delivered in this issue, the respondent claimed that the last material was furnished to the School Division and the Red Deer Construction Company on or about November 22, 1949. Nothing was said in the pleading as to the date which was given as the date of the last delivery in the lien filed having been made by mistake. The justification for the claim that the last delivery was on November 22nd is to be found, if at all, in a delivery of materials made after Matatall's death under the following circumstances: Prior to Matatall's death, he had employed a carpenter named Whaley on this work. On an adjoining property to that upon which the new school was in course of completion, there was an old school building and on November 11th Whaley was doing certain carpenter work there, the exact nature of which became the subject matter of dispute at the trial. When Mr. Kirby had been at Rocky Mountain House, on November 17th, he said that he had asked Whaley for a statement of his wage claim against the estate and he obtained this made up to November 11th. Thereafter, Whaley said that he was employed by the School Division in doing certain carpenter work and on the instructions of the principal and the secretary-treasurer, he ordered material from the respondent amounting to $22.10 for the purpose of doing certain work on their instructions in the old school. Whaley said that from November 12th on he was working for and was thereafter paid by the School Division. As it had been shown that the last previous delivery of material was on October 26, 1949, the learned trial judge, at the conclusion of the argument, dismissed the action on the ground that the claim of lien had been filed too late, as the transaction of November 22nd was an isolated transaction relating to the old school building and had no connection with the contract between the School Division and the Red Deer Construction Company.

Some time later, but before judgment had been entered, upon the application of the present respondent, the hearing was reopened and additional evidence given in an endeavour to show that Whaley had been mistaken in saying that the work he had done after November 11th, for which the material had been delivered on November 22nd, was required, was done in the old school. Both parties were permitted to give further evidence. When recalled, Whaley said that he had been mistaken in saying that the material was required for work done upon the old school, but it had been used for making certain cabinets and also some shelves to go over the radiators. He said that he had done this work on the orders of the Principal of the school and Stronach, the secretary-treasurer and that it had nothing to do with Matatall nor was it part of the Matatall contract. While the evidence of this witness, as to the exact nature of the work in question, is not entirely clear and there is no description of the nature of the cabinets referred to, it is undoubted that it was done on the instructions of the officials of the School Division referred to and the necessary material, on their instructions, purchased on the credit of the School Division. There is no suggestion that this work was either directed to be done or authorized by the architect or that he had anything to do with the matter.

Further evidence given on behalf of the respondent on the continued hearing was given by Mr. Ellenwood who had been the manager of the respondent's yard at Red Deer at the time and who had gone with Mr. Kirby to Rocky Mountain House on November 17, 1949, who said that when they were in the new school building on that day Whaley was working there and had been instructed by Mr. Kirby and Mr. Stronach "to get this lab completed so they could get into it."

Mr. Kirby who had been called for the first time on the continued hearing was not asked as to whether he had given these instructions. Whether the work of completing the laboratory included the making of the cabinets and the shelving to go above the radiators is not shown nor indeed where these articles were to be placed. Whaley, however, had said that the work which he had done after Matatall's death was on the instructions of the officials of the School Division as above stated, a statement which is borne out

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by the fact that he was paid for this work by the Division and that when he went to the lumber yard to order the material on November 22nd, he directed that it be charged to it. The learned trial judge has said that he considered Whaley to be an honest man and accepted his testimony where it was in conflict with that of other witnesses, and I can see no ground for differing from this finding.

The evidence given on behalf of the respondent as to the manner in which the transaction of November 22nd was treated by it requires close examination. Mr. W. S. Heron was the manager of the yard of the respondent at Rocky Mountain House from some time in April, 1949, and it was upon his evidence that the respondent relied to prove its account. Heron, in addition to his other duties, apparently kept the books and, in giving evidence at the first hearing, he said that the respondent's account with the Red Deer Construction Company ran until October 26, 1949. In giving evidence in chief, he produced a number of documents called "yard slips" and these included one made out on November 22, 1949, for material the price of which amounted to $26.55, the slip reading that the material was "sold to R. Mt. House School Div.", and being signed by Whaley who, Heron said, was working for the School Division. This account included materials amounting to $4.45 to be delivered to two other schools and which were not ordered by Whaley, the amounts being entered on the slip after he had signed it. The balance was for the material delivered that day to the school in question. There were also produced and put in evidence at the same time certain ledger sheets showing the Red Deer Construction Company's account with the respondent running back to the year 1946 and the account of the School Division, and it was in the latter account that the material ordered by Whaley and the two amounts delivered to other schools were charged. Heron was unable to explain how it was that in the claim of lien filed, the statement was made that the materials were furnished on or before the second day of November, other than to suggest that it was a mistake made at the head office of the respondent in Calgary where the yard slips and journal pages had been sent for the purpose of making up the claim of lien. He was not recalled when the hearing was continued and further evidence taken. It is common ground that there were no deliveries

on November 2nd, and in the examination for discovery of Mr. J. P. Glaum, an officer of the respondent, it had been admitted that the last delivery prior to that date was October 26th. It is of importance to note that the amount of the lien claimed by the respondent was $7,402.48 and that this amount did not include the sum of $22.10 for the material delivered on November 22nd. It was also stated by the counsel for the respondent at the trial that the School Division had paid for the material delivered on November 22nd.

The learned trial judge, after hearing the further evidence adduced by the parties, delivered written reasons for his judgment dismissing the claim in which the relevant portions of the evidence of Heron to which I have referred are quoted. In the course of these reasons, it was said that the School Division and not Matatall were billed for the material delivered on November 22nd. In delivering the judgment of the Appellate Division, Mr. Justice Frank Ford has said that this was incorrect and that what had happened was that the original delivery slip was made out on that date to the School Division and that:—

> Although set up in the appellant's books as a debit to the School Division another statement bearing the same date was made out to "Red Deer Construction in account with Atlas Lumber Company Ltd". Thus it appears that the item was "billed" to both.

With great respect, I do not think that the evidence supports the latter statement. Heron's uncontradicted evidence makes it quite clear that the material sold on November 22nd on Whaley's order was supplied on the credit of the School Division and the amount was charged to it and not to Matatall. Whaley's evidence makes it equally clear than he was instructed by the officials of the School District to purchase the material and did so, directing Heron to charge the amount to them. Matatall had then been dead for eleven days and Whaley had no authority to order material on his credit even if he had assumed to do so. There appear, however, among the exhibits in this case copies of a number of accounts of the respondent company charged to "Red Deer Construction" commencing on September 4th and continuing to November 22nd, which were put in during the course of Heron's evidence in chief. In answer to a question asked by counsel for the respondent at the trial whether the documents included in

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this exhibit, which was marked Exhibit 13, had been sent to the School Division, he said that this was right. Included in Exhibit 13 was a statement dated November 22, 1949, for the items making up the amount of $22.10 made out against "Red Deer Construction". A further account made out against "Red Deer Construction" bearing the dates September 24, 1949, November 22, 1949, shows that an entry on November 22nd of $22.10 was included. No explanation was given by Heron or by anyone else as to how this document came to be made up. It was apparently made, however, not at the time the material was purchased but on or after December 3, 1949, since under that date at the foot of the statement there appears an entry "fee filing lien $5.00." A further matter to be noted is that the balance shown as owing by the Red Deer Construction Company on this statement is $7,424.58, while, as pointed out, the claim of lien was for $22.10 less. There is no proof to be found in this record that these accounts were ever rendered to the Red Deer Construction Company or to Mrs. Matatall as executrix of her husband's estate, and, on the contrary, Heron's evidence proves conclusively that no charge had been made against anyone but the School Division for the amount in question at the time the material was supplied.

The learned trial judge further found upon the evidence that by November 22nd, the contract between Matatall and the School Division had been abandoned. The learned judges of the Appellate Division have disagreed with this finding, holding that the evidence does not show any such abandonment. In the view that I take of the matter and in the circumstances of the present case, I think the point is immaterial. It should, however, be noted that when Mr. Kirby wrote the letter of November 18, 1949, to the School Division, which would no doubt be received before November 22nd, the latter apparently proceeded to treat the contract as being at an end. As to this the evidence of Mr. Stronach, the secretary-treasurer, is clear.

From the date of the receipt of Mr. Kirby's letter, the School Division apparently took charge of the completion of the school. The provision of the agreement which gave the owner the right to terminate the contract upon written notice, was apparently not complied with, the letter from

the solicitor apparently being treated as a refusal to complete and the Division electing to rescind. There is no evidence that the matter of the performance of the further work, either that done by Whaley after November 11th or by other workmen, was authorized in writing by the architect, as provided by the agreement. The only question of law to be determined in the case is as to whether, under these circumstances, the respondent's claim of lien was filed in time.

By *The Mechanics' Lien Act,* a person who furnishes any materials to be used in the construction of any improvement for any owner or contractor has, by virtue thereof, a lien for so much of the price as remains due to him upon the estate or interest of the owner in the improvement, subject in the case of material supplied at the instance of a contractor rather than directly to the owner, to certain limitations. By s. 14 of the Act, the person primarily liable upon a contract by virtue of which a lien may arise, is required to retain for the statutory period 15 per cent of the value of the work actually done where the contract price, as in the present case, exceeds $15,000. The lien is declared to be a charge upon the amount directed by this section to be retained in favour of lienholders whose liens are derived under persons to whom the moneys so required to be retained are respectively payable. The section further provides that all payments up to 85 per cent in a case such as this, made in good faith by the owner to a contractor before notice in writing of the lien is given by the person claiming the lien to the owner, shall operate as a discharge pro tanto of the lien.

By the terms of the contract in this matter, it was provided, however, that 20 per cent of the value of the work should be held back and the evidence of Mr. Stronach on behalf of the School Division shows that this was done. The lien which the respondent was entitled to assert in respect of the material supplied by it on the orders of Matatall up to October 26, 1949, differed materially from that which is was entitled to assert against the School Division in respect of material delivered from November 22, 1949 onward, in that the former claim was subject to the limitations of s. 14, while the latter claim was not.

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The respondent's contention to which effect has been given in the judgment of the Appellate Division is that the delivery of November 22nd was not made under a separate contract but, as stated in the reasons:—

> was a delivery under the contract between the owner and the contractor

and accordingly preserved the right of lien. The only authority to which we have been referred in support of this finding is a judgment of Harvey J., as he then was, in *Union Lumber Co.* v. *Porter* (1). In that case, the contractor, after proceeding part way with the contract, abandoned the work and the building was completed by the owner. Prior to the abandonment, material had been supplied to the contractor and afterwards further material was delivered on the directions of the architect. None of the material delivered at the instance of the contractor was furnished within thirty-one days of the time of the filing of the lien, being the statutory period in Alberta at that time. As to this Mr. Justice Harvey said:—

> I think the continuing to supply material keeps the lien alive under the terms of the statute in respect of all material supplied before. If it were otherwise, all a person who wished to get rid of a lien would need to do would be to pay for the last 31 days' work or material, and so cut out the claim for all that was done or supplied before.

Dealing first with the statement made in the second sentence, it could hardly be contended that the lien of a material man supplying material for an improvement at the request of the contractor engaged in performing the work, could be disposed of in this manner. With great respect, however, for the opinion of the late learned Chief Justice of Alberta, I am unable to perceive how this statement bears upon the proposition stated in the first sentence. While the question does not directly arise in the present case, it was decided in *Morris* v. *Tharle* (2), that where there is a general arrangement, even though it be not binding, between a contractor and a supplier of building material for the supply of all the material required for a particular building contract, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides and a lien for all material so supplied is in time, if filed within thirty days of the furnishing of the last item. The reasoning of the Divisional Court in that case was adopted by Killam

(1) (1908) 8 W.L.R. 423. (2) (1893) 24 O.R. 159.

C.J., in *Robock* v. *Peters* (1). In the view of the law as it was stated by Chancellor Boyd in *Morris* v. *Tharle* and adopted by Killam C.J., the lien would not be affected if there were a greater period than the time within which the lien must be registered after the delivery of the last material between deliveries made from time to time as the work progressed. In my opinion, this statement of the law applies to liens arising under *The Mechanics' Lien Act* of Alberta, but as a period of thirty-eight days elapsed from the time the respondent ceased to furnish material under the arrangement made between Matatall and Paulsen, the question does not arise.

The opinion expressed in the first sentence of the quotation raises an entirely different and, in my view, unrelated question. For the conclusion of the learned judge no authority was given. While the arrangement made between Matatall and Paulsen was rather indefinite and the former did not obligate himself to purchase all the required material from the respondent nor agree upon the prices to be paid, I think that, as I have said, the evidence is sufficient to show that both parties contemplated that, as in the case of other earlier contracts, Matatall would order and the respondent company would supply such lumber and other building material of the kind sold by it as was necessary for carrying out the contemplated work. In this respect the position of the respondent is supported by the authorities to which I have above referred. The agreement to be inferred from the conduct of the parties, however, was solely between Matatall and the respondent: there was no privity of contract between the respondent and the School Division and there could accordingly be no claim upon a money count for material supplied under the arrangement with Matatall, the only remedy as against the owner being that provided by *The Mechanics' Lien Act*, if the terms of that statute were complied with. Upon the respondent's own showing, the last delivery made by it under the agreement with Matatall was on October 26, 1949, and within a few days after his death on November 11th it was made clear to the parties that his estate did not propose to continue with the work or complete the contract with the School Division. This fact was recognized by the respondent in supplying

(1) (1900) 13 Man. R. 124 at 136.

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all the required material thereafter at the request and on the credit of the School Division without any reference to Matatall's personal representative. The right to a mechanics' lien which accrued to the respondent by virtue of the delivery of the material on November 22nd and thereafter, arose by virtue of the arrangement it made following Matatall's death with the School Division, and in respect of that right a separate lien must have been filed to preserve the respondent's position, in my opinion, had the claim not been extinguished as it was by payment.

I am unable, with respect, to agree with the statement contained in the judgment of the Appellate Division that the delivery of November 22nd was not made under a separate contract but was a delivery under the contract between the owner and the contractor. The evidence, in my opinion, clearly demonstrates the contrary. While it was by virtue of the fact that the School Division had entered into the contract for the erection of the school building with Matatall that the respondent might, by furnishing material at Matatall's request, acquire the statutory right of lien upon the property of the School Division, that fact does not mean that deliveries made under the arrangement made between the respondent and Matatall were deliveries under the contract between the School Division and the latter. To that contract the respondent was a complete stranger. To the agreement made between the School Division and the respondent for the supply of material after Matatall's death, the estate of Matatall was equally a stranger. That the right to a lien which arose by virtue of the supply of material after Matatall's death under these circumstances is distinct from that which was vested in the estate of Matatall appears to me to be clear from a consideration of ss. 6, 13 and 14 of *The Mechanics' Lien Act.*

Further support for the view which I have expressed is to be found in the statement of the law adopted by Lamont J. in *Whitlock* v. *Loney* (1), to which reference is made in the reasons for judgment of the Appellate Division. In that case Lamont J. adopted the following statement taken from 27 Cyc. 114:—

> Where labour or materials are furnished under separate contracts, even though such contracts are between the same persons and relate to the same building or improvement, the contracts cannot be tacked together

(1) (1917) 38 D.L.R. 52.

so as to enlarge the time for filing a lien for what was done or furnished under either, but a lien must be filed for what was done or furnished under each contract within the statutory period after its compliance. Where, however, all the work is done or all the materials are furnished under one entire continuing contract, although at different times, a lien claim or statement filed within the statutory period after the last item was done or finished is sufficient as to all the items; and in order that the contract may be a continuing one within this rule it is not necessary that all the work or materials should be ordered at one time, that the amount of work or materials should be determined at the time of the first order, or that the prices should be then agreed upon, or the time of payment fixed; but a mere general arrangement to furnish labour or materials for a particular building or improvement is sufficient, if complied with, even though the original arrangement was not legally binding.

In effect, what has been attempted in the present case is to tack the right of lien acquired by the respondent under its arrangement with Matatall to that which subsequently arose under its arrangements with the School Division. It may be noted that this statement of the law was adopted by the Appellate Division of Ontario in *Fulton Hardware Co.* v. *Mitchell* (1).

While this is decisive of the matter, in my opinion, it may further be noted that the material delivered on November 22nd was not for the purpose of carrying out work to be done under the contract between the owner and the contractor. According to Whaley, none of this work was specified by the contract. The School Division, apparently electing to treat the contract with Matatall as rescinded and at an end, did not act under its terms and ask the authority of the architect for this work outside the terms of the contract, but clearly undertook the work on its own account. Thus the materials were not supplied nor the work done under the contract.

I would allow this appeal with costs throughout and dismiss the action.

Appeal allowed with costs.

Solicitors for the appellant: *Smith, Clement, Parlee & Whittaker.*

Solicitors for the respondent: *Helman & Barron.*

(1) (1923) 54 O.L.R. 472.

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*Jun. 9,10

*Oct. 5

HER MAJESTY THE QUEEN .....APPELLANT;

AND

ANDREW SHYMKOWICH .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Theft—Mens Rea—Beachcomber collecting logs from booming ground without consent of owner—Whether theft—Whether mens rea—Criminal Code, ss. 22, 396.

The respondent was charged under the *Criminal Code* with the theft of two saw logs belonging to a lumber company and stamped with a registered brand, which had been floating within a recognized booming ground but not contained in any boom. He admitted taking and selling them to another beachcomber who, according to the existing practice, had them scaled by the Forest Branch of the provincial government. But he contended that he did not intend to do anything wrong and thought that he had the right to do what he did; that they were drifting and that he thought that the tide or the wind had carried them into the enclosure.

His acquittal by the trial judge, on the ground that there had been no mens rea, was affirmed by the Court of Appeal.

Held (Locke J. dissenting), that the appeal should be allowed and a conviction directed.

Per Taschereau and Rand JJ.: The respondent's belief that by the general law he had the right to collect the logs as he did, to dispose of them, and in effect to require the owners to pay him or the person to whom he transferred them a remuneration for his salvage work, being a mistake of law, was not admissible as a defence by virtue of s. 22 of the *Criminal Code*.

Per Estey and Fauteux JJ.: In the circumstances of this case, it cannot be said that the respondent could justify his collecting the logs by stating that they were drifting. The were not drifting in an area that would permit a beachcomber to take them into his possession. He did not collect them in such a place or under such circumstances that he could reasonably presume that they had been abandoned or that he might take them out of possession of the party in control of the booming ground. Knowing that they were in a booming ground under the control and direction of the company, he could not be said to have had an honest and reasonable belief in the existence of facts which, if true, would have constituted a defence and, therefore, he possessed mens rea.

By trespassing upon the booming ground and taking the logs fraudulently and without colour of right, with intent of disposing of them in a manner that deprived the company temporarily of its property, he was guilty of theft.

Per Locke J. (dissenting): There was evidence upon which the trial judge could find that the respondent took possession of the logs believing that he was entitled to do so with the intention not of stealing them

*PRESENT: Taschereau, Rand, Estey, Locke and Fauteux JJ.

but of profiting by obtaining salvage from the owners if they were found, or which could leave the trial judge in such doubt as to require him to acquit. To constitute the crime of theft, the act must be done fraudulently and without colour of right.

Section 22 of the *Criminal Code* did not affect the matter since the question to be determined was whether or not the respondent committed any offence.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the acquittal by the trial judge of the respondent on a charge of stealing saw logs from a booming ground.

S. J. Remnant, Q.C. for the appellant.

Glen McDonald for the respondent.

The judgment of Taschereau and Rand JJ. was delivered by:—

RAND J.:—The external facts in this appeal are few and simple. The accused removed from a booming ground, within which a lumber company, the prosecutor, had exclusive privileges for the putting down of mooring dolphins, the anchorage of booms, a line of piles and a log haul-up, two logs belonging to the company which at the time of removal had become lodged against the easterly end of a line of booms. He did that by entering the water area over a boundary line of single logs a distance of approximately 40 feet and towing the two logs out and down the Fraser river where on the following day he sold them, along with 23 others, for eighty dollars or so.

He was believed in saying that he did not intend to do anything wrong and that he thought he had the right to do what he did. This both the County Court judge who tried him and the Court of Appeal (1) have found to be an answer to the charge laid.

The accused can be said, as he was in the courts below, to have acted upon a mistake, but in what did the mistake lie? He acknowledged that the logs were not drifting, that is, not at large in the river; he claims they were floating, that is, within the leased area, and for a distance of about 40 feet, they might move as the tide came in or went out. With admittedly no claim whatever to any property

(1) [1954] 12 W.W.R. (N.S.) 49; 108 C.C.C. 194.

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Rand J.

interest in them but as a means of earning what may be called salvage money, he proceeded to gather them up as if they were adrift and, if not interfered with, might be carried out to sea some miles distant. He knew or abstained from ascertaining that the logs were stamped with the mark of the logger and that they were owned by some person who could establish his title to them. They were not lost and he was not in the position of a finder, though if that circumstance had been present it would not yield much benefit to him. He admits that, for all he knew, they might have belonged to the company, but with that he was not concerned. He does not suggest that from the company he had any right or privilege in any manner or degree to appropriate them and in fact he was aware of a memorandum of advice published by the provincial land department which told him that even when logs gathered up were drifting, he was, if called upon, bound to surrender them to the owner, and whether or not he would be entitled to receive compensation for his trouble depended on some form of understanding between himself and the owner. No such distinction between a drifting and a floating log is made in that memorandum.

What, then, he believed was that by the general law he had a right to collect them as he did, to dispose of them, and in effect to require the owners to pay him or the person to whom he transferred them remuneration for his salvage work. Is that admissible as a defence? I have no doubt that it is not. As Kenny in his outlines of criminal law, 1952 Ed. at p. 48 says:—

> The final condition is, that the mistake, however reasonable, must not relate to matters of law but to matters of fact. For a mistake of law, even though inevitable, is not allowed in England to afford any excuse for crime. Ignorantia juris neminem excusat. The utmost effect it can ever have is that it may occasionally, like drunkenness, rebut the existence of the peculiar form of mens rea which some particular kind of crime may require.

This principle is embodied in sec. 22 of the *Criminal Code:*—

> The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.

A claim to ownership of a chattel, although it may depend on matter of law, is, in most cases, a question of fact, or its legal basis may, in the ordinary sense of the

word, be subsumed in "fact". This enhances the difficulty of separating legal from factual elements in any relation to property and in any case it may resolve itself into a refined conceptual distinction. But a distinction between justifying an act as authorized by law and as a bona fide belief in a property interest does seem to correspond with an instinctive discrimination between the two concepts.

This idea is given its best expression by Lord Westbury in *Cooper* v. *Phibbs* (1) in the following language:—

> It is said "ignorantia iuris haud excusat"; but in that maxim the word "ius" is used in the sense of denoting general law, the ordinary law of the country. But when the word "ius" is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake.

This language was used in a civil proceeding but it furnishes a most helpful distinction for the application of the maxim in criminal law of which it has always been taken to be a basic principle.

The taking into possession and the conversion of the logs obviously was intended to deprive the owner temporarily at least of its property and this comes within the express language of the definition of theft given by the *Criminal Code.*

I would therefore allow the appeal and direct a judgment of conviction upon the second count, with a fine of $25 imposed upon the accused.

The judgment of Estey and Fauteux JJ. was delivered by:—

ESTEY J.:—The respondent was found not guilty in the County Court Judge's Criminal Court of Westminster, British Columbia, on a charge containing two counts: (1) that he did, on February 15, 1953, without the consent of the owner, fraudulently collect two saw logs stamped with a registered brand and thereby committed an offence contrary to s. 394(*a*)(i) of the *Criminal Code;* (2) that he did steal the said logs and thereby committed an offence contrary to s. 396 of the *Criminal Code.* His acquittal was

(1) L.R. 2 H.L. 149 at 170.

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affirmed in the Court of Appeal (1). Leave to appeal to this Court was granted, but restricted to the acquittal under the second count.

These logs were each stamped with a registered brand—8 over 697 within a triangle. They had been sold by the owner of that brand and at all times material hereto were the property of McKay and Flanagan Brothers Lumber Mill Limited (hereinafter referred to as the company). This company operates a sawmill on the Fraser River near New Westminster and leases an area of that river in front of its mill site, about 1,300 feet in length and in width varying from 240 to 265 feet, as a booming ground. For some distance from the shore this booming ground is well marked on the surface thereof and the respondent admits that these logs were within that marked area and that he knew the logs were in this booming ground, both when he first saw them and when he collected them.

The respondent describes himself as a fisherman who does "a bit of beachcombing". About ten o'clock Sunday morning, February 15, 1953, accompanied by a boy fifteen years of age named Hamilton, he went out in his fishing boat upon the Fraser River to "look for some logs". He deposed that in "going up river and passing Flanagan's booming ground I noticed two logs drifting down and I circled the boat and came up against the tide, it was just about slack tide by that time. By the time I got the boat turned around the logs landed on top of the boom, at the head end of their boom". He directed his boat into the booming ground and collected the two logs which he estimated had floated approximately forty to fifty feet since the time he first saw them. The next day he disposed of the logs to another beachcomber, Patterson, along with some twenty-six other logs he had obtained in beachcombing, all for a sum which he recollected to be $78.

Patterson, called on behalf of the Crown, described the respondent as a "fisherman, and he picks up a few logs for me". Patterson states that on the Monday the respondent brought some twenty-eight or thirty logs for which he paid him $80. That Patterson intended to communicate with the authorities and have these logs disposed of in the

(1) [1954] 12 W.W.R. (N.S.) 49; 108 C.C.C. 194.

usual way there can be no doubt, but before the scalers had arrived a representative of the company called and Patterson delivered to him the two logs in question, as well as three more of the company's logs which he had in his possession.

The Fraser River at this point flows approximately westward and these logs were at the upper or east end of the booming ground, well inside of the marked area thereof. At this end a barrier exists between that of the Farris Lumber Company Limited and the booming ground of the company, for the purpose of separating these grounds.

Respondent justifies his collecting these logs upon the basis that they were drifting and, therefore, he "was entitled to go and pick them up". When it was suggested he incurred some risk, he replied: "I didn't figure it was a risk picking up logs at all, because they were loose and floating and drifting".

Respondent based his belief in his right to take a floating log upon his reading of the pamphlet issued by the British Columbia Forestry Service entitled "General Information on Beachcombing" and which was filed as an exhibit at the trial. He did not specify any particular portion thereof, but contented himself with stating: "According to this, as long as you don't steal them" it is all right to collect floating logs, but that "if you take a log out of a boom that is stealing". In fact the pamphlet makes no reference to a booming ground or a boom. It refers to the civil rights of one engaged in the business of beachcombing and indicates his position to be that of "a finder of lost things". Section 394 of the *Criminal Code* is specifically referred to, and in part set out. It further reminds the beachcomber that he must comply with the provisions of the *Forest Act*. Indeed, when one reads the pamphlet as a whole it supports the view that the purpose and intent of beachcombing is to restore to the owner logs which have passed out of his control. In *Watts and Grant* v. *The Queen* (1), the logs were collected at points not under the control or direction of the owner and the issues concerned the collection by the accused parties of logs belonging to a particular owner and what, if any, were the rights of the accused

(1) [1953] 1 S.C.R. 505.

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with respect to these logs, while in the present case the issue turns on the right of one, while engaged in the business of beachcombing, to knowingly enter and collect logs floating outside of a boom but within a private booming ground.

Counsel for the Crown, upon these facts, submitted that, as respondent took the logs from an area which he well knew was a booming ground and, therefore, an area under the control and direction (except with respect to certain matters not material hereto) of the company as lessee, he could not do so with other than a dishonest or fraudulent intent. The logs within such an area are subject to the control of the company and, apart from the rights of an owner (with which we are not here concerned), the lessee has a right to the possession thereof against a person in the position of the respondent. *South Staffordshire Water Company* v. *Sharman* (1). The conduct of the respondent, in the submission of the Crown, in going into and trespassing upon the booming ground with the intent and purpose of collecting floating logs therein, though not inside a boom, was itself, in the circumstances, such evidence of dishonest or wrongful intent that the mere assertion on his part that he thought he had a right to collect floating logs would not establish an honest intent. The conduct of the respondent, at the time of collecting the logs, as well as later when the police officer called at his home, appears to support the contention of the Crown. When the police officer called, and before he had intimated the reason therefor, the respondent stated: "I guess it is about the logs". He had lived for about twenty-five years in the vicinity and, while the evidence does not disclose how long he had been beachcombing, Patterson says he had purchased logs from him during the "last year and a half anyway I believe". Apart altogether from the pamphlet, which does not support the respondent, a person in his position would know that as a beachcomber he would not be entitled to take these logs out of a private booming ground. In the ordinary circumstance the logs there would be the property of the lessee, as, in fact, they were in this case. A beachcomber, therefore, in collecting them would do so for the purpose of having the lessee pay him for

(1) [1896] 2 Q.B. 44.

finding and collecting the logs in his own (the lessee's) booming ground. There is really, in such circumstances, no "finding" and no "collecting" in the sense that these words would be understood in the business of beachcombing.

In these circumstances it cannot be said that one in the position of the respondent, who collected logs in the booming ground, could justify his doing so by stating that they were drifting. They were drifting in one sense, but they were not drifting in an area that would permit of one engaged in the business of beachcombing taking them into his possession.

In *Brend* v. *Wood* (1), the accused had been absent from the country on service with the Navy. He was given a forged motor vehicle fuel coupon and later was charged with having that coupon in his possession with intent to deceive. It was established that he did not know it was forged and he satisfied the court that he had acted in good faith. In the present case the accused had lived in the vicinity for a period of twenty-five years and was himself, at least to some extent, engaged in the business of beachcombing and, therefore, is not in a position at all analagous to that of the accused in *Brend* v. *Wood*.

The beachcomber collects logs which are lost to the owner in the sense that they are out of his control and, in so far as his position is similar to that of one who finds lost articles, the observations of Baron Parke in *Regina* v. *Wm. Thurburn* (2), are pertinent. There the accused found a note which had been accidentally dropped on the highway with no name or mark thereon to indicate the owner, nor were there any circumstances which would enable the finder to discover to whom the note belonged when he picked it up, nor had he any reason to believe that the owner knew where to find it again. At p. 393 Baron Parke states:

> To prevent, however, the taking of goods from being larceny, it is essential that they should be presumably lost, that is that they should be taken in such a place and under such circumstances, as that the owner would be reasonably presumed by the taker, to have abandoned them, or at least not to know where to find them. Therefore if a horse is found feeding on an open common or on the side of a public road, or a watch found apparently hidden in a hay stack, the taking of these

(1) (1946) 62 T.L.R. 462.

(2) (1849) 1 Den. Cr. C. 387.

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would be larceny, because the taker had no right to presume that the owner did not know where to find them; and consequently had no right to treat them as lost goods.

The respondent did not collect these logs "in such a place or under such circumstances" that he could reasonably presume that they had been abandoned, or that he might take them out of the possession of the party in control of the booming ground.

Bank of New South Wales v. *Piper* (1) was an action for malicious prosecution arising out of a charge laid by a bank manager against a mortgagor who had mortgaged his sheep to the bank as security. Under s. 7 of the relevant statute (11 Vict. No. 4) the mortgagor could not sell any of his sheep without the written consent of the mortgagee. The mortgagor, with the oral consent of the mortgagee, sold the sheep and when a charge was laid by the bank the Attorney General refused to proceed with it. In the action for malicious prosecution the jury found that, while the mortgagor did not have the written consent, he had the oral consent of the manager of the bank and judgment was directed for the plaintiff. In the Privy Council this was reversed. It was there held that the legislature intended to make a sale by the mortgagor without the written consent of the mortgagee a criminal offence and with respect to mens rea it was stated: ". . . the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent". A written consent would have made the accused innocent of the charge. He did not claim such and, therefore, never had "an honest and reasonable belief . . . of the existence of" a written consent "which, if true, would make the act charged against him innocent". Therefore, in the opinion of the Judicial Committee, he possessed mens rea.

In the present case the respondent knew he was taking logs out of a booming ground under the control and direction of the company. The fact that the logs were floating outside of a boom does not alter or qualify the fact that while they were within the limits of the booming ground they were in the possession of the company. Had these logs been outside the booming ground and floating in a

(1) [1897] A.C. 383.

position and manner that one might reasonably conclude they were out of the control of, or, in effect, lost to the party entitled to their possession, then the beachcomber might collect them and cause the party entitled to them to pay for his work. The respondent did not have present to his mind any such facts. His belief was analagous to that of Piper in the *New South Wales* case who thought the verbal permission sufficient. The respondent, in taking these logs out of the possession of the company, could not be said to have an honest and reasonable belief in the existence of facts which, if true, would have constituted a defence and, therefore, within the foregoing authority, he possessed mens rea.

The respondent made no effort to see if the logs were marked. Even if he had found a mark, it is doubtful if he would have known they were the property of the company. That, however, is not a material circumstance. What he did know, and which is material, is that these logs were in the company's booming ground. In this connection the language of Lord Goddard C.J. in *Hibbert* v. *McKiernan* (1) is pertinent. There the accused went upon a golf course and picked up certain golf balls which had been abandoned by their owners. It was held that the golf club had sufficient property and interest in these balls to support an indictment for larceny. Lord Goddard C.J., in the course of his judgment, stated:

> Every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property occupied by him, and this confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, not under a claim of right, but with a felonious intent.

These cases illustrate what is stated in Halsbury's Laws of England, 2nd Ed., Vol. 11, p. 497:

> To prevent the taking from being felonious the claim of right must be an honest one, though it may be unfounded in law or in fact.

See also Kenny's Outlines of Criminal Law, 1952 Ed., p. 241; Stephen's History of the Criminal Law of England, Vol. 3, p. 124.

A reading of this record in the light of the authorities, and I say this with the greatest possible respect to the learned judges who hold a contrary view, leads to the conclusion,

(1) [1948] 2 K.B. 142.

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when regard is had to the area in which the logs were floating, the knowledge of the respondent in respect to that area and the rights of the company therein, that the respondent trespassed upon the booming ground, took the logs fraudulently and without colour of right, with the intent of disposing of them in a manner that deprived the company temporarily of its property or interest therein. I am, therefore, of the opinion that the respondent committed the offence of theft as charged and would impose a fine of $25.

I am, therefore, of the opinion that the appeal should be allowed.

LOCKE, J. (dissenting):—This is an appeal by the Crown taken pursuant to leave granted by Rand J. from a judgment of the Court of Appeal for British Columbia (1) which dismissed the appeal of the Crown from the acquittal of Shymkowich by His Honour Judge Grimmett after a trial held in the County Court Judge's Criminal Court of the County of Westminster.

Two charges were laid against the respondent but the leave granted restricts the matter to be considered to the acquittal upon the second of these, which was in the following words:—

> For that the said Andrew Shymkowich on or about the 15th day of February A.D. 1953 at South Westminster in the County of Westminster and Province of British Columbia, unlawfully did steal two saw logs bearing timber mark 8 over 697 within a triangle and valued at over $25.00 and being the property of McKay and Flanagan Brothers Lumber Mill Limited, contrary to the form of the Statute made and provided and against the Peace of our Lady the Queen, her Crown and Dignity.

The facts disclosed by the evidence, in so far as it is necessary to consider them, are as follows:—On the south bank of the Fraser River, a short distance east of the City of New Westminster, the lumber company referred to operates a lumber mill. For the purpose of carrying on its operations, the company obtained in the year 1938 the right, granted under the provisions of the *Navigable Waters Protection Act* (c. 140, R.S.C. 1927), to place a line of six dolphins at equal distance between the easterly and westerly boundary of a 7·41 acre portion of the Fraser River immediately adjacent their mill property to the north, a log haul-up, a line of piles fifty feet in length on the southerly

(1) [1954] 12 W.W.R. (N.S.) 49; 108 C.C.C. 194.

boundary of the log haul-up produced north westwardly and any other dolphins, piling or construction which might be necessary for the more efficient operation of a saw mill. For these privileges the lumber company paid an annual sum to the New Westminster Harbour Commissioners. In pursuance of the rights thus granted to them by Order-in-Council, the dolphins were installed along the northerly boundary of the booming ground and piling was driven along the easterly or up river end of the area to which boom sticks were attached, forming what was referred to as a standing boom extending from the shore line approximately 135 ft. to the north, designed apparently to prevent logs being carried out of the booming ground to the east by the tide, and similarly to prevent logs being carried into the booming ground by the current from the east. The booming ground was not enclosed in any way along its northerly boundary other than by the dolphins placed there and, while the evidence is not clear on the point, it apparently was not enclosed in any way at its westerly extremity.

On the day in question, a boom of logs which the lumber company had bought from the Scheller Logging Company was tied up to the piling which had been driven in a line parallel to the southern shore of the river and some 50 feet north of the water line between the log haul-up and the easterly limits of the booming ground.

The respondent is a fisherman and apparently supplements his income by beachcombing logs on the Fraser River and, on the day in question which was a Sunday, proceeded in company with a fifteen year old boy, Albert Hamilton, in his fishing boat up the river, apparently in search of logs drifting on the river which he might salvage. According to the respondent, on Saturday, February 14, 1953, there had been a very heavy wind on the Fraser and there were quite a few logs drifting around but the waves were so high they could not be salvaged. He described his actions on the following day as follows:—

> I decide I would go up river and have a look for some logs. Going up river and passing Flanagan's booming ground I noticed two logs drifting down and I circled the boat and came up against the tide, it was just about slack tide by that time. By the time I got the boat turned around the logs landed on top of the boom, at the head end of their boom.

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Circling around, coming in against the tide, I reversed into the top of the boom and I got Ab Hamilton to drive a couple of dogs in the logs and after I got the logs dogged up, I came out past the boom and went down the river and tied up alongside of my float there.

Nothing was said by the respondent in giving his evidence in chief as justification for his actions in going in the booming ground and taking away logs which presumably were the property of the lumber company but, when cross-examined, he said that when he saw the logs they were "floating down river". He then said that they were floating down from the standing boom and that, at that time, the tide was just starting to change and as he circled the boat around the tide carried them up against the top of the boom, referring to the purchased boom above mentioned. After saying that he knew that the logs were in a booming ground, when asked why he went in and took possession of them, he said:—

Well, it has been the practice, any log floating, any fisherman picks up any log that has been floating.

He then said that:—

I couldn't tell that they were McKay and Flanagan's logs.

In answer to further questions, he gave the following evidence:—

Q. Did you realize that you were taking quite a risk in picking up logs indiscriminately?

A. Not to my knowledge, I didn't figure it was a risk picking up logs at all, because they were loose and floating and drifting.

Q. Do you know the difference between a floating log and a drifting log?

A. Yes.

Q. What is it?

A. Well, a floating log is in a boom and a drift log is drifting down the river, floating loose say out of the boomsticks.

Q. Referring to your own statement, you saw two logs floating within a booming ground of McKay & Flanagan Mill, didn't you?

A. Yes.

Q. You think those are drift logs, do you?

A. Well, in a boom I regard it—but actually this wasn't in a boom.

Q. We are talking about logs within this booming ground.

A. Well, they could have drifted down there.

Q. They weren't drifting, were they?

A. Yes, they were drifting.

Q. Where were they drifting?

A. They were drifting down the river.

Q. Did you see those logs being blown in there?
A. No, I didn't.
Q. So you don't know how they got there?
A. No, I don't.

When asked by the learned trial Judge as to whether he thought he was entitled to go in to the booming ground and take the two logs, he said he thought that he was. Asked by counsel for the Crown where he got this information, he said it was contained in a pamphlet issued by the Forest Branch of the B.C. Government. Whether he had seen this before the date in question does not appear. However, the document referred to, which had been received in evidence though objected to by counsel for the Crown, was apparently issued for the information of beachcombers and expressed certain views as to their civil rights and informed them that any log found by them which did not bear a registered timber-mark was deemed to be the property of the Crown: if the log bore a registered mark it was prima facie evidence that it was the property of the registered owner of the mark. Certain parts of section 394 of the *Criminal Code* were referred to and information as to the necessity of paying stumpage or royalty on such logs was given.

At the request of the respondent's counsel, the following passage was read into the evidence:—

> The Forest Service grants no authority to any person either by licence or permit to engage in the beachcombing of logs but does not attempt to prohibit or restrict such ventures providing that logs are not stolen or obtained by other unlawful methods.

Following this, the respondent was asked if he understood what stealing was and he said that he understood that if you take a log out of a boom that is stealing and said finally:—

> I was acting on the knowledge that probably the tide or wind blew them logs in there.

Hamilton, who was called as a witness by the Crown, said that, as the respondent's fishing boat was passing the booming ground, they saw the two logs starting to drift down from the standing boom and, by the time they got in to the booming ground, they had been carried, apparently by the current, to the most easterly end of the purchased boom which, he said, was tied up some 30 or 40 feet from

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the shore and indicated the place at which the logs came to rest against it as a point some 50 feet from the shore. This, as shown upon a sketch showing the dimensions of the booming grounds, would be some 90 to 100 feet to the south of the line of dolphins along the northerly limit of the booming grounds.

Persons logging on Crown lands in the Province of British Columbia are required by the provisions of the Part IX of the *Forest Act* (c. 128, R.S.B.C. 1948) to mark each log with a timber-mark issued by the Forest Service in such a manner that it is readily discernible when the log is floated. The logs in the purchased boom and the two logs in question had been cut on a timber sale in the Chilliwack River Valley by the Collins Macken Lumber Company of Chilliwack who had registered a timbermark 8/697 within a triangle for that timber sale. It was shown that the two logs in question were stamped with this mark but the respondent does not appear to have examined them to ascertain whether they bore a timber-mark.

The respondent had apparently previously accumulated a number of logs presumably found adrift in the river and on February 16, 1953, he purported to sell these or his interest in them, with the two taken from the lumber company's booming ground, to Richard Patterson, a fisherman who also dealt in beachcombed logs. Patterson was familiar with the instructions given in the circular issued by the Forest Branch above referred to. On the 17th of February he had the logs scaled by an official scaler of the Forest Branch and paid to the Department timber royalties upon such of the logs as bore a timber-mark and stumpage upon those where no such mark was visible. The Scale and Royalty Account for this sum does not show any logs bearing the mark 8/697, the scaler apparently not observing the mark upon these logs. According to Patterson, the practice established by the Forest Branch is that, when logs bearing a registered mark are found adrift and beachcombed, the person finding or having possession of the logs reports the fact to the local office of the B.C. Forest Service and the registered owner of the mark is notified of the fact. As between dealers such as Patterson and loggers or lumber mill operators who are either registered as owners of a timber-mark or have purchased logs so marked, the usual

practice is to pay the dealers fifty per cent of the market value of the logs as salvage. As to logs upon which there is no visible timber-mark, the dealer, after paying stumpage to the Forest Branch, proceeds to sell them on the footing, apparently, that they have been purchased from the Crown. I think it is sufficiently clear from the evidence of this witness that a person such as Shymkowich finding a log adrift in the river bearing a timber-mark might expect, after paying the timber royalty, that the owner would deal with him in the same manner as with Patterson.

It was on February 19 that the two logs in question and three other logs similarly marked were found by the Royal Canadian Mounted Police in Patterson's boom. While there was no evidence that the three logs so marked were taken from the booming grounds of the McKay and Flanagan Lumber Company or that they had purchased all of the logs so marked by the Collins and Macken Lumber Company, it was apparently assumed that they were their property and they were returned to them, Patterson delivering the logs and making no claim for salvage.

In delivering judgment, the learned County Court Judge, after referring to certain of the evidence which had been given before him, said in part:—

> The accused says he did not know he was doing anything wrong in picking up the floating logs which were not contained in a boom. It is interesting to note that in the Regina vs Watts and Gaunt case beachcombed logs are described there as 'any logs which are separated from the booms and floating or resting on the shore.' The only complication in this particular case is that the accused actually entered a recognized booming ground to retrieve the floating logs which he thought were drift logs.
>
> I think that mens rea, that is an intent to do wrong, is an integral part of this offence and must be proved, and in this connection, I feel that the story and the actions of the accused have created more than a reasonable doubt in my mind as to there being any intent on his part to do anything wrong, and it is of course well established practice that the accused shall be entitled to any reasonable doubt. In view of this, I feel I must dismiss the charge.

The reasons for the judgment of the Court of Appeal were delivered by the Chief Justice of British Columbia. They refer only to the first of the two charges which had been laid under section 394(*a*) (1) of the *Code*. It is, however, quite clear that the remarks of the learned Chief Justice were intended equally to apply to the second charge, with which alone we are concerned. Agreeing with the learned trial

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Judge that *mens rea* was an essential element of the offence and finding that there was evidence to support his conclusion that there was no *mens rea* on the part of the respondent, the learned Chief Justice found that there was no error in law. He further expressed the opinion that the evidence disclosed that the respondent was under the honest impression that he had the right to take possession of the logs in order to recover some portion of their value from the owners.

The relevant part of the definition of theft contained in section 347 of the *Criminal Code* reads:—

> Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent,
>
> (*a*) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest.

This portion of the definition appeared in the same terms when the *Criminal Code* was first enacted in 1892 as section 305. The definition does not appear to have been taken from the English Statutes enacted up to that time dealing with the offence of larceny under that name (c. 96, 24-25 Vict. and c. 116, 31-32 Vict.), but rather to embody the accepted definition of the offence of larceny at common law. To constitute the offence, the act must be done fraudulently and without colour of right. In Stephen's History of the Criminal Law, Vol. 3, p. 124, the learned author says:—

> The expression 'fraudulent misappropriation of property' obviously involves three elements: fraud, property capable of being misappropriated, and misappropriation in its various forms. Fraud, as I have observed elsewhere, involves, speaking generally, the idea of injury wilfully effected or intended to be effected by deceit or secretly, though it is not inconsistent with open force. It is, however, essential to fraud that the fraudulent person's conduct should not merely be wrongful, but should be intentionally and knowingly wrongful. Fraud is inconsistent with a claim of right made in good faith to do the act complained of. A man who takes possession of property which he really believes to be his own does not take it fraudulently, however unfounded his claim may be. This, if not the only, is nearly the only case in which ignorance of the law affects the legal character of acts done under its influence.

In East's Pleas of the Crown, Vol. 2, p. 659, in dealing with the offence of larceny, it is said:—

> And here it may be proper to remark, that in any case if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal.

In *Reg.* v. *Reed* (1), where the accused person had found a five-pound note and appropriated it, the Court directed the jury to consider the state of the finder's mind and ruled that if the jury thought the person really believed the note to be her own by right of finding they should not bring in a verdict of guilty on the indictment for larceny. Coleridge, J. said in part (p. 308):—

> Ignorance of the law cannot excuse any person; but, at the same time, when the question is, with what intent a person takes, we cannot help looking into their state of mind; as, if a person take what he believes to be his own, it is impossible to say that he is guilty of felony.

In *Reg.* v. *Farnborough* (2), Lord Russell of Killowen, delivering the judgment of a Court consisting of himself, Pollock B., Grantham, Lawrence and Wright, JJ. said that to shown an animus furandi on the part of the prisoner was an essential ingredient of the crime of larceny and was a matter to be decided by the jury, a statement referred to and adopted by the Court of Appeal in *Rex* v. *Bernhard* (3).

These statements of the law are supported by the statement of Blackburn, J. to the jury in *Reg.* v. *Wade* (4), referred to by the learned Chief Justice of British Columbia, and the result of the authorities is, in my opinion, correctly stated in the passage from Kenny's Outlines of Criminal Law, at p. 241, quoted by him.

The evidence as to the extent of the rights of the lumber company to the booming ground in question is not entirely clear. The Order-in-Council relied upon as evidence as to such rights simply permitted the installation of the dolphins and other works to which I have above referred, but did not purport to give to the company the exclusive right of possession and expressly stipulated that the works should be constructed so as not to interfere with navigation in any way. It is, however, unnecessary, in my opinion, to decide whether in entering the booming ground the respondent was committing a trespass. The accused had sworn that he thought that probably the tide or wind carried the two logs into the enclosure, a statement which apparently the learned County Court Judge understood as meaning that they had theretofore been adrift in the main stream, where the

(1) (1842) C. & M. 306.
(2) [1895] 2 Q. B. 484.
(3) [1938] 2 K.B. 272.
(4) (1869) 11 Cox. C.C. 550.

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respondent thought he would have been entitled to take them into possession for the purpose of obtaining salvage, and had simply floated into the booming ground and were not the property of the lumber company. I do not think the question to be determined is affected by section 22 of the *Criminal Code* stating that ignorance of the law is not an excuse for any offence committed, since the question to be determined is whether or not the respondent committed any offence. Other than to construe the language of the *Code* defining theft, I see no question of law in this matter other than as to whether there was any evidence upon which the learned County Court Judge could find that the respondent took possession of the logs believing that he was entitled to do so with the intention not of stealing them but of profiting by obtaining salvage from the owners if they were found, or which left him in such doubt as to require him to acquit him. I respectfully agree with the Chief Justice of British Columbia that there was evidence upon which the trial Judge could so find.

I would dismiss this appeal.

Appeal allowed; conviction directed.

Solicitor for the appellant: *S. J. Remnant.*

Solicitors for the respondent: *Collins, Green, Eades, Collins & McDonald.*

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*Feb. 17, 18, 19

*Oct. 5

MAPLE LEAF BROADCASTING COMPANY LIMITED (*Defendant*) — APPELLANT

AND

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LIMITED (*Plaintiff*) ..... — RESPONDENT

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Copyright—Infringement—Test case—Copyright Appeal Board, powers of —Validity of Tariff established by the Board—Radio broadcasting stations—Copyright Act, R.S.C. 1927, c. 32 and amendments.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

Action for infringement of copyright, damages and an injunction, brought to test the validity of the tariff (Tariff No. 2) applicable to radio broadcasting stations for the year 1952. The tariff as fixed by the Copyright Appeal Board called for a charge based on a defined percentage of the Stations' gross revenue for their previous fiscal year and directed that the respondent would have the right, in order to verify that gross revenue, to examine the books of the licencees. The defence contended that the imposition of such a charge was not within the power of the Board as it was not a statement of "fees, charges or royalties" within the meaning of those words in the *Copyright Amendment Act*, 1931. Furthermore, the power of the Board to impose as a term in the tariff the right for the respondent to inspect the books of the stations, was also questioned. The action was maintained by the trial judge.

Held: The appeal should be dismissed (Rand and Locke JJ., dissenting, would have allowed the appeal in part).

Per Kerwin C.J., Taschereau and Cartwright JJ.: The statements filed by the respondent before the Board and the statements certified by the Board were both statements of "fees, charges and royalties" within the meaning and contemplation of the *Act*.

The inconvenience which might result from the statements of fees requiring the stations to ascertain their gross revenue by the last day of their fiscal year, when such a day was the last day of the calendar year, was not a sufficient reason to void the tariff. The statute must be construed *ut res magis valeat quam pereat*, and to give effect to this argument would render the statute, in its present form, unworkable. Nor was the inconvenience resulting from the fact that for a certain period in each year the respondent could not know what to charge for a licence and that those wishing to obtain a licence could not know what they might be called upon to pay, a sufficient reason for construing the statute as imperatively requiring the Board to certify the fees for a calendar year on or before the first of the year under penalty of voidance. The statements, upon certification, relate back to the commencement of the year.

Since the Board was within its powers in fixing the fees at a percentage of the gross revenue, it was within its powers to approve or prescribe the manner in which the amount of such revenue was to be ascertained or verified.

Semble, that the word "tendered" in section 10B(9) of the *Copyright Act* should be construed as "offered to undertake to pay".

Per Rand J. (dissenting in part): The contention that there was no authority in the society to use the gross revenue as a basis of the fees is untenable. Since the terms of the licence allow any work to be used at any time of the day for any length of time, the contribution of the works to the total activities and thus to the total revenues of the stations is directly related to that revenue and becomes a legitimate basis for the fees. That basis has been aproved by the Board and considering its broad discretion, it could not be held that it was beyond the scope of that discretion. Provisions of this nature for which a practical workability has proved itself could not, because of a logical or theoretical difficulty, be nullified by interpretation. But it was not necessary to the establishment of the fees that the books should be opened to inspection. There is a legitimate distinction

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between the disclosure of the total revenue and the disclosure of the details of that revenue. However, that part of the statement was clearly severable.

Per Locke J. (dissenting in part). As the *Act* does not state the basis on which the Board is to fix the rates, the matter being left to its discretion and judgment, it was not beyond its powers to approve such a charge. The possible injustice which might result from the method used was a matter solely for the consideration of the Board and the Courts were without power to intervene.

It was not within the powers of the Board to authorize the inspection of the books of the appellant. The Board, upon the true construction of the statute, has merely the power to fix the rate but not the other terms of any licensing agreement to be made between parties.

Subsection 9 of section 10B of the *Copyright Act* was a clear indication of the intention of Parliament that the licences should amount to a simple permission to use the works and did not contemplate that, in addition to the payment of fees, the copyright holder might impose further terms such as the one in question. Nor was it reasonably necessary for, or incidental to, the discharge of the Board's implied functions that it should have the power to settle such a term of the licence to be given.

The matter being one of jurisdiction, no assistance can be derived from the fact that the respondent might be deprived of its fees unless the revenue of the stations could be verified by it.

The damages awarded should be reduced to $1. and there should be no costs here or in the Exchequer Court.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J.(1), maintaining an action for infringement of copyright.

S. Rogers Q.C. and *G. W. Ford Q.C.* for the appellant.

H. E. Manning Q.C. for the respondent.

The judgment of Kerwin C. J. and Taschereau and Cartwright JJ. was delivered by:—

CARTWRIGHT J.:—This is an appeal, brought pursuant to leave granted by my brother Locke, from a judgment of Cameron J. (1) pronounced on the 23rd of February, 1953, declaring that the respondent is the owner of that part of the copyright in a number of musical works which consists of the sole right to perform the same in public throughout Canada, declaring that the appellant has infringed the said copyright, and awarding damages of $500 and an injunction.

(1) [1953] Ex. C.R. 130; 18 C.P.R. 1.

The performances complained of took place on the 5th, 6th, 7th, 8th, 20th and 21st of May, 1952. The respondent's action was commenced on May 22, 1952. The action was tried on November 28 and December 1, 1952. No witnesses were called. An agreed statement of facts and a number of exhibits therein referred to were filed by consent.

The appellant admitted, for the purposes of the action, that the respondent is the owner of the public performing right in the musical works set out in the Statement of Claim, that the appellant had performed by means of broadcasting the works referred to on the dates alleged in the Statement of Claim and that such broadcasting is a performance in public within the meaning of the Copyright Act.

In paragraph 6 of the agreed statement of facts the purpose of the action is stated as follows:—

> This action is brought to determine whether the alleged statements of fees, charges or royalties as filed by the Plaintiff on or about November 1, 1951, and the said statements as modified and approved by the Copyright Appeal Board and published in the Canada Gazette under date of March 27, 1952, as follows:—
>
> Tariff No. 2
>
> RADIO BROADCASTING
>
> (1) Domestic Broadcasting
>
> For a general licence to all operating broadcasting stations covering the broadcasting for private and domestic use only at any time during 1952 and as often as desired of any and all the works for which the Association has from time to time power to grant a performing licence the following fees,
>
> (*a*) By the Canadian Broadcasting Corporation a fee of $.01 per capita of the population of Canada as latest reported by the Dominion Bureau of Statistics, plus the sum provided for in paragraph (*b*) hereunder written, which is made applicable mutatis mutandis to the Corporation with respect to its gross revenue from commercial broadcasting.
>
> (*b*) By each licensee of the Association operating a commercial broadcasting station or stations a sum equal to 1¾ per cent of the gross revenue of such station or stations as defined in P.C. 5234, enacted on the 14th day of October, 1949 in the operation of such station or stations for the fiscal year of the licensee ending on or before the 31st day of December, 1951: provided that, if the licensee shall not have operated in 1951 for a full fiscal year, the gross revenue shall be computed on the basis of the period during which the station was in operation until the 31st day of December, 1951, prorated for a full twelve months.

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Cartwright J.

The Association will, if payments are punctually made accept fees payable by any licensee in twelve equal monthly instalments paid in advance on the first of each month.

The Association shall have the right by a duly authorized representative at any time during customary business hours to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered by the licensee.

is a valid statement of fees, charges or royalties under the provisions of Sections 10, 10A and 10B of the Copyright Amendment Act, Chapter 8, 1931, as enacted by Section 2 of Chapter 28, 1936.

On or about October 30, 1951, the appellant filed with the Secretary of State certain statements of proposed fees, charges or royalties which were intended to comply with the provisions of section 10 (2) of the *Copyright Act*. The Minister and the Copyright Appeal Board followed the procedure laid down by sections 10A and 10B of the *Act*. The Board made certain alterations in the Statements and transmitted them as altered and revised to the Minister certified as the approved statements and the Minister published them in the *Canada Gazette* on March 27, 1952.

The appellant contends that the statements filed by the respondent are not statements of fees, charges or royalties within the meaning of sections 10, 10A and 10B of the *Copyright Act,* that consequently the respondent has not complied with section 10 (2) and was disabled by the terms of section 10 (3) from bringing this action without the consent of the Minister given in writing. It is common ground that no such consent was given. The appellant further contends that the statements certified by the Copyright Appeal Board and particularly Tariff 2 quoted above are not statements of fees, charges or royalties within the meaning of the sections mentioned and are accordingly null and void. I agree with the conclusion of the learned trial judge that both these contentions must be rejected and I am in substantial agreement with his reasons. I wish, however, to add some observations as to the grounds of attack upon the tariff in question as certified by the Board which are set out in paragraphs 1(*a*) and 1(*d*) of the appellant's counter-claim.

Paragraph 1(*a*) reads as follows:—

1. The said purported statement of fees, charges or royalties approved by the Copyright Appeal Board for the year 1952 is not a statement of fees,

charges or royalties in accordance with the provisions of the said Copyright Amendment Act, as amended, and is accordingly null and void for the following amongst other reasons:—

(a) The defendant was unable on the 1st day of January, 1952, and still is unable to ascertain by reference to the said purported statement the specific amount which it is required to pay to the plaintiff in order to acquire a licence for the public performance of the works controlled by the plaintiff as aforesaid.

It is admitted that approximately 70 per cent of the privately owned broadcasting stations in Canada have fiscal years which end on December 31 and counsel for the appellant contends that, although no evidence was given on the point, it is obvious that it would be a practical impossibility for the owners of such stations to ascertain their gross revenue for the fiscal year for a period of at least some days after December 31, and consequently during such period they could not avail themselves of the protection against an action for infringement afforded by section 10B (9). It is argued that this result indicates that the tariff certified by the Board is not within the contemplation of the *Act* and particularly of the sub-section mentioned and is therefore void.

Subsections 8 and 9 of section 10B read as follows:—

(8) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

(9) 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 dramatico-musical or 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.

For the purposes of this argument, I will assume that in the case of broadcasting stations whose fiscal years terminate on December 31 there would be a period early in the ensuing calendar year in which the owner of such station could not ascertain his gross revenue with exactitude. From this certain inconveniences might result but I do not find it a sufficient reason for declaring the certified tariff to be void. The statute nowhere provides expressly that the Board shall so proceed that persons desirous of

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using the works shall be able to ascertain at all times on and after January 1st in each year the amount of the fees payable certified by the Board and indeed in view of the procedure laid down by the *Act* it would appear most unlikely that the Board would be able in any year to certify the statements to the Minister until some time after January 1. It is admitted that it has never as yet done so. The statute must be construed *ut res magis valeat quam pereat* and to give effect to this argument of the appellant would render the statute in its present form unworkable.

It will be observed that in the year 1952 it was not until March 22, that the Board certified the statements of fees, charges and royalties which might be collected by the respondent for the issue or grant of licenses for or in respect of the performance of its works in Canada for the year 1952, and that the tariff with which we are concerned as certified provides rates substantially lower than those proposed in the statements filed by the respondent and published in the Canada Gazette of November 2, 1951. Assuming that the owner of a broadcasting station whose fiscal year ended on December 31 would not know early in January what his gross revenue was for the preceding year, he would no doubt be able to calculate it approximately. He would, however, still be in ignorance as to what percentage of this revenue he would be required to pay for a license and it is at least conceivable that there might be cases in which such owner would decide against taking a license at the fee stipulated in the statement filed but would be willing to take a license at the fee finally certified by the Board. While it may not be strictly necessary to the decision of this appeal to express an opinion upon the point, it appears to me that the word "tendered" in section 10B (9) should be construed as "offered to undertake to pay" and that the owner of a broadcasting station in the position suggested above could avail himself of the protection afforded by section 10B (9) by offering to undertake to pay the fees approved by the Board so soon as the same were approved, while a person using the works without having made such offer would appear to be liable to an action for infringement. That it is inconvenient that for a certain period in each year the respondent can not know what it may charge for a license for the performance of its works and those wishing to use

the works can not know what they may be called upon to pay is not to be denied, but such inconvenience does not appear to me to be a sufficient reason for construing the *Act* as imperatively requiring the Board to certify the statements of fees which may be collected during a calendar year on or before January 1 of such year and rendering void any statements certified thereafter. I think the better view is that it is an implied duty of the Board to proceed with all possible expedition and that the statements if certified later than January 1 relate back upon certification to the commencement of the year. This is not to say that a person who before certification performs the works of the respondent without its consent and without offering to undertake to pay the fees certified by the Board as soon as the same are certified necessarily becomes liable to pay those fees if it does not then take a license from the respondent; that question does not arise in this action in which the respondent seeks damages and does not allege any implied contract with the appellant.

Paragraph 1 (d) of the appellant's counter-claim is as follows:—

> (*d*) The provisions in the last paragraph of section 1 of the said Tariff No. 2 in the said purported statement of fees, charges or royalties deal with matters other than quantum of fees, charges or royalties and is accordingly beyond the jurisdiction of the Copyright Appeal Board which, by the terms of Section 10B of the said Act, is limited to the approval with or without modification of the quantum of fees, charges or royalties.

The last paragraph of section 1 of Tariff 2 referred to reads as follows:—

> The Association shall have the right by a duly authorized representative at any time during customary business hours to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered by the licensee.

I have already expressed my agreement with the reasons of the learned trial judge for upholding the validity of Tariff 2 *in toto* including this final paragraph. Once it has been held that the Board was acting within its powers in fixing fees at a stated percentage of the gross revenue of a licensee it appears to me to follow that it must be within its powers to approve or prescribe the manner in which the amount of such gross revenue is to be ascertained or verified.

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Cartwright J.

I would not interfere with the award of damages made by the learned trial judge. In dealing with this question the learned trial judge says in part:—

> It was agreed, also, that the Canadian Association of Broadcasters should do its utmost to secure the undertakings of its members to do certain things, including payment by them to the plaintiff of a sum equivalent to that paid in 1951, pending the final outcome of the proposed litigation, which amount, if the chosen defendant were finally successful in the action, would be accepted in full settlement for the period of litigation; on the other hand, if the plaintiff succeeded in upholding the validity of the tariff, such stations would then pay such balance as might be due the plaintiff under the said tariff. The defendant herein, while a member of the Canadian Association of Broadcasters, was not a party to that agreement and has not paid the plaintiff any amount whatever in respect of the year 1952 as contemplated by the said agreement.

I do not understand this statement of fact to have been challenged and neither the appellant's pleadings nor its factum contain any statement that it is willing to make payment to the respondent in accordance with the Tariff certified by the Board in the event of such certification being held valid.

I agree with the view of my brother Locke that the paragraph of the formal judgment of the Exchequer Court reading:—

> AND THIS COURT DOTH FURTHER DECLARE that the defendant has infringed the plaintiff's said copyright in the said musical works by the performance thereof or by authorizing the performance thereof in public without the consent of the plaintiff and by permitting the premises operated by it to be used for the said performance for the defendant's private profit without the consent of the plaintiff.

should be amended to read:—

> AND THIS COURT DOTH FURTHER DECLARE that the defendant has infringed the plaintiff's said copyright in the said musical works by the performance thereof or by authorizing the performance thereof in public without the consent of the plaintiff.

and that the paragraph of such formal judgment reading:—

> AND THIS COURT DOTH ORDER AND ADJUDGE that the defendant, its, and each of its agents, servants and employees be, and they are hereby perpetually restrained from infringing the plaintiff's copyright in the said musical works by the performance of the same or any substantial part thereof in public without the consent of the plaintiff.

should be amended by deleting the last six words thereof.

Subject only to these variations in the formal judgment, I would dismiss the appeal with costs.

RAND J. (dissenting in part):—The question in this appeal must take into account the broad purposes of the statute. Here is the regulation of copyright in respect of the use of musical works in a mode which has become a feature of the development of radio. That and other developments have led to the organization of performing rights societies. So extensive have the functions of this new agency become that special provisions were enacted by s. 2 of c. 28, 1936 and ss. 1 and 4 of c. 27, 1938, of the statutes of Canada which deal exclusively with them; these have now become s. 10 of c. 8, 1951. They require that each such society shall file with the Minister at the copyright office lists of all dramatic-musical and musical works over which it has licensing and other powers. On or before the 1st day of November in each year, the society shall likewise file "statements of all fees, charges or royalties" which it proposes to collect in respect of its works for the ensuing calendar year; and in case of neglect or refusal to file those statements, the right to move against infringements by action or other proceeding, without the consent of the Minister, is forbidden.

An Appeal Board is also set up. S. 10(*b*) directs that after the Minister shall have referred these statements to the Board, it "shall proceed to consider the statements and the objections, if any" and the Board itself may raise any objection which appears to it proper to be taken. Upon the conclusion of its consideration, the Board is to make such alterations in the statements as it may think fit and transmit them so altered or revised or unchanged, to the Minister as approved. Upon their publication in the official gazette, they become the legal "fees, charges or royalties" which the society may collect or sue for in respect of licenses issued by it.

The fees set forth on the statements which are objected to are a sum equal to $1\frac{3}{4}$ per cent of the "gross revenue" of each station as that revenue is defined in Order-in-Council P.C. 5234 made on October 14, 1949. For the year 1952, that in question here, the gross revenue is that of the station for its next previous fiscal year ending on or before December 31, 1951.

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Rand J.

The first contention urged against the statement is that there is no authority in the society to use the gross revenue as the basis of its charges, but a consideration of the manner in which these works are used by the stations shows it to be untenable. The terms of the license allow any work to be used at any time of the day for any length of time and that mode of use has become the means of what might be called the unbroken performance of the radio. From this it is plain that the contribution which the works make to the total activities and thus to the total revenues of each station is directly related to that revenue and becomes a legitimate basis for charges. For some years prior to 1952 the basis was the number of radio receiving sets used throughout Canada, but that appears to me to be much less germane to the functional participation of the works than what is now contested.

But it is urged that it is inconsistent with the requirements of the statute. If, for example, the fiscal year ends on December 31, how can it be that the fees should have a datum of determination which could not be applied to the use on the 1st day of January following? This, no doubt, is theoretically formidable: but the statute provides for a quasi-administrative function of the Board and the dates fixed and the times contemplated for the work of the Board, must, as a practical necessity, contain a period in which no approved fees may be in force; at the same time it must equally contemplate a retroactive effect to the approval. This in fact has been the history of the Board's administration and I do not understand that provisions of this nature for which a practical workability has proved itself can, because of a logical or theoretical difficulty, be nullified in interpretation.

But the basis has been approved by the Board and considering the broad discretion directly related to that action, it would be quite out of the question to hold that it was beyond the scope of that discretion. I agree, therefore, with the judgment of Cameron J. that the basis is unobjectionable.

Against the statement a further objection is raised. There has been included in it a requirement incidental to the license that the society shall have the right to examine

the books and accounts of the licensee in order to verify the gross revenue returned. It is argued that this is beyond any scope of a statement of "fees, charges or royalties" and, as a term of any agreement to pay them, equally beyond any obligation imposable on a prospective licensee.

Admittedly there is nothing express in the statute to authorize such an inspection, but in the view of Cameron J. as the fees could have as their basis of calculation the gross revenue, it must be taken to be a reasonably necessary implication of the statute that there be a power of inspection. I agree that whatever may be reasonably necessary to the establishment of the fees is impliedly authorized, but I am unable to assent to the view that it is necessary in that sense here that the private books and accounts of the broadcasting stations should be opened to the inspection of the society. It is a question of degree. There is a legitimate distinction between the disclosure of the total revenue of a station and the disclosure of the details of that revenue. Under the Act authorizing the licensing of the broadcasting stations, the fees are likewise related to the gross revenue, but for the purposes of administration the proof of that revenue appears to be satisfied by the statement of the broadcasting company verified by the oath of one of its officers. It would seem to me that that furnishes a standard which can be taken to mark the reasonable limits of the implication of the statute in the matter before us.

On the other hand, although the right of inspection forms part of the statement of the fees, it is clearly a severable provision. Its whole function is ancillary and its elimination cannot affect the validity of the basis or the fee resulting from it. The statement must then be taken as having been approved with this provision eliminated.

The appeal must be in part allowed and the judgment below modified by striking out the second last paragraph and by substituting for it a declaration that provision for an inspection of the books and accounts of the broadcasting station is invalid, and by reducing the damages to $1.00. There should be no costs in either court.

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LOCKE, J.: (dissenting in part)—This is an appeal from a judgment of Cameron J. delivered in the Exchequer Court (1) finding, inter alia, that the appellant has infringed the respondent's copyright in a number of musical works by authorizing their performance in public without the consent of the plaintiff, restraining the appellant, its agents, servants and employees from further infringement and awarding damages in the sum of $500.

The appellant is the operator of a radio broadcasting station in Hamilton, Ontario, licensed under the Broadcasting Act of Canada and it is admitted that, without the respondent's permission, the appellant, during the month of May, 1952, caused to be broadcast a number of musical works, that part of the copyright in which, which consists of the sole right to perform the same in public in Canada, was the property of the respondent. The action is of the nature of a test action upon which the rights of the respondent against a large number of other broadcasting stations in Canada depend.

The relevant facts and the provisions of the *Copyright Act* (R.S.C. 1927, c. 32) as amended which affect the matter are stated in the reasons for judgment delivered at the trial. Prior to November 1, 1951, the respondent filed at the Copyright Office a statement purporting to be a statement of the fees, charges or royalties which it proposed to collect during the next ensuing calendar year, in compensation for the issue or grant of licences in respect of the performance of its works in Canada, as required by subsection 2 of section 10 of the Act.

This statement contained a number of proposed tariffs relating to the performance of the copyrighted works but, of these, we are, in my opinion, concerned only, with Tariff No. 2 for radio broadcasting, which set forth a schedule of charges to cover the broadcasting for private and domestic use only during the year 1952 as often as desired of all the works for which the respondent had power to grant a performing licence for privately owned broadcasting stations. These included a sum equal to $2\frac{1}{4}\%$ of the gross billings for the sale of broadcasting by each licensee of the respondent during its preceding fiscal period ending in 1951. The tariff

(1) [1953] Ex. C.R. 130; 18 C.P.R. 1.

further proposed that each licensee should furnish to the respondent, not later than the end of each month, a complete record of all musical programs radio broadcast from its station during the preceding month and that the fees payable might be paid in twelve equal monthly instalments. The tariff contained the following further proposed term:—

> The Association shall have the right by a duly authorized representative at any time during customary business hours to examine books and records of account of the licensee to such extent as may be necessary to verify any and all statements rendered by the licensee.

As required by the *Act*, the Secretary of State published the statements so filed in the Canada Gazette of November 2, 1951, and gave notice that any person having any objection to the proposals contained in the statements must lodge particulars of his objection at the Copyright Office on or before December 8, 1951.

In the Canada Gazette of March 27, 1952, the Secretary of State published the statement in the form in which it had been, after certain changes, approved by the Copyright Appeal Board. Tariff No. 2, as so approved, fixed the charge for a general licence to all operating broadcasting stations for broadcasting for private and domestic use only for 1952 as follows:—

> (*b*) By each licensee of the Association operating a commercial broadcasting station or stations a sum equal to $1\frac{3}{4}$ per cent of the gross revenue of such station or stations as defined in P.C. 5234, enacted on the 14th day of October, 1949, in the operation of such station or stations for the fiscal year of the licensee ending on or before the 31st day of December, 1951: provided that, if the licensee shall not have operated in 1951 for a full fiscal year, the gross revenue shall be computed on the basis of the period during which the station was in operation until the 31st day of December, 1951, prorated for a full twelve months.

The provision that the Association should have the right to examine the books and records of account of the licensee was approved in the form proposed.

The tariff of fees to be paid to the respondent so approved differed in their nature from those which had been proposed by the respondent and approved by the Copyright Appeal Board and paid by broadcasting stations in previous years. In the years 1944 to 1946 both inclusive, the Copyright Appeal Board had approved a schedule of fees calling for the payment to the respondent of a stated lump sum for the issue of its licences to broadcast which was

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Locke J.

prorated between the Canadian Broadcasting Corporation and the private broadcasting stations in Canada. For the purpose, inter alia, of avoiding annual hearings before the Copyright Appeal Board as to these charges, the respondent and the Canadian Association of Broadcasters entered into an agreement dated January 31, 1947, for a term of five years commencing on January 1 of that year, which provided that the respondent should receive from all privately owned broadcasting stations in Canada ·07 cts per radio receiving set licensed by the Department of Transport for the year ending March 31 next preceding the commencement of each calendar year of the agreement. The amount so payable was prorated by the Canadian Association of Broadcasters among the privately owned stations and the amounts so payable were submitted to and approved by the Copyright Appeal Board throughout the term of the agreement.

It is the change made by the statement filed prior to November 1, 1951, as approved by the Copyright Appeal Board, fixing the charges at a percentage of the gross returns of the broadcasting stations and assuming to give to the respondent the right to inspect the business records of the various stations, which has given rise to the present litigation.

The respondent's action, as pleaded, was for a declaration that it was the owner of that part of the copyright for the specified musical works which consists of the sole right to perform the same in public throughout Canada, that the appellant had infringed the said copyright, for damages and an injunction.

By the defence, the appellant admitted having broadcast from its station CHML at Hamilton, without the permission of the respondent, the musical works referred to, but denied that doing so constituted an infringement on the ground that the respondent had not filed a statement of the "fees, charges or royalties" which it proposed to collect during the calendar year 1952, as required by the *Copyright Act* as amended, but had filed a statement which, after amendment, had been approved by the Copyright Appeal Board, which did not comply with the requirements of the said *Act* and was accordingly of no legal effect. A

further defence raised was that the plaintiff having failed to file the required statement of fees, charges or royalties, the action failed as the consent in writing of the Minister had not been obtained prior to the commencement of the action, as required by section 10(3) of the *Act*. By way of counterclaim, the appellant set forth the grounds upon which its claim that the statement did not comply with the requirements of the Act was based and claimed a declaration that such statement, as filed and as modified and certified by the Copyright Appeal Board, did not comply with the statute and was null, void and of no legal effect.

By way of defence to the counterclaim, the respondent put in issue the allegations that the statement did not comply with the statute and the claim raised by the appellant in its counterclaim that it desired to acquire a licence for the year 1952 but was unable to do so since no statement of fees, charges or royalties had been included in Tariff No. 2, and alleged that the appellant had at all times been able to obtain a licence to perform these works under Tariff No. 1 which had been approved by the Copyright Appeal Board and fixed a schedule of charges for the performance of such works in fixed amounts.

While this last mentioned contention of the respondent raised an issue which did not arise upon the pleadings in the principal action, I mention it by reason of the argument addressed to us on behalf of the respondent that in any event it is entitled to damages under the provisions of Tariff No. 1.

The action was tried upon a statement of facts agreed upon between the parties which rendered it unnecessary to call evidence. The agreement, in my opinion, and the course of the trial restricted the issues to be determined to the questions as to whether the charges proposed by Tariff No. 2 complied with the provisions of the *Act* and as to whether the Copyright Appeal Board acted within its powers in approving that tariff, including that portion of it which required the appellant to permit the respondent to have access to its business records for the purpose of verifying the statements as to the gross revenue of the station during the year in question.

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The agreement between the parties expired on December 31, 1951, and the tariffs filed prior to November 1 of that year were not approved by the Copyright Appeal Board until March 22, 1952. The fact that there was thus an interval between January 1 and March 22, 1952, when persons affected by the tariff did not know what the approved rate would be for the purpose of negotiating for a licence with the respondent or of taking advantage of the provisions of subsection 9 of section 10B, need not be considered in disposing of the present action, the real issues of which are as to the validity of Tariff No. 2 as ultimately approved.

I respectfully agree with the learned trial Judge that, as the *Act* does not state the basis on which the Board is to fix the rates, that matter being left to its discretion and judgment, it cannot be said that it was beyond its power to approve a charge or royalty for the use of the copyrighted works as a defined percentage of the gross revenue of the broadcasting station as defined in P.C. 5234.

That such a method of fixing the charge may require the station to pay to the owner of the copyright a part of its earnings from activities quite divorced from the use of the copyrighted works, or that the percentage required to be paid may result in the payment of amounts much greater than those theretofore paid by the operators of broadcasting stations, were matters, in my opinion, solely for the consideration of the Board and in which the courts are without power to intervene.

I am, however, unable, with respect, to agree with the conclusion of the learned trial Judge that it was within the power of the Copyright Appeal Board to approve the term of the tariff which would authorize the respondent to examine the business books and records of the appellant, for the purpose of ascertaining the accuracy of statements as to its gross revenue made by it. It is true that such a provision may at times be agreed upon by licensees of patents but that is where the matter is one of agreement between the parties and is not a relevant consideration in determining the powers of the Board unless, upon the true construction of the statute, those powers include not merely that of fixing the rate or royalty but the other terms of a licensing agreement to be made between the parties.

The duties and the powers of the Copyright Appeal Board are defined in section 10B of the *Copyright Act* as amended. When the society or association owning the copyright has filed the statement of fees, charges or royalties which it proposes to collect for the ensuing year, as required by section 10(2), the Minister, after such statement has been published in the *Canada Gazette* pursuant to section 10A(1) is required to refer it to the Board, together with the objections, if any, which have been received in respect to it. The duty of the Board is then to consider the statements and the objections, if any, and:—

> make such alterations in the statements as it may think fit and shall transmit the statements thus altered or revised or unchanged to the Minister, certified as the approved statements.

Subsection 8 of section 10B provides that the statements of fees, charges or royalties so certified shall be those which the society or association concerned:—

> may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

Subsection 9 declares that no society or association shall have any right of action to enforce any remedy for infringement of the performing right in any dramatico-musical or musical work against any person who has tendered or paid the fees, charges or royalties which have been approved as aforesaid.

The respondent takes the attitude that the terms of such licence other than the amount of the charges or royalties is for it to decide and it was apparently upon this theory that the statement filed by it with the Minister contained the proposed term that it should have the right to examine the books and records, of licensees, to such extent as may be necessary to verify any statements of their gross revenue rendered by them. The charges or royalties approved by the Copyright Appeal Board are a percentage of the gross revenue of the station as defined by Order-in-Council P.C. 5234. Section 1 of that Order defines "gross revenue" for the purpose of the Regulation as:—

> the total revenue earned by the licensee in the operation of the station, less agency commissions, as set forth in the financial return made under oath by the licensee to the Minister covering the operation of the station for the fiscal year of the licensee.

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Since the activities of private broadcasting associations would not be confined to broadcasting the musical works of the respondent, the latter obviously intended to impose as a condition of a licence to perform its copyrighted works that the operator of the station pay not merely a portion of the revenue derived from performing its copyrighted works but also of all of its revenue-producing activities.

In my opinion, subsection 9 of section 10B above quoted is a clear indication of the intention of Parliament that the licences to be granted, if they were indeed requested, should amount to a simple permission to utilize the copyrighted works or any of them during the ensuing calendar year in Canada and did not contemplate that, in addition to the payment of the prescribed charges or royalties, the copyright holder might impose further terms such as the one in question. Under the terms of that subsection, a broadcasting station might lawfully broadcast any of the copyrighted works of the respondent on tendering to it an amount equal to the prescribed percentage of its net income in its previous fiscal year without obtaining any licence from the respondent. It cannot, I think, have been intended that those obtaining licences would be required to submit to an examination of their business records at the instance of the respondent as a term of doing what they could lawfully do without any such licence.

The Copyright Appeal Board is the creature of the statute and as such it has, in my opinion, in addition to the express powers vested in it, implied power to do such things as may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorized (*Attorney-General* v. *Great Eastern Railway* (1). *Attorney-General* v. *Pontypridd Urban District Council* (2)). Those functions, in so far as they affect the present matter, are limited to considering the statements of fees, charges or royalties filed and the objections, if any, made to them and to alter the terms if, in its opinion, this should be done and to certify the statement as submitted or as so altered or revised. It is not, in my opinion, reasonably necessary for, or incidental to, the discharge of these functions that the Board shall have the power to settle the terms of the licence to be given and to direct that, in order to enable the holder

(1) (1880) 5 A.C. 473 at 478. (2) [1906] 2 Ch. D. 257 at 266.

of the copyright to verify the accuracy of the statements made by licensees as to the amount of their gross revenue, the owner of the copyright may examine the books of account in the manner which has been authorized.

Since the matter is one of jurisdiction, it does not assist the position of the respondent that, unless it is enabled in some manner to ascertain the true amount of the gross revenue of its licence holders, it may be deprived of charges or royalties to which it is entitled. The difficulty has been caused by the respondent's own action in endeavouring to include this term in the statement of the fees, charges or royalties proposed to be collected and asking the Copyright Appeal Board by its approval to assist it in enforcing it. I am not, moreover, impressed with the suggestion that under a tariff which requires a licence holder, or person who wishes without a licence to use the copyrighted works to pay a fixed proportion of its gross revenue, there need be any loss to the respondent. Statistics are available to it indicating, at least generally, the extent of the activities of the various private broadcasting stations and, in any case where the respondent might suspect that the amount of the gross revenue of any station has been understated in an action properly framed, the operator of the broadcasting station might be compelled to produce his business records and the true amount of the gross revenue thus ascertained.

The formal judgment entered in the Exchequer Court reads in part:—

> And this Court doth further declare that the defendant has infringed the plaintiff's said copyright in the said musical works by the performance thereof, or by authorizing the performance thereof in public without the consent of the plaintiff and by permitting the premises operated by it to be used for the said performance for the defendant's profit without the consent of the plaintiff.

A further clause perpetually restrains the defendant, its agents, servants and employees from infringing the plaintiff's copyright in the said musical works without the consent of the plaintiff.

The appellant objects to that portion of the first quoted clause which follows the word "plaintiff" in the sixth line thereof, on the ground that there was no evidence to support that portion of the plaintiff's claim which is pleaded in paragraph 7 of the Statement of Claim and is based

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upon subsection 3 of section 17 of the *Copyright Act*. I agree with this contention and would direct that that portion of the judgment at the trial be deleted.

The part of the judgment which contains the restraining order is also objectionable in that it restrains the appellant from utilizing the copyrighted works without the consent of the plaintiff. This is contrary to the terms of subsection 9 of section 10B under which the appellant is entitled at will to broadcast any of the copyrighted works after it has tendered or paid to the respondent the charges or royalties specified in the tariff approved by the Board. Accordingly, the words "without the consent of the plaintiff" which appear in the concluding lines of the paragraph should be deleted.

The learned trial Judge considered that despite the fact that, by arrangement, the appellant agreed to pay and the respondent agreed to accept charges in the amounts paid under the agreement which expired on December 31, 1951, pending the final disposition of this action, and that it was admittedly a test action to determine the validity of the Tariff No. 2, as approved by the Copyright Appeal Board, there should be an award of damages.

By the counterclaim a declaration was asked that Tariff No. 2 be declared "null and void and of no legal effect" and, in my opinion, the appellant is entitled to a declaration that the paragraph of that tariff which assumed to authorize the respondent to examine the books and records of licensees is not binding upon the appellant as being beyond the powers of the Copyright Appeal Board.

The appellant did not, as it might well have done, tender to the respondent the percentage of its gross revenue for its fiscal year ending January 31, 1951, which would have been a bar to any claim of infringement, but elected to put the whole question of the validity of Tariff No. 2 in issue. As, in my opinion, the main ground for the failure to comply with the tariff as approved was the objection of the appellant and the other private broadcasting associations to exposing their business records to examination by the respondent and as success on the real

issues is divided I would further amend the judgment at the trial by reducing the amount of damages awarded to the sum of $1.00.

In all the circumstances, I think there should be no costs in this Court or in the Exchequer Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Rogers & Rowland.*

Solicitors for the respondent: *Manning, Mortimer & Kennedy.*

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*May 17, 18, 19
*Oct. 5

IN THE MATTER of the Estate of ALEXANDRA LOGGIE, deceased.

WINSTON C. BREWER AND HERMAN S. MURRAY, EXECUTORS UNDER THE LAST WILL OF THE SAID ALEXANDRA LOGGIE *(Plaintiffs)* ..... APPELLANTS,

THE ATTORNEY GENERAL OF NEW BRUNSWICK *(Defendant)* . APPELLANT;

AND

ELIZABETH FYFE McCAULEY AND OTHERS *(Defendants)* ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK CHANCERY DIVISION

Wills—Charity—Charitable bequest—"Charitable, religious, educational or philanthropic purposes"—Uncertainty.

A testatrix by her will directed her executors to apply the residue of her estate "for charitable, religious, educational or philanthropic purposes" and vested in them special powers of appointment but restricted the allocations to be made under the powers of appointment to the Province of New Brunswick. By a second paragraph, without restricting the powers of appointment, she expressed the wish that a special trust, scholarship or foundation be established and named the Robert Loggie and/or Alexandra Loggie Trust, Scholarship or Foundation.

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

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Held: that the whole of the purported trust was void for uncertainty as not confined to charitable purposes.

Decision of the Supreme Court of New Brunswick, Chancery Division (1953) 34 M.P.R. 66, varied.

APPEAL by plaintiffs with special leave of the Supreme Court of New Brunswick, Appeal Division, from that portion of the judgment of Harrison J. (1), a judge of the Supreme Court of New Brunswick, Chancery Division, whereby he determined that the trust of one half of the residue of the Estate of Alexandra Loggie set out in clause 10 of her last will was void for uncertainty and fell to be distributed as of an intestacy. The defendants by way of cross-appeal sought a declaration that the whole trust was void for uncertainty.

C. F. Inches, Q.C. and *Norwood Carter* for the appellant executors.

A. B. Gilbert, Q.C. and *D. M. Gillis* for the Attorney General of New Brunswick, appellant.

C. J. A. Hughes, Q.C. and *H. W. Sutherland* for the respondents.

RAND J.:—Notwithstanding the exhaustive argument of Mr. Carter, I have no doubt about what our judgment should be. I cannot accept the interpretation of the will urged upon us that by the second paragraph of the residual provision, the testatrix directed a trust for education. In addition to the fact that the opening words, "without restricting the generality of the foregoing special powers of appointments" which are simply powers to carry out the declared objects, provided *ex abundantia cautela,* expressly exclude such an interpretation, and that all that is expressed is a "wish" that a "Special Trust, Scholarship or Foundation" be established, the language "Trust, Scholarship or Foundation" are all recognized means of perpetuating the name of a donor who is desirous of creating a perpetual gift, and they express not an object, education, but three modes of achieving objects elsewhere specified.

We are then remitted to the words of the first paragraph by which the residue is to be given and applied "for charitable, religious, educational or philanthropic purposes"

(1) (1953) 34 M.P.R. 66.

which confer an unfettered discretion on the trustees to apply the residue to any of those four objects. In its relation to the scope of charity as delimited by the courts, the last word is indistinguishable from "benevolent" and admittedly the authorities in England have pronounced on both of them.

In *Chichester Diocesan Fund and Board of Finance (Incorp.)* v. *Simpson* (1), the word "benevolent" in the context of "such charitable institution or institutions or other charitable or benevolent object or objects in England" was held to be outside of the scope of the statute of Charities and that the purported bequest was invalid as being uncertain.

In *re Macduff* (2), the language of the bequest "for some one or more purposes charitable, philanthropic or (blank) " was held invalid because of the presence of the word "philanthropic". To the same effect was *In re Eades* (3). In *Wintle* v. *Diplock* (4), the Court of Appeal, consisting of Sir Wilfred Greene, M.R., Clauson L.J., and Goddard L.J. applied the same rule to the word "benevolent" in the context "apply the residue for such charitable institution or institutions or other charitable or benevolent object or objects in England." In the course of his reasons the Master of the Rolls dealt specifically with the two words 'benevolent" and "philanthropic" and his analysis of the law as laid down in the cases demonstrating there the impossibility of upholding the judgment of Farwell J. who, on the construction of the will, had found an overriding intention to benefit charitable objects only, equally clearly presents an insuperable obstacle to this appeal.

The appeal must, therefore, be dismissed, and the cross-appeal allowed; the judgment below should be varied so as to declare that the whole of the purported trust of the residue is void for uncertainty and the residue to be distributed as of an intestacy. Costs to all parties will be payable out of the estate, those of the executors of the testatrix as between solicitor and client.

(1) [1944] A.C. 341.
(2) [1896] 2 Ch.D. 451.
(3) [1920] 2 Ch. 353.
(4) [1941] 1 Ch. 253.

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The judgment of Kellock, Estey, Cartwright and Fauteux JJ. was delivered by:

KELLOCK J.:—This appeal and cross-appeal are brought *per saltum* from a judgment of the Supreme Court of New Brunswick, construing the terms of paragraph 10 of the will of the deceased Alexandra Loggie.

After appointing executors and directing payment of succession duties, the testatrix gave certain pecuniary legacies to relatives and to certain organizations and institutions, all of the latter being, as I shall assume, of a charitable nature. Thereupon follows paragraph 10, reading as follows:

> 10. All the rest, residue and remainder of my Estate I do direct shall be given and applied for charitable, religious, educational or philanthropic purposes. I do hereby devise and bequeath all the residue of my estate unto my Executors and Trustees in trust for the purposes as hereinafter more particularly set forth. And in addition to all powers conferred by law I do vest in my Executors and Trustees special Powers of Appointment to allocate the residue of my Estate with full power and discretion to them and restricted only in that any and all allocation made by my Executors and Trustees from the residue of my Estate under the special Powers of Appointment must be for charitable, religious, educational or philanthropic purposes within the Province of New Brunswick and further that they are not restricted to gifts to established institutions.
>
> Without restricting the generality of the foregoing special Powers of Appointment I express the wish that a special Trust, Scholarship or Foundation or more than one, if practicable to do so, be established and named and identified as the ROBERT LOGGIE and/or ALEXANDRA LOGGIE Trust, Scholarship or Foundation, etc., and the said newly established trust to be properly organized and Trustees in addition to my Executors and Trustees herein appointed. The charter members to be named and appointed by my Executors and they to make provision for appointment to fill vacancies and establish rules, regulations and conditions governing the administration of any such Trust, Scholarship or Foundation so established in compliance with the aforegoing expressed wish.
>
> For further direction to Trustees of any trust that may be established I wish that total payments made each year be not necessarily confined or restricted to the income or revenue only but that total annual payments under any trust so established may at the discretion of the Trustees be made in part from principal but only in a degree from the principal that would permit the Trust so established to operate for an extended term of years but not of necessity in perpetuity.

Harrison J., in the court below held that while the provision contained in the first sub-paragraph was invalid by reason of the inclusion of "philanthropic" among the purposes enumerated by the testatrix, the second sub-paragraph was to be construed as constituting a trust for educational

purposes. The learned judge directed that one-half of the residue should be devoted to that end, the remaining one-half being undisposed of.

The appellants contend that all of the provisions of paragraph 10 are valid, while for the cross-appeal, it is argued that the paragraph is invalid *in toto*.

In support of the appeal, it is urged that the word "or" in the phrase "charitable, religious, educational or philanthropic purposes" in the first sub-paragraph, is used conjunctively; that all of the named purposes other than "charitable" take their colour from association with it, the other words being merely explanatory, "or" to be read as "id est". It was further contended that the court should apply a benignant interpretation so as to uphold the validity of the gift if at all possible and that by reason of the existence of the charitable pecuniary legacies, a general charitable intention appears upon the whole will, in the light of which the word "philanthropic" is to be read as synonymous with and governed by the word "charitable."

I do not think it necessary to discuss these arguments in detail. In my view, upon the language of this will it is impossible to read the word "or" as conjunctive. Accordingly, while the word "charitable" must receive its technical meaning, and there is no difficulty about the words "religious" and "educational", the presence of the word "philanthropic" vitiates the gift. In my view, the case at bar is governed by the principle of the decision in *Chichester Diocesan Fund* v. *Simpson* (1). The earlier decision in *Attorney-General for New Zealand* v. *Brown* (2), may also be usefully referred to. In this view the appeal fails.

The fundamental principle is that a testator must, by the terms of his will, himself dispose of the property with which the will proposes to deal. He may not depute that duty to his executors or trustees, save in the case of a gift for charitable purposes, when he may depute the selection of the charities. The courts in such case are able to determine whether or not a particular gift is charitable. But where the testator employs such words as "charitable or benevolent" or "charitable or philanthropic", it is impossible for the courts to be able to decide with accuracy the ambit of

(1) [1941] A.C. 341. (2) [1917] A.C. 393.

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Kellock J.

these expressions as it is well settled that neither of them mean the same as "charitable". The result is that where a testator has left to his trustees a discretion to devote the whole of his property to one or the other, the gift fails.

Although in the *Chichester* case it was the word "benevolent" which rendered the particular provisions there in question invalid, while the word in question in the case at bar is "philanthropic", it is well settled that both words are tainted by the same vice, as is pointed out by Lord Porter in the *Chichester* case at p. 365, and Lord Simonds at p. 370. I refer also to the judgment of Lord Davey, with whom Lord Watson concurred, in *Hunter* v. *Attorney General* (1). *In re Macduff* (2); *In re Eades* (3); and to *re Poole* (4). In the *Chichester* case in the Court of Appeal, reported *sub nom. In re Diplock* (5), Sir Wilfred Greene M.R., as he then was, said at p. 259:

> The Crown has never assumed the right to come to the Court and ask for the execution of a philanthropic trust.

With respect to the view which found favour with Harrison J., namely, that the second sub-paragraph constitutes a valid precatory trust for the "furtherance of education by scholarships", I think it is impossible so to construe this will for two reasons. The sub-paragraph opens with the words:

> Without restricting the generality of the foregoing special Powers of Appointment.

The "foregoing special Powers of Appointment" are powers of appointment "to allocate" the residue of the estate, the discretion of the trustees being "restricted only" in that any and all allocation "must be" for "charitable, religious, educational or philanthropic purposes within the Province of New Brunswick."

It is clear, in my opinion, that the trustees' discretion under the terms of the first sub-paragraph, extends to the entire residue if they see fit to exercise it, in which event there would be nothing left upon which the second sub-paragraph could operate, assuming for the moment that the words "Trust, Scholarship or Foundation" may be construed as Harrison J. has construed them, with which view, in the second place I cannot, with respect, agree. In

(1) [1899] A.C. 309 at 323.
(2) [1896] 2 Ch.D. 451.
(3) [1920] 2 Ch. 353.
(4) (1931) 40 O.W.N. 558.
(5) [1941] 1 Ch. 253.

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my opinion, the provision made by the second sub-paragraph is nothing more than one mode of carrying out the trust provided for by the first sub-paragraph, should the trustees see fit so to do.

An argument was addressed to us on behalf of the Attorney General for New Brunswick to the effect that as the testatrix had used, in the first sub-paragraph, a form of words which gives to her trustees a power of appointment for the purpose of allocating among the named purposes instead of simply constituting a trust for the purpose, the will was not open to the objection given effect to in the decisions to which I have referred. The argument may be disposed of by reference to the decision of Romer J., as he then was, in *In re Clarke* (1), at pages 419-20, with which I respectfully agree.

I would therefore dismiss the appeal and allow the cross-appeal, the costs of all parties in this court to be taxed and paid out of the residue of the estate, those of the trustees as between solicitor and client. The order below as to costs should stand.

Appeal dismissed and cross-appeal allowed, both with costs.

Solicitors for the appellant executors: *Inches & Hazen.*

Solicitors for the Attorney General of New Brunswick, appellant: *Gilbert, McGloan & Gillis.*

Solicitor for the respondents: *H. W. Sutherland.*

1954

*May 28
*Oct. 5

PERCY McKEE AND LLOYD TAYLOR *(Defendants)* ..... } APPELLANTS;

AND

ELI MALENFANT AND EARL BEETHAM *(Plaintiffs)* ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—motor vehicle—momentarily stopped on highway at night—Rear-end collision—Liability—Proximate cause—Meaning of "parked or left standing" in s. 43(1), The Highway Traffic Act, R.S.O., 1950, c. 167.

*PRESENT: Taschereau, Kellock, Locke, Cartwright and Fauteux JJ.

(1) [1923] 2 Ch. 407.

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McKEE AND TAYLOR v. MALENFANT AND BEETHAM

On Dec. 31, 1949 at 5 o'clock p.m. the respondents' motor truck driven by B while proceeding westerly on Provincial Highway No. 3 and at a point some 150 feet west of the intersection of a railway level crossing ran into the rear of the appellants' motor truck. The latter also headed west had been backed down the highway by T and stopped north of the centre of the highway to pick up some equipment from the side of the road. It was equipped with rear lights which complied with the requirements of *The Highway Traffic Act* (Ont.). Two cars travelling westward passed the stationary truck immediately prior to the accident. Gale J., who tried the action without a jury, found that the respondents' negligence was the effective cause of the accident and dismissed the action. The Court of Appeal for Ontario reversed the judgment and held that the cause of the accident was the combined negligence of both parties.

Held: (Cartwright J. dissenting) that the appeal should be allowed and the judgment of the trial judge restored.

Per: Locke J.: Since the oncoming cars were over 1,300 feet distant when the appellants' truck was backed along the highway and brought to a stop, the fact that it was brought into its position in this manner was an irrelevant consideration in determining liability. The proper inference to be drawn from the evidence was that the rear lights were burning on the appellants' truck. It was not "parked" on the highway within the meaning of that term in s. 40(1) (now s. 43(1)) of *The Highway Traffic Act,* and the evidence did not disclose any negligence on the part of the appellants. *Speers* v. *Griffin* [1939] O.R. 552 and *Blyth* v. *Birmingham Water Works Co.* 11 Ex. 781 at 783, referred to.

Per: Cartwright J., dissenting: Whether the negligence of B was the sole or only a contributory cause of the collision was a question of fact with which the Court of Appeal was as well able to deal as the trial judge and the view of the Court of Appeal was the right one. If in doubt it would be the duty of this court to affirm the decision of the appellate court on the principles stated in *Demers* v. *Montreal Steam Laundry Co.* 27 Can. S.C.R. 537.

Decision of the Court of Appeal for Ontario [1953] O.W.N. 652, reversed.

APPEAL from the judgment of the Court of Appeal for Ontario (1) which allowed the plaintiff's appeal from the judgment of the trial judge, Gale J., dismissing the action, to the extent of apportioning the responsibility for the accident equally among the parties to the action.

T. N. Phelan, Q.C. and *John Holland* for the appellants.

C. L. Dubin, Q.C. for the respondents.

The judgment of Taschereau, Kellock and Fauteux JJ. was delivered by:

KELLOCK J.:—The circumstances out of which this litigation arises are set forth in the following paragraphs from the judgment of the learned trial judge:

(1) [1953] O.W.N. 652.

The plaintiff, Beetham was driving a truck owned by himself and his co-plaintiff westerly on No. 3 Highway, with which he was entirely familiar. He said that by reason of the fog and other conditions, which reduced visibility, he was obliged to drive his car at no more than 35 miles an hour, although once he accelerated to 40 miles an hour to pass another vehicle. He further swore that when he approached the railway track, which is shown in the plan, Exhibit No. 1, he slowed down and crossed it at a rate of about 20 to 25 miles an hour. Both figures were mentioned by him. He says at that time he was in a patch of fog, and that upon crossing the tracks he noticed an object in front of him, and that while he attempted to apply his brakes, he does not recall having done so effectively. The next thing he knows was waking in the hospital.

I hold that the impact took place approximately—and when I say "approximately" I mean within a few feet or so either way—150 feet west of the west rail of the Chesapeake and Ohio Railway track. There is a decline away from the track both easterly and westerly and it would seem to be a factor of some consequence to users of the highway, though it is to be observed that the lights on the standing truck into which the plaintiff, Beetham crashed were apparently higher than the elevation of the tracks.

Let me say at once that there was shown to be clear negligence on the part of the plaintiff, Beetham. I do not accept the suggestion that as he went over the railway tracks or that just after crossing the railway tracks he passed through a patch of fog. While it was a bad night and while there was fog elsewhere I am satisfied that the last fog which he saw was some considerable distance east of the railway tracks. This is made plain by an answer or two he gave on his examination-for-discovery which indicated that he was not aware of the place at which he had last met a bit of fog. It is incredible that if it was at or in close proximity to the railway tracks, he would not have remembered the fact when he was examined-for-discovery.

Whether or not the truck with which he collided was showing lights, it is perfectly apparent that Mr. Beetham was driving too quickly in view of the conditions which then existed or was not paying proper attention to what was ahead of him. If he had been proceeding at a proper rate or if he had been attending to his driving it is obvious that he would not have run into the truck. A heavy onus rests upon him to show why he did, and in my view, he has fallen far short of discharging that burden.

The learned trial judge found also that the appellants had been guilty of negligence in leaving their truck on the pavement in the path of westbound traffic when it was perfectly open to them to have taken it entirely off the pavement. The learned judge continues:

The real point in this case seems to be this: Ought Mr. Beetham to have been aware of the existence of that truck on the highway at a point before he did and thus have been able to do something or, alternatively, could he have prevented the collision by the exercise of ordinary care after he actually did see it? I am afraid that both of these questions must be answered in the affirmative.

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The evidence of Mr. Beetham is that he was driving his truck at approximately 20 miles an hour crossing the railway tracks, and that then or immediately thereafter he could have stopped his truck in 40 feet. He also testifies that even driving at 35 miles an hour he could have brought it to a stop in 120 feet. Much stress is laid on the effect of the elevation of the railway track, and it is pointed out in the evidence that that elevation causes a 30 per cent reduction in the view of a motor vehicle on the other side of the tracks. I fear that the situation does not help Mr. Beetham because it is to be remembered that when he was on the railway track with a perfect view ahead of him he was still 150 feet away from the accident. At that time he says he was proceeding at 20 miles an hour and able to stop in 40 feet. It is obvious that if he was being careful he could have then stopped or turned aside in plenty of time to avoid striking the defendant's vehicle.

In addition to that there is the uncontradicted evidence put in by the plaintiff to the effect that two vehicles were preceding the plaintiff's truck and they successfully skirted the defendant's truck just prior to the impact. The implication of that evidence is, of course, important, particularly when it is also coupled with the fact that both of those vehicles had their headlights on. It not only means that two other drivers saw the truck and avoided it, but deeper than that, it shows that for some distance ahead of the plaintiff the highway was illuminated by the lights of those cars and that those lights were successively directed upon the truck which he struck. It also means that he must have witnessed two cars ahead of him turn out to the left side of the highway to pass the truck.

All of these circumstances show conclusively that, on his own story, Mr. Beetham was not giving proper attention to what was going on in front of him and also that even after he did see the standing truck he ought to have been able to turn out or stop and thus avoid hitting it.

The learned judge found considerable difficulty in deciding the question as to whether or not the lights of the truck were lit, but said that if he were required to make up his mind on that point, he would say that the respondents had failed to prove that the lights of the truck were not on. He accordingly concluded that while there was negligence on the part of the appellants in leaving the truck on the highway, that negligence was not a cause of the accident because the respondent Beetham had seen the truck on the highway in sufficient time to have avoided striking it and because he was at fault in not seeing it sooner than he did. This judgment was reversed in the Court of Appeal, the view of that court being expressed as follows:

With respect, I do not agree that the negligence of the plaintiff was the only effective cause of the collision. The defendant Taylor was in his truck with the motor running. He knew that cars were approaching and knew or should have known that under the weather conditions that existed, there was danger of a collision if he remained where he was on the pavement, and he could, at any time up to the moment of impact, have moved his truck on to the twenty-one foot shoulder.

For the respondents it was contended in this court that the situation would have been altogether different had there been no one in the appellants' truck at the time, but as its driver was in fact in the truck, the contention was that there was continuing negligence down to the moment of impact in that the driver could have moved the vehicle off the road at any time prior thereto.

In my view, with respect, this contention, which found favour in the Court of Appeal, is not sound. Whether or not there was a driver who remained in the truck, there was continuing negligence in the continuing presence of the truck on the road, but it is well settled in cases of this kind that where a clear line can be drawn between the negligence of plaintiff and defendant, it is not a case of contributory negligence at all. This case may therefore be disposed of upon the first ground upon which the learned trial judge disposed of it, namely, that after the respondent saw the vehicle in his path, he had plenty of opportunity to avoid it but failed to do so.

As to the contention with respect to the second ground, that although Beetham should have seen the truck at a much greater distance than he actually did see it had he been keeping a proper lookout, this could amount to no more than contributory negligence, it is sufficient to refer to the judgment of the Privy Council in *Sigurdson* v. *B.C. Electric Ry. Co. Ltd.* (1), where Lord Tucker, at p. 9, said:

> The proposition is that where one party (A) actually knows of the dangerous situation created by the negligence of another (B) and fails by the exercise of reasonable care thereafter to avoid the danger, A is generally speaking solely liable, but that if A by reason of his own negligence did not actually know of the danger or by his own negligence or deliberate act has disabled himself from becoming aware of the danger he can only be held liable for a proportion of the resulting damage.
>
> No authority was cited to their Lordships for such a far-reaching proposition, which, if correct, would seem to provide the respondent in such a case as the present with a means of escaping its 100 per cent liability by relying on the failure of its motorman to keep a proper look-out. It can hardly be the consequence of such a collision that, if the respondent's motorman had kept a good look-out but had nevertheless continued to drive at an excessive speed, he might be treated as solely to blame, but that by failing to keep a good look-out until it was too late to avoid the accident the measure of the respondent's liability would be reduced. Moreover, the proposition is directly contrary to the

(1) [1952] 4 D.L.R. 1; [1953] A.C. 291 at 302.

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second of the rules propounded by Greer L.J. as useful tests in *The Eurymedon* (1), although it is true to say that it is not altogether easy to reconcile to rules (ii) and (iv) as there stated.

I would allow the appeal with costs in this court and in the court of appeal and restore the judgment of the learned trial judge.

LOCKE J.:—There are some facts, in addition to those referred to in the judgment at the trial, which, in my opinion, require consideration in determining whether any negligence on the part of the appellants was shown.

The vehicle owned by the appellant McKee is described as a 1941 International stake and dump truck which had been loaned by him to the Municipal Telephone Board for use in telephone line construction, and at about 4.30 p.m. on December 31, 1949, the day's work being over, it was parked in the yard of the Sandwich South Town Hall. The appellant Taylor, intending to pick up some tools and equipment, backed it out of these premises which adjoined Ontario Provincial Highway No. 3 to the north and to a point some seventy feet distant to the east from the point of intersection of the highway and the road leading out of the Town Hall property. This manoeuvre was carried out entirely upon the north half of the highway, which was of asphalt 20.4 feet in width, or partly on the north half and partly on the shoulder to the north of the highway, at a time when there was no traffic in either direction. There Taylor, seeing three cars approaching from the east at a distance estimated by him as being some 1300 feet, stopped the truck intending, after they had passed, to back some 80 feet further to the east to a point opposite the place where the equipment lay to the north of the highway. According to him, about one half of the truck was on the highway when it was stopped, the remainder being on the shoulder to the north, but the evidence of Constable Sheppard, who attended the scene of the accident almost immediately after it happened, is to the effect that he, from the marks on the pavement, concluded that the truck was entirely upon the north side of the highway at the moment of impact. Whichever be right in the view I take of this aspect of the matter, this is an irrelevant consideration in the circumstances of the present case.

(1) [1938] P. 41.

According to the appellants' evidence, the truck was equipped with the usual lights for such vehicles, both front and rear. The rear lights were described by Taylor as being two red lights at the corners of the body, three red lights directly in the middle of the rear of the truck about ten inches below the rack and a tail light about two feet in from the extreme outside of the rack, close to the place where the licence plate was attached. The dimensions of the vehicle are not given in the evidence other than a statement by one of the Police witnesses that it was more than eighty inches wide, and the description of the lights appears to comply with the requirements of s. 10(5a) of *The Highway Traffic Act* (R.S.O. 1937, c. 288 as amended). Both of the appellants swore that these lights had been turned on as the vehicle was backed on to the highway and were burning at the time the truck was stopped on the highway and at the time of the collision. Police Constable Sheppard of the Ontario Provincial Police who arrived at the scene of the accident a few minutes after it had occurred, said that at that time the light at the right rear was burning but the others were not, having apparently been shattered by the impact. The respondent Beetham, however, said that he had not seen any lights on what he called the "blurry object" with which he collided. The respondent Malenfant, who arrived at the scene some minutes after the collision, and one Hornsey, who arrived after the event, both said that there were then no lights showing at the rear.

Upon this question, the learned trial Judge said that he had difficulty in coming to a conclusion as to whether or not the lights were on at the time of impact and that it was unnecessary for him to decide the point but that, if he were required to do so, he would say that the plaintiffs had failed to satisfy the onus of proving that the lights were not on. He said further that, while there was much to be said both ways, it would be very difficult for him to conclude that the appellants, who he considered to be responsible and decent people, would perjure themselves, and that, as against their positive evidence, there was only the testimony of Beetham which he thought was so uncertain and unsatisfactory as to be unworthy of much credence.

No finding upon this question of fact was made by the Court of Appeal.

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I interpret what was said by the learned trial Judge as meaning that he accepted the evidence of the appellants upon this point in preference to that of the respondent Beetham. My consideration of the evidence leads me to the conclusion that the lights were on.

Whether or not part of the truck was off the asphalt to the north, there is no dispute as to the fact that all of it was to the north of the centre line. The first two of the oncoming cars passed to the left of it but the truck driven by the respondent Beetham which closely followed them, without changing its course along the northern half of the highway, crashed into the rear of the appellant McKee's truck.

The learned trial Judge in delivering judgment at the conclusion of the trial said in part that:—

> . . . it was a matter of extreme foolishness to back the defendant's truck on to the pavement and into the path of the westbound traffic when, as the evidence demonstrated, it could have been kept entirely off the pavement.

During the course of the argument of this appeal, counsel for the respondent was asked if, in considering whether or not the appellants had been guilty of any negligence, he contended that the fact that the truck had been backed along the highway some seventy feet affected the matter, or whether from the standpoint of liability the situation was any different than it would have been had the truck been halted at the place in question while proceeding westerly on the highway. The learned counsel conceded that in the circumstances there was no distinction to be made and I can see none. The fact that the car had been backed into this position was, in my opinion, an irrelevant consideration when, as shown, the oncoming cars were over 1,300 feet distant when the truck was brought to a halt and there was no other traffic in the vicinity.

The question to be decided upon this aspect of the matter in considering the judgment appealed from is as to whether it was actionable negligence, in conditions such as were shown to exist at the time of this accident, to halt a truck equipped with all the warning lights required by the provision of *The Highway Traffic Act* for a brief period for the purpose of collecting the equipment used for construction along the highway. The truck was not "parked" within

the meaning of that expression in 40(1) of the Act (*Speers* v. *Griffin* (1)). The learned Judges of the Court of Appeal consider that it was. With respect, I am of the contrary opinion.

The Legislature has by the Highway Act prescribed regulations to be complied with by those using motor cars upon the highways of the Province, for the protection of others lawfully upon them. These include the requirements as to lights to which I have referred, designed to enable drivers to detect other objects upon the road in time to avoid them and to warn other traffic of the approach or presence of cars at times when, by reason of darkness or other causes, visibility is impaired. Subject to certain provisions such as those contained in s. 40(1), persons operating motor cars, on compliance with these statutory requirements, may lawfully drive them upon the highways and there is no requirement that they must be kept perpetually in motion. To stop a car for some temporary purpose upon its proper side of the road cannot be negligence *per se*. Motor cars are constantly stopping upon the highway for short periods for a variety of purposes, whether they be motor buses, such as was the case in the action of *Colonial Coach Lines Ltd.* v. *Garland* in which judgment was delivered by this Court in April of this year, or passenger or commercial vehicles. Drivers of other vehicles are aware of this and that they must for their own protection keep a vigilant lookout.

The fact that the appellants' truck was lighted in the manner required by the statute does not, of course, of itself relieve them from liability for negligence and there may well be circumstances where to leave a car so lighted for any appreciable period of time might be a negligent act. The appellants were not required, however, to assume that other persons approaching from the east would do so with a complete disregard for their own safety. In *Blyth* v. *Birmingham Water Works Co.* (2), Baron Alderson said that negligence was the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do. Here, both of the appellants had seen the approaching

(1) [1939] O.R. 552. (2) (1856) 11 Ex. Welsh. H. & G. 781 at 783.

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cars when they were a considerable distance away and were, in my opinion, entitled to assume that, as they could see them approaching, the drivers of the approaching cars, the head lights of all of which were turned on, would see the truck with its warning lights in ample time to pass it in safety. I do not consider that it was the duty of the appellants in these circumstances to drive the truck off the highway, or that it was a negligent act to fail to do so.

While being of this opinion, I would come to the same conclusion as that of the learned trial Judge if, contrary to my view, it was a negligent act on the part of Taylor to permit the truck to remain standing upon the highway at the time in question. I respectfully agree with him that the proximate cause of this accident was the undoubted negligence of the respondent Beetham. According to his evidence, he approached the place where the highway crossed the right-of-way of the Chesapeake and Ohio Railway at a speed of twenty miles an hour with the headlights of his car burning. The respondents put in evidence as part of their case in chief a portion of the examination for discovery of the appellant Taylor, in which he said that he had first seen the three cars approaching from the east when they were some 1,200 feet east of the railroad track, a statement which he repeated when giving evidence on his own behalf. The appellant McKee, who was a short distance away from the place where Taylor stopped the truck, said that he had seen the cars approaching when they were at least a quarter of a mile east of the railroad. The respondent's car was the last of these three cars but the evidence of Beetham is entirely silent regarding them and it would appear that he had not seen or had not noticed either of them, though they were only a short distance ahead of him and passed the truck in the customary manner almost immediately before his vehicle collided with it. The point of impact was found to have been 150 feet west of the track, yet Beetham driving, as he says, at only twenty miles an hour, a speed which would have enabled him to stop his truck within 40 feet and with the head lights burning, proceeded due west upon the north half of the highway without swerving, driving in to the rear of the stationary truck. I do not consider that the evidence of Beetham sustains the view that his vision was

obscured by fog at the time he crossed the railroad track but if, indeed, it was, it was his negligent act in continuing at an undiminished speed which caused the accident.

I would allow this appeal and restore the judgment at the trial. The appellants should have their costs throughout.

CARTWRIGHT J. (dissenting):—The relevant findings of the learned trial judge are stated in the judgment of my brother Kellock.

As I read the reasons of the learned trial judge, he does not discredit the evidence of Beetham generally or regard him as an untruthful witness although he does reject that part of his testimony as to encountering a patch of fog just as he crossed the railway tracks about 150 feet east of the point of collision. The reason assigned by the learned trial judge for rejecting this part of Beetham's evidence is that it was inconsistent with an answer made by him on his examination for discovery which, at the trial, he did not remember having made but which it was proved he did make.

The shorthand reporter who had taken down the examination was called as a witness and her evidence so far as relevant is as follows:—

Mr. Holland: Q. Would you refer to your notes, please, perhaps one-third of the way through Mr. Beetham's examination. We had been talking about fog banks and the actual number of the question is Question 82 and 83? A. Yes, sir.

Q. You have looked at that? A. I have a reference here to fog banks.

Q. Your questions are not numbered?—A. Not in my shorthand notes, no.

Q. Following the question, "How thick were these fog banks"? then we have another question: "For what period of time would you be going through a fog bank, for instance? A. Well, it would be about 15 or 20 feet at a time".

Q. Have you looked that up? A. Yes.

Q. Would you read the next two questions and answers?

A. "Q. I see, when was the last fog bank you went through prior to the accident? A. I don't recall that.

Q. You have no idea? A. No".

His Lordship: Does that conform with the transcript?

Mr. Holland: Yes, my Lord.

On reading the whole of Beetham's testimony I incline to agree with Mr. Dubin's submission that the probable explanation of these answers is that Beetham understood

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the questions to refer not to the bank of fog which blew in immediately preceding the impact but to banks of fog encountered prior to that time; but, be this as it may, accepting the primary facts as found by the learned trial judge, I am in agreement with the view of the Court of Appeal that this is a case in which the negligent acts of both parties were continuing and effective causes of the collision.

On the evidence the concurrent findings of fact that both parties were negligent could not be successfully challenged. The difficult question on which the Court of Appeal has differed from the learned trial judge is as to whether a clear line can be drawn between the negligence of Taylor and that of Beetham so that the negligence of the latter is to be regarded as the only effective cause of the accident.

The learned trial judge refers to the conduct of the appellants in leaving the truck on the pavement when it could have been kept entirely off it as "extreme foolishness" and continues:—

> I am completely satisfied that the truck need not have been on the pavement prior to the accident. If it was on the pavement unnecessarily then those who were in control of that vehicle were showing less than normal commonsense to put it there, and I think that Mr. McKee himself realized that it was a highly dangerous thing to do for when conversing with Mr. Malenfant shortly after, he made such an admission.

I respectfully agree with these observations. The danger involved in leaving the truck on the highway was that the driver of some vehicle proceeding westerly along the highway, who would have no reason to anticipate the presence of the stationary truck, might fail to see it in time to avoid a collision, perhaps by reason of the bad visibility caused by the weather conditions, perhaps through momentary inattention, perhaps by reason of some other cause. It is not now disputed that Beetham was negligent in failing to see the truck or in failing to realize that it was a stationary obstruction sooner than he did, but I think the conclusion inescapable that as soon as he did realize the situation he applied his brakes. He was in fact too late in doing this and more until he "came to in the hospital".

The question whether on the findings of the learned trial judge as to the primary facts the negligence of Beetham was the sole cause or only a contributory cause of the collision is itself a question of fact, but it appears to me to be

one with which the Court of Appeal is as well able to deal as was the learned trial judge and I agree with the view of the former expressed by F. G. MacKay J.A., when after referring to the judgments in *Admiralty Commissioners* v. *S. S. Volute* (1) and *Marvin Sigurdson* v. *Electric Ry. Co.* (2) he says:—

> Applying these principles to the facts of the present case, as found by the learned trial judge, I am of opinion that the cause of the accident was the combined negligence of the plaintiff Beetham and the defendant Taylor, and that the negligent acts of each of them were so closely involved the one with the other in time, place and circumstances, as to render them in combination the effective cause of the accident and I would apportion the responsibility to each of them equally.

Where two parties have been negligent, the question of fact whether the dividing line between such negligences is clearly visible is often difficult and I think it is so in this case. I have, however, as indicated above, reached the conclusion that the right answer to the question is that given by the Court of Appeal. Had I been doubtful I would have thought it our duty to affirm the decision of the Court of Appeal on the principles stated in *Demers* v. *Montreal Steam Laundry Co.* (3).

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitors for the appellants: *McTague, Deziel, Clark & Holland.*

Solicitors for the respondents: *Riordon & Mousseau.*

HER MAJESTY THE QUEEN (*Defendant*) ..... APPELLANT;

AND

DAME PEARL MATHILDA KEMBER THOMPSON (*Petitioner*) ..... RESPONDENT.

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*June 18

*Oct. 5

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Damages—Petition of right—Married woman common as to property—Right to compensation for injuries resulting from delict under Art. 1279(a) of the Civil Code.

*PRESENT: Taschereau, Kellock, Estey, Cartwright and Fauteux JJ.

(1) [1922] A.C. 129. (2) [1953] A.C. 291.

(3) (1897) 27 Can. S.C.R. 537.

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THE QUEEN
v.
THOMPSON

Article 1279 (*a*) of the *Civil Code* entitles a married woman common as to property to claim compensation, not only for the bodily injuries she has suffered, but also for all the consequences resulting from the delict or quasi-delict such as hospitalization costs, medical costs, services rendered etc. (*Labonne* v. *Noël* Q.R. [1948] R.L. 552 approved).

APPEAL from the judgment of the Exchequer Court of Canada, Angers J., in an action for damages.

L. Jacobs, Q.C. and *S. W. Weber, Q.C.* for the appellant.

S. Fenster for the respondent.

The judgment of the court was delivered by:—

TASCHEREAU, J.:—Le 31 décembre 1951, l'intimée a été blessée à la Gare Windsor, à Montréal, lorsqu'elle a été frappée par un camion du Ministère des Postes. Elle a réclamé la somme de $16,757.65, mais la Cour de l'Echiquier ne lui a accordé que $6,183.99. James Thompson, l'époux de la requérante, à qui il est marié sous le régime de la communauté, a autorisé les procédures, et cette autorisation apparaît au dossier. Par la pétition de droit, les montants réclamés se divisent en déboursés pour frais de médecins et d'hôpitaux, dépenses futures d'hospitalisation, salaires perdus, salaires pour aide à la maison, douleurs souffertes et incapacité permanente partielle.

Au cours de l'argument, la Cour a signifié à M. Fenster, procureur de l'intimée, qu'elle désirait l'écouter seulement sur la question des dommages, et c'est en conséquence le seul point que nous avons à décider.

En 1945, la Législature a amendé le *Code civil* en y incorporant l'article 1279(*a*) qui se lit de la façon suivante:—

> Sont propres à chacun des époux les indemnités perçues après la célébration du mariage à titre de dommages-intérêts pour injures, torts personnels ou blessures corporelles résultant de délits ou de quasi-délits, ainsi que le droit à ces indemnités et l'action qui en découle.

La soumission de l'appelante est que l'intimée ne peut réclamer que les dommages qu'elle a subis personnellement et directement, et non pas les accessoires résultant du quasi-délit, pour lesquels, seul le mari chef de la communauté, pourrait réclamer. Je crois que cette objection n'est pas fondée, et que l'article 1279(*a*) donne à la femme

le droit de réclamer, non seulement pour les blessures corporelles dont elle est la victime, mais aussi pour la consequence qui en découle, comme les soins d'hospitalisation, les frais médicaux, les services rendus, etc.

Les termes que le législateur a employés ne permettent pas de faire la distinction que propose l'appelante. C'est d'ailleurs ce que la Cour du Banc du Roi de Québec a décidé dans une cause de *Labonne* v. *Noël* (1).

L'indemnité pour blessures corporelles souffertes par la femme mariée et dont le Code Civil (art. 1279(*a*)) a fait un bien propre, sans distinction, de même que l'action qui en découle, comprend les frais médicaux *et tous les autres déboursés,* lesquels peuvent être réclamés par la victime elle-même, quel que soit l'état matrimonial.

Je crois cependant que le montant de $6,183.99 accordé par le juge au procès est excessif, et qu'il doit être réduit. Malheureusement, aucun détail de ce montant n'a été donné par le juge, vu qu'il n'a pas écrit de raisons à l'appui du jugement formel, et il est difficile de dire comment il se compose. Cependant, deux des item réclamés sont indiscutables. Ce sont les comptes du Dr. Rabinovitch au montant de $150.00, et les comptes d'hôpitaux qui se totalisent à $717.65. La preuve pour la perte de salaire, pour salaire d'une personne pour tenir la maison, ainsi que pour frais futurs d'hospitalisation, me semble complètement insuffisante, et n'a pas la force probante voulue pour permettre d'accorder une indemnité. En ce qui concerne la compensation pour incapacité permanente partielle, ainsi que pour douleurs souffertes, je serais disposé à accorder une somme globale de $3,000.00, ce qui fait un montant total de $3,867.65.

L'appel doit donc être maintenu en partie, et le montant de $6,183.99 accordé, doit être réduit à celui de $3,867.65. L'intimée aura droit à ses frais devant la Cour de l'Echiquier, mais devra payer la moitié des frais du présent appel.

Appeal allowed in part.

Solicitors for the appellant: *Jacobs & Jacobs.*

Solicitors for the respondent: *Gameroff & Fenster.*

(1) Q.R. [1948] R.L. 552.

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*May 19, 20
*Oct. 21

HER MAJESTY THE QUEEN .....APPELLANT;

AND

DANIEL O'BRIEN .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law—Conspiracy to commit indictable offence—Gist of offence—Whether necessary to have intention to commit the indictable offence—Criminal Code, s. 573.

It is misdirection for a trial judge to tell the jury, at the trial of a person charged of having conspired with another person to commit the indictable offence of kidnapping, that the offence of conspiracy was complete by the making of the agreement to kidnap even though the other alleged conspirator never at any time had had any intention of carrying the agreement into effect. The mere agreement, without the intention of both parties to carry into effect the common design, is not sufficient. There must exist an intention not only to agree but also an intention to put the common design into effect.

Per Locke J. (dissenting): The gist of the offence of conspiracy is the agreement of two or more persons to commit any indictable offence, and the mens rea is to be found in the intention to offend against the penal provisions of an act. Therefore, the agreement entered here between the two conspirators to commit the offence of kidnapping was a conspiracy within the meaning of s. 573 of the Criminal Code. There was an agreement in the eyes of the law and the fact that one of the parties in the agreement did not intend to carry out his part of the bargain could not affect the legal nature of the arrangement.

The portion of the judgment of Willes J. in *Mulcahy* v. *The Queen* ((1868) L.R. 3 H.L. 306), purporting to define criminal conspiracy, was never intended as such, but rather was it a statement of the offence covered by the statute under which that case was tried.

R. S. Wright's *The Law of Criminal Conspiracies and Agreements* (1873 ed.); *Poulterers Case* (1611) 9 Co. Rep. 55b; *Reg.* v. *Best* (1705) 1 Salk. 174; *O'Connell* v. *Reg.* (1844) 11 Cl. & F. 155; *Reg.* v. *Aspinall* (1876) L.R. 2 Q.B.D. 48; *Brodie* v. *The King* [1936] S.C.R. 188 and *Bank of New South Wales* v. *Piper* [1897] A.C. 383 referred to.

Per Fauteux J. (dissenting): In the circumstances of this case, the exchange of promises could not be treated as having never existed because of the alleged mental reservation on the part of one of the two parties. Mental reservations are not apt to defeat the natural consequences of words accompanied by deeds. In this case, the common intention was assented to and encouraged by word and by deeds, and that was sufficient to constitute the conspiracy even though one of the parties did not intend to go through with the execution of the agreement.

*PRESENT: Taschereau, Rand, Estey, Locke and Fauteux JJ.

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THE QUEEN v. O'BRIEN

APPEAL from the judgment of the Court of Appeal for British Columbia (1), allowing, Robertson J. dissenting, the appeal of the respondent from his conviction on a charge of having conspired to kidnap and ordering a new trial.

T. G. Norris Q.C. for the appellant.

J. Stanton and *G. M. Bleakney* for the respondent.

TASCHEREAU, J.:—The Attorney General of British Columbia appeals from a judgment of the Court of Appeal (1) which ordered a new trial. It held that there had been misdirection.

The charge for which the respondent was convicted was that, in the City of Vancouver, British Columbia, between the 30th day of November, 1952, and the 14th day of January, 1953, the respondent unlawfully conspired with one Walter John Tulley and others, to commit a certain indictable offence, namely, kidnapping.

Tulley, the alleged co-conspirator, was not charged, but at the trial, being called as a Crown witness, he gave an account of various meetings he had with the respondent, and explained that both had agreed, at the request of the latter, to kidnap one Joan Margaret Pritchard. He said in his evidence that he never had any intention of going through with this plan, but was just fooling the respondent, or hoaxing him. He also explained that he denounced the whole scheme to the police authorities, and the respondent was arrested.

The learned trial Judge in his charge said:—

> Counsel for the accused has suggested that the offence is not complete, because Tulley, in his own evidence, said that he had had at no time any intention of carrying out that agreement. I tell you as a matter of law, gentlemen, *that the offence was complete,* if, in point of fact, the accused and Tulley did make the agreement which is charged against him, *even though Tulley never at any time had any intention of carrying the agreement into effect.*

The Court of Appeal, Mr. Justice Robertson dissenting, held that this constituted misdirection, and therefore, ordered a new trial.

The contention of the respondent which was accepted by the majority of the Court of Appeal, is that Tulley, not having any intention to carry through the common design,

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could not be a party to the conspiracy, and that therefore, O'Brien the respondent, could not alone be found guilty of the crime. It is common ground that no others were involved in the conspiracy. The mere agreement, without any intention to carry into effect the common design would, according to the submission of the appellant, be sufficient.

I think there has been some confusion as to the element of intention which is necessary to constitute the offence. It is, of course, essential that the conspirators have the *intention to agree,* and this agreement must be complete. There must also be a common design to do something unlawful, or something lawful by illegal means. Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist *an intention to put the common design into effect.* A common design necessarily involves an intention. Both are synonymous. The intention cannot be anything else but the will to attain the object of the agreement. I cannot imagine several conspirators agreeing to defraud, to restrain trade, or to commit any indictable offence, without having the intention to reach the common goal.

I fully agree with some of the statements that have been made by the Court of Appeal of Quebec in *Rex* v. *Kotyszyn* (1). The head note reads:—

> There was no common design between the accused and the police-woman, and there was no agreement between them *since the police-woman had no intention of undergoing the operation.* Consequently there *was neither* a *conspiracy* nor an *attempt to conspire.*

In the same case, at page 269, Mr. Justice MacKinnon said:—

> There can be no conspiracy when one wants to do a thing and the other does not want to do it.

Stephen (Commentaries on the laws of England, 21st Ed., Vol. 4) says at page 166:—

> The object of the agreement may be the accomplishment of an unlawful act, or of a lawful act by unlawful means. In other words it must be unlawful either in *its aims or in its methods.*

The two elements of agreement and of *common design* are specifically stated to be essential ingredients of the crime of conspiracy. Willes, J. in *Mulcahy* v. *The Queen* (2):

(1) 95 C.C.C. 261.

(2) (1868) L.R. 3 H.L. 306 at 317.

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties . . . punishable if for a criminal object . . .

Vide also *Rex* v. *McCutcheon* (1).

This is not the case of the conspirator, who after having completed the crime, withdraws from the conspiracy. If a person, with one or several others, agrees to commit an unlawful act, and later, after having had the intention to carry it through, refuses to put the plan into effect, that person is nevertheless guilty, because all the ingredients of conspiracy can be found in the accused's conduct. But, when the conspiracy has never existed, there can be no withdrawal.

The definition of conspiracy itself supposes an aim. People do not conspire unless they have an object in view. The law punishes conspiracy so that the unlawful object is not attained. It considers that several persons who agree together to commit an unlawful act, are a menace to society, and even if they do nothing in furtherance of their common design, the state intervenes to exercise a repressive action, so that the intention is not materialized, and does not become harmful to any one. The intention must necessarily be present because it is the unlawful act necessarily flowing from the intention, that the state wishes to prevent.

In the case at bar, there is evidence that although he made an agreement with the respondent, Tulley never intended to carry the plan through and kidnap Mrs. Pritchard. On the other hand, there is also evidence that may indicate that he intended to attain the object of the agreement. Did Tulley have this intention or not? This is a question for the jury, and I would invade a domain which is not mine, if I attempted to answer it.

It has been said that if the submission of the respondent were the law, it would be impossible to obtain a conviction on a charge of conspiracy, because the mental state of an accused very often remains in the sphere of uncertainty. All crimes where intention is an essential element would then become impossible to prove. Various factors have to

(1) (1916) 25 C.C.C. 310.

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come into play, and with their help it is then possible to determine what the intention was. There is a presumption for instance, that a person who does an act intends to do it. As well, numerous circumstances will indicate if an alleged thief intended to rob, or if a killer intended to murder. Conspiracy is not in a different class. It is within the exclusive province of the jury, to weigh all the evidence and to determine all these questions of fact, and to say whether the intentional element is revealed by the evidence.

But I do think that the jury were not properly instructed when they were told that, even without the intention to commit the kipnapping, which was necessarily the common design, the conspiracy was complete by the agreement. The jury were not free to weigh the evidence because, being improperly instructed, they had to disregard what is in my view one of the most important elements of the crime for which the accused was charged.

I agree with the Court of Appeal that there was misdirection, and that consequently there must be a new trial. It has been suggested that the Court of Appeal should have dismissed the appeal, on the ground that although there was misdirection, a properly instructed jury would have necessarily come to the same conclusion. (Cr. Code 1014). With this proposition, I entirely disagree. There is evidence that would justify a properly instructed jury to acquit or to convict, and I do not think in either alternative, that the verdict would be set aside as unreasonable.

I would dismiss the appeal.

RAND J.:—I agree that a conspiracy requires an actual intention in both parties at the moment of exchanging the words of agreement to participate in the act proposed; mere words purporting agreement without an assenting mind to the act proposed are not sufficient. The point of difference between the judgments below is the meaning to be given the word "agreement". In the opinion of Robertson J.A. (1) there was an agreement when Tulley in effect said "I will" even though at that moment his mind was "I won't". The mens rea here appears to lie in the intent to utter the words "I will"; but this severance of the intention to speak the words from that of carrying out the action they signify

(1) 108 C.C.C. 113.

is a refinement that seems to me to be out of place in a common law crime. Modern statutes have introduced offences in which the objective or physical acts themselves are struck at but they are irrelevant to the unwritten offences. Bishop's Criminal Law, 9th Ed. Vol. II, p. 131 puts it thus:—

> Obviously there must be, between the conspirators, a concert of will and endeavor, not a mere knowledge, acquiescence or approval or a mere several attempt to accomplish the particular wrong. . . . Where there are only two, and one simply joins in appearance to draw the other on, neither is a conspirator.

and at p. 132:—

> As soon as this union of will is perfected, the offence of conspiracy is complete,—no act beyond is required. . . . It is sufficient if the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and commit the offence charged, although such agreement be not manifested by any formal words.

The question raised is, in my opinion, concluded by the judgment of the House of Lords in *Mulcahy* v. *The Queen* (1). In that case a prosecution had been brought under *The Crown and Government Security Act,* 11 Vict., c. 12. The indictment following the language of the statute alleged that the accused with five other persons "did feloniously and wickedly compass, imagine, invent, devise, and intend to deprive and depose Our Lady the Queen from the style, honour, and royal name of the Imperial Crown of the United Kingdom of Great Britain and Ireland" and proceeded to declare that the accused did "express, utter, and declare by divers overt acts and deeds hereinafter mentioned, that is to say". The overt acts were then alleged:—

> In order to fulfill, perfect and bring to effect this felonious compassing, imagination, invention, devise and intention aforesaid, they . . . feloniously and wickedly did combine, conspire, confederate, and agree with (19 other persons all named) and with divers other evilly disposed persons, to the jurors aforesaid unknown to raise, make, and levy insurrection and rebellion against Our said Lady the Queen within this realm.

The statute required the expression of compassing and intending by overt acts and it was necessary, therefore, to allege them. The question raised was whether a conspiracy was such an act.

(1) (1868) L.R. 3 H.L. 306.

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The House held that it was. This means that the act of conspiracy was sufficient to establish both the compassing and the intention to do the forbidden act, or to put it in another form, that in conspiracy there is not only agreement to do the act proposed signified by words or other means of communication, but also the coexistent intent in each to do it. If that were not so, conspiracy would not have evidenced the *intention* of those charged "to deprive and depose, etc." The language of Willes J. at p. 317 of the report bears out that view. In the course of considering the argument that conspiracy rests in intention only and that an overt act must consist in some external manifestation or deed, he says:—

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.

In that language he distinguishes between the intention of each person severally and the communicated assent between them to carry out the intention. In stressing the necessity for agreement he assumes the existence of intent.

The same view is expressed in *Rex* v. *Dowling* (1). It appears that one of the witnesses had in appearance been involved in the conspiracy and it had been urged that being an accomplice his evidence required corroboration. Erle J., in directing the jury on this, said:—

> He was not an accomplice, for he did not enter the conspiracy *with the mind of a co-conspirator,* but with the intention of betraying it to the police, with whom he was in communication.

In *The Queen* v. *Aspinall* (2), Brett J.A., dealing with one of the counts in the indictment for conspiracy to defraud, expressed himself thus:—

> If the second count in this indictment contains averments sufficiently stated which are enough to shew sufficiently that the defendants unlawfully, i.e. *with minds intending to do wrong,* agreed by false pretences to cheat and defraud . . . it sufficiently alleges a criminal conspiracy within the last rule above enunciated.

(1) (1848) 3 Cox C.C. 509 at 516. (2) (1876) L.R. 2 Q.B.D. 48 at 59.

That rule was,

> An agreement made with a fraudulent or wicked mind to do that which, if done, would give to the prosecutor a right of suit founded on fraud, or on violence exercised on or towards him, is a criminal conspiracy.

On the contrary view, even if both parties had been without the intent to carry out the scheme, each seeking to incriminate the other, they would have drawn guilt upon themselves.

Assuming, then, the truth of the evidence of Tulley that at no time did he ever intend to go along with the proposal made to him, there was no conspiracy.

I would, therefore, dismiss the appeal.

ESTEY, J.:—The respondent was found guilty before a jury upon an indictment that charged that he conspired with Tulley and others to kidnap Mrs. P. The learned judges in the Court of Appeal (1), Mr. Justice Robertson dissenting, were of the opinion that there had been misdirection and directed a new trial. The passage held to constitute misdirection reads as follows:

> Counsel for the accused has suggested that the offence is not complete, because Tully, in his own evidence, said that he had had at no time any intention of carrying out that agreement. I tell you as a matter of law, gentlemen, that the offence was complete, if, in point of fact, the accused and Tully did make the agreement which is charged against him, even though Tully never at any time had any intention of carrying the agreement into effect.

The contention is that the learned trial judge was in error in stating that even though Tulley never, at any time, had any intention of carrying the agreement into effect, the offence was completed. Tulley was not charged, but was called as a witness on behalf of the Crown. O'Brien gave evidence on his own behalf. These parties, upon all essential points, are in complete disagreement. It is clear, however, that no others were involved and, therefore, if there was a conspiracy, it existed only between O'Brien and Tulley.

In view of the objection to the charge, it will be necessary to summarize only Tulley's evidence. Early in December O'Brien approached him and suggested, and it was agreed, that he would assist O'Brien to kidnap Mrs. P. for the sum

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of $500. During one of the first conversations he received $10. O'Brien also showed him where Mrs. P. lived and, as Mrs. P. was standing in the window, he pointed her out as the lady he desired to kidnap. He accompanied O'Brien to White Rock to find a house where they might take Mrs. P., but none was found. Before Christmas he received $190. In January he received $40 to pay for the rent of a house that he led O'Brien to believe was available for rent. He did not, however, spend this $40, but retained it, making a total of $240 that he had received from O'Brien and which he kept. In January, though a day was not fixed for the kidnapping, O'Brien was pressing that it ought to be done as quickly as possible. On January 12 Tulley told Mrs. P. of O'Brien's intentions, which led to the arrest and prosecution of O'Brien. Tulley deposed to the foregoing and stated that though he had entered into an agreement with O'Brien to kidnap Mrs. P. that never, at any time, had he intended to carry out the agreement. O'Brien denies that at any time he entered into an agreement to kidnap Mrs. P. He admits the payment of the three sums of money—$10, $190 and $40—but explains these in a manner that has no relation to the kidnapping, and likewise the trips looking for the houses.

Though dealt with in several sections of the *Criminal Code,* the result is that conspiracy to commit any indictable offence is itself an indictable offence. Nowhere, however, does the *Code* define a conspiracy. The definition, therefore, must be found in the common law. Since 1868 the accepted definition has been that of Mr. Justice Willes in delivering the opinion of the judges in *Mulcahy* v. *The Queen* (1):

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.

Mulcahy was indicted under *An Act for the better Security of the Crown and Government of the United Kingdom* (11 & 12 Vict., c. 12). This statute, in part, provides that

(1) (1868) L.R. 3 H.L. 306 at 317.

If any Person . . . shall, . . . compass, . . . or intend to deprive or depose our most Gracious Lady the Queen, . . . and such Compassings, . . . Intentions, or any of them, shall express, utter, or declare, . . . by any overt Act or Deed, every Person so offending shall be guilty of Felony, . . .

It was the contention of the prosecution in the Mulcahy case that his conspiracy with nineteen others to stir up and incite insurrection and rebellion constituted an overt act within the meaning of the statute.

Mulcahy was convicted and his conviction affirmed in the Court of Queen's Bench in Ireland. Upon a further proceeding by way of writ of error his conviction came before the House of Lords. Their Lordships solicited the opinion of the judges and this was delivered by the Honourable Mr. Justice Willes, in the course of which he gave expression to the definition of a conspiracy above quoted and which, as I have said, has been accepted since 1868.

The point material to this discussion was stated by Mr. Justice Willes at p. 316:

The main point of this question is, whether a conspiracy to do an unlawful act in promotion of a felonious design can be a sufficient "overt act" to express that design within the 11 Vict. c. 12. The first count and the first overt act sufficiently raise that question.

This point, particularly as it was contended on behalf of Mulcahy that, as conspiracy rested in intention only, it could not be an overt act within the meaning of the statute, required a consideration of what constituted a conspiracy and, where it existed, would it be accepted as an overt act and, if so, was it an overt act within the meaning of the statute. The statute under which Mulcahy was indicted did not contain a definition of conspiracy and it would appear that Mr. Justice Willes and the learned judges on whose behalf he was writing were setting forth their conception of conspiracy under the common law. Under this definition a conspiracy does not exist in the mere intention to commit an unlawful act, but when two or more entertain that intention and embody their common design in an agreement the conspiracy is complete. It is the concluding of the agreement which constitutes the overt act. Then, specificially referring to whether the conspiracy constituted an overt act within the meaning of the statute, Mr. Justice Willes stated at p. 317:

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The history of the statute also points clearly to the conclusion that a conspiracy is a sufficient overt act, and, indeed, seems to shew that the language of the Act, following that of 36 Geo. 3, c. 7, was framed to confirm, and even extend, the decisions upon the construction of Statute of Treasons, and to preclude all such questions for the future.

The opinion of the learned judges expressed by Mr. Justice Willes was approved by all of their Lordships sitting in the House of Lords. Lord Chelmsford, while approving of Mr. Justice Willes's opinion, stated the grounds upon which he arrived at the same conclusion. At p. 328 he stated:

> It is a mistake to say that conspiracy rests in intention only. It cannot exist without the consent of two or more persons, and their agreement is an act in advancement of the intention which each of them has conceived in his mind. The argument confounds the secret arrangement of the conspirators amongst themselves with the secret intention which each must have previously had in his own mind, and which did not issue in act until it displayed itself by mutual consultation and agreement.

Though the precise point with which we are here concerned was not before the court in the Mulcahy case, the language of both Mr. Justice Willes and Lord Chelmsford, it seems to me, indicates the answer. In that case, as in all cases of felony, or, under the *Code,* indictable offences, unless otherwise provided, the requisite mens rea must be found. This can only be found, when conspiracy is charged, if the mental attitude of the parties is such that each possesses a common design or intention to do an unlawful act or a lawful act by unlawful means. Lord Chelmsford gives expression to the same view in the passage already quoted. In this passage he emphasizes that it is the agreement to carry out the intention which each has conceived in his mind. If, therefore, where only two parties are involved, one has not "conceived in his mind" that intention, there can be no agreement evidencing a common design and, therefore, the offence of conspiracy is not completed. In this case, as it is so often throughout the criminal law, the nature and character of the act is determined by the intention of the party committing it.

Again in Russell on Crime, 10th Ed., at p. 1798, it is stated:

> The external or overt act of the crime is concert by which mutual consent to a common purpose is exchanged.

This further emphasizes that there must be "mutual consent to a common purpose". Tulley's conduct was undoubtedly reprehensible, whether he intended to conspire, or to obtain money wrongfully from respondent, or to accomplish some other wrongful purpose. We are here only concerned with whether he possessed an intention to conspire with the respondent to kidnap Mrs. P. If he had such an intention at the time of the agreement and subsequently withdrew, he is none the less guilty. If, however, he never possessed a common design or intention with respondent to kidnap Mrs. P., then there was no conspiracy.

I am, therefore, in respectful agreement with the learned judges who have held that there was misdirection. While there was evidence to support the verdict, it cannot be said that a jury, properly directed, would have necessarily reached the same conclusion. I would, therefore, affirm the judgment of the Court of Appeal directing a new trial.

The appeal should be dismissed.

LOCKE J. (dissenting):—This is an appeal by the Crown from a judgment of the Court of Appeal for British Columbia (1) by which the appeal of Daniel O'Brien from his conviction of conspiracy to kidnap Joan Margaret Pritchard was allowed and a new trial directed. Mr. Justice Bird, with whom the Chief Justice of British Columbia agreed, delivered the judgment of the majority of the Court. Mr. Justice Robertson dissented and would have dismissed the appeal.

O'Brien was charged in that he, at the City of Vancouver, between November 30, 1952 and January 14, 1953:—

> Did unlawfully conspire, combine, confederate and agree together with Walter John Tulley, and together with divers other persons unknown, to commit a certain indictable offence, namely kidnapping, by then and there conspiring, combining, confederating and agreeing together to unlawfully kidnap Joan Margaret Pritchard with intent to cause her to be secretly confined within Canada against her will, against the form of the Statute in such case made and provided.

On this charge he was tried before Davey J. and a jury at Vancouver, found guilty and thereafter sentenced to five years' penal servitude.

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O'Brien appealed to the Court of Appeal on the ground of misdirection in the charge to the jury and it was upon this ground that the majority of the Court considered there should be a new trial.

It is necessary for the determination of the matter to examine closely the evidence given on behalf of the Crown at the trial. Tulley, referred to in the indictment, had apparently known O'Brien for several years. On December 11, 1952, Tulley was unemployed and apparently penniless. His evidence was that that day he met the accused in Vancouver, when the latter asked him to go with him to a club where they had some drinks together. At this time O'Brien told him, without mentioning her name, that he had been going with a young woman for two years, that she had left him and that he was trying to get her back. During the time that they were together, Tulley said that O'Brien told him that the only way he could figure out to do this was to kidnap her. At the same time, he said that O'Brien, learning that he was "broke", gave him $10. Two or three days later, the two men met by arrangement and discussed plans for kidnapping the woman and Tulley said that O'Brien then said that if he would "stick with him and see him through this thing he would do right by me in regard to money" and mentioned the sum of $500. According to Tulley, what O'Brien proposed was that they would kidnap the woman and conceal her in a house and Tulley said that he thought it would be possible to get a satisfactory place for this purpose at White Rock, a village near the American border on the coast south of Vancouver. On December 18, 1952, Tulley hired a U-Drive car and drove with O'Brien to White Rock. The search there for a suitable house in which to conceal the woman was unsuccessful and the two returned to Vancouver. Tulley told O'Brien that he knew a fisherman in Vancouver from whom he thought they could get a house. This statement, he admitted, was untrue and the fisherman an imaginary person. On the day following, the two men met and Tulley asked O'Brien if he would loan him a couple of hundred dollars. O'Brien agreed and the amount was paid but not as a loan but rather as a payment on account of the promised sum of $500 to assist in the

kidnapping. In spite of this fact, Tulley said that he offered O'Brien an I.O.U. for the money but this the latter refused, saying that he:—

> Would trust me and if I would stick with him he would stick by me, he would keep his promise.

Tulley, according to his story, continuing the deception of O'Brien told him that he did not think he would be able to get the fisherman's house before some time in January. Thereafter they met several times and discussed the manner in which they were to carry out the proposed kidnapping. O'Brien's plans according to Tulley, were that they would go together to Mrs. Pritchard's house when Tulley was to knock on the door and when she came seize her, put tape over her mouth, put her in the back seat of a car and take her to the house selected.

Around New Year's Tulley says that he borrowed a car and drove out to East 52nd Street in Vancouver with O'Brien and pointed out a house which, he said, he had in mind as the place to conceal the woman and that O'Brien approved of it. Tulley said that his statements as to this house were also false, that he had merely picked it at random and had made no arrangements to rent it. At the same time, the two of them discussed how they were going to get food into the house while the woman was concealed there and, according to Tulley, O'Brien then stated that he was going to either make her come with him or she would go back a very sorry woman. Later that day, Tulley said that he told O'Brien that the rent of the house would be $40 and the latter gave him the money. No arrangements had been made to rent the place and Tulley apparently appropriated the money to his own use. About January 12, O'Brien who had, according to Tulley, been trying to speak to the woman on the telephone, said that they must carry out their plan at once, whereupon Tulley decided to inform Mrs. Pritchard and her husband of what O'Brien proposed and he was then taken in charge by the Police.

During the cross-examination of Tulley at the trial, the statements were made which gave rise to the claim of misdirection. The relevant portion of the evidence reads:—

> Q. Now isn't it a fact that you at no time did any more than pretend to O'Brien that you would assist him in this kidnapping?
> A. I didn't get the question.

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Q. Perhaps I can assist you. I am going to read to you something that you said at the Preliminary Hearing. I would direct your attention to page 39, my lord, about the fifth line from the top of the page:

Q. You had no intention of going through with this scheme you are telling us about, did you?
A. This kidnapping?
Q. Yes.
A. No.

Q. Were you asked that question on the Preliminary Hearing and did you make the answer which I have read to you on oath?
A. I did.
Q. Is it true?
A. It is.
Q. I will proceed:

Q. No, no of course not. And you didn't agree in any way with O'Brien that you would do such a thing, did you?
A. Yes.
Q. You mean "yes" you did make such an agreement?
A. With him, yes.
Q. But you had no intention of carrying it out?
A. No.
Q. You were just fooling him, eh?
A. Yes.
Q. Were you asked those questions at the preliminary hearing and did you make those answers on oath?
A. I did.
Q. Are they true?
A. They are.
Q. In other words, witness, you were just hoaxing him, weren't you?
A. I was.

In charging the jury, the learned trial Judge instructed them that, as a matter of law, the offence of conspiracy was complete if in point of fact the accused and Tulley did make the agreement, even though Tulley never at any time had any intention of carrying his part of it into effect.

Bird J.A. considered that the charge was in this respect inaccurate, since the burden was upon the Crown to prove that each of the participants had the intent that the agreement should be carried into effect by one or both of them and that since, if the quoted portion of Tulley's evidence should be believed by the Jury, the intent was that of O'Brien alone, he could not be found guilty of conspiracy. As the question as to whether Tulley did in fact intend to carry out his agreement at the time he made it had not been left to the jury, he considered there should be a new trial.

Robertson J.A. was of a contrary opinion, considering that the gist of the offence was the agreement itself and that as Tulley, on his own statement, had intended to make the agreement, whether or not he intended to carry it into effect, the conspiracy was proved if the evidence were to be believed. Agreeing with the opinion of the majority that mens rea must be shown, he said in part:—

> I think in this case mens rea was proved by the mere entering into the agreement. If one person does the act of agreeing with another person to commit an indictable offence, intending to do that act (that is to say the act of agreeing) his mind is rea whether he intends to commit that indictable offence or not. It is not of the essence whether he has, or has not, a mental reservation as to its completion. Mens rea is in such a case merely a condition of mind which is evidenced by the act of agreeing itself. The guilty intent which is important is the intent to enter into the agreement.

The charge was laid under section 573 of the *Criminal Code* which reads:—

> Every one is guilty of an indictable offence and liable to seven years' imprisonment who, in any case not hereinbefore provided for, conspires with any person to commit any indictable offence.

In the same terms, this was enacted as section 527 of the *Criminal Code* when first enacted in 1892 (c. 29). Kidnapping is made an indictable offence by section 297 of the *Code*.

The *Code* does not define either the word conspire or the offence of conspiracy. In some of the text books and in some of the reported cases, a passage from the judgment of Willes J. in the opinion expressed by him on behalf of the judges in *Mulcahy* v. *The Queen* (1), is accepted as a definition of a criminal conspiracy. In the 10th edition of Russell on Crimes, at p. 1797, the following appears:—

> The generally accepted definition of the offence is that given by Wilkes (sic.) J. on behalf of all the judges in *Mulcahy* v. *R.*, and accepted by the House of Lords in that and subsequent cases:—
>
> > A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means.

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It has been said that in *Quinn* v. *Leatham* (1), this was accepted as a definition of the offence (*R.* v. *Brailsford* (2), Alverstone C.J. at 746). With respect, I think this to be inaccurate since Lord Brampton alone, of the Law Lords who considered *Quinn* v. *Leatham,* mentioned *Mulcahy's* case or the extract from the judgment of Willes J. quoted by Russell.

In my opinion, the portion of the judgment of Willes J. above quoted was never intended as a definition of a criminal conspiracy, rather was it a statement of the offence which was punishable under the statute under which Mulcahy was charged. That *Act* was chapter 12 of 11 Vict. being *An Act for the better security of the Crown and Government of the United Kingdom* and amended earlier statutes passed in the reign of Geo. III directed to the punishment of treason. The language of the indictment followed that of the statute and charged that the accused

> Did feloniously and wickedly compass, imagine, invent, devise *and intend* to deprive and depose Our Lady the Queen.

and thereafter alleged various overt acts. It was of the offences so charged that Willes J. employed the language quoted by Lord Brampton in *Quinn* v. *Leatham* (and repeated in Russell as aforesaid), but part of his remarks were omitted which preceded and appear to me to explain the part quoted. The omitted passage reads (p. 317):—

> The argument was that a conspiracy rests in intention only, that the law distinguishes between acts intended and acts done; and that an overt act, to satisfy the statute, must consist in either publishing or printing some writing, or in some bodily act or deed, such as procuring arms.
>
> *So far as this question depends upon the bare construction of the statute, it appears to admit of no doubt.*

It has been said that the opinion of the judges in *Mulcahy's* case was approved by the House but it seems quite clear that all that the Law Lords approved was that this part of the opinion of Willes J. was a correct statement of the offence created by the statute, cap. 12 of 11 Vict.

It is to be noted that in *Regina* v. *Dowling* (3), a prosecution under the statute under which Mulcahy and others had been charged, Erle J. in charging the jury said (p. 514):—

(1) [1901] A.C. 495. (2) [1905] 2 K.B. 730.
(3) (1848) 3 Cox C.C. 509.

The indictment is divisible into two distinct parts: first, the criminal intent: secondly, the overt acts, by means of which such intent was carried out. The law requires proof, to the satisfaction of the jury, that such intent existed, and that such overt acts were committed.

In the Law of Criminal Conspiracies by R. S. Wright published in 1873, five years after the judgment of Willes J. and that of the House of Lords in *Mulcahy's* case had been delivered, the learned author said (p. 14) that no intelligible definition of conspiracy had yet been established and an examination of the earlier authorities supports this statement, in my opinion. After referring to the expression used by Willes J. in *Mulcahy's* case above referred to, Wright said (p. 66):—

An expression cannot be the definition of conspiracy, the defining part of which is itself so devoid of definiteness for the purposes for which a definition is required.

I have referred to the language employed in the judgment in *Mulcahy's* case since, in the judgment of the majority of the Court of Appeal, the part of the passage from the judgment of Willes J. quoted by Lord Brampton in *Quinn* v. *Leatham* is given as authority for the proposition that the intention to commit the offence of kidnapping is of the essence of the offence charged in this case under *Code* section 573. I am unable, with respect, to agree with that opinion.

It is unnecessary in disposing of the present matter to attempt to formulate a general definition of the offence of criminal conspiracy as it was prior to the enactment of the *Criminal Code* in 1892. In *Quinn* v. *Leatham,* before quoting the passage from the judgment of Willes J. in *Mulcahy's* case, Lord Brampton said (p. 528) that a conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It is sufficient for me to say that, in my opinion, the agreement between Tulley and O'Brien to commit the offence of kidnapping was a conspiracy, within the meaning of this section of the *Code.* In agreement with the opinion of Mr. Justice Robertson, it is my view that the gist of the offence referred to is the agreement of two or more persons to commit any indictable offence.

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This construction of the section appears to me consistent not only with the earlier cases in England but with the decisions of this Court in which the matter has been considered. Thus, in the *Poulterers Case* (1), it is said that a false conspiracy between divers persons shall be punished although nothing be put in execution and that "a man shall have a writ of conspiracy though they do nothing but conspire together and he shall recover damages and they may also be indicted thereof." In *Reg.* v. *Best* (2), it was said that the conspiracy is the gist of the indictment:—

> And that though nothing be done in prosecution of it, it is a complete and consummate offence of itself.

In *O'Connell* v. *Reg.* (3), Tindal C.J. said in part (p. 233):—

> The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent or even lawful. That it was an offence known to the common law, and not first created by the statute 33 Edw. 1, is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be "a definition of conspirators". It has accordingly been always held to be the law that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not.

In *Reg.* v. *Aspinall* (4), Brett J.A. said (p. 58):—

> Now, first, the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed.

In *Brodie* v. *The King* (5), Rinfret J. (as he then was), in delivering the judgment of the Court said in part (p 198):—

> On a charge of conspiracy, the agreement is itself the gist of the offence (*Paradis* v. *The King*, 1934 S.C.R. 165 at 168). The mere agreement to commit the crime is regarded by the law sufficient to render the parties to it guilty at once of a crime (Kenny, Outlines of Criminal Law, 13th ed., p. 81).
>
> And we need only recall the often cited passage of Lord Chelmsford in *Mulcahy* v. *The Queen*:—
>
> > It cannot exist without the consent of two or more persons; and their agreement is an act in advancement of the intention which each of them has conceived in his mind.

(1) (1611) 9 Co. Rep. 55b.
(2) (1705) 1 Salk. 174.
(3) (1844) 11 Cl. & F. 155.
(4) (1876) L.R. 2 Q.B.D. 48.
(5) [1936] S.C.R. 188.

In other words, to borrow the expression of Mr. Justice Willes (*Mulcahy* v. *The Queen* at p. 317):—"The very plot is an act in itself". It follows that a person may be convicted of conspiracy as soon as it has been formed and before any overt act has been committed. The offence is complete as soon as the parties have agreed as to their unlawful purpose (Kenny, Outlines of Criminal Law, 13th ed., p. 289; *Belyea* v. *The King*, 1932 S.C.R. 279).

The contention of the Crown is that the offence of conspiracy in this matter was complete when O'Brien and Tulley agreed to commit the offence. Conceding that *mens rea* must be shown, the Crown contends, rightly in my opinion, that an intention to offend against the penal provisions of an Act (in this case to agree to commit an indictable offence) constitutes *mens rea* (*Bank of New South Wales* v. *Piper* (1)).

It is however, said for the respondent that if it be the case that to agree to commit an indictable offence is punishable under section 573 of the Code, here there was no agreement since, on Tulley's own showing, he did not intend to carry out his undertaking. Thus, while the parties exchanged promises, to adopt the above quoted language of Willes, J., "capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means", it is said there was no agreement within the legal meaning of that expression, since Tulley never intended to go through with the plan.

Some support for this contention is to be found in a case of *Woodworth* v. *State* (2). That case is relied upon to support a statement in Bishop on Criminal Law, 9th ed. vol. 2, p. 131, that where there are only two parties and one simply joins in appearance to draw the other on, neither is a conspirator. That statement is followed by some further expressions of opinion as to what is necessary to constitute an agreement to support a charge of conspiracy founded on other American cases. In *Woodworth's* case, the Texas Court of Appeal considered an appeal from a conviction under certain articles of the Penal Code of the State of Texas. According to Willson, J. that Code defines the offence of conspiracy to be a positive agreement entered into between two or more persons to commit one of certain named offences. That learned judge then proceeded to express his view as to what was the meaning to be assigned

(1) [1897] A.C. 383.

(2) (1886) 20 Tex. App. 375.

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to the word "agreement" in the Penal Code and apparently accepted as a definition of the word one given in Webster's Dictionary and one of several definitions given in Bouvier's Law Dictionary. The latter publication said, inter alia, that agreement "consists of two persons being of the same mind, intention, or meaning, concerning the matter agreed upon". Since the evidence supported the view that the principal witness for the State, one Hunt, who was the only party to the conspiracy alleged, at no time intended to commit the offence but proposed rather to prevent its commission and was merely trying to entrap the accused, Willson, J. considered that there was no such agreement as was contemplated by the statute. It would appear that this decision has been followed in a case in Tennessee and other cases in the State of Texas.

Whatever is to be said as to what constitutes a "positive agreement" under the Penal Code of the State of Texas, it is (in the absence of a statutory definition) to the common law of this country that we must look to determine what amounts to an agreement to commit an indictable offence. Where two or more persons declare their consent as to any act or thing to be done or foreborne by some or one of them, it is an agreement in the eyes of the law and the fact that one of the parties agreeing does not intend to carry out his part of the bargain cannot affect the legal nature of the arrangement. On the question as to whether or not an agreement has been made, the intention of either party to carry it out is an irrelevant consideration. If the contention of the respondent on this aspect of the matter be analysed, it amounts simply to this that when two parties exchange promises to do any act it is an agreement if the act to be done be lawful, but it is not an agreement if it is unlawful and one of the parties does not intend to carry out his part of it. This argument appears to be wholly untenable.

The cases which decide that the evidence of police spies or agents provocateurs who, in pursuance of their duty to suppress crime, become parties to criminal conspiracies do not, in my opinion, assist the respondent in the present matter.

It is to be remembered that these cases deal with the law of evidence and do not assume to deal with the legal position of such persons endeavouring to discharge the duties

imposed upon them by their calling who enter into agreements with others for the commission of criminal offences. They are collected in the standard works on the law of evidence (Phipson, 9th ed. 510: Roscoe, 16th ed. 145: Wigmore, 3rd ed. art. 2060).

The principal cases in England dealing with the question are: *R.* v. *Despard* (1): *Reg.* v. *Dowling* (2): *Reg.* v. *Mullins* (3): *R.* v. *Bickley* (4). Such persons are variously described as police spies, informers or accomplices, though in *Despard's* case Lord Ellenborough said they could not be considered as accomplices. The rule as to the corroboration of the evidence of accomplices generally is stated in *Reg.* v. *Stubbs* (5).

That the rule does not apply to persons who have joined in, or even provoked, the crime as police spies was decided by this Court in *Vigeant* v. *The King* (6). The reason that it does not apply is explained in the judgment of Lord Reading, L.C.J. in *R.* v. *Baskerville* (7).

The question as to whether an agent provocateur entering into an agreement such as that made between Tulley and O'Brien would be guilty of the offence referred to in section 573 has not been decided by any court whose decisions are binding upon us and does not arise in this case. Robertson, J. A. expressed the view that a person so acting on the instruction of the authorities would be excused on grounds of public policy. In Stroud on Mens Rea, p. 14, the learned author suggests that, since whenever the law imposes a duty it necessarily confers a right to carry out that duty, this might afford justification.

In none of these cases is the question considered as to whether such an arrangement made between an agent of the police and a third person, with the design on the part of such agent merely to entrap the other person, would in the eyes of the law be an agreement of the nature necessary to support a charge of criminal conspiracy. The cases, therefore, afford no support for the contention made here that

(1) (1803) 28 St. Tr. 346.
(2) (1848) 3 Cox C.C. 509.
(3) (1848) 3 Cox C.C. 526.
(4) (1909) 2 C.A.R. 54.
(5) (1855) Dears. 555.
(6) [1930] S.C.R. 396 at 400.
(7) (1916) 12 C.A.R. 81 at 89.

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what transpired between Tulley and O'Brien was any the less such an agreement if Tulley did not intend to carry out his part of the bargain.

In my opinion, the learned trial judge did not misdirect the jury and I would allow this appeal and set aside the judgment of the Court of Appeal.

FAUTEUX J. (dissenting):—The material facts of this case appear in the reasons for judgment of my brother Locke. In substance, the appellant O'Brien, having formed the project of kidnapping one Mrs. X, confided it to one Tulley, with whom he was acquainted. The two had then several meetings during which they discussed and plotted with finality the means by which the criminal design of the appellant could be achieved. In brief, by words, Tulley declared his consent and, thereafter, by deeds, continued to manifest his agreement and encouragement to O'Brien as to both means and aim. Indeed he actually pocketed money which, he admitted, O'Brien gave him as part of the consideration agreed to between them for his guilty participation in the execution of this criminal purpose. At trial, Tulley admitted all these facts and more specially his corrupt participation in the plotting of the crime, his agreement to commit it and his acceptance of the money and he also testified that he hired a cab which he said he used with O'Brien for the purpose of locating a house convenient for the sequestration of the woman. He testified, however, that he never had the intention "of going through with this scheme" or "of carrying it out". On the basis that some credence could be given by a reasonable jury to the existence of this alleged mental reservation as to the execution of the agreement—negatived by his overt acts—it is contended that the trial Judge misdirected the jury in instructing them that, in law, the offence of conspiracy was complete if, in point of fact, the accused and Tulley did make the agreement even though the latter "never at any time had any intention of carrying the agreement into effect."

The question of law which then falls to be determined is whether there was an indictable conspiracy if Tulley, one of the two parties to the agreement who—motivated by a desire to extort money from O'Brien—admittedly had the

intention and the will to and did actually plot the commission of the crime and openly agreed to and encouraged its commission, but had no intention to satisfy his own part of the exchanged promises and engagements.

It is recognized in jurisprudence and in text books that no complete and exhaustive definition of conspiracy has yet been formulated. Generally, it is said that conspiracy is an agreement of two or more persons to effect an unlawful purpose whether as their ultimate aim or only as a means to it. But that the legal concept of criminal conspiracy and the legal concept of criminal agreement are not to be confused is, I think, sufficiently suggested by s. 266 of the *Criminal Code* enacting that:—

> Every one is guilty of an indictable offence and liable to 14 years imprisonment who conspires *or* agrees with any person to murder or to cause to be murdered, any other person . . .

The modern law of conspiracy stems from what is referred to as the 17th century rule. The principle is thus formulated by Coke:—

> Quando aliquid prohibetur, prohibetur et id quod pervenitur ad illud: et affectus punitur licet non sequatur effectus; and in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it. Coke's Reports, Vol. V, New Edition, page 101.

A similar principle underlies these provisions of s. 69 of the *Criminal Code* prescribing that he who counsels the commission of a crime is guilty of a substantive offence even if the offence he counselled is not committed, such substantive crime being completed once counselling has taken place. *Brousseau* v. *The King* (1). Furthermore, if the offence counselled is committed, the person who counselled it is also guilty of the latter unless he has, before its commission, given a timely, express and actual countermand or revocation of the counselling. *Croft* v. *The King* (2). An unmanifested change of heart on behalf of a person who has counselled is not sufficient. In the *Croft* case, it may be added, there was a mutual agreement to commit suicide, consequential to which one of the parties died. Croft, the other party to the agreement—who could undoubtedly have been successfully charged with criminal conspiracy, for

(1) (1917) 56 Can. S.C.R. 22. (2) 29 C.A.R. 168 at 173.

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suicide is a common law crime, (Kenny, Outlines of criminal law, 13th edition, page 289)—was actually charged and found guilty of the major offence of murder and this on the basis that the agreement itself amounted to such counselling, procuring, inducing, advising or abetting of murder as constituted the survivor an accessory before the fact if he was not present when the other party to the agreement committed suicide. There was no suggestion that Croft's agreement was affected by any mental reservation with respect to the execution of the criminal purpose. But whether or not it was leaves untouched the proposition that his participation in the plotting of the crime and his signified agreement, his promise or engagement to execute it were tantamount to counselling, inducing, advising the other party to commit it. Hence, in the face of these promises and engagements amounting to counselling, inducing, etc., mental reservation could have been no defence to the charge of murder. And to say that, assuming the existence of such mental reservation there would have been no conspiracy, would be tantamount to a denial of the existence of the very ultimate foundation upon which the same party was found guilty of the partially executed agreement.

That two or hundreds of persons may confederate and plot in advance the commission of a crime or crimes against another person or group of persons, or even the State, though agreeing, at the same time, to defer to a later date the question whether such criminal plans should at all be executed, is not an extravagant hypothesis. That such a secret combination against the peace, though for the time being denuded of the actual intention to commit the plotted crime or crimes, would not come within the meaning of those which, under the principle enunciated by Coke, are indictable, I am not ready and do not have to say for the determination of this appeal.

To the narrower proposition, i.e., that, in the circumstances of this case, the external manifestation of intention, this exchange of promises, of engagements and encouragements between the parties must be treated as having never existed because of the alleged mental reservation on the part of Tulley as to the "going through with the scheme", I am unable to subscribe. An agreement is an act in the law whereby two or more persons declare their consent as to

any act or thing to be done. Such a declaration takes place by the concurrence of the parties in a spoken or written form of words as expressing their common intention. Mental acts or acts of the will, it has been said, are not the material out of which promises are made. Hence the law, in civil matters at least, does not allow one party to show that his intention was not in truth such as he made it or suffered it to appear to the other party. That a different view should be adopted because of the criminal nature of the object of the agreement in this case where Tulley, willingly and with full appreciation of the matter, signified his agreement, promised and took the engagement, and thus encouraged the criminal design, is not only inconsistent with the economy of our criminal law but, in my respectful view, unwarranted under the authorities.

Halsbury's Laws of England, Vol. 9, 2nd edition, page 44:—

> The gist of the offence lies in the bare *engagement and association* to do an unlawful thing (i.e., a thing contrary to or forbidden by law), whether such thing be criminal or not, and whether any act other than the *engagement or association* be done by the conspirators or not.

Russell on Crime, Tenth edition, Vol. 2, p. 1798:—

> The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, *but in the forming of the scheme or agreement between the parties.* The external or overt act of the crime is *concert by which mutual consent to a common purpose is exchanged.* In an indictment, it suffices if the combination exists and is unlawful, *because it is the combination itself* which is mischievous, and which is considered to give the public an interest to interfere by indictment.

Harris and Wilshere's Criminal Law, 17th edition, page 45:—

> The offence consists *in the combining.*

In *Quinn* v. *Leatham* (1), Lord Brampton, at page 528, said:—

> The essential elements, whether of a criminal or of an actionable conspiracy, are, in my opinion, the same, though to sustain an action special damage must be proved.

and the learned Lord then proceeds to quote "as a very instructive definition of a conspiracy", the words of Willes J., in *Mulcahy* v. *R.* (2), who, in delivering the unanimous

(1) [1901] A.C. 495. (2) (1868) L.R. 3 H.L. 306 at 317.

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opinion of himself, Blackburn J., Bramwell B., Keating J., and Pigott B., subsequently adopted by the House of Lords, said:—

> A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, *promise against promise, actus contra actum, capable of being enforced, if lawful,* punishable if for a criminal object or for the use of criminal means . . . The number and the compact give weight and cause danger.
>
> It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present.

Dealing with and giving the reasoning out of which emerged the 17th century rule and its subsequent extension, Harrison in Law of Conspiracy, page 14, says:—

> For it was a general rule of criminal law that the gist of a crime was in the criminal intent, although it could not be punished until the intent was manifested by some act done in furtherance of it. Thus it was argued that in conspiracy the criminal intent was *the intent to combine* to indict falsely, and this intent was sufficiently manifested by *the act of combination,* that is, by the agreement, without any carrying out of the objects of the agreement.

The case of *Rex* v. *Kotyszyn* (1), quoted in support of respondent's contention, does not, in my respectful view, support the proposition that the alleged mental reservation of Tulley as to the commission of the crime of kidnapping renders the agreement, his promises and his engagements, non-existent and without jural consequences in criminal law. Indeed Bissonnette J., at page 202, quotes with approval the following passage of Marchand J. in *Deur* v. *The King*:—

> The principal element of the offence of conspiracy is the plotting or agreement of two or more persons to commit an act that is criminal in its design, or to accomplish a legitimate purpose by criminal means, and the complete offence is committed by the participants in the conspiracy as soon as there is an agreement between them to commit a crime. It is not necessary that the crime, the object of the plotting, be committed by one or the other of the conspirators. Each of them is guilty of conspiracy as soon as *he has signified his adherence to, or promised his collaboration in,* the common criminal design.

(1) 95 C.C.C. 261.

In the same case, Mackinnon J., having also, at page 268, quoted with approval the above statement of Marchand J., adds at page 269:—

> The dealings between Mary Elm and the respondent had advanced far past an attempt to commit a conspiracy, *the conspiracy itself having actually been accomplished.*

And then he quotes what was said by Willes J. in *Mulcahy* v. *R.*

Finally, Gagné J., at page 264, says:—

> I do not know that it is necessary to scrutinize the intimate intention of each one of the persons. The expression of the desire to conspire communicated to another person who consents thereto, ought to be sufficient to incriminate the latter, *even when it might later appear that the former did not really have the intention of doing an unlawful act.* The object that she pursued in her own conscience cannot be said to be an excuse for another. It seems to me that that is simply good sense.

The case of *Rex* v. *Kotyszyn* stands, besides, in quite a different category than the present. Furthermore, the fact that, on grounds of public policy, a peace officer, for instance, might be excused, or immuned of prosecution, for agreeing to buy drugs from a drug pedlar agreeing to sell them, in order that the latter be successfully brought to justice on the statutory charge of selling drugs, has not yet authoritatively permitted the statement that, because of the honest motives of the officer or his lack of criminal intent, there was, in criminal law, no agreement to sell and no sale.

For the dismissal of the present appeal, it is also said that if Tulley was charged with conspiracy and the jury would attach credence to his story, he should in law be acquitted and that, in such event, even if O'Brien had been previously convicted, O'Brien should be discharged according to the practice based on the rule that one cannot conspire alone. In this argument, I cannot find any assistance, for whether or not Tulley should in law be acquitted on the basis of his mental reservation is a question involved in the determination of this appeal. The question is one which according to Kenny, Outlines of criminal law, 15th edition, page 336, in a foot-note—has been raised, but whether as a pure academic question or in the consideration of an actual case, the learned author does not say. Indeed, no case in point, either in England or in Canada, has been quoted at bar nor was it possible to find any. Hence, furthermore, whether, assuming a defence resting on mental

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reservation should, contrary to the views I hold, obtain in favour of Tulley, O'Brien—who, as implied by the verdict of the jury, had undoubtedly not only the intention to conspire but also the will to kidnap,—should legally benefit of the mental reservation of Tulley with whom he had agreed, is a question which has not then been considered in the cases where one convicted party was discharged because of the acquittal of the other party to the conspiracy, and is moreover a question which does not arise here in view of the conclusion I have reached as to Tulley's legal position in the premises.

In brief, Tulley, by lending a receptive ear to O'Brien's criminal proposition, by plotting along with him the unlawful means by which the crime was to be committed, by promising to O'Brien to actually join with him in its commission, by accepting money given to him by the latter as part of the price agreed for his participation in the matter, by hiring a cab and using it with O'Brien for the purpose of locating a house convenient for the sequestration of the woman, has, by deeds and by words, assented to and encouraged the design, and this whether he intended or not to go through with it. Mental reservations are not apt to defeat the natural consequences of words accompanied by deeds. Undoubtedly, O'Brien believed in and was encouraged by the manifested sincerity of Tulley. In Tulley's own words, O'Brien "believed something he had planned himself along with me." Indeed and when the moment came to actually kidnap the woman, Tulley thought it advisable, for motives of his own, to inform her husband of the plot against her. In the Law of Criminal Conspiracies and Agreements by R. S. Wright (London, 1873) at page 70, it is stated:—

> For the rest, there seems to be no reason to suppose that, unless perhaps in some forms of treason, the kind of conduct necessary for making a man a party to a conspiracy differs in any respect from that which would be necessary for making a man a party to any other sort of criminal design. If he procures, counsels, commands or abets a design of felony, he is involved in the guilt of the principal felon, though in a lower degree, if the felony is not actually committed. If he procures, counsels, commands or abets a misdemeanor, he is guilty of a misdemeanor at common law. So there can be no doubt but that a person may involve himself in the guilt of a conspiracy *by his mere assent to and encouragement of the design,* although nothing may have been assigned or intended to be executed by him personally.

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In the circumstances of this case, I agree with Robertson J.A. of the Court of Appeal of British Columbia, and with my brother Locke, that the verdict of the jury should not be disturbed and that the present appeal should be maintained.

Appeal dismissed.

Solicitor for the Appellant: *T. G. Norris.*

Solicitor for the Respondent: *J. Stanton.*

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*May 3, 4
*Nov. 1

JOSEPH A. ROBILLARD *(Petitioner)* ..... APPELLANT

AND

LA COMMISSION HYDROÉLECTRIQUE DE QUÉBEC *(Defendant)* } RESPONDENT

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

Petition of right—Claim against Quebec Hydro-Electric Commission—Method of proceeding—Service of proceedings on Attorney General but not on Commission—Whether valid summons—Appearance made in name of Commission—Whether fiat has lapsed—Meaning of words "mutatis mutandis" in s. 16a of the Quebec Hydro-Electric Commission Act (1944) 8 Geo. VI, c. 22 and (1945) 9 Geo. VI, c. 30—Attorney General's Department Act, R.S.Q. 1941, c. 46—Articles 82, 117, 174, 176, 1011 to 1024 C.P.C.

Section 16*a* of the statute creating the Hydro-Electric Commission of Quebec makes applicable, mutatis mutandis, to actions instituted against the Commission, the provisions of Articles 1011 to 1024 of the *Code of Civil Procedure*. In his action asking for a condemnation in damages against the Commission, the appellant had the documents mentioned in Article 1017 deposited at the office of the Attorney General together with a notice requesting in terms from the latter a contestation on behalf of Her Majesty. Service of the documents and of the notice requesting contestation was not made upon the Commission, but an appearance was entered in its name.

The trial judge and the majority in the Court of Appeal dismissed the action on the ground that, since the Commission was never summoned, the fiat had lapsed after sixty days.

Held (Rand and Cartwright JJ. dissenting), that the appeal should be dismissed.

Per Rinfret C.J.: By virtue of the principle that no judicial demand can be adjudicated upon unless the party against whom it is made has been duly summoned, the appellant, having asked for a condemnation

*PRESENT: Rinfret C.J. and Taschereau, Rand, Cartwright and Fauteux JJ.

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against the Commission, should have served the petition and the other documents upon the Commission. As this was not done, the Commission was, therefore, never summoned and was never called upon to produce a contestation. This lack of summons could not be covered by the appearance made by the Commission.

Per Taschereau and Fauteux JJ.: Section 16*a* is not the clear text which would be required to conclude that the legislator, in providing that Article 1017, with the necessary modifications, applied to an action against the Commission, intended to do away with the principle that it is the party being sued which must be notified of the action and called upon to contest it. It follows that the petition, the fiat and the notice requesting contestation should have been served upon the Commission. Not only was this not done but the Commission was never requested to produce a contestation. There was, therefore, no summons of the Commission and the appearance entered in its name could not take the place of it.

Per Rand and Cartwright JJ. (dissenting): The words "mutatis mutandis" in section 16*a* do not necessarily require any change in the wording of Article 1017. The Legislature has provided that a person claiming monies from the Commission, which is an agent of the Crown, must do so by a petition of right addressed to Her Majesty. It would, therefore, require clear words to indicate that the service of all the documents upon the Attorney General, would not be valid and sufficient service. It could not be suggested that the procedure followed in the case at bar would not inevitably result in full notice of the pending proceedings being brought to the immediate attention of all those having an interest or a duty to resist the claim.

APPEAL from the judgment of the Court of Queen's Bench, appeal side, province of Quebec (1), affirming, Galipeault C.J.A. and Casey J.A. dissenting, the judgment of the trial judge that the fiat obtained by the appellant to sue the respondent had lapsed.

Jules Prieur for the appellant.

L. E. Beaulieu Q.C. for the respondent.

THE CHIEF JUSTICE:—Le point important et essential de ce litige est que la procédure de l'appelant est dirigée contre la Commission Hydroéletrique de Québec demandant jugement contre cette dernière, la condamnant à payer l'appelant la somme de $3,175, à titre de dommages-intérêts lui résultant de l'inondation causée par un barrage appartenant à cette Commission.

L'appelant lui-même a désigné la Commission comme étant une corporation légalement constituée, ayant son siège social en la ville et le district de Montréal, par la Loi 8 Geo. VI, c. 22, insérée dans les Statuts Refondus de Québec 1941, comme en étant le chapitre 98a.

(1) Q.R. [1953] Q.B. 378.

La loi organique de la Commission fut modifiée en 1945 par le Statut 9 Geo. VI, c. 30.

En vertu de l'article 16a de ce statut,

> Nul recours en justice de quelque nature que ce soit ne peut être exercé contre la Commission autrement que par pétition de droit adressée à Sa Majesté et requérant l'autorisation d'exercer le recours désiré contre la Commission.
>
> Les articles 1012 à 1023, inclusivement du Code de procédure civile sont applicables, *mutatis mutandis*, à cette pétition de droit.

Par application des articles 1017 et 1018 du *Code de procédure civile*, une copie de la pétition de droit et de l'ordre du Lieutenant-Gouverneur, certifiée par le protonotaire, est déposée au bureau du Procureur général, avec un avis requérant la production d'une contestation dans les trente jours de la signification d'icelui. Ces documents doivent être déposés au bureau du Procureur général dans les soixante jours de la date de l'ordre du Lieutenant-Gouverneur que droit soit fait. Si ce dépôt n'a pas été fait dans ce délai, l'ordre est périmé de plein droit et le requérant ne peut pas procéder sur la pétition de droit. Si, dans ce délai de trente jours, qui doit être établi par la production d'un certificat de la signification de la pétition, de l'ordre et de l'avis, il n'est pas produit de contestation, le requérant procède comme dans une cause par défaut.

Ce sont là les prescriptions des articles 1017 et 1018 du *Code de procédure civile*. Et les procédures subséquentes sont les mêmes que dans une cause contestée ordinaire, sauf que l'audition ne peut pas se faire devant un jury.

Il s'ensuit que la procédure prévue contre la Commission Hydroélectrique de Québec est une pétition de droit, mais c'est là tout simplement le nom donné par le statut au document par lequel la poursuite contre la Commission est initiée. En pareil cas, la pétition de droit remplace le bref de sommation et la déclaration par lesquels toute action ordinaire est commencée dans la province de Québec.

Cette pétition de droit est tout d'abord dans le but de requérir de Sa Majesté l'autorisation d'exercer en justice contre l'intimée. Du moment que cette autorisation est accordée, au moyen du fiat habituel dans toute pétition de droit, l'instance en devient une exclusivement entre le pétitionnaire et la Commission Hydroélectrique de Québec. Dès que l'autorisation est donnée, Sa Majesté est hors de

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cause et ne devient nullement partie à l'instance qui se poursuit ensuite exclusivement entre le pétitionnaire et la Commission Hydroélectrique de Québec.

D'ailleurs, la procédure qui fait l'objet de l'appel ne contient aucune conclusion contre Sa Majesté ou contre le Gouvernement de Québec. La demande de condamnation s'adresse uniquement à la Commission Hydroélectrique de Québec. Dès lors, ce sont les articles 1012 à 1023 du *Code de procédure civile* qui régissent le litige en y faisant les changements nécessaires (*mutatis mutandis*) pour les adapter à un recours exercé non pas contre le Gouvernement de Québec, mais contre la Commission Hydroélectrique.

L'appelant a bien déposé au bureau du Procureur général une copie de la pétition de droit et de l'ordre du Lieutenant-Gouverneur certifiée par le protonotaire. Mais il n'a jamais signifié cette pétition de droit et cet ordre à l'intimée et il n'a jamais donné à cette dernière l'avis requérant d'elle la production d'une contestation dans les trente jours de la signification d'icelui, ainsi que l'exige l'article 1017 C.P.C. Il s'ensuit que l'intimée n'a jamais été assignée et n'a jamais été saisie de l'obligation de produire une contestation dans les trente jours, tel qu'exigé par les articles 1017 et 1018 du *Code de procédure civile.*

Dans cette situation, l'intimée produisit alors une motion basée sur l'article 1017 du *Code de procédure civile* concluant à ce qu'il soit déclaré que le fiat ou l'ordre du Lieutenant-Gouverneur se trouvait périmé de plein droit et à ce que la pétition de droit soit rejetée et renvoyée avec dépens.

Le juge de première instance, dans un jugement très élaboré et fortement raisonné, a accueilli la motion de l'intimée et a déclaré périmée et éteinte la procédure de l'appelant. Il l'a rejetée sans frais.

Ce jugement a été confirmé par la Cour du Banc de la Reine du district de Montréal (1) avec la dissidence de l'honorable Juge en chef de cette Cour et celle de M. le juge Casey.

Telle que l'affaire se présente maintenant devant la Cour Suprême du Canada, l'appelant nous demande, en somme, d'infirmer les deux jugements des Cours de la province de Québec et de rendre un jugement condamnant l'intimée sans

(1) Q.R. [1953] Q.B. 378.

que cette dernière ait jamais été assignée. Il faut insister sur ce point qu'll ne s'agit pas ici d'une signification irrégulière ou illégale, mais qu'il s'agit d'une absence totale de signification, ou, en d'autres termes, d'un défaut d'assignation.

Cette remarque dispose de l'objection de l'appelant que l'intimée aurait dû procéder par exception à la forme. On invoque par exception à la forme l'irrégularité ou l'illégalité d'une signification, mais cette procédure ne s'applique pas à un défaut complet d'assignation (C.P.C. 174, par. 1).

L'appelant n'aurait jamais pu procéder contre l'intimée dans l'état où il avait laissé la cause et lorsqu'il aurait voulu procéder contre elle par défaut, le seul acte qu'aurait pu poser le tribunal saisi de cette demande eût été que jugement ne pouvait être rendu contre une personne qui n'avait pas été assignée.

Il n'est pas besoin, en cette Cour, de référer à d'autres décisions sur ce point que celle qui a été rendue tout récemment sur l'appel de *l'Alliance des Professeurs catholiques de Montréal* v. *Quebec Labour Relations Board* (1). Il ne peut être adjugé sur une demande judiciaire sans que la partie contre laquelle elle est formée ait été entendue ou dûment appelée (C.P.C. 82). C'est là un principe fondamental basé sur l'équité naturelle et dont l'inobservance détruit la juridiction du tribunal et entraîne la nullité de toutes les procédures subséquentes, y compris le jugement. Ce principe a été établi chaque fois qu'il a été soulevé et a été appliqué par les tribunaux d'une façon constante.

C'est à raison de ce principe que l'appelant, ayant demandé une condamnation contre l'intimée, c'est à l'intimée que devait être signifiée la pétition de droit et les autres documents qui doivent l'accompagner et c'est au bureau de la Commission que pareille signification doit être faite.

La prétention de l'appelant que l'intimée, en l'espèce, est réellement la Couronne ne saurait être entretenue. La Commission Hydroélectrique de Québec est, comme je le disais au commencement, une corporation indépendante et qui doit être traitée d'une façon distincte de la Couronne elle-même (*Salomon* v. *Salomon* (2)).

(1) [1953] 2 S.C.R. 140.

(2) 75 L.T. 427.

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Le statut incorporant l'intimée lui donne tous les pouvoirs et les prérogatives d'une compaignie indépendante de la Couronne. Elle possède des biens et c'est sur ces biens que la jugement rendu contre elle peut être exécuté.

L'autre objection résultant du fait que l'intimée a produit une comparution ne peut non plus être considérée. L'article 176 du *Code de procédure* dit bien que les irrégularités dans la signification sont couvertes par la comparution du défendeur et son défaut de les invoquer dans les délais fixés, mais ici, je le répète, il ne s'agit pas d'une signification irrégulière mais d'une absence complète de signification.

Dans les circonstances, je suis d'avis de rejeter l'appel avec dépens.

The judgment of Taschereau and Fauteux JJ. was delivered by:

FAUTEUX J.:—Je concours dans le rejet de cet appel et désire tout simplement indiquer quelques-uns des motifs m'amenant à cette conclusion.

La Commission Hydroélectrique de Québec, ci-après appelée la Commission, est une corporation ayant son siège social à Montréal; elle est l'agent de la Couronne mais, nonobstant cette qualité, elle peut être personnellement traduite devant les tribunaux. Elle a donc une entité juridique manifestement distincte de celle de la Couronne. Pour exercer un recours contre la Commission, le Législateur, cependant, a fait exception à la procédure de droit commun et statué: (i) que nul recours en justice, de quelque nature que ce soit, ne peut être exercé contre la Commission autrement que par pétition de droit adressée à Sa Majesté et requérant l'autorisation d'exercer le recours désiré contre la Commission; (ii) que la plupart des dispositions du *Code de procédure civile* régissant la pétition de droit, soit celles des articles 1012 à 1023 inclusivement, sont applicables à cette pétition de droit; (iii) mais que l'application de ces dispositions doit être faite *mutatis mutandis,* c'est-à-dire en apportant à chacune de ces prescriptions établies en fonction d'un recours pourvu contre Sa Majesté, tous les changements qui y sont nécessaires pour les rendre effectives dans un recours dirigé contre la Commission. La procédure n'est donc pas modifiée dans le principe; au contraire, elle demeure

puisqu'elle doit s'appliquer. Mais les dispositions qui l'organisent devront être modifiées dans la mesure où il est nécessaire pour les adapter en plénitude à une entité juridique autre que celle pour laquelle elle est normalement établie.

En conséquence, je ne puis voir que par l'article 16(a), établissant cette procédure d'exception au droit commun pour ester en justice contre la Commission, le Législateur ait entendu déroger, autrement que pour fins d'adaptation, à ce principe dominant toute procédure d'ordre judiciaire, déjà implicitement mais clairement mis en œuvre et précisé par les dispositions ci-après de l'article 1017 pour les fins d'une pétition de droit contre Sa Majesté, soit à ce principe général et d'ordre public sanctionné à l'article 82 du *Code de procédure civile,* édictant qu'il ne peut être adjugé sur une demande judiciaire sans que *la partie contre laquelle elle est formée* ait été entendue ou dûment appelée. C'est ainsi que le premier paragraphe de l'article 1017 édicte:—

> Une copie de la pétition et de l'ordre du lieutenant-gouverneur, certifiée par le protonotaire, est déposée au bureau du procureur général, avec un avis requérant la production d'une contestation dans les trente jours de la signification d'icelui.

Le texte de cet avis, apparaissant au *Code de procédure civile* immédiatement après l'article 1017, est libellé comme suit:—

> A l'honorable procureur général de la province de Québec.
>
> Le requérant demande une défense ou contestation *de la part de Sa Majesté,* dans les trente jours de la signification de la pétition de droit ci-dessus; sans quoi il procédera comme dans une cause où le défendeur fait défaut de comparaître.

Ces dispositions de l'article 1017 rappellent donc substantiellement celles propres au bref d'assignation dans une cause ordinaire, et aux termes desquelles le défendeur, étant d'abord informé de la demande faite contre lui, est mis en demeure de comparaître dans un délai de six jours de la signification de cette demande et de la contester, sans quoi jugement pourra être rendu contre lui. Sans la présence et le respect des dispositions de l'article 1017, il est évident qu'il n'y aurait aucune procédure établie au titre de la pétition de droit permettant au procureur général, jurisconsulte officiel de Sa Majesté et de son gouvernement (S.R.Q. 1941, ch. 46), de connaître: (i) que le privilège de poursuivre accordé par le lieutenant-gouverneur est, en fait, exercé par

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celui qui l'a obtenu et (ii) de savoir également qu'on requiert dans un délai courant du moment où il en est ainsi informé par la signification de cet avis, qu'il doit, pour éviter qu'il soit procédé à jugement comme dans une cause où le défendeur fait défaut de comparaître, produire une défense ou une contestation de la part de Sa Majesté. Ainsi est mis en œuvre et précisé pour les fins d'une pétition de droit contre Sa Majesté, le principe d'ordre public voulant que la partie contre laquelle une demande judiciaire est formée, soit entendue ou dûment appelée. Il faudrait, je crois, un texte clair pour conclure que le Législateur, en édictant que les dispositions de l'article 1017 s'appliquent dans une poursuite dirigée contre la Commission, tout en prescrivant que ces dispositions soient modifiées pour les adapter à cette poursuite, ait voulu déroger au principe voulant que ce soit la partie poursuivie qui soit notifiée de l'action et mise en demeure de contester. Cette intention n'est certainement pas exprimée par le texte de l'article 16(a) de la loi régissant la Commission. Et, en tout respect, pour affirmer qu'elle doit être inférée, en s'inspirant de motifs qui n'apparaissent pas dans cet article, il faudrait écarter l'obligation qui y est mentionnée, i.e., celle d'adapter à un recours dirigé contre la Commission, la procédure établie pour ester en justice contre Sa Majesté.

Si ces vues sont fondées, c'est donc au siège social de la Commission à Montréal et non au bureau du procureur général, comme il a été fait, que la copie de la pétition et de l'ordre du lieutenant-gouverneur, certifiée par le protonotaire, avec l'avis requérant la production d'une contestation dans les trente jours de sa signification, devait être déposée. Il en résulte que, non seulement les dispositions de l'article 1017, ainsi adaptées, n'ont pas été suivies, mais que, de plus, l'appelant, suivant le libellé de l'avis par lui envoyé au bureau du procureur général, étant au texte celui de l'avis apparaissant au *Code de procédure civile,* n'a jamais requis la Commission de se défendre ou de contester. Il est donc vrai de dire qu'en ce qui regarde la Commission, il n'y a jamais eu d'assignation.

On ne saurait corriger la situation en prétendant qu'une signification de l'avis au procureur général équivalait virtuellement à une signification à la Commission. Cette prétention, on voudrait l'appuyer, en droit, sur des motifs que

l'article 16(a) de la loi organique de la Commission ne manifeste ni expressément, ni implicitement, et en fait, sur la présomption que la pétition, l'ordre et l'avis ainsi déposés et signifiés au bureau du procureur général à Québec aient été, une ou plusieurs journées après—on ne s'en soucie pas—, transmis au bureau de la Commission à Montréal. En tout respect, je ne puis accéder à cet argument car il reste que l'avis ainsi porté à la connaissance de la Commission ne requérait pas cette dernière de contester la demande dirigée contre elle mais requérait du procureur général une contestation de la part de Sa Majesté contre laquelle aucune conclusion n'était adoptée dans la pétition. De plus, s'il fallait tenir cette remise de documents par le procureur général à la Commission comme équivalant à une signification à cette dernière, se poserait la question suivante: A partir duquel de deux moments, celui de la signification de l'avis au procureur général ou celui de la réception subséquente de cet avis par la Commission, devrait commencer à courir ce délai de trente jours pour contester, quand la loi dit que ce délai se compute du jour de la signification, laquelle, en l'instance, a été faite au procureur général et non à la Commission. Dans *Turcotte* v. *Dansereau* (1), il y avait eu signification de l'action à un tiers. Rendant le jugement pour la Cour, M. le Juge Taschereau, tel qu'il était alors, s'exprime ainsi sur la question, à la page 586:—

> The appellant was the defendant in the Superior Court at Three Rivers in an action by the respondent on two promissory notes instituted on September 26th, 1888. The service of this action on the appellant, it is conceded, was absolutely illegal. It was served upon a third party, not at the appellant's domicile, and though the documents eventually reached the appellant, (when and whether before or after the return of the writ does not appear) yet he had the right to disregard it and treat it as a nullity.

En la présente instance et "sous toute réserve que de droit", la Commission a comparu, par procureur. Mais je ne vois pas que cette comparution puisse être invoquée pour en déduire le fait d'une assignation qui jusque-là n'existait pas. Car, au mieux, tout ce que la Commission peut être présumée avoir reçu du procureur général sont des procédures par lesquelles elle était informée que ce dernier avait été requis de produire une défense ou une contestation *de la part de Sa Majesté,* dans les trente jours suivant le moment

(1) (1897) 27 Can. S.C.R. 583.

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où pareille procédure lui avait été signifiée. En somme, la situation résultant de la procédure adoptée par l'appelant équivaut à peu près à celle où une action dirigée contre Paul serait signifiée à Pierre et où Pierre, ainsi informé de cette demande, serait requis de produire de sa part une contestation pour éviter un jugement qu'on ne recherche pas contre lui mais contre Paul seulement. En telle occurence, on ne saurait prétendre que Paul a été régulièrement ou même irrégulièrement assigné puisqu'il ne l'a été aucunement.

Je suis donc d'avis que l'appel doit être renvoyé avec dépens.

The judgment of Rand and Cartwright JJ. (dissenting) was delivered by:

CARTWRIGHT J.:—In this appeal I am in general agreement with the reasons which led Galipeault C.J. and Casey J. to the conclusion that the service of duly certified copies of the petition of right and the fiat of the Lieutenant-Governor together with a notice requesting a contestation made at the office of the Attorney-General was a sufficient compliance with the terms of Article 1017 of the *Code of Civil Procedure* construed in accordance with the provisions of Section 16a of the *Act to Establish the Quebec Hydro-Electric Commission,* 8 George VI Cap. 22 (1944) as amended by 9 Geo. VI Cap. 30, section 5. It therefore becomes unnecessary for me to examine the second ground upon which they would have allowed the appeal, i.e., that the fact that an appearance was entered in the name of the respondent was, in the circumstances of this case, fatal to the success of its motion.

I wish merely to emphasize one or two of the matters which are fully dealt with in the reasons of the minority in the Court of Queen's Bench.

Accepting the view that the respondent while an agent of the Crown is not merely a department or branch of the government but is a corporation having a distinct legal existence, the fact remains that in all its activities it acts as agent of the Crown. It has possession, no doubt, of property moveable and immoveable and of money but everything which it possesses belongs not to it but to the Crown.

If a judgment is rendered against it it is from funds in its hands which are owned by the Crown that payment will be made.

The form of section 16a above referred to is significant. This legislation does not merely require the consent of the Lieutenant-Governor as a condition precedent to the commencement of an action in the ordinary form against the respondent corporation. It provides that the only form of procedure against it shall be by petition of right and expressly stipulates that such petition shall be addressed to Her Majesty.

I am unable to convince myself that the words *mutatis mutandis* in section 16a necessarily require any change in the wording of Article 1017 of the *Code of Civil Procedure*. A claim is made that the appellant is entitled to be paid certain monies by the agent of the Crown out of the monies of the Crown. The Legislature has provided that this claim may be asserted before the Courts only by a petition of right addressed to Her Majesty. It would, I think, require clear words to indicate that the service of such a petition and the accompanying documents upon the Attorney-General, who is normally both by Statute and tradition the Officer of State charged with the duty of enforcing and protecting the rights of Her Majesty in the Courts, would not be valid and sufficient service. I would respectfully adopt the following passage from the reasons of Casey J.:—

> Were Respondent a corporate entity acting for its own account, I could easily come to the conclusion that because of the words "mutatis mutandis" C.C.P. 1017 would have to be read so as to exact that the deposit of the documents therein mentioned be made at its office. But Respondent is not acting for its own account. It is the Crown's agent in the operation and administration of assets which belong to the Crown and it is undoubtedly because of this that the Legislator has removed it from the operation of the ordinary rules of procedure and has enacted that it can only be sued when and if such suit is authorized by the Lieutenant-Governor. No doubt it is because the Legislator intended that it should never be anything more than a wholly controlled agent that it enacted the special provisions to which the Chief Justice has referred. The mere reading of these sections brings the conviction that Respondent's activities have been seriously hobbled and that it is the jealously guarded creature of the Crown.
>
> What then could be more logical than that the Crown should want immediate knowledge of the fact that the person to whom permission to sue had been granted had in fact proceeded with his action? How can one imagine a more effective way of acquiring that knowledge than by having all such actions served on the Attorney-General? Viewed against

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this background, the argument based on *mutatis mutandis* loses its force and it becomes evident that the deposit at the office of the Attorney-General is not one of those details which must necessarily be changed to make the rules governing petitions of right applicable to Respondent.

The primary purpose of service of process in all legal proceedings is to ensure that a person's rights shall be dealt with by the Courts only after he has had notice of what is claimed against him and a full opportunity to be heard. It is not, and could not be, suggested that the procedure followed by the appellant in the case at bar would not inevitably result in full notice of the pending proceedings being brought to the immediate attention of all those having an interest or a duty to resist the appellant's claim. If the appearance entered has no other bearing on the problem before us it at least furnishes conclusive evidence that in this case the procedure followed did have this result. This procedure was in complete accord with the provisions of Article 1017, unless it can be said that a change in those provisions was necessitated by the words "mutatis mutandis" in Section 16a. I think that such a change can not be said to be necessary so long as it is clear that although no change is made prompt and complete notice will be received by those whose duty it is to see that the claim is defended.

I conclude, as did the minority in the Court of Queen's Bench, that the service made in this case was valid and sufficient under the relevant statutory provisions.

I would allow the appeal with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *J. Prieur.*

Solicitor for the respondent: *L. E. Beaulieu.*

JESSIE ALEXANDER *(Plaintiff)* .....APPELLANT;

AND

TORONTO, HAMILTON & BUFFALO RAILWAY CO. AND WALTER RICKER *(Defendants)* ..... } RESPONDENTS.

WILBERT O'HANLEY *(Plaintiff)* .....APPELLANT;

AND

WALTER RICKER AND TORONTO, HAMILTON & BUFFALO RAILWAY CO. *(Defendants)* ..... } RESPONDENTS.

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*Mar. 25, 26, 29, 30

*Oct. 5

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Railways—Level crossing—Statutory requirements and Board of Transport regulations complied with—Whether special circumstances existed imposing Common Law duty to take additional precautions.

In actions in damages arising out of the collision of a motor car and a locomotive at a railway level crossing on the outskirts of the limits of the City of Hamilton, it was established that the rate of speed at which the appellant railway's train approached the crossing was within the limit approved by the Board of Transport Commissioners and that the Board had refused a petition for the installation of a wigwag signal on the ground that the existing signals were adequate under existing traffic conditions. The jury however found the negligence of the appellants the sole cause of the accident in that with knowledge of the special circumstances existing and knowing the crossing was a dangerous one, the railway allowed its trains to operate at a high rate of speed at that point and the engineer failed to exercise due care; the railway was further negligent in permitting vegetation to grow on its right-of-way to a height that impeded the view and both, in their admission as to the blowing of the train whistle, contrary to a city by-law.

Held: that there was no evidence to support the jury's finding of special circumstances that called for special safety measures to be taken by the appellants, or of the appellants' negligence, and the findings should be set aside.

Per: Kerwin C.J. and Taschereau JJ.: In the absence of special circumstances, the rule in *G.T.R.* v. *McKay* 34 Can. S.C.R. 81, applied and it was not open to the jury to question the Board's ruling as to the rate of speed or the adequacy of the crossing signals. The general rule is subject to qualification but the qualification must be stated and applied with care to see if there is any evidence upon which a jury could find exceptional circumstances to take the matter out

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke and Cartwright JJ.

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of the rule. Here there was no such evidence. *Columbia Bithulitic Ltd.* v. *B.C. Electric Ry. Co.* 55 Can. S.C.R. 1; distinguished. *C.P.R.* v. *Fleming* 22 Can. S.C.R. 33; *Lake Erie & Detroit River Ry.* v. *Barclay* 30 Can. S.C.R. 220; *Napierville Jct. Ry.* v. *Dubois* [1924] S.C.R. 375 at 380; *Rex.* v. *Broad* [1915] A.C. 1110 and *C.P.R.* v. *Rutherford* [1945] S.C.R. 609, referred to.

Per: Rand J.: The by-law was approved by the Board before the crossing had been brought within the city limits and the approval, given in the light of existing conditions could not apply to it in the circumstances, but that did not affect the issue in this appeal because the whistle was sounded as required by the Railway Act, and if the deceased did not hear it, the fault must be charged against him.

Per: Locke J.: To give effect to the answer made by the jury to Question 2 would be to allow that body to usurp the functions of the Board of Transport Commissioners. There was no evidence of any actionable negligence. *Wakelin* v. *London & Southwestern Ry. Co.* 12 Ap. Cas. 41; *G.T.R.* v. *McKay* 34 Can. S.C.R. 81; *G.T.R.* v. *Hainer* 36 Can. S.C.R. 180 followed: *Columbia Bithulitic Ltd.* v. *B.C. Electric Ry. Co.* 55 Can. S.C.R. 1 referred to.

Decision of the Court of Appeal for Ontario [1953] O.R. 168, affirmed.

APPEALS by the plaintiff in each of two actions tried together by consent from a judgment of the Court of Appeal for Ontario (1) which set aside the judgments of Kelly J. entered on the finding of a jury.

C. L. Dubin, Q.C. and *Sidney Paikin* for the appellants.

C. F. H. Carson, Q.C., Halliwell Soule and *J. B. S. Southey* for the respondents.

The judgment of the Chief Justice and of Taschereau J. was delivered by:

THE CHIEF JUSTICE:—Counsel for the appellants did not deny the general rule set forth in *Grand Trunk Ry. Co.* v. *McKay* (2) that the exercise of the powers of the Board of Transport Commissioners and their predecessors is not subject to review either as to their adequacy or otherwise by a jury but submitted that the rule is subject to a qualification. This is true but the qualification must be stated and applied with care.

It was put in general terms by King J. in *Fleming* v. *Canadian Pacific Ry. Co.* (3) at 343:—

> Obviously the railway is under the common law obligation to use or exercise its rights as not unnecessarily to injure another except so far as they may be relieved of this obligation by the clear intention of the statute.

(1) [1953] O.R. 168; 2 D.L.R. 3.

(2) (1903) 34 Can. S.C.R. 81; 3 C.R.C. 52.

(3) (1892) 31 N.B.R. 318.

The majority of this Court (*Canadian Pacific Ry. Co.* v. *Fleming* (1)) quashed an appeal from the decision of the Supreme Court of New Brunswick for lack of jurisdiction but stated that if they had considered the merits to be open they would have dismissed the appeal for the reasons given by Mr. Justice King. In *Lake Erie & Detroit River Ry. Co.* v. *Barclay* (2) Sedgewick J. in delivering the judgment of the majority of the Court dismissing the company's appeal, at pp. 363-4, amplifies the statement of the qualification and stated that it was properly left to the jury to determine whether or not

> In this particular case . . . it was not necessary . . . at that particular time and under those particular circumstances, to take greater precautions than they (the railway company) really did take, and to be much more careful than in ordinary cases where these conditions did not exist.

In *Canadian Pacific Ry* v. *Roy* (3), Lord Halsbury speaking for the Judicial Committee in an appeal from the Province of Quebec pointed out at p. 230 that the statutory right to work a railway did not by the law of England or the law of Quebec "authorize the thing to be done negligently or even unnecessarily to cause damage to others".

In *Columbia Bithulitic Ltd.* v. *British Columbia Electric Ry. Co.* (4), in which it was found that the respondent's electric tramcar had been equipped with a defective and inefficient brake, this Court reversed the judgment of the British Columbia Court of Appeal and restored that of the trial Judge. Chief Justice Fitzpatrick agreed with Anglin J. but added that it was not suggested that railway trains could never pass over a public crossing except at such speed that in case of necessity they could be stopped before reaching it. As Brodeur J. agreed with Anglin J., the judgment of the latter became that of the Court. At p. 31 he does state that he does not understand that the *McKay* case or any other decision

> Is authority for the proposition that statutory powers may be exercised with reckless disregard for the common law rights of others.

and at p. 32:

> Circumstances may exist at particular level crossings which involve peril from running at high speed obviously exceptionally great.

(1) (1893) 22 Can. S.C.R. 33.
(2) (1900) 30 Can. S.C.R. 360.
(3) [1902] A.C. 220.
(4) (1917) 55 Can. S.C.R. 1; 21 C.R.C. 243; 37 D.L.R. 64.

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but a perusal of his reasons as a whole makes it clear that different considerations apply to a tramcar than to a steam train.

In the judgment of Duff J., which varies in many respects from that of the majority, it is stated that it does not follow that in no circumstances does a legal obligation rest upon a railway in relation to the speed of its trains in approaching or crossing a highway. Later in the same paragraph, it is pointed out that the circumstances of a particular emergency may obviously cast a duty upon the servants in charge of the train to moderate its speed or bring it to a stop; "so also the permanent conditions of a particular crossing or the practice of the railway in relation to it . . . may give rise to a duty to take extraordinary measures there for the protection of the public." What is here meant is explained at p. 19:—

> As regards the crossing and the car in question there are, however, two reasons which put the question of the duty of the appellant company in relation to speed beyond question. First, as to the crossing—there was a stopping-place there and in the ordinary course of operation the car would be brought under control to enable the motorman to stop for passengers; and there could consequently be no general overriding necessity or convenience to prevent the taking of proper measures for the safety of the public on the highway; as to the car, the fact alone that it was not equipped with proper brakes was sufficient to limit in the special circumstances any otherwise uncontrolled discretion as to speed, assuming such discretion as a general rule to exist.

In *Napierville Junction Ry. Co.* v. *Dubois* (1), Duff J. (with whom Malouin J. agreed) at p. 380 referred to Lord Halsbury's statement in the *Roy* case quoted above. He also referred to the judgment of Lord Sumner in *Rex* v. *Broad* (2).

> As authority (if authority, indeed, could be needed for such a proposition) that nothing short of a legislative enactment, expressed in language unambiguous and precise, could affect the right of persons on the highway to have reasonable care exercised by the appellant company in the use of its line, with a view to the safety of such persons.

Idington J. gave reasons for dismissing the appeal and mentioned the *Broad* case. Mignault J. dissented and Maclean J. *ad hoc* concurred in dismissing the appeal.

(1) [1924] S.C.R. 375; 29 C.R.C. 419; 4 D.L.R. 188.

(2) [1915] A.C. 1110.

Finally in *Canadian Pacific Ry. Co.* v. *Rutherford* (1) it was assumed in the judgment in this Court that one of the answers of the jury meant that a fog was "so dense in front of you that you could not see" but held that even on that assumption there was no common law duty upon the company under the circumstances to take special measures of warning to persons on the highway while the train was stopped on the crossing and the jury was not the tribunal to which Parliament had entrusted the duty of determining what permanent protection should be installed.

All these decisions indicate that in each case the facts must be closely examined to see if there was any evidence upon which the Jury could find exceptional circumstances to take the matter out of the rule in *Grand Trunk Railway* v. *McKay*. Counsel for the appellants seized upon the statement of Duff J. in the *Bithulitic* case that "the permanent conditions of a particular crossing or the practice of the railway in relation to it . . . may give rise to a duty to take extraordinary measures there for the protection of the public", and argued that in the present case the respondent, to use the wording of the jury's finding, had "allowed vegetation to grow to a height which restricts the view from Cochrane Road to the east on the north side of the rails".

The facts in this case are set out in the judgment of Mr. Justice Locke, but to that statement I desire to add the following circumstances and comments. At the trial (p. 110), upon motion on behalf of the appellant Jessie Alexander for a view by the jury of the scene of the accident, it was stated by her counsel that the conditions were the same then as at the date of the accident although it was a different time of the year. Counsel for the respondent agreed and counsel for the appellant Wilbert O'Hanley did not demur. The evidence shows that the curve in the line was one of the reasons for the application to the Board on June 13, 1951, and that the latter found no warrant for an order reducing the speed of trains at the crossing. There was no evidence to support the jury's finding quoted above as to vegetation, as it would have to be construed as meaning that there was vegetation growing along the right of way to such a height that the view of a person sitting in a car pointing south and immediately north of the rails at the

(1) [1945] S.C.R. 609; 3 D.L.R. 609; 58 C.R.T.C. 241.

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Cochrane Road crossing was restricted with respect to seeing a locomotive approaching from the east. There is no such evidence.

I agree with the Court of Appeal that it was not proper to permit the appellants to make either amendment desired by them. As to the first, even if it were made, for the reasons given above, there was no evidence upon which the jury could make the finding they did; as to the second, there is no evidence of any of these circumstances urged before us by counsel for the appellants. Whatever may be the legal position as to By-law No. 3553 of the City of Hamilton (approved by the Board of Railway Commissioners) prohibiting the blowing of a locomotive whistle when such locomotive was approaching a highway crossing in the city, in view of the fact that at the time of its enactment and approval (1927) the area in question had not been annexed to the city, the evidence at the trial shows that engineers were expected to blow for any unprotected crossing. Evidence was also given that this was done and the fact that the jury did not find that the bell had not been rung or the whistle not blown indicates that they negatived any suggestions to the contrary.

The appeals should be dismissed and with costs if demanded.

RAND J.:—I agree with the view taken by Laidlaw J.A. that at this crossing there were no special circumstances that called for special safety measures to be taken by the railway company, and that apart from that, there was no evidence of negligence involving the company in responsibility for the accident.

But it appears to have been assumed at the trial and before the Court of Appeal that the statutory duty to whistle had been suspended by a by-law of the City of Hamilton. The by-law had been approved by the Board of Railway Commissioners before Cochrane Street had been brought within the territorial limits of the city, and the question arises whether, so approved, it would apply to crossings in areas subsequently brought within the city limits. I have no doubt that it would not. The approval was given in the light of existing conditions and in a matter of such vital concern to the public was obviously passed

upon only after public safety had been carefully considered. I should have no difficulty in holding, then, that the by-law did not affect the duty to whistle when approaching the crossing.

But in the circumstances that fact does not appear to affect the issue of this appeal. The evidence is overwhelming that the whistle was sounded as required by the *Railway Act*, and if the deceased did not hear it, the fault must be charged against him. If this had not been so, I should have had to consider whether a new trial ought to be directed.

The appeal must then be dismissed with costs if demanded.

LOCKE J.:—These are appeals taken from a judgment of the Court of Appeal of Ontario which set aside judgments entered in these actions (which had been tried together by consent) after a trial before Kelly J. and a jury at Hamilton.

The actions arose out of an accident which occurred at a level crossing on the outskirts of the City of Hamilton on February 13, 1952, at about 5 p.m., in which Frederick Alexander, the husband of the plaintiff Jessie Alexander, was killed and the appellant O'Hanley suffered serious injuries.

The facts disclosed by the evidence, in so far as it is necessary to consider them, are as follows: The respondent railway company, incorporated by a private Act of the Legislature of Ontario, has been declared a work for the general advantage of Canada and the provisions of the *Railway Act*, c. 234, R.S.C. 1952, accordingly apply to its operations. In the year 1913, upon the application of the Township of Saltfleet, the Board of Railway Commissioners authorized the Township, at its own expense, to construct a highway known as the Cochrane Road across the railway company's line on Lot 34, Concession 4, the crossing to be constructed in accordance with "the standard regulations of the Board affecting highway crossings as amended May 4th, 1910." The Cochrane Road runs north and south and the crossing constructed in pursuance of the Board's authority was at rail level. The area within which it is situate has since that time been incorporated in the City of Hamilton.

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It appears that between the year in which the crossing was constructed and the year 1949, two accidents occurred at the crossing and in respect of neither of these was any blame attached to the railway company or its servants. When the area was incorporated within the limits of the city, the lands lying both to the north and south of the crossing were built up to an extent which is not described in the evidence. In December of 1949, the city solicitor wrote to the Board of Transport Commissioners saying that a petition for the installation of a wigwag signal had been presented to the Board of Control by some 200 residents of the area. As a result of this letter the Board caused the crossing to be inspected by one of its engineers, accompanied by representatives of the city and the railway company, following which the secretary advised the city that the engineer had reported that the traffic over the street was very light, that there were reasonably good sight lines in all angles of the crossing for drivers of vehicles travelling at a low rate of speed and accordingly, that the installation of automatic protection at the crossing was not warranted, in the opinion of the Board.

In October 1950, the city solicitor again applied to the Board to consider the matter, pointing out that numbers of school children crossed the crossing every day and that on account of the curves in the line and the high speed at which trains were operated there was grave danger of accidents occurring. A further inspection was then made by the Board's Chief Engineer and a traffic count directed as a result, and on June 13, 1951, the Board informed the parties that as the sight lines were considered to be reasonable for slow traffic, it did not consider that the expense of installing automatic signals was warranted at that time. Following this, the city solicitor took the matter up, apparently directly with the railway company, and the latter informed the Board of Transport Commissioners that it did not oppose an application for additional protection, providing that the expense of the installation and maintenance was borne by the city since the latter was "junior" at the crossing.

On October 3, 1951, the city solicitor made a further application to the Board to limit the rate of speed at which railway trains might be operated through the area. This

application was opposed in writing by the railway company. On February 20, 1952, a week after the accident, the Board wrote to the solicitor saying that a speed restriction to be of any benefit as a protection would require to be so restrictive as to seriously affect railway operations, but that the installation of automatic warning equipment should be further considered. Thereafter, on the joint application of the city and the railway, the installation of flashing light signals and a bell was directed by the Board.

On the afternoon of the day in question, Alexander was driving his Anglia motor car from his place of employment towards his home, where he had lived for some fourteen years and which was to the south of the crossing in question. There are double tracks on this section of the railway line. When some distance north of the crossing he stopped and picked up the appellant O'Hanley, who was his neighbour, and the car proceeded south. When it was about 100 yards to the north of the track, Alexander stopped to enable Michael Evanoff, another friend to whom he was giving a lift, to alight and then proceeded toward the crossing.

According to O'Hanley, Alexander drove the car going very slowly in what he described as "first gear" (presumably meaning low gear) and when it was about five feet from the most northerly rail he said it was practically at a standstill. This witness said that when at this point, he saw Alexander look both to the west and to the east before he proceeded on to the track and that he himself had also looked to the east and had seen nothing, though the visibility was good and there was a clear view, according to him, of at least 400 feet from that point. He said that Alexander then proceeded and that:—

> Apparently he just got on to the rail of the track and he seemed to hesitate a moment there. He had his hand up as though he was working at the controls of the car, and I do not know whether he was trying to put it in gear, or what had happened to it. I sort of saw him raise his hand, and just in seconds the train was on us.

O'Hanley said that he did not hear any whistle (which the jury found to have been blown) or bell sounded nor any sound of the approach of the train. After having said that the car was practically at a standstill when some five feet from the most northerly rail, he said, in cross-examination,

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that Alexander had apparently slowed down to make certain the track was clear. When asked if he thought the car had stopped, he said that he would say that it was stopped when it was four or five feet from the crossing. Later in his cross-examination, O'Hanley said that when he had looked to the east the car was not moving and that:—

> When he started on, we just moved up there a few feet, and the car kind of hesitated, and I looked at him and he has his hand up in the air, at the controls.

Then, in answer to a question:—

> And his wheels went over the north rail, and then for some reason the car came to a standstill?

he answered:—

> It seemed so.

No evidence was given as to the mode of shifting gears on the Anglia car and O'Hanley's statement that Alexander had his hand up in the air at the controls is unexplained.

There was other evidence as to the progress of the car immediately before the collision. Robert Crump, a witness for the appellants who lived in the vicinity north of the track, was driving along the Cochrane Road from the south approaching the crossing at the same time and seeing the train coming, stopped south of the crossing. Describing what had happened, he said that just about the time he stopped he had seen the front wheels of Alexander's car go over the first track and that:—

> The car just gave a jolt and the train took it away.

He was then asked the following questions by counsel for Alexander:—

> And where would it (i.e. the train) be when Mr. Alexander's car—have you any idea where it would be when his car *pulled up and stopped?*

to which he answered:—

> It was very close, may be about a block, or may be a couple of hundred feet, or somewhere in there.

A portion of the cross-examination of this witness reads:—

> Q. Did you look at Mr. Alexander's car after it had stopped on that north rail?
>
> A. Yes.
>
> Q. Did you continue to look at it?
>
> A. Yes, I looked both ways—at the train and the car.
>
> Q. The car is stopped on the north rail, and you see it stop?
>
> A. Yes.

Q. Did you watch what the driver did?

A. The only thing I seen Mr. Alexander do, he sort of looked down, and the car gave a jolt.

James Kirkpatrick, a boy of eighteen called by the respondents, who was walking along Cochrane Road close to the crossing, said that he had seen Crump's car stop to the south of the crossing and that he saw Alexander's car when the front wheels were on the most northerly rail when the train was just a little way around the bend, and that when he saw the car it was not moving, saying:—

Well, it seems to me it was stalled there, and it gave a little jolt, and that was all—the car itself.

Kirkpatrick had heard the whistle of the train as it approached.

Albert Draper, called for the defence, had been driving south on the Cochrane Road behind Alexander and saw the latter stop to let Evanoff alight and said that thereafter the car had stopped on the track. As to this, he said:—

Well, he proceeded very slow right up to the track, and then something seemed to go wrong with the car, and it was as far as he went.

The respondent Ricker, a railway engineer with twenty-three years' experience, said that as the train approached Cochrane Road, he had given the whistle signal at the whistling post (which was shown to be more than 1300 feet east of the crossing), that the bell had been ringing continuously since the train had left Welland and that as the engine came around the curve he had seen the car approaching the crossing from the north slowly as though it intended to stop north of the crossing, but that it had stopped on the track at a time when he estimated the engine to have been about 140 feet distant. The witness had, however, when examined for discovery at an earlier time, said that he had seen the car approaching when he was about 400 feet from the crossing, at which time he had also said that he thought it was going to stop but that it had stopped on the track in front of the train. The curve referred to was to the north and commenced 500 feet to the east of the crossing. The speed of the train was 55 miles an hour as it rounded the curve.

There was no other evidence as to the manner in which Alexander's car was driven up to the time of the collision and it thus appears from the evidence called for both of the

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parties that the car had stopped on the track immediately in front of the oncoming train. I think the only reasonable inference to draw from all of the evidence is that the engine had stalled.

The allegations of negligence made in the pleadings of both of the appellants were the same. As against the company, it was alleged that, well knowing the intersection to be dangerous, it had not posted proper warning of such danger and, further, that it permitted a "trap like condition" to exist at the intersection. As against the engineer Ricker, the negligence alleged was in driving a locomotive over a highway crossing in a thickly peopled portion of the city at an excessive rate of speed, in not keeping a proper lookout, in failing to give any sufficient warning of the approach of the train, in driving over the intersection at an excessive rate of speed, well knowing the intersection to be dangerous, and in failing to apply the brakes. It was further alleged that Ricker had the last chance of avoiding the accident but had failed to do so. To these allegations there was added a claim in nuisance against the railway company by permitting the intersection to fall into a condition of disrepair.

In addition to the oral evidence as to how Alexander's car came to be upon the crossing at the time of the accident, photographs were put in showing the view to the east from the crossing. Those put in by the appellants had been taken on February 16th, four days following the accident and one of these indicated some growth of what appeared to be weeds or grass growing between the gravel portion of the right-of-way and the fence which contained it to the north. The photographs put in by the railway company had been taken on the following October and did not, therefore, indicate the condition of that portion of the right-of-way at the time of the accident. They were, however, very clear. For at least 500 feet there was a clear and unobstructed view from the crossing. According to Constable Lawrence, the weeds or grass were quite high and there were a number of telegraph poles and he said that they interfered with the view to the east if you were north of the track. It is, however, perfectly clear that there was nothing growing on the

gravelled portion of the right-of-way which carried the double track of the railway company and the photographs filed by the appellants show that this growth could not conceivably have affected the view of Alexander and O'Hanley to the east for some 500 feet when they were at the point described by the latter as some five or six feet to the north of the most northerly rail, where Alexander either stopped or slowed down almost completely, and at the place where the car stopped on the track.

At the conclusion of the evidence, counsel for the respondents moved for the dismissal of the action on the ground that there was no evidence of negligence, but this application was refused by the learned trial judge. The questions submitted to the jury and their answers follows:—

1. Were the damages suffered by the Plaintiffs caused or contributed to by any negligence or want of care on the part of the Defendants T. H. & B. Railway Company or of their Engineer, Walter Ricker? Answer "Yes" or "No"—Answer: Yes.

2. If your answer to the first question is "yes" then in what did such negligence consist? Answer fully. Answer: The T. H. & B. Railway Company was negligent in that they having full knowledge of the special circumstances that existed at the Cochrane Road Crossing, did permit and allow their trains to operate at a high rate of speed at that point, and that Walter Ricker was negligent in that he did not exercise due care and caution in the operation of the locomotive at the Cochrane Road Crossing having full knowledge that this was a dangerous crossing as attested to by the previous accident in which Walter Ricker was involved and the fact that both the T. H. & B. Railway Company admit to blowing train whistle at this point contrary to City of Hamilton By-law No. 3553, and the T. H. & B. Railway Company did not maintain their right-of-way in a manner compatible with the restricted vision in that they allowed vegetation to grow to a height which restricts the view from Cochrane Road to the east on the north side of the rails.

3. Have the Plaintiffs satisfied you that the loss or damage suffered by the Plaintiffs did not arise through the negligence or improper conduct of the late Frederick Alexander, the owner and driver of the motor car which was in collision with the train operated by the Defendants? Answer "Yes" or "No"—Answer: Yes.

4. If you find that the damages suffered by the Plaintiffs were caused or contributed to by the negligence of the Defendants and of the late Frederick Alexander, then in what proportion do you determine the respective degrees of negligence of each—

Answer: The late Frederick Alexander ..... %
The Defendants 100%

100%

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5. Regardless of who you find is responsible for the damages suffered by the Plaintiffs or in what proportion you determine the respective degrees of negligence of those responsible, in what amount do you assess the total damages of the Plaintiffs:

Answer: Jessie Alexander $35,250.00
Wilbert O'Hanley .....$1,464.13 special
3,500.00 general

$4,964.13 Total.

The appellants had alleged as one of the negligent acts of the respondent Ricker that he had failed to give any sufficient warning of the approach of the train. What was meant by this was apparently the alleged failure to sound the engine whistle at least eighty rods before reaching the crossing and ringing the bell continuously, as required by s. 308 of the *Railway Act* (R.S.C. 1927, c. 170), as evidence was given by O'Hanley and others in an attempt to prove that these warning signals were not given. The jury, however, as shown by their answer to question 2, accepted Rickers' statement that the train whistle was blown and as they did not find that the bell had not been rung, it must be taken that they negatived this allegation of negligence (*Andreas* v. *C.P.R.* (1)).

The previous accident at the crossing in which Ricker was involved had occurred on January 12, 1952, when a horse-drawn bakery wagon, driven at a walk across the tracks at this place in the face of an oncoming train, was struck and damaged though no personal injury resulted. Apparently the driver of this wagon, who knew that the train was coming, was unable to induce the horse to move faster and the rear part of the wagon was struck before it cleared the most northerly track. The evidence as to this occurrence given by the driver of the wagon had been ruled to be inadmissible by the learned trial judge, rightly in my opinion. The occurrence, in any event, was quite irrelevant to any of the issues which the jury were required to consider.

In the answer to question 2, mention is made of a by-law of the city which had been passed in the year 1927 and which prohibited the blowing of engine whistles when approaching any highway crossing except when absolutely necessary as a signal of danger. This by-law, which would otherwise have been ineffective, had been approved by an order of

(1) (1905) 37 Can. S.C.R. 1; 5 C.R.C. 450.

the Board of Railway Commissioners in that year. The engineer had said that he had caused the whistle to be blown commencing at the whistling post. The only meaning which I am able to attribute to the reference to the blowing of the whistle at that point is that the jury considered that the fact that it was blown indicated that the engineer was aware that a dangerous condition existed at the crossing at the time in question due to the approach of Alexander's car from the north. This would appear to overlook the fact that at the whistling post, the crossing could not be seen by the engineer due to the curve in the line. If this is not what was intended by the answer, it must presumably have been intended to mean that the fact that the whistle was blown was an acknowledgment that the particular crossing was a dangerous one. As all level crossings are dangerous to traffic proceeding across them in the face of oncoming trains, this portion of the answer appears to me to be equally irrelevant.

The finding that the railway company allowed vegetation to grow on their right-of-way was not a matter which had been alleged as one of the particulars of negligence, and no application had been made to the learned trial judge for leave to amend. Such an application was made in the Court of Appeal and leave refused by that court. The matter was not, therefore, one for the consideration of the jury. However, even if it had been, it could not have affected the matter for the reasons which I have stated.

There remains that portion of the answer to question 2 which finds the respondent railway company to have been negligent in that with knowledge of the special circumstances that existed, they allowed their trains to operate at a high rate of speed at that point. The expression "special circumstances" appears to have been taken from a phrase used by Riddel J. in *Walker* v. *Grand Trunk Ry.* (1), where that learned judge referred to any "special circumstances of danger" which might affect the obligation of a railway company to a traveller on the highway. By this, I take it, is meant a failure on the part of a railway company of its duty to exercise its statutory powers without negligence. So long ago as 1886, Lord Halsbury L.C., pointed out

(1) (1920) 47 O.L.R. 439 at 450; 55 D.L.R. 495.

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in *Wakelin* v. *London and Southwestern Ry. Co.*, (1), that railway companies are permitted to establish their undertakings for the express purpose of running trains at high speed along their lines. For reasons which are discussed at length in the judgment of Sedgewick J. in *Grand Trunk Ry.* v. *McKay* (2), Parliament, in enacting the *Railway Act*, did not consider that it was practical in a country where distances are so vast as they are in Canada to require that gates be installed at level crossings as was required by the *Railway Clauses Consolidation Act* in England. In place of such a statutory requirement, authority was vested at first in the Railway Committee of the Privy Council and thereafter in the Board of Railway Commissioners and their successors, the Board of Transport Commissioners, to regulate and limit the rate of speed at which trains may be run in any city, town or village, and to determine the precautions to be taken for the protection of the public at railway crossings. In the judgment of Davies J. (as he then was) in that case, with which the Chief Justice and Killam J. concurred, the following passage appears at p. 97:—

> In my judgment Parliament has by the 187th section of the Railway Act vested in the Railway Committee of the Privy Council the exclusive power and duty of determining the character and extent of the protection which should be given to the public at places where the railway track crosses a highway at rail level. The exercise of such important powers and duties requires the careful consideration of many possible conflicting interests and the fullest powers to enable this committee to bring all such interests before them and determine all necessary facts, are given by the Act in question. Similar powers to enable this tribunal effectively to enforce any order it may make in the premises are vested in the committee. It is quite open to any municipality through which a railway runs at any time it thinks proper, or to any interested person or corporation, or, indeed, to any one of the travelling public to invoke the exercise of this jurisdiction. The composition of the tribunal, the simplicity and ease with which its powers can be invoked, and the completeness with which it can carry out the intentions of Parliament and the scope and extent of its powers, all combine to convince me that Parliament designed to establish and has established a tribunal which while fairly guarding the interests of the railway corporations would at the same time provide the fullest necessary protection to the travelling public. I cannot think that these powers, so full, so complete, and so capable of being made effective, can if exercised be subject to review either as to their adequacy or otherwise by a jury, nor do I think that failure to invoke the exercise of the powers is of itself sufficient to take the matter away from the jurisdiction to which Parliament has committed it and vest it in a jury.

(1) (1886) 12 App. Cas. 41. (2) (1903) 34 Can. S.C.R. 81.

It was under the provisions of the statute that continue the powers referred to in the Board of Transport Commissioners that the applications were made by the City of Hamilton in December, 1949, October, 1950 and October, 1951, and the very matter referred to in the answer made by the jury was considered by the Board. While the first two applications were for the installation of further warning signals at the crossing, the last was to direct a limitation of the speed of trains operated on the line. However, all of the applications raised before the Board the question as to what measures, if any, were requisite for the protection of persons passing along the highway across this level crossing and this would require consideration both of the necessity of warning signals, the limitation of speed or whatever other matters were relevant to the question of affording reasonable protection.

The existence of the curve in the line and the fact that it was utilized for passenger traffic was the very reason for each of applications made and, as shown by the answer made by the Board on June 13, 1951, it did not consider that the installation of automatic signals was warranted, and, as shown by the letter of February 20, 1952, did not consider that there should be any order restricting the speed of the trains.

In my opinion, to give effect to this finding of the jury based on the speed at which the train was operated would be to allow that body to usurp the functions of the Board of Transport Commissioners and is therefore wholly ineffective.

The railway company is authorized by its statute to operate passenger trains and these must be operated at high rates of speed for, amongst others, the reasons pointed out by Sedgewick J. in *McKay's* case. The finding of the jury, even if the matter had been one with which, in the circumstances of this case, it was proper for them to deal, would simply mean that a train such as this must, at a place such as that in question, proceed at such a limited rate of speed as to enable the engineer to bring the train to a halt if a motor car or other vehicle stops or is stalled upon the level crossing, and that the failure to do so is actionable negligence. No support for any such contention is to be found in the judgments of this court in *Columbia Bithulitic*

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ALEXANDER v. TORONTO, HAMILTON & BUFFALO RY. CO. AND RICKER

Locke J.

v. *B.C. Electric Ry* (1), in my opinion. For the reasons explained in the judgment of Duff J., as he then was, the cars of the interurban railway, the operation of which was in question, were merely large street cars, as pointed out in that judgment, to which different considerations apply to those which affect the operation of passenger trains of the nature referred to in *Grand Trunk Ry.* v. *McKay*.

The proximate cause of this accident is made clear by evidence which, as I have pointed out, is undisputed, disclosing that the motor car was stopped on the track in the face of the oncoming train in circumstances that gave the engineer no opportunity of avoiding the collision. As Alexander had lived for many years in the vicinity and must have known that the train passed at about that time at high speed, it is apparent that it was some accidental occurrence, such as the stalling of the engine, which brought the car to a halt. If it be the case that the train had not appeared around the curve when he undertook to make the crossing, and if the train had not yet reached the point where the whistle was blown, the occurrence would appear to be a pure accident. If, on the other hand, Alexander embarked upon the crossing after the whistle warning him had been blown and after the train was plainly visible at a distance of 500 feet, it was this negligent act alone which caused the accident. As Nesbitt J. pointed out in *Grand Trunk Ry.* v. *Hainer* (2):

> . . . the cases clearly establish that if a man actually looks and sees a coming train and crosses with full knowledge of its approach he does so at his own risk.

I respectfully agree with the finding of the Court of Appeal that there was no evidence of any actionable negligence on the part of either of the respondents and I would dismiss these appeals with costs if they are demanded.

CARTWRIGHT J.:—I agree that these appeals should be dismissed with costs if demanded.

Appeals dismissed with costs, if demanded.

Solicitors for the appellants: *White, Paikin & Robinson.*

Solicitors for the respondents: *Soule & Soule.*

(1) (1917) 55 Can. S.C.R. 1.

(2) (1905) 36 Can. S.C.R. 180 at 199; 5 C.R.C. 59 at 74.

BEATRICE C. DEGLMAN *(Defendant)* ... APPELLANT;

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*Feb. 25, 26
*June 21

AND

THE GUARANTY TRUST COMPANY OF CANADA (ADMINISTRATOR OF THE ESTATE OF LAURA CONSTANTINEAU BRUNET, DECEASED) *(Defendant)* ..... RESPONDENT,

AND

GEORGE CONSTANTINEAU *(Plaintiff)* RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contracts—Land—Parol agreement to leave real property by will for services rendered—Part performance—Referability to such land—Statute of Frauds, s. 4—Quantum Meruit—Statute of Limitations.

The respondent sought to recover from the estate of his deceased aunt under an oral agreement whereby the aunt, on condition that the respondent perform such services as she might request during her lifetime, undertook to make adequate provision for him in her will and in particular to leave him a certain piece of land. The respondent fully performed his part of the agreement. The aunt, who owned other land as well, died intestate.

Held: that the acts relied upon were not unequivocally and of their own nature referable to any dealing with the land in question so as to take the case out of s. 4 of the Statute of Frauds; but that the deceased having had the benefits of full performance by the respondent of an existing although unenforceable contract, the law imposed upon her, and so upon her estate, the obligation to pay the fair value of the services rendered. The cause of action did not accrue until the death of the deceased intestate and the statutory period only then began to run. *Wilson* v. *Cameron* 30 O.L.R. 486 and *Fox* v. *White* [1935] O.W.N. 316 overruled. The rule in *Maddison* v. *Alderson* 8 App. Cas. 467, as adopted in *McNeil* v. *Corbett* 39 Can. S.C.R. 608, followed.

APPEAL by the defendant, representative of the next-of-kin, from the judgment of the Court of Appeal for Ontario (1) (*sub nom Constantineau* v. *Guaranty Trust Co.*), which dismissed her appeal from the judgment of Spence J. enforcing an oral contract regarding certain land.

*PRESENT: Rinfret C.J. and Taschereau, Rand, Estey, Locke, Cartwright and Fauteux JJ.

(1) [1953] O.W.N. 665; [1954] 3 D.L.R. 785.

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Alastair Macdonald, Q.C. and *G. J. Gorman* for the appellant.

M. H. Fyfe, Q.C. for the respondent.

The judgment of Rinfret C.J. and of Taschereau and Rand JJ. was delivered by:

RAND J.:—In this appeal the narrow question is raised as to the nature of part performance which will enable the court to order specific performance of a contract relating to lands unenforceable at law by reason of s. 4 of the Statute of Frauds. The respondent Constantineau claims the benefit of such a contract and the appellant represents the next of kin other than the respondent of the deceased, Laura Brunet, who resist it.

The respondent was the nephew of the deceased. Both lived in Ottawa. When he was about 20 years of age, and while attending a technical school, for six months of the school year 1934-35 he lived with his aunt at No. 550 Besserer Street. Both that and the house on the adjoining lot, No. 548, were owned by the aunt and it was during this time that she is claimed to have agreed that if the nephew would be good to her and do such services for her as she might from time to time request during her lifetime she would make adequate provision for him in her will, and in particular that she would leave to him the premises at No. 548. While staying with her the nephew did the chores around both houses which, except for an apartment used by his aunt, were occupied by tenants. When the term ended he returned to the home of his mother on another street. In the autumn of that year he worked on the national highway in the northern part of Ontario. In the spring of 1936 he took a job on a railway at a point outside of Ottawa and at the end of that year, returning to Ottawa, he obtained a position with the city police force. In 1941 he married. At no time did he live at the house No. 548 or, apart from the six months, at the house No. 550.

The performance consisted of taking his aunt about in her own or his automobile on trips to Montreal and elsewhere, and on pleasure drives, of doing odd jobs about the two houses, and of various accommodations such as errands

and minor services for her personal needs. These circumstances, Spence J. at trial and the Court of Appeal, finding a contract, have held to be sufficient grounds for disregarding the prohibition of the statute.

The leading case on this question is *Maddison* v. *Alderson,* (1). The facts there were much stronger than those before us. The plaintiff, giving up all prospects of any other course of life, had spent over twenty years as housekeeper of the intestate until his death without wages on the strength of his promise to leave her the manor on which they lived. A defectively executed will made her a beneficiary to the extent of a life interest in all his property, real and personal. The House of Lords held that, assuming a contract, there had been no such part performance as would answer s. 4.

The Lord Chancellor, Earl Selborne, states the principle in these words:—

> All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequence.

At p. 479, referring to the rule that payment of the purchase price is not sufficient, he says:—

> The best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself) until the connection is established by parol testimony, indicative of a contract concerning land . . . All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature referable to some such agreement as that alleged.

Lord O'Hagan, at p. 485, uses this language:—

> It must be unequivocal. It must have relation to the one agreement relied upon, and to no other when it must be such, in Lord Hardwicke's words, "as could be done with no other view or design than to perform that agreement".

At p. 489 Lord Blackburn, speaking of the delivery of possession as removing the bar of the statute, says:—

> This is, I think, in effect to construe the fourth section of the Statute of Frauds as if it contained these words, "or unless possession of the land shall be given and accepted". Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was res integra in refusing to interpolate such words or put such a construction on the statute.

(1) (1883) 8 App. Cas. 467.

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I am quite unable to distinguish that authority from the matter before us. Here, as there, the acts of performance by themselves are wholly neutral and have no more relation to a contract connected with premises No. 548 than with those of No. 550 or than to mere expectation that his aunt would requite his solicitude in her will, or that they were given gratuitously or on terms that the time and outlays would be compensated in money. In relation to specific performance, strict pleading would seem to require a demonstrated connection between the acts of performance and a dealing with the land before evidence of the terms of any agreement is admissible. This exception of part performance is an anomaly; it is based on equities resulting from the acts done; but unless we are to say that, after performance by one party, any refusal to perform by the other gives rise to them, which would in large measure write off the section, we must draw the line where those acts are referable and referable only to the contract alleged. The facts here are almost the classical case against which the statute was aimed: they have been found to be truly stated and I accept that; but it is the nature of the proof that is condemned, not the facts, and their truth at law is irrelevant. Against this, equity intervenes only in circumstances that are not present here.

There remains the question of recovery for the services rendered on the basis of a *quantum meruit*. On the findings of both courts below the services were not given gratuitously but on the footing of a contractual relation: they were to be paid for. The statute in such a case does not touch the principle of restitution against what would otherwise be an unjust enrichment of the defendant at the expense of the plaintiff. This is exemplified in the simple case of part or full payment in money as the price under an oral contract; it would be inequitable to allow the promissor to keep both the land and the money and the other party to the bargain is entitled to recover what he has paid. Similarly is it in the case of services given.

This matter is elaborated exhaustively in the Restatement of the Law of Contract issued by the American Law Institute and Professor Williston's monumental work on Contracts in vol. 2, s. 536 deals with the same topic. On the principles there laid down the respondent is entitled to

recover for his services and outlays what the deceased would have had to pay for them on a purely business basis to any other person in the position of the respondent. The evidence covers generally and perhaps in the only way possible the particulars, but enough is shown to enable the court to make a fair determination of the amount called for; and since it would be to the benefit of the other beneficiaries to bring an end to this litigation, I think we should not hesitate to do that by fixing the amount to be allowed. This I place at the sum of $3,000.

The appeal will therefore be allowed and the judgment modified by declaring the respondent entitled to recover against the respondent administrator the sum of $3,000, all costs will be paid out of the estate, those of the administrator as between solicitor and client.

The judgment of Estey, Locke, Cartwright and Fauteux JJ. was delivered by:

CARTWRIGHT J.:—The facts out of which this appeal arises are stated in the reasons of my brother Rand.

The appeal was argued on the assumption, that there was an oral contract made between the respondent and the late Laura Constantineau Brunet under the terms of which the former was to perform certain services in consideration whereof the latter was to devise No. 548 Besserer Street to him, that the contract was fully performed by the respondent and that there was no defence to his claim to have the contract specifically performed other than the fact that there was no memorandum in writing thereof as required by the Statute of Frauds, which was duly pleaded.

It is clear that none of the numerous acts done by the respondent in performance of the contract were in their own nature unequivocally referable to No. 548 Besserer Street, or to any dealing with that land. On the other hand there are concurrent findings of fact, which were not questioned before us, that the acts done by the respondent were in their nature referable to some contract existing between the parties. On this view of the facts the learned trial judge and the Court of Appeal were of opinion that the acts done by the respondent in performance of the agreement were sufficient to take it out of the operation of the Statute of Frauds and that it ought to be specifically

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enforced. The reasons which brought the Court of Appeal to this conclusion are succinctly stated in the following paragraph:—

> A more serious argument presented by the appellant was that this agreement being an agreement whereby the aunt would leave to him at her death a particular piece of property, the acts of part performance must be such as in their own nature were referable to and affected the land in question, and he relied upon the decision and judicial views expressed in the case of *Maddison* v. *Alderson* (1). We have, however, been referred to the decision in this Court of *Fox* v. *White* (2), where this Court distinguished the decision in *Maddison* v. *Alderson* and the principles there laid down from a case such as the case at bar, and in that case this Court held that if the acts relied upon as being acts of part performance were referable to some contract, and consistent with the contract alleged, then evidence was admissible as to the precise terms of the particular contract alleged. We are of the opinion that the acts in this case which are alleged to be acts of part performance are plainly referable to the existence of a contract and are consistent with the particular contract alleged, and that when the evidence is admitted as to the precise terms of the particular contract the plaintiff's case is made out and the acts of part performance take the case out of the Statute.

The judgment of the Court of Appeal in *Fox* v. *White* is reported only in the Ontario Weekly Notes, but counsel informed us that they had examined the original reasons of the learned Justices of Appeal and that nothing of substance is omitted in the printed report. It is to be observed that Middleton and Masten JJ.A. who agreed with Riddel J.A. in dismissing the appeal did not in terms concur with his reasons. The statement of Riddel J.A. applied by the Court of Appeal in the case at bar, was taken from the article on Specific Performance in Halsbury's Laws of England, 1st Edition, Vol. 27, para. 49, of which Sir Edward Fry was the author. That statement of the rule was expressly approved by the Court of Appeal for Ontario in *Wilson* v. *Cameron* (3). At pages 490 and 491 Sir William Meredith C.J.O., who delivered the unanimous judgment of the Court, said:—

> In Fry on Specific Performance, 5th ed., para. 582, it is said that "the true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged". And again (para. 584) it is said: "To make the acts of part performance effective to take the contract out of the Statute

(1) (1883) 8 App. Cas. 467. (2) [1935] O.W.N. 316.
(3) (1914) 30 O.L.R. 486.

of Frauds, they must be consistent with the contract alleged and also such as cannot be referred to any other title than a contract, nor have been done with any other view or design than to perform a contract".

To the same effect is the statement of the principle in Halsbury's Laws of England, Vol. 27, para. 49. After stating the principle in somewhat similar language to that used by the Lord Chancellor in *Maddison* v. *Alderson* (1), to which I shall afterwards refer, it is there said: "If, however, the acts of part performance are referable to some contract, and are consistent with the contract alleged, evidence is admissible as to the precise terms of the particular contract which is alleged. In effect, the necessity of writing is dispensed with, and the Court is entitled to find what the parties have actually agreed, although the terms of the agreement go beyond those to which the acts of part performance in themselves point".

The passages quoted from the 5th Edition of Fry on Specific Performance and from the 1st Edition of Halsbury are repeated in the same words in the current editions of those works.

In *Wilson* v. *Cameron* at page 491, after quoting the statement of the Earl of Selborne L.C. in *Maddison* v. *Alderson* at page 479:— "All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged", Meredith C.J.O. proceeds:—

> It is plain, I think, that the Lord Chancellor, by the use of the words "some such agreement as that alleged", did not intend to state the principle in narrower terms than those in which it is stated in Fry on Specific Performance and Halsbury's Laws of England in the passages I have quoted.

It will be observed that in *Fox* v. *White,* Riddell J.A. was of opinion that some, if not all, of the expressions of opinion in *Maddison* v. *Alderson* as to the nature of the acts of performance which will take an unwritten contract out of the operation of the Statute were *obiter* as the Law Lords had held that no contract had been proved and that ground was sufficient to dispose of the appeal. With the utmost respect, I am unable to agree with this. While it is true that the Law Lords expressed doubts as to the existence of a contract in that case, it appears to me from the following passages that what was said in their speeches in regard to part performance formed the *ratio decidendi* of the case.

At pages 473 and 474, the Earl of Selborne L.C. said:—

> Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that a contract was proved in this case (notwithstanding the character of the evidence and the form of the verdict), on which, but

(1) (1883) 8 App. Cas. 457 at 479.

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for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it necessary for your Lordships now to examine the doctrine of equity as to part performance of parol contracts.

At page 484, Lord O'Hagan said:—

In this case, the learned judge who presided at the trial, and the judges of the Court of Appeal seem all to have thought that an unwritten contract capable of execution by a Court of Equity, on the fulfilment of the proper conditions, was established by the verdict and the reported testimony. In my view, it is not necessary to decide the point, though it was the subject of ingenious argument at the bar, on the one side and the other.

At pages 487 and 488, Lord Blackburn said:—

But it seems to me that in this case the evidence is evidence from which a contract would not have been found by a jury, if it had been explained to them that to make a contract there must be a bargain between both parties. I doubt, therefore, whether in any way the judgment in favour of the defendant could have stood, though perhaps it might have been necessary to have a new trial. I do not decide this, for it is quite clear that the contract alleged is a contract for an interest in lands; and it is not denied that there was no note or memorandum of the contract signed by Thomas Alderson.

And I have come to the conclusion that this is not a case in which part performance gives an equitable right to have the contract (assuming that there was one) specifically performed.

At page 491 Lord FitzGerald said:

The decision of your Lordships' House is to rest on the ground that there was nothing in the case to take the supposed agreement out of the operation of the 4th section of the Statute of Frauds.

In *Wilson* v. *Cameron,* Meredith C.J.O. did not treat what was said in the judgments in *Maddison* v. *Alderson* in regard to the point with which we are here concerned as *obiter,* but interpreted those judgments as supporting the statements from Halsbury and Fry on Specific Performance which he adopted in the passage which is quoted from his judgment above. I am unable to agree with this interpretation. After an anxious consideration of the judgments in *Maddison* v. *Alderson,* of all the cases cited by counsel and of the decisions referred to by the Court of Appeal for Ontario in *Fox* v. *White* and in *Wilson* v. *Cameron,* I have reached the conclusion that the correct interpretation of the decision in *Maddison* v. *Alderson* is that adopted by this Court in

McNeil v. *Corbett* (1). In that case the unanimous judgment of the Court was delivered by Duff J., as he then was. The judgment turns on the question whether the acts relied upon as part performance were sufficient to take the contract sued on, which was for the purchase of an interest in lands and of which there was no sufficient written memorandum, out of the operation of the Statute of Frauds. At pages 611 and 612 Duff J. says:—

> With great respect, moreover, I must disagree with the view of the court below that the plaintiff has made out a case enabling him to take advantage of the doctrine known as the doctrine of part performance. A condition of the application of that doctrine is thus stated by Lord Selborne, in *Maddison* v. *Alderson*. at page 479:—
>
> > "All the authorities shew that the acts relied upon must be unequivocally, and in their own nature, referable to some such agreement as that alleged;"
>
> i.e. to an agreement respecting the lands themselves; and, as further explained in that case, a plaintiff who relies upon acts of part performance to excuse the non-production of a note or memorandum under the Statute of Frauds, should first prove the acts relied upon; it is only after such acts unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued upon have been proved that evidence of the oral agreement becomes admissible for the purpose of explaining those acts. It is for this reason that a payment of purchase money alone can never be a sufficient act of performance within the rule.
>
> Here there is nothing in the nature of the acts proved which bears any necessary relation to the interest in land said to have been the subject of the agreement in question.

Mr. Fyfe argues that it appears from the report of the judgment in this case in the Court below (41 N.S.R. 110) that the only act that could have been relied on as a part performance was the payment of money and that consequently what was said by Duff J. in the passage quoted above was not strictly necessary to the decision of the case and should be regarded as *obiter*. I do not find it necessary to decide whether the passage quoted is, strictly speaking, binding upon us as I am convinced that it states the law correctly.

It may be observed that the reports do not indicate whether the decision in *McNeil* v. *Corbett* was referred to in argument in *Fox* v. *White* or in *Wilson* v. *Cameron;* it is not referred to in the judgments in either case.

(1) (1907) 39 Can. S.C.R. 608.

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An interpretation similar to that in *McNeil* v. *Corbett* was placed upon the decision in *Maddison* v. *Alderson* by Turgeon J.A., with whom Haultain C.J.S. and Lamont and McKay JJ.A. agreed, in *Re Meston, Meston* v. *Gray et al* (1). At page 888, Turgeon J.A. said:—

> . . . In order to exclude the operation of the Statute of Frauds, the part performance relied upon must be unequivocally referable to the contract asserted. The acts performed must speak for themselves, and must point unmistakably to a contract affecting the ownership or the tenure of the land. and to nothing else.

I have already expressed the view that the acts relied upon by the respondent in the case at bar are not unequivocally and in their own nature referable to any dealing with the land in question and on this point the appellant is entitled to succeed.

It remains to consider the respondent's alternative claim to recover for the value of the services which he performed for the deceased and the possible application to such a claim of the Statute of Limitations.

I agree with the conclusion of my brother Rand that the respondent is entitled to recover the value of these services from the respondent administrator. This right appears to me to be based, not on the contract, but on an obligation imposed by law.

In *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* (2), Lord Wright said, at page 61:—

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

and at page 62:

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort though it resembles contract rather than tort.

(1) [1925] 4 D.L.R. 887. (2) [1943] A.C. 32.

Lord Wright's judgment appears to me to be in agreement with the view stated in Williston on Contracts referred to by my brother Rand.

In *Scott* v. *Pattison* (1) the plaintiff served the defendant under a contract for service not to be performed within one year which was held not to be enforceable by reason of the Statute of Frauds. It was held that he could nonetheless sue in *assumpsit* on an implied contract to pay him according to his deserts. While I respectfully agree with the result arrived at in *Scott* v. *Pattison* I do not think it is accurate to say that there was an implied promise. In my view it was correctly decided in *Britain* v. *Rossiter* (2) that where there is an express contract between the parties which turns out to be unenforceable by reason of the Statute of Frauds no other contract between the parties can be implied from the doing of acts in performance of the express but unenforceable contract. At page 127 Brett L.J., after stating that the express contract although unenforceable was not void but continued to exist, said:—

> It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing.

Cotton L.J., at pages 129 and 130 and Thesiger L.J. at page 133 expressed the same view. In the case at bar all the acts for which the respondent asks to be paid under his alternative claim were clearly done in performance of the existing but unenforceable contract with the deceased that she would devise 548 Besserer Street to him, and to infer from them a fresh contract to pay the value of the services in money would be, in the words of Brett L.J. quoted above, to draw an inference contrary to the fact.

In my opinion when the Statute of Frauds was pleaded the express contract was thereby rendered unenforceable, but, the deceased having received the benefits of the full performance of the contract by the respondent, the law imposed upon her, and so on her estate, the obligation to pay the fair value of the services rendered to her.

(1) [1923] 2 K.B. 723. (2) (1879) 11 Q.B.D. 123.

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Cartwright J.

If this is, as I think, the right view of the nature of the obligation upon which the respondent's claim rests it follows that the Statute of Limitations can have no application. There are a number of cases in which on facts somewhat similar to those in the case at bar, the opinion has been expressed that while a party in the position of the respondent in the present case can recover the value of services rendered by him under an unenforceable contract his right to recover is limited to the value of the services rendered in the six years preceding the commencement of the action. Examples of such cases are, *Cross* v. *Cleary* (1), *Re Meston, Meston* v. *Gray* (*supra*) and *Walker* v. *Boughner* (2). These cases seem to have proceeded on the view that the liability of the defendant was under "an implied promise to pay a reasonable sum per annum" (see *Cross* v. *Cleary* (*supra*) at page 545). I have already indicated my reasons for holding that, in the case at bar, no such promise can be implied. In my opinion the obligation which the law imposes upon the respondent administrator did not arise until the deceased died intestate. It may well be that throughout her life it was her intention to make a will in fulfilment of the existing although unenforceable contract and until her death the respondent had no reason to doubt that she would do so. The statutory period of limitation does not commence to run until the plaintiff's cause of action has accrued; and on the facts of the case at bar the cause of action upon which the respondent is entitled to succeed did not accrue until the death of the deceased intestate.

For the above reasons I would dispose of the appeal as proposed by my brother Rand.

Appeal allowed with costs.

Solicitors for the appellant: *Clark, Macdonald, Connolly, Affleck & Brocklesby.*

Solicitors for the respondents: *Beament, Fyfe & Ault.*

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(1) (1898) 29 O.R. 542. (2) (1889) 18 O.R. 448.

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT

AND

ANACONDA AMERICAN BRASS LIMITED ..... RESPONDENT

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*Mar. 22, 23, 24, 25

*Nov. 1

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Income tax—Excess profits tax—Whether respondent in computing its net taxable income for 1947 was entitled to use the LIFO method of inventory accounting.—Excess Profits Tax Act, 1940, S. of C. 1940, c. 32, s. 2(1) (F)—Income War Tax Act, R.S.C. 1927, c. 97, s. 3(1).

The respondent, at its primary brass mill, produced semi-finished copper and other copper alloys from raw metals it purchased. It neither traded nor speculated in its raw materials. The prices at which it sold its products were based upon the replacement cost of their metal content and a processing charge which included all expenses, other than the replacement cost of the metal, and an allowance for profit. The nature of its business required a large inventory and the rate of its turnover was slow. It made no attempt to use the raw materials in the order of their purchase or in any particular order.

The respondent had been using the last in first out (LIFO) method of inventory accounting, for its own corporate purposes, since 1936, but only commenced using it in computing its income and excess profits tax in 1946. The Minister refused to recognized the right to use that method and determined that the first in first out (FIFO) method should be followed. The respondent's appeal to the Exchequer Court in respect of its assessment for the year 1947 was successful.

Held (Kerwin C.J. and Estey J. dissenting), that the appeal should be dismissed.

Per Taschereau and Locke JJ.: In the absence of any statutory direction, manufacturing costs of this nature are to be determined upon the ordinary principles of commercial trading. The evidence in this case leads to the conclusion that, in a business such as this, the LIFO method of inventory accounting determined what was the true income of the respondent with greater accuracy than any other method which it was practical to apply.

Per Taschereau and Cartwright JJ.: Where, as in the case at bar, the dispute as to what were the true gains for a particular year centred on the question as to which of two well-recognized systems of accounting would in the case of the business carried on by the respondent most nearly arrive at the true figure for the materials cost of its sales for such year, that question was one of fact. The evidence fully supported the finding of fact made by the trial judge on this crucial question.

*PRESENT: Kerwin C.J. and Taschereau, Estey, Locke and Cartwright JJ.

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Per Kerwin C.J. (dissenting): Even though the LIFO assumption is recognized as a proper method for corporate purposes, that is not sufficient for the purposes of the taxation sought to be imposed, as it does not determine the respondent's true profits more accurately than the FIFO method which is more in accordance with the known facts.

Per Estey J. (dissenting): Under the LIFO method, the current market value is used to compute the value of only that quantity assumed to be added to the inventory in the last year and the valuation of the balance of the inventory is computed by using the market values of former years. Consequently, since the assumption under the FIFO method eliminates many of the former years, the computation under the FIFO method more closely approximates the current value.

APPEAL from the judgment of the Exchequer Court of Canada (1), Thorson P., reversing the Minister's decision as to the method of inventory accounting to be used by the respondent in computing its income and excess profits tax.

C. F. H. Carson Q.C., W. R. Jackett Q.C., F. J. Cross and *A. Findlay* for the appellant.

A. S. Pattillo Q.C., W. E. P. DeRoche Q.C. and *A. J. MacIntosh* for the respondent.

THE CHIEF JUSTICE (dissenting):—This appeal involves ascertainment of the proper amount of excess profits for its 1947 taxation year of the respondent company Anaconda American Brass Ltd. pursuant to the *Excess Profits Tax Act 1940*. By Section 2(1) (f) of that *Act* "profits" means the amount of the company's net taxable income as determined under the *Income War Tax Act* and in accordance with the well known Section 3(1) of the latter, "income" means the annual net profit; that is, profits are not to be ascertained over any period except (as applied to the present case) the 1947 calendar year.

The statement of Lord Clyde in *Whimster & Co.* v. *The Commissioners of Inland Revenue* (2), as to the two fundamental matters to be kept in mind in computing annual profits is accepted in England and is applicable here. It appears at p. 823 of the report:—

> In the first place, the profits of any particular year or accounting period must be taken to consist of the difference between the receipts from the trade or business *during such year or accounting period* and the expenditure laid out to earn *those receipts*. In the second place, the account of profit and loss to be made up for the purpose of *ascertaining that difference* must be framed consistently with the ordinary principles of commercial accounting, so far as applicable, and in conformity with the

(1) [1952] Ex. C.R. 297; C.T.C. 116. (2) (1925) 12 Tax Cas. 813.

rules of the Income Tax Act, or of that Act as modified by the provisions and schedules of the Acts regulating Excess Profits Duty, as the case may be. For example, the ordinary principles of commercial accounting require that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and at the end of the period covered by the account should be entered at cost or market price, whichever is the lower; although there is nothing about this in the taxing statutes.

The second of these propositions was approved by the House of Lords in *Ryan* v. *Asia Mill Ltd.* (1). At p. 293, Lord Porter states:—

> It was also common ground that in computing such profits the value of the Appellant Company's stock-in-trade in hand at 13th January, 1945, was, in accordance with the principles enunciated in *Whimster & Co.* v. *Commissioners of Inland Revenue,* 1926 S.C. 20 at page 25, required to be included at a figure representing its true cost to the Appellant Company.

At p. 300, Lord Radcliffe, with whom Lord Normand agreed, puts it thus:—

> Here we are dealing with the application of 'the principle of commercial accounting . . . that in the profit and loss account of a merchant's or manufacturer's business the values of the stock-in-trade at the beginning and the end of the period covered by the account should be entered at cost or market price, whichever is the lower'.

Lord Clyde's two propositions were approved by the Court of Appeal in *Patrick* v. *Broadstone Mills Ltd.* (2). At p. 171 Lord Justice Singleton (with whom Birkett and Hodson, LJJ., agreed, although the former added a comment of his own) set out the extract given above. After setting out the headnote in *Sun Insurance Office* v. *Clark* (3) as it appears in 6 Tax Cas. 59 and Lord Loreburn's examination in his speech in that case of the previous decision of the House of Lords in *General Accident, Fire and Life Assurance Corpn Ltd* v. *McGowan* (4), Lord Justice Singleton extracts what the Lord Chancellor had said (p. 77) towards the end of his speech:—

> I am equally anxious that your Lordships should not be supposed to have laid down that the method applied by the commissioners in the present case has any universal application. If the Crown wishes in any future instance to dispute it they can do so by evidence, and it is not to be presumed that it is either right or wrong. A rule of thumb may be very desirable, but cannot be substituted for the only rule of law that I know of, viz.: that the true gains are to be ascertained as nearly as it can be done.

(1) (1951) 32 Tax Cas. 275.
(2) [1954] 1 All E.R. 163.
(3) [1912] A.C. 443.
(4) [1908] A.C. 207.

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Leave to appeal to the House of Lords in the Patrick case was refused by the Court of Appeal (1) and no motion for leave has been made to the House itself.

Two other preliminary but important matters may be mentioned. The first of these is that in *Russell* v. *Town and County Bank* (2), Lord Herschell stated:—

> The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts.

Lord Fitzgerald, at p. 429, in the same case, stated:—

> 'Profits' I read on authority to be the whole of the incomings of a concern after deducting the whole of the expenses of earning them—that is, what is gained by the trade.

The second is Lord Cairns' statement in *Coltness Iron Company* v. *Black* (3):

> It may be proper for a trader, or for a trading company, to perform in his or their books an operation of this kind every year, in order to judge of the sum that can in that year be safely taken out of the trade and spent as trade profits.

This part of Lord Cairns' speech was reiterated by Lord Buckmaster (with whom Lord Atkinson concurred) in *Navel Colliery* v. *Commissioners of Inland Revenue* (4), to which Lord Buckmaster added:—

> . . . But it cannot be done when the question is the amount of profits received.

To the same effect are these statements by Lord Sands in the *Whimster* case:—

> The consideration of how it would be prudent for a trader to act does not solve the question here presented to us as one of Revenue Law. Under this law the profits are the profits realized in the course of the year. (p. 826).

> The manner in which they have adjusted their accounts was probably quite reasonable as a domestic arrangement, but it would lead to great confusion if such haphazard and speculative estimates were to enter into the business of the collection of the public revenue. (p. 827).

The respondent was incorporated in Canada in 1922 but is a subsidiary of The American Brass Co., a United States corporation. It operates a primary brass mill and, from raw metals which it purchases from various Canadian mining

(1) 35 Tax Cas. 72.
(2) (1883) 13 A.C. 418 at 424.
(3) (1881) 6 A.C. 315 at 324.
(4) (1928) 12 Tax Cas. 1017 at 1047.

companies and from scrap, it produces semi-finished copper and copper brass alloys in the form of sheets, rods, seamless tubes, and shapes. About 90% of the metal content of its products consists of copper (over 80%) and zinc (about 15%). It purchases from companies with which it has no connection all its raw metals at the market and has always avoided speculation in their price as it seeks to make a profit entirely from their fabrication. The prices charged for its products are based upon the replacement cost of the metal content of its product and a processing charge which includes all expenses, other than the replacement cost of the metal, and an allowance for profit. The processing charge has never been affected by fluctuations in the prices of the raw metals, which, particularly in the case of copper and zinc, have, since the lifting of price controls on June 10, 1947, varied considerably. With unimportant exceptions: from January 1, 1947, until February 28, 1947, it accepted orders on the condition that the price would be that shown on its price list in effect of the first day of the month in which the order was shipped; from February 28, 1947, until December 31, 1947, it accepted orders on the condition that the price would be that shown on the price list in effect on the date when the order was shipped.

During the first few days of each month the company calculated the raw materials which would be required, and what orders it would fill by shipment, in the next calendar month. The amount of raw materials ordered was the amount so estimated to be required in that next calendar month. The company's business is not seasonal; its turn over is slow (about three or four times a year) and the inventory required is large physically and in value. One pound of metal in the inventory has the same value as another, no attempt is made to identify any portion of the inventory, and any record of scrap would be of very little use.

The company commenced and ended the year 1947 with an inventory of raw materials. The question is not as to the quantities but as to values. It is settled, if not admitted, that the values must be taken at market or cost, whichever be lower. The difficulty arises because the company put a value on its inventory at the end of 1947 on the Lifo assumption, that is, last in first out, while the appellant valued

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that stock on the Fifo assumption, that is, first in first out. Neither theory is based on any presumption as to the actual physical movement of the metals in the course of operations. As to Lifo, to quote Mr. DeRoche, a witness for the company, it is an "assumption as to the order in which costs should flow into cost of sales and for the establishing of the amount of cost to be assigned to the quantity on hand"; it is "indicative of the flow of costs which are employed in the method". If the company piled its metals in such a way as to be able to allocate the actual purchase prices to the various lots there would be no difficulty, because the cost of what had been used in processing, whereby its profits were made, would be known. Since it did not do this it was necessary to adopt some method, the result of which would most nearly approach the known facts.

As to copper, which accounts for more than 80% of the metal content of the company's products, the situation in 1947 was that the company purchased 63,268,555 pounds and at the end of the year 14,291,007 pounds were on hand. Slightly more than the total closing inventory, i.e. 14,745,979 pounds had been purchased in the last three months of the year at 21·5 cents per pound. In using the Lifo assumption the company went back to the year 1936 when the theory had been adopted by it for corporate purposes and allocated the cost of the closing inventory of 14,291,007 pounds in the following manner:—

(a) 6,500,000 pounds were regarded as having a cost of 7·5 cents per pound (the average cost of the copper in the inventory when LIFO was adopted in 1936) amounting to $487,500;

(b) 802,697 pounds were regarded as having a cost of 9·466 cents per pound (the average price paid in 1936) amounting to $75,983.30;

(c) 17,577 pounds were regarded as having a cost of 11·191 cents per pound (the average price paid in 1937) amounting to $1,967.04;

(d) 639,807 pounds were regarded as having a cost of 10·443 cents per pound (the average price paid in 1938) amounting to $66,847.04;

(e) 973,477 pounds were regarded as having a cost of 11·036 cents per pound (the average price paid in 1939) amounting to $107,432.92;

(f) 3,151,684 pounds were regarded as having a cost of 11·5 cents per pound (the price paid in 1945) amounting to $362,443.66;

(g) 2,205,765 pounds were regarded as having a cost of 11·5 cents per pound (the price paid in 1946) amounting to $53,662.97.

As more than two-thirds of the copper inventory is continuously in process, it is evident that about two-thirds of

the 14,291,007 pounds could not have been used in manufacturing the products sold in 1947. What is required is the cost of the metals used in processing so as to ascertain the profit for that year and not what the company adopts as a wise plan to cover fluctuations over the years in the cost of its raw materials. I would think that an assumption, the result of which indicates that 6,500,000 pounds had been in the premises since 1936, would be unwarranted and that it is contrary to the facts is shown by the evidence of Mr. Evans, the company's Works Manager, and Mr. Richardson, an accountant called as a witness on behalf of the company. At p. 139 of the record the following appears in the examination-in-chief of Mr. Evans:—

Mr. Pattillo: Q. And do you happen to know, Mr. Evans, of your own knowledge whether you have on hand at the plant, copper that has been received from the refineries that has been there for a good many years and that has never yet gone into the mill?—A. I would not know whether there would be any around there or not.

His Lordship: Q. Is it likely that there would likely be any considerable portion of quite old copper in the plant?—A. No, there would not be, sir, any large quantity that you could identify as being an old lot. There might be. There is only one instance that I know of where we had some cast billets which had been in the yard for about five years—that is an alloy.

Q. Some cast billets?—A. Yes.

Q. That were in the yard, and was that any particular kind of alloy?—A. It was a special alloy for which we had no orders during that period.

At p. 284 Mr. Richardson is under cross-examination:—

Mr. Pickup: Is not the difference this on that one point—that l.i.f.o., as you say, does not reflect physical realities; f.i.f.o. may or may not?—A. It may approximate them. I would doubt if you would ever have a case where it could be said that it exactly reflected physical realities.

Q. But in many cases you would have it where it substantially reflected physical realities. That is true, isn't it?—A. That is right.

His Lordship: Would it be possible for the l.i.f.o. method to reflect physical realities?—A. It would be possible to be a reasonable reflection of the movements in a particular year but cumulatively you would get probably further and further from reality. That is, at the end of ten years on the method you would probably not have at that stage the quantity of material on hand ten years old corresponding to the quantity which was priced at the prices of ten years ago, for instance.

Mr. Pickup: Well, if we look at Exhibit 7, we find that the exhibit is showing that in 1947 at the end of the year the company is still, so far as reality is concerned, operating on the basis of having an inventory that it had prior to 1936 and some more raw copper that it got in 1936, 1937, 1938 and 1939. Is that what you mean (and I think it is) when you say it is actually further and further away from the reality if you use l.i.f.o.?—A. Well, I cannot speak as to the realities in this particular case but I do not

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imagine that any of the company witnesses would claim for a minute that there is a quantity of metal now on hand acquired in the year 1936 equal to the quantity which is priced at that price. I did not hear their evidence.

In the United States Fifo had been in use for years and efforts to secure permission from the taxing authorities to use the Lifo method in connection with such industries as The American Brass Company did not succeed until 1938. It was only when legislation in that year permitted the use of this method for tax purposes, subject to certain conditions, that the United States parent company made its tax returns in that form. Such a method, either with or without conditions, has never been permitted in Canada. This was known to the company, which, although for corporate purposes had made use of the theory as early as 1936, adopted it for tax purposes in Canada only on June 16, 1947, when it filed its tax returns for the year 1946. Before that date very considerable increases in the price of copper and zinc had occurred as a result of the relaxation and later of the removal of price controls. The company's appeal to the Exchequer Court from the appellant's assessment of it for 1946 was abandoned and was dismissed without costs.

Even though the Lifo assumption is recognized as a proper accounting method for corporate purposes, the authorities noted above show that that is not sufficient and, therefore, the view of the learned President of the Exchequer Court (1) that the question to be determined was whether Lifo was an acceptable accounting method for the company is, in my opinion, incorrect. The Lifo method does not determine the company's profits for 1947 more accurately than the Fifo method which later, for the reason given, is more in accordance with the known facts. The following statement by Lord Loreburn in *Sun Insurance Office* v. *Clark* (2) may, I think, be repeated with advantage:—

> A rule of thumb may be very desirable, but cannot be substituted for the only rule of law that I know of, viz.: that the true gains are to be ascertained as nearly as it can be done.

The appeal should be allowed, the judgment of the Exchequer Court set aside, and the assessment made by the appellant restored with costs throughout.

(1) [1952] Ex. C.R. 297; C.T.C. 116.

(2) [1912] A.C. 443.

TASCHEREAU, J.:—For the reasons given by Locke J. and Cartwright J, I would dismiss this appeal with costs.

ESTEY, J. (dissenting):—The respondent, at its primary brass mill in Toronto, produces copper and copper-base alloys for which it requires and purchases large quantities of copper and zinc and smaller quantities of lead and tin. At all times it has on hand a quantity of these metals. In 1946, for the first time, and again in 1947 the respondent, in preparing its income tax returns, computed the value of the inventories of these metals under the l.i.f.o. system of accounting. The appellant refused to accept this computation and insisted that the valuation of these metals be computed, as in former years, under the f.i.f.o. system. Upon an appeal to the Exchequer Court the learned President (1) upheld the respondent's contention. In part, the learned President stated:

> Under the circumstances, I find that the l.i.f.o. method was appropriate in the circumstances of the appellant's business. This means that it was entitled to use the method in ascertaining the cost of the metal content of its finished products that was properly chargeable against its gross income for sales and that the method correctly reflects its net taxable income in 1947 and I so find. It follows that the appeal from the assessment for 1947 must be allowed.

In a business such as that of the respondent it is, in any practical sense, impossible to precisely identify each item in its inventory and allocate to it the exact cost thereof. It is, therefore, conceded that some assumption or arbitrary method must be adopted in determining the valuation.

In 1946 the difference in the computation under the two systems was not sufficient to warrant that the proceedings in respect to that year be continued and we are, therefore, here concerned only with the year 1947. The valuation of the inventory as computed under l.i.f.o. for the year 1947 was $1,611,756.43 less than the valuation computed under the f.i.f.o. system . The older system which the respondent used in computing its income tax returns prior to 1946, and which the appellant in this case insists upon, is known as f.i.f.o. Under this system it is assumed that the items in the inventory first received are the first used, or, as expressed by the letters "f.i.f.o.," first in first out.

(1) [1952] Ex. C.R. 297; C.T.C. 116.

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Estey J.

Under the l.i.f.o. system the difference material hereto is that it is assumed the last items received are the first used. This may be illustrated by observing how the respondent's copper inventory was computed in 1947. On January 1, 1936, the year in which the company adopted the l.i.f.o. system, it had on hand 6,500,000 pounds of copper, the average price of which, in 1935, was 7·5¢ per pound, a total of $487,500. The weight and the price of the copper added to the above 6,500,000 pounds in the subsequent years are as follows:

Date	Weight	Cost per lb.	Total
Jan. 1, 1937	802,697 lbs.	9·466¢	$ 75,983.30
Jan. 1, 1938	17,577 lbs.	11·191	1,967.04
Jan. 1, 1939	639,807 lbs.	10·443	66,847.04
Jan. 1, 1940	973,477 lbs.	11·036	107,432.92
Jan. 1, 1946	3,151,684 lbs.	11·5	362,443.66
Jan. 1, 1948	2,205,765 lbs.	11·5	253,662.97

The foregoing figures show that on December 31, 1947, the total inventory of copper was 14,291,007 pounds and the cost thereof $1,355,836.93.

In the years December 31, 1939, to December 31, 1944 inclusive, as well as in 1947, the company used more copper than it purchased. In such years under the l.i.f.o. system the excess used over purchases was subtracted from the surplus in the last year in which there was a surplus. This may be illustrated by referring to the years 1946 and 1947. In 1946 the excess in the quantity purchased over that which was used was 2,936,468 pounds. In 1947 the company used more than it purchased to the extent of 730,703 pounds. This quantity was, in the inventory, deducted from the 1946 surplus, leaving, as shown in the above table, as of January 1, 1948, 2,205,765 pounds and, of course, the earlier weights remained unchanged. The value of these 2,205,765 pounds was, therefore, computed at 11·5¢ per pound, being the average cost thereof in 1946.

The inventory of all metals as of December 31, 1947, computed on the l.i.f.o. basis, totalled $1,848,497.89. Mr. Gordon, who supervises the auditing of respondent's books, when asked if this figure was either the cost or the market price of the metals, replied: "No. It is certainly not the market price —nothing to do with it—and it depends on what you mean by 'cost price'. It is 'cost' as considered on the last-in, first-out basis." The accountants called as witnesses made it clear

that the l.i.f.o. method is not intended to indicate physical flow of goods. Rather, as one stated, "it is a statement of an assumption as to the order in which costs should flow in and out of an inventory account on the calculation under this method." When asked if he would apply the same principle if it was known, as a fact, that the raw materials last in were not the first used, he replied: "In appropriate circumstances I would apply the principle because, as I indicated, I do not think that physical identification of goods has anything to do with proper determination in certain circumstances." Or, as otherwise stated, "In my opinion, first-in, first-out again is a description of a costing method and refers to the order in which items of cost recorded through the inventory account should be taken out of the inventory account." And again, "I thought I had made it clear that the question of physical identification is not, in my opinion, a factor which governs the determination of income."

In 1936 the respondent adopted the l.i.f.o. system of accounting, but until 1946 continued to file its income tax returns as prepared under the f.i.f.o. system because it had been informed that the Department of National Revenue would not accept returns prepared under the l.i.f.o. system.

In the years immediately preceding the war the prices of these metals, particularly copper, which constitutes 83% of the respondent's inventory, remained rather constant. Throughout the war period and until June 10, 1947, the prices of these metals were fixed. With the increase in the price of these metals, particularly copper, the difference in the computation of the inventory under f.i.f.o. and l.i.f.o. was such that the company decided to insist upon the appellant accepting its computation of its inventory under the l.i.f.o. system. That the difference may be substantial is evident from the fact that in 1947 the computation of the inventory arrived at under the l.i.f.o. system was $1,611,756.43 less than that arrived at under the f.i.f.o. system. Though the company computed its income tax returns in 1946 on the l.i.f.o. basis, the change in prices was not such as to make a great difference, but in 1947, as indicated by the figures, the position was entirely changed.

The issue here raised is whether, under the *Income War Tax Act* and the *Excess Profits Tax Act*, the Minister must accept returns computed under any recognized accounting

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system which is deemed appropriate to its business by a company, or whether the Minister in a particular case may insist upon that accounting system which will the more closely arrive at the actual value of the inventory.

Mr. Richardson stated:

> The question is as to what portion of the expenditure for the purchases of raw material, for labour and for manufacturing supplies, and expenses, is properly chargeable against the gross revenues from sales during the year; and what portion is properly to be carried forward as a charge against future periods.

In order to more fully appreciate the purpose and object of the l.i.f.o. system it is of some assistance to consider the circumstances under which is was developed. Mr. Peloubet, of the accounting firm of Pogson, Peloubet and Company of New York, explained that in the years 1916 and 1917 management then using the f.i.f.o. method was disturbed not so much by the general increase but by the fluctuation in prices. As he stated:

> . . . what they did not like was the fluctuation and the idea: 'If we end the year with a higher price, we are going to show a terrific profit which is not there and if we end it at a low price we are going to show an apparent shortage which is not there'.

Mr. Peloubet also stated:

> . . . the management of the company realized in the middle and late 20's that their accounts were not on a correct profit basis, that they were not correct for dividend purposes. Of course, it had no relation at that time to taxation because no one even thought of taxation in connection with this but the company was definitely disturbed about their profit showing and they were definitely disturbed about the amount of inventory profits that were shown.

There is no necessary conflict between a system that computes profits for dividend purposes and one that computes profits for taxation purposes, but, of course, there may be.

It is obvious that if the respondent continues in business and to use the l.i.f.o. method of accounting for 100 or even 1,000 years and never, at any time, utilizes its entire inventory or stock of metals, the inventory will be computed as containing some copper at 7·5¢ per pound, i.e. the average price paid in 1935, or, as otherwise stated, if the 6,500,000 pounds shown in the inventory as on hand on January 1, 1936, never becomes exhausted the remaining portion thereof, whatever it may be, will be computed at 7·5¢ per pound, irrespective of what current market values may be. It is this feature that I assume Mr. Richardson had in mind

when he said the longer the period the farther the inventory computation becomes from reality. He quite properly pointed out that f.i.f.o. is often far from reality because, whatever the system used, some arbitrary assumption must be made, but the problem which must be decided for taxation purposes is which of the two more nearly approaches the actual value, or market value. The respective assumption are: under f.i.f.o. the first metals received are the first used in production and under l.i.f.o. the last metals received are the first used.

The income tax law is concerned with commercial and industrial operations within the taxation period and with the computation of profits upon operations carried on in an exchange or market sense during that period. Therefore, an accounting system which tends to minimize fluctuations in prices and business losses and gains and, therefore, provides a more even accounting history for dividend and other purposes, may possess the greatest merit from a corporate point of view, but it does not follow that the Minister must, for taxation purposes, accept that method.

Throughout the evidence the profits shown in periods of rising prices are referred to as fictional profits and the losses in periods of falling prices as fictional losses. It is obvious that accountants, in so describing these losses, are considering the interests of the company over a period of years and, as Mr. Peloubet states, such fictional profits and losses were not "correct for dividend purposes." Mr. Richardson stated:

> The objective is to arrive properly at profits or losses and in the sort of illustration which I gave you on Exhibits 25 and 26 it may arrive at a more stable result by avoiding the showing of fictional profits or losses; it is not a process of levelling for the sake of levelling. There is nothing arbitrary about the process about which you could say: 'This is something which a prudent business man might feel that he should do in the interests of conservatism' or anything of that kind.

Then, after pointing out that where physical identification is, as here, impossible, some assumed basis must be accepted, he was asked:

> Q. Well, do you agree with this, that above all any assumption adopted should not be unduly out of line with the ascertainable unquestioned physical facts?—A. No. I do not agree with that, Mr. Pickup.

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In fact, as Richardson stated, referring to both systems,

> They are not based on presumption as to the physical movement—or what we sometimes call the 'physical flow of goods through the inventory and out to customers,' but rather are indicative of the flow of costs which are employed in the method.

or, as he stated when specifically referring to l.i.f.o.,

> It represents rather an assumption made as to the order in which costs should flow from the inventory account into the cost of sales in the process of determining income.

It is the acccountants' conception of how "costs should flow" that commends the l.i.f.o. system. They find in l.i.f.o. that over a period of years it, to a large extent, eliminates the artificial profits or losses and goes far to compute how the costs of the company should flow.

It may well be that where, as here, the inventory is neither subject to "physical determination" nor to "style changes or obsolescence" that, from the point of view of the company which is concerned with how costs should flow and dividends be paid over a period of years, l.i.f.o. is the more acceptable system of accounting. It does not, however, follow that, apart from legislation particularly directed to l.i.f.o., its computation of the inventories must be accepted by the Minister.

The word "profits" is not defined in either the *Income War Tax Act* or the *Excess Profits Tax Act,* but it has been repeatedly defined as that surplus in the taxation period by which the receipts from a trade or business exceed the expenditures necessary for the purpose of earning those receipts. Fletcher Moulton L.J. stated in *In re Spanish Prospecting Company, Limited* (1):

> The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates. . . . Even if the assets were identical at the two periods it would by no means follow that there had been neither gain nor loss, because the market value—the value in exchange—of these assets might have altered greatly in the meanwhile . . . A depreciation in value, whether from physical or commercial causes, which affects their realizable value is in truth a business loss.

(1) [1911] 1 Ch. 92 at 98.

The income tax statutes are concerned with business and commercial enterprises the assets of which possess a value to the extent that they may be used or exchanged. As stated by Fletcher Moulton L.J. in *In re Spanish Prospecting Company, Limited, supra,* at p. 100:

> The figure inserted to represent stock in trade must be arrived at by a valuation of the actual articles. Property, of whatever nature it be, acquired in the course of the business has a value varying with the condition of the market.

It is, therefore, the current commercial trading or market values that these statutes contemplate should be used in the computation of profits. If it be, from a business or commercial sense, impracticable to determine that valuation with accuracy, then that method which more closely approximates the current market value should be used.

In *Whimster & Co. v. The Commissioners of Inland Revenue* (1), the company prepared its income tax returns and allowed for losses which it anticipated in the following year. It had, in fact, settled with one of its partners who was retiring upon the basis of that statement. It was conceded that such was not a usual method and was not "in accordance with ordinary commercial practice." Lord Clyde states at p. 823:

> In such a case the trader may, as a matter of ordinary commercial prudence, decline to treat the profits shewn in his accounts in the same way as he would have done if the circumstances of his business had been liable only to the normal fluctuations of trade. He may, for instance, prefer to carry his profits forward, or put them to reserve, rather than consume or divide them. But they are none the less profits of the year or accounting period to which the accounts relate, and as such assessable to Income Tax or Excess Profits Duty . . . It is therefore nothing to the point—say, as regards assessment to Income Tax—that if a particular trader's profits were computed on an average of two years instead of three, or simply on the results of the year immediately preceding the year of assessment, an apparent profit might be turned into an apparent loss.

and at p. 825:

> But all this cannot affect the answer to the question; what are the actual profits made during the accounting period? Whatever the bargain made with the retiring partner—generous or strict, fair or unfair—the question remains the same and so also does the answer.

The metals here in question do not suffer a physical depreciation in value. Their commercial or market values, however, do fluctuate from time to time. Under l.i.f.o. the current market value is used to compute the value of only

(1) (1925) 12 Tax Cas. 813.

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that quantity assumed to be added to the inventories in the last year and the valuation of the balance of the inventories is computed by using the market values of former years. The assumption under f.i.f.o. eliminates many of the former years and, therefore, the computation thereunder more closely approximates the current value than that made under l.i.f.o.

Moreover, the l.i.f.o. system is comparatively new. While the reason for its development in the early 20's, as explained by Mr. Peloubet, had no relation to taxation, it has become more widely adopted in the United States since the passage of the legislation in 1938 and 1939, permitting a company to compute its income tax returns under the l.i.f.o. system, subject to certain specified conditions. As stated by Mr. Butters:

> In contrast, since 1939 few management decisions on Lifo have been made without reference to their tax effects. Decisions as to whether to use Lifo how to apply it, and even as to the industries in which the method constitutes acceptable accounting practice, have been dominated by tax considerations.

The l.i.f.o. system provides an alternative method which, as illustrated in this case, may produce a valuation substantially different from f.i.f.o. While the *Income War Tax Act* and the *Excess Profits Tax Act* contemplate that the valuation of these inventories be computed according to the recognized or accepted accounting methods, these statutes do not contemplate that a company may, from time to time, adopt that which may best serve its ends. Many companies would not, and I do not suggest the respondent did or would, from year to year, adopt that method which would result in a lower tax. It would seem that the statutes do not provide against this possibility. Moreover, that it can be done by a company in any year without changing its accounting system is illustrated by the fact that the respondent adopted the l.i.f.o. system in 1936 for accounting purposes, but continued to compute its income tax returns on the f.i.f.o. basis until 1946. It was no doubt such considerations which caused the United States to enact legislation in 1938 and 1939 which permitted a company to prepare its income tax returns under the l.i.f.o. system, but only upon certain conditions, which may be summarized:

(a) The company must start with a cost inventory on the same basis as it ended its last f.i.f.o. period of cost.

(b) Once adopted the l.i.f.o. method cannot be changed without the consent of the appropriate revenue officials.

(c) The company must keep its corporate accounts on the same basis as its tax accounts.

(d) It is not a compulsory system, but a company may elect to adopt the l.i.f.o. method.

The *Income War Tax Act* and the *Excess Profits Tax Act, 1940,* do not contain any such provisions.

In my opinion the Minister was justified in refusing the respondent's computation and requiring that the company compute its inventories upon a basis that more nearly approximated the current market value thereof.

In my opinion the appeal should be allowed with costs.

LOCKE, J.:—This is an appeal by the Minister of National Revenue from a judgment of the President of the Exchequer Court (1) by which the appeal of the respondent from an assessment for excess profits tax for the taxation year 1947 was allowed. While the respondent also appealed from the assessment for income tax made in respect of the same year, we were informed that the parties had agreed that they would regard themselves in that matter as bound by the outcome of this appeal, this for the reason that the question for determination is the same in both appeals, that is, as to the amount of the taxable income of the respondent as defined by section 3 (1) of the *Income War Tax Act.*

The facts disclosed by the evidence as to the manner in which the respondent company carried on its operations are described fully in the judgment appealed from and it is unnecessary to repeat them. The respondent operates what is described in the evidence as a primary mill producing copper and copper alloys in the form of sheets, rods and tubes for use in the manufacturing operations of motor car and other manufacturers. It is, according to the evidence of the Manager of the Copper and Brass Research Association, a typical brass mill similar to those of the American Brass Company, of which the Canadian Company is a wholly owned subsidiary. The point to be determined is as to what is the method of inventory accounting which will most accurately determine the income of the respondent for the year in question, as that term is defined by the *Act.*

(1) [1952] Ex. C.R. 297; C.T.C. 116.

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It is clear from the evidence that, in view of the magnitude of the operations and the manner in which it is necessary they should be carried on, the cost of the metal content of the products sold cannot be calculated with exactness on the basis of what is referred to by the accountants as the "physical flow" of the inventory. It is also shown by the evidence that, at least as conditions were during the year 1947, there was no means by which the respondent company could hedge its purchases of raw material and it is the fact that, owing to the fluctuations in copper and zinc prices which took place during the year 1947, the calculation of such costs was not exact.

Neither of the statutes defines the manner in which manufacturing costs of this nature are to be calculated and, in the absence of any such direction, they are to be determined, in my opinion, upon the ordinary principles of commercial trading. My consideration of the evidence in this matter leads me to the conclusion that, in a business operation such as this, the last in first out method of inventory accounting determines what was the true income with greater accuracy than any other method which it was practical to apply.

I respectfully agree with the conclusion of the learned President of the Exchequer Court and would accordingly dismiss this appeal with costs.

CARTWRIGHT J.:—In this appeal I agree with the reasons and conclusion of the learned President and propose to add only a few observations.

In my view the only questions of difficulty raised in this case are questions of fact. I do not disagree with any of the principles of law stated in the authorities quoted in the reasons of my Lord the Chief Justice and I do not understand the learned President to have done so. The effect of these authorities is, I think, accurately summarized in the statement quoted from the judgment of Earl Loreburn L.C. in *Sun Insurance Office* v. *Clark* (1) that the only rule of law is "that the true gains are to be ascertained as nearly as it can be done." Where, as in the case at bar, the dispute as to what are the true gains for a particular year centres

(1) [1912] A.C. 443 at 454.

on the question as to which of two well-recognized systems of accounting will in the case of the business carried on by the respondent most nearly arrive at the true figure for the materials cost of its sales for such year that question is one of fact. In my opinion the evidence fully supports the findings of fact made by the learned President on this crucial question.

While I have already expressed my agreement with the reasons of the learned President, I wish to quote two paragraphs therefrom which sum up his findings and in support of which the evidence seems to me to be overwhelming.

> After careful consideration of the opinions of the experts I have come to the conclusion that where a manufacturing company avoids speculation or trading in its materials and makes the sales price of its finished products closely reflect the current replacement cost of their materials content and matches its purchases of materials to its sales of finished products so that the inflow of the materials equals the outflow of the materials content of the finished products and it must continuously maintain a large inventory and the rate of its turnover is slow the l.i.f.o. method of inventory accounting and ascertaining the materials cost of its sales for the year is the method that most nearly accurately reflects its income position according to the manner in which it carries on its business and is the method that ought to be applied in ascertaining the materials cost of its sales and determining its net taxable income.
>
> .....
>
> While I need not say more I also find that the method employed by the Minister in arriving at his assessment was not a proper one. This is not a case in which either of two accounting methods is acceptable. Only the one method, namely, the l.i.f.o. method, is appropriate. The Minister used the f.i.f.o. method in ascertaining the appellant's materials cost of sales which left it with a much larger income than it earned. The result of this method has been to ascribe to it greater profit than could have come to it through its processing charges. The additional profit so ascribed is said to be inventory profit. The criticisms of the f.i.f.o. method mentioned by Mr. Richardson apply here. It seems plain to me that when a company so conducts its business as to avoid the risk of profit or loss through the rise or fall of its raw materials its income position cannot be correctly determined if so-called inventory profits or losses which it has not earned or sustained are brought into its accounts. To do so is to use an accounting system that is not in accord with its business policy and practice and does not fairly reflect its income position.

In a year in which the prices of the metals used by the respondent remain constant it is a matter of little importance so far as the result is concerned whether the f.i.f.o. or the l.i.f.o. method of accounting is used. The evidence appears to me to establish that in a year in which the prices of such metals rise or fall the l.i.f.o. method will shew the true gain for the year as nearly accurately as is possible

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while the f.i.f.o. method will in the case of a rise shew a fictitious profit and in the case of a fall shew a fictitious loss.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *F. J. Cross.*

Solicitors for the respondent: *Blake, Cassel & Graydon.*

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*Feb.26
*March 1
*Nov. 1

THE CORPORATION OF THE CITY OF OTTAWA *(Defendant)* ..... APPELLANT;

AND

JOSEPH CHARLES DANIEL MUNROE, an infant by his next friend Bernard Munroe and the said BERNARD MUNROE *(Plaintiffs)* RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Infants—Landlord and Tenant—Child injured by fall through wash-room window—Whether allurement or trap to children—Whether child invitee or licensee.

The appellant municipality leased to the grandmother of the infant respondent, a child of four and a half years of age, an apartment situate on the 3rd floor of a building in which to alleviate the post-war housing shortage it provided "emergency shelter" to taxpayers unable to secure other accommodation. The grandmother's household included the infant and his mother and his father, the other respondent. A common wash-room was provided the several occupants on that floor. In it was a row of wash-basins set in a stand at the back of which was a counter some three feet high at right angles to, and within two feet of a large window, the sill of which was some nineteen inches from the floor. Just below the sill and parallel to it and between it and the basins was a radiator. An adult found the infant respondent and another child playing on the counter and told them to get down. Shortly after the adult left the room the infant respondent fell through the window pane to the ground below and was seriously injured. In an action claiming damages from the appellant, a jury found that the injured child was on the premises with the knowledge and permission of the appellant. That his injuries were caused by the fall through the window pane and that there was present in the wash-room a hidden danger or allurement to the infant respondent, namely the combination of radiator, basins, platform etc., adjacent to the unpro-

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

tected window. That the appellant knew the danger existed, and by its neglect to install protection guards on the window, failed to use reasonable care to prevent injury to the child.

Held: (Estey and Cartwright JJ. dissenting)—that there was no evidence upon which the jury could find that the structural design of the wash-room constituted a trap or concealed danger, and the action should be dismissed.

Per Kerwin C.J. and Rand J.: The duty owed by a landlord to a licensee at the invitation of the tenant is no greater than the duty owed the tenant. *Hugget* v. *Miers* [1908] 2 K.B. 278; *Cavalier* v. *Pope* [1906] A.C. 432; *Fairman* v. *Perpetual Investment Bldg. Society* [1923] A.C. 75. In the absence of a trap or hidden danger no duty is owed by the landlord to a tenant, and a licensee on the premises at the invitation of the tenant is in no better position nor can a distinction be drawn if the licensee be a child of tender years. *Dobson* v. *Horsley* [1915] 1 K.B. 634.

Per Locke J.: There was a preliminary question of law to be determined by the trial judge as to whether the evidence disclosed anything in the nature of a concealed danger which might constitute a trap (*Latham* v. *Johnson* [1913] 1 K.B. 415) which should have been answered in the negative. There was no evidence from which negligence on the part of the defendant might reasonably be inferred (*Metropolitan Ry. Co.* v. *Jackson* 3 App. Cas. 193 at 197) and the case should have been withdrawn from the jury.

Per Estey and Cartwright JJ. (dissenting): The jury, acting upon instructions to which no exception was taken and upon evidence that supported that view, found as a fact that the infant was a licensee and the "combination" constituted a trap. The case was therefore to be distinguished from *Cavalier* v. *Pope, supra, Latham* v. *Johnson, supra* and *Dobson* v. *Horsley supra,* and brought within the rule in *Lynch* v. *Nurdin* 1 Q.B. 29 followed in *Cooke* v. *Midland Great Weastern Ry. of Ireland* [1909] A.C. 238. *Glasgow Corp.* v. *Taylor* [1922] A.C. 44, *Ellis* v. *Fulham Borough Council* [1938] 1 K.B. 212, *Yachuk* v. *Oliver Blais Co. Ltd.* [1949] A.C. 386, *Williams* v. *Cardiff Corp.* [1950] 1 K.B. 514. *Gough* v. *National Coal Board* [1953] 2 All E.R. 1283 and *Hawkins v. Coulsdon* and *Purley Urban District Council* [1954] 2 W.L.R. 122 referred to.

Per Cartwright J. (dissenting): Assuming that the attention of the jury was not directed to the question whether or not it was an implied term of the license to the infant respondent to be in the wash-room that he should be accompanied by an adult and that this point was left undecided by their answers, it was the right and duty of the Court of Appeal to decide it (*The Judicature Act* (Ont.) s. 27), and that court rightly held that the license was not subject to the implied condition.

APPEAL by the defendant corporation from the judgment of the Court of Appeal for Ontario (1) which dismissed (Hogg J.A. dissenting in part) its appeal from the judgment of Spence J upon a verdict of a jury.

F. J. Hughes, Q.C. and *A. T. Hewitt* for the appellant.

R. A. Hughes, Q.C. for the respondent.

(1) [1953] O.R. 453; 3 D.L.R. 84.

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CITY OF OTTAWA v. MUNROE

The judgment of Kerwin C.J. and of Rand J. was delivered by:

RAND J.:—This action was brought in tort by a father and his infant child aged 4½ years against the city of Ottawa as landlord of the former's mother-in-law with whom he and his family were living, for damages resulting to the infant in falling through a window from the third storey of an emergency apartment house. On that storey was a tenant's washroom, one of the basins in which had been allocated to the tenant. The basins were set in a stand at the back of which rose a top or counter a foot or so in width to hold washing, shaving and other accessories. The counter was about three feet from the floor. The stand was placed at right angles to and within two feet of a large window. The sill of the latter was about nineteen inches above the floor. Just below the sill was a radiator or heating coil which apparently could be used by children to reach the wash basins and, it may be, climb the stand.

The child, with one or two others, was playing in the washroom and in some way, with at least one other, managed to get up on the top of the stand. While there and shortly before the accident, another tenant entered the room and seeing them there, warned them to get down and from what appeared later the companion did. The mother was in an adjoining room washing some clothes and knew the child with two other children had been playing in the hall on which the washroom opened. There was a crash of breaking glass and the little boy was found lying on the ground, about 40 feet below, gravely injured. It does not appear what happened but it is possible that in trying to get off the stand at the end near the window, or in standing on the sill or coil in the course of getting down, he lost his balance and fell against the pane which gave way.

The father, as well as another, had complained to the janitor of the danger presented by the low window in its special situation and had asked that boards be placed across the lower part to prevent just such an accident; but neither the janitor nor the tenant did anything and the hazard remained. Some time previous to the accident a woman had fallen out of the window but under what circumstances does not appear.

The jury found that there was present in the washroom a "hidden danger, allurement or enticement" consisting of a "combination of a heating radiator, pipes, basin, bracket and platform adjacent to an unprotected window", the structural elements mentioned; and the question is whether, in law, such a claim lies.

From the earliest times the courts have laid it down that a landlord vis-a-vis the tenant may lease lands or unfurnished premises in any condition in which they may be and that the tenant takes them with all their objectionable features. In *Chappell* v. *Gregory,* (1) the Master of the Rolls. Sir John Romilly, states the rule in these words:—

> But, in the absence of such promise, (to put the house in a state of repair) a man who takes a house from a lessor, takes it as it stands; it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor "This house is not in a proper condition, and you or your builder must put it into condition which makes it fit for my living in."

In *Robbins* v. *Jones,* (2) Erlie C.J., at p. 776:—

> A landlord who lets a house in a dangerous state, is not liable to the tenants, customers or guests for accidents happening during the terms; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any.

And the language of Lord Atkinson in *Cavalier* v. *Pope,* (3) is to the same effect.

That being the general law in respect of the leased premises, no question would arise here were it not that the injury arose in a washroom common to the tenants of the third floor. We have no direct evidence of the person who was in possession of that room. That the landlord may have undertaken to keep it and the basins in fit condition for use might conceivably be inferred from the fact that a janitor was supplied for the building. We have no particulars of any duty in this respect or whether, generally, he had the oversight of the room. But I will assume he did have and that the legal possession of the washroom had been retained by the city.

Since the lease was made to the mother-in-law, the right of the child to be on the leased premises derives through her, arising from the fact of her sole possession. But when we

(1) (1864) 55 E.R. 631; 24 Beav. 250.
(2) (1863) 143 E.R., 15 C.B. (N.S.) 222.
(3) [1906] A.C. 428 at 432.

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come to collateral privileges annexed to leased premises, other considerations must be taken into account. It is clear that involved in the right to the washroom given the tenant is the contemplated use of it by members of the tenant's family and that will include those in fact living with the tenant; but whatever their privilege, it is essentially derivative. The right to extend permission to children or others to make use of these facilities is properly looked upon as being included in what is granted to the tenant, but they are there primarily as the tenant's guests or licensees, and only in a secondary sense do relations between them and the landlord arise.

What, then, is the duty of the landlord toward the tenant, because it would appear to follow that the tenant cannot confer greater rights or privileges upon others than he possesses himself; the scope of the tenant's rights against the landlord will limit those of such licensees.

The tenant is in contractual relations with the landlord upon the terms of which she would, in this case, be entitled to rely. For example, a covenant to repair, running directly to the lessee, provides a right that is not available to any one who is not a party to that contract: *Cavalier* v. *Pope, supra.* The position of the licensees must, then, be placed upon the footing of a duty at law not higher than that which is owed by the landlord to the tenant exclusive of contractual rights which run to the tenant alone.

This limitation has been declared by the Court of Appeal of England in *Hugget* v. *Miers,* (1). There an employee of one of the tenants, in going down an unlighted staircase retained in the possession of the landlord, fell through a door and suffered injuries. In the course of holding against the claim, Sir Gorell Barnes, President, at p. 283, said:—

> If there were no such duty on the part of the landlord towards the tenants, I cannot see how there possibly could be such a duty towards an outsider who comes on the premises on the invitation of a tenant.

and at p. 284:—

> It appears impossible under the circumstances to infer in favour, of a person using the staircase by invitation of a tenant any undertaking on the part of the landlord to do what the tenants, as it would seem by arrangement with the landlord, undertake to do for themselves, and I cannot see how such a person could be in a better position in this respect than the tenant himself.

(1) [1908] 2 K.B. 278.

In this Farwell L.J. concurred:—

> A member of the public using the staircase on the invitation of the tenant can (not) have a greater right than the tenant himself.

The same authority, as well as *Cavalier* v. *Pope, supra,* and *Fairman* v. *Perpetual Investment Building Society,* (1) shows also that under the general duty implied in law from the circumstances of the appurtenance, the landlord is responsible to such a person only as to a licensee, that is, one entering by the authority of the tenant takes the premises as he finds them, subject to protection against concealed dangers or traps. It is obvious that, here to the tenant as well as to her licensee there was no trap or hidden danger. What is complained of is simply certain parts of the structural design which the landlord saw fit to give to the washroom. On that state of things, the tenant could not have found any claim against the landlord, nor could an adult licensee.

Is the child in any better position? The only ground upon which this can be suggested is that what is apparent to the tenant may be a trap or an allurement to the child. Apart from the fact that the child is brought on the premises by his father, it would be a strange proposition that a landlord should be bound to alter his premises in order to make them safe for the child when they are unobjectionable as to his tenant. The answer to be given the tenant is simply that if the premises are not fit for his children he should look for others. Now that may appear to be a cold answer when premises are at a premium; but if through stress of circumstances the tenant, and a *fortiori* a tenant's licensee, must live where he can, then any special accommodation necessary for the needs of his children must, in some manner, be provided by himself. Of course not all tenants have children and children may arrive in the family at any time and it would be a *reductio ad absurdum* that the duty of the landlord in relation to the structure of his accessory accommodation should depend upon such happenings. On long leases of, say, apartments, safe today they would become dangerous tomorrow as and where and when children happened to be added to a family.

(1) [1923] A.C. 74.

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On this point there is direct authority. In *Dobson* v. *Horsley*, (1), the facts were almost identical with those here. The tenant's child of 3½ years of age, while playing on steps retained in the control of the landlord, fell through an aperture of the railing owing to one of the upright bars being missing. It was argued that as to the child the stairway, the danger of which he could not appreciate, was a trap but the Court of Appeal held that no cause of action was shown. Buckley L.J. at p. 641, meeting this contention, said:—

> If this was a dangerous place, as obviously it was, the child ought not to have been there without proper protection; and the liability of the defendant cannot be enlarged by exposing him to a liability for not providing such a railing as would prevent a child from falling into the area.

In this statement Pickford L.J. concurred:—

> With regard to the question as to the child, I entirely agree with what has been said by Buckley L.J., that his age makes no difference.

Does the case gain any strength from the fact that the landlord, for instance, has knowledge that the child has played in the washroom and on the top of the stand? That can only be on the principle of the cases that have held an owner liable to a trespassing child who had been attracted by an object containing a hidden danger. But the child here was not a trespasser nor was it attracted to the room by the so-called combination of features; it was in the room as of right through the tenant, and although it bears a relation of licensee toward the landlord, I know of no consideration in law which in such a situation transfers the care of the infant from the parent to the landlord.

But the arrangement here cannot be called an allurement or trap as that term is used in the cases. The washroom and its fixtures were of ordinary design. The window was, in a sense, dangerous because it reached so near to the floor, but no one would suggest that it constituted a trap. If an ordinary table had been supplied and the child fell off and went through the window, could that also be called a trap? If the common approach was a high narrow walk without any protecting sides, would the landlord be liable when a young child, playing on it, falls off? Would his knowledge

(1) [1915] 1 K.B. 634.

that the child was accustomed to play on it make any difference? I should say no to both questions, and if that is so there is no distinction that I can see to be drawn between that and what we have before us.

The appeal must therefore be allowed and the action dismissed. If, in the face of the circumstances disclosed, the city insists on costs, they must follow the event throughout.

ESTEY J. (dissenting):—The respondent, Bernard Munroe, in this action claims damages on behalf of himself and, as next friend, of his infant son, Joseph Charles Daniel Munroe, for injuries suffered by the latter when, at the age of about four and one-half years, he fell through a third floor window in the appellant's apartment block, Wallis House.

By a lease in writing dated April 1, 1948, the appellant leased to Mrs. Caroline Dorion suite No. 29 consisting of three rooms in the said Wallis House. While not mentioned in the lease, it was understood that Mrs. Dorion and her guests would use the washroom on the third floor. In fact, one of the basins in that room was allotted to her suite. Mrs. Dorion is the mother-in-law of the respondent Bernard Munroe. The latter, with his wife and infant son, were, for some time prior to and at all times material hereto, living with Mrs. Dorion in this suite No. 29.

In the afternoon of October 19, 1949, the infant respondent, with another infant, was playing in the washroom when he fell through a pane of glass in a closed window and suffered the injuries here claimed for. Only the infant plaintiff and the other infant of tender years were, at the critical time, present in the washroom and it is, therefore, impossible to ascertain precisely what happened. Two or three minutes before the infant respondent fell, George Thomas, who occupied suite No. 31, which had a door opening into this washroom, was in the latter and saw him and another infant playing on the counter. He told them to get down and they were apparently in the course of doing so when he left the washroom. The jury evidently concluded that in doing so the infant respondent fell through the window.

This washroom, located on the south side of the corridor at the west end of the building, was for "personal washing and shaving." The window in question is one of two facing

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in a southerly direction. Between these two windows there is a short space and the wash basins extend from near that space northward through the middle of the room. Immediately behind these wash basins, and used for placing toilet and shaving accessories, is what is variously described as a platform, counter, shelf or washstand (hereinafter called the counter). This counter rests upon the floor. It is eleven feet three inches in length, one foot six inches in width and two feet eleven inches in height. It commences about one foot from that part of the window through which the infant fell and extends behind and along the wash basins. Under the window is a radiator heating the room and the basin nearest to the window had been removed but, in the main, the equipment necessary to service it remained in place. The glass in the lower sash of this window is in two parts. He fell through one of these which is two feet eight inches in length and one foot six inches in width. The window itself is three feet four inches wide and the window pane described as of "ordinary light glass." The janitor deposed that the presence of the radiator and the drainage pipe, exposed since the removal of the basin, provided "good climbing" and that small children three or four years old could climb on it. The janitor, when asked "Would they go through the window?" answered "It is a dangerous window."

The respondent Bernard Munroe, some five months prior to the infant's falling through this window, in the presence of Walter Casey, another tenant, and the janitor, complained of the window here in question being dangerous to children, without a guard or other protection thereon, to Louis Nezan, who was employed by the appellant and was in charge of purchasing cleaning supplies for Wallis House and was one of the employees who might instruct the janitor to make repairs. At that time he asked "if it were possible to put any guard or railings in front of that window." He stated that when Louis Nezan asked why "I told him why I was asking, and he said he did not have time or men for that."

Walter Casey recalled the conversation and deposed that Bernard Munroe

> was talking about putting some protection on the windows so that the children would not fall out and hurt themselves.

The janitor, while he recalled the occasion, could not remember what was said and Louis Nezan had no recollection of the occasion, or of any complaint in respect to the window.

The janitor, Balmore Lemire, was the attendant on the premises. He admitted that he had seen children playing in this room and upon the counter. In the course of his evidence he stated:

Q. Did you ever see children on the counter which is shown in these exhibits? A. Yes, I have seen them, and took them off myself.

Q. How often? Frequently? Were they up there a lot? A. Especially on a Saturday when they had no school, or something.

Q. What were they doing up there when you saw them? A Mostly sitting down, or else they were bending down and turning the taps on and throwing water on each other.

Q. In other words, they would lean over the taps, and have water fights on the counter? A. Yes.

Q. Were they standing up on the counter when you saw them? A. I didn't see them stand up. I saw them sitting down, and stooping down.

Q. Did you ever tell them to get off? A. Sometimes they were using hot water, and I told them we have not got enough to throw away, so I brought them down with my hand, and told them not to get on there any more.

Q. You took them down, and told them not to get on there again? A. No; it was a dangerous place to play.

In spite of the fact that the janitor had said this was a "dangerous window," when asked why he did not put a guard thereon, he replied: "Because there did not seem to be any danger there." Moreover, Louis Nezan deposed, when specifically referring to the washroom, "I did not know it as a dangerous condition" and, when asked if the presence of wash basins, coils and platform where "children were wont to get up and play" did not require some protection on the window, he replied: "I did not think it was necessary."

The jury found the infant was on the premises at Wallis House to the knowledge of and with the permission of the appellant; he suffered his injuries when he fell through a window in the washroom; the combination of the heating radiator, pipes, basins, bracket and platform adjacent to an unprotected window constituted, in the washroom, a hidden danger, an allurement or enticement to the infant plaintiff; the appellant, through its officials, knew of the danger and

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did not take reasonable care to prevent injury from the hidden danger, allurement or enticement in that it failed to install protection guards on the washroom windows.

The washroom was not included in the lease and the evidence establishes that it remained at all times in the control and possession of the appellant, whose janitor regularly inspected it, as did other employees, and in this, as in the other washrooms, it would make any necessary repairs or alterations. The fact that the injury did not occur in the demised suite, but in that portion which remained in the possession of the landlord, distinguishes it from cases such as *Cavalier* v. *Pope* (1). This distinction is emphasized in a number of cases, particularly in *Sutcliffe* v. *Clients Investment Co. Ltd.* (2), where a licensee with an interest, or an invitee, was injured when a portion of a balcony not included in the lease gave way. Scrutton L.J. at p. 756 stated.

> The first question is, Did this balcony and balustrade form part of the premises demised to the tenant? Because if they were included in the demise, I do not think, as at present advised, that any action would lie against the landlords . . . The learned judge has decided the question as a matter of law, and in the circumstances I do not feel able to interfere with his decision, and so we must proceed on the assumption that not being included in the demise they remained in the possession and control of the landlords.

It is clear that the facilities of this washroom were essential to the enjoyment of the suite by Mrs. Dorion, as well as by her boarders and guests, and, as already stated, one of the basins was specifically allotted to her suite. As indicated by the foregoing evidence, children were, to the knowledge of the appellant's servant, playing in the washroom, unattended, upon a number of occasions. The finding of the jury that the infant respondent was on the premises at Wallis House to the knowledge of and with the permission of the appellant, when construed, as it must be, in relation to the evidence and the other findings, cannot be restricted to parts of Wallis House other than this washroom, but rather must include the latter.

The relationship between the infant respondent when in the washroom and the appellant is similar to that of the plaintiff in *Fairman* v. *Perpetual Investment Building*

(1) [1906] A.C. 428. (2) [1924] 2 K.B. 746.

Society (1), where, in the view of the majority, the relationship between the lodger and the landlord was that respectively of licensee and licensor. While there may be much to be said for the view expressed by Scott L.J. in *Haseldine* v. *C. A. Daw and Son Ltd.*, (2), to the effect that the expression of the majority in the *Fairman* case was but a dictum, and that the relationship in such circumstances should be that of invitee and invitor, it is unnecessary, in the present case, to determine that issue, as, in my view, upon the facts in this record, the result would be the same whether the infant be described as an invitee or a licensee.

Upon the assumption that the infant respondent was, while in the washroom, a licensee, he must accept the premises with whatever inconveniences, risks or dangers as are open and obvious. *Latham* v. *Johnson* (3). In this regard there is no distinction between an adult and a child, as emphasized in *Dobson* v. *Horsley* (4).

In the present case, however, the jury, upon instructions to which no exceptions have been taken upon this appeal, have not found the danger to be open and obvious, but, on the contrary, that the heating radiator, pipes, basins, bracket and counter constituted an allurement or enticement to the infant to climb thereon and that the combination of this equipment and the window adjacent thereto, through which, in the absence of guards or appropriate protection, a child might, as the infant plaintiff did, fall in the course of his climbing or playing upon this washroom equipment, constituted a concealed or hidden danger. When such facts are found to exist by a jury, the issue is not whether the members of an appellate court agree with the jury's finding, but whether there was evidence upon which a jury, acting judicially, might so find.

This finding brings the case within *Lynch* v. *Nurdin* (5), where an infant climber upon a cart left unattended in a public place. He fell off and suffered injuries for which damages were recovered because such a vehicle so left was to children but an attraction or an inducement to the exercise of their natural tendencies. As stated by Lord Atkinson, the principle of *Lynch* v. *Nurdin* "applies to any place

(1) [1923] A.C. 74.
(2) [1941] 2 K.B. 343.
(3) [1913] 1 K.B. 398.
(4) [1915] 1 K.B. 634.
(5) (1841) 1 Q.B. 29.

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to which boys or girls have a legal right to go and may reasonably be expected to be not unlikely to frequent." *Cooke* v. *Midland Great Western Ry. of Ireland* (1).

In *Ellis* v. *Fulham Borough Council,* (2), the borough provided a paddling pool in a public park for the use of children. On the morning in question the attendant had raked out the pond for the purpose of making it safe for the children to paddle and almost immediately thereafter the infant stepped into the pond and cut his foot upon a piece of glass. On the basis that the infant was a licensee, it was held that the council knew of the danger and had taken inadequate precautions to provide against that danger. Lord Justice Greer at p. 225 stated:

> . . . the ground which I think is sufficient is that the corporation recognized the danger to the children when they stepped into this pond at the place adjoining the sand patch, but that they took inadequate measures to remove that danger which they could have prevented if they had taken adequate measures to prevent it.

The language of this statement is particularly appropriate as no doubt the infant respondent, in the present case, would not have fallen through this window pane had the appellant provided guards, or other reasonable protection. In its failure to do so it "exposed the children to a danger" which it could, by reasonable means, have removed.

In *Williams* v. *Cardiff Corporation* (3), an infant four and one-half years old, while playing on a piece of waste ground, the property of the Cardiff Corporation, rolled down a bank and was injured by broken glass and tins at the foot thereof. The corporation was held liable and Jenkins L.J. at p. 518 stated:

> From the point of view of an infant, I have no doubt that such objects, scattered about the ground, are traps or concealed dangers, whatever might be said of them from the point of view of an adult.

Romer J. at p. 519 stated:

> It is obvious, I think, that the mere presence of a grassy slope could not amount to a concealed danger, for it could be seen. What I think is equally clear on the evidence is that the presence of that slope, coupled with the presence of tins and broken glass and other material at the bottom of it, did amount, and the county court judge was right in so holding, to a concealed danger, which would result in the corporation's being liable for damage sustained by this infant plaintiff.

(1) [1909] A.C. 229 at 238. (2) [1938] 1 K.B. 212.
(3) [1950] 1 K.B. 514.

Here again it may well be said that even a child would see that if he climbed upon the equipment he might fall to the floor or on some other part thereof and, therefore, that such was an obvious and not a concealed danger. That, however, was not the issue. The infant respondent had fallen through the closed window and the jury found it was the "combination" of this alluring equipment in such proximity to the window that constituted a concealed or hidden danger.

In *Corporation of the City of Glasgow* v. *Taylor* (1), the berries were perfectly obvious to children, but it was their poisonous character that they did not appreciate and, therefore, constituted "something in the nature of a trap." Lord Atkinson at p. 53 points out:

> The defenders were, therefore, aware of the evistence of a concealed or disguised danger to which the child might be exposed when he frequented their park, a danger of which he was entirely ignorant, and could not by himself reasonably discover, yet they did nothing to protect him from that danger or even inform him of its existence.

In *Latham* v. *Johnson, supra,* where the danger was obvious, the infant did not recover, Hamilton L.J. (later Lord Sumner), however, in the course of his judgment, stated at p. 416:

> On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object.

These cases illustrate that a licensor ought not to have upon his premises, which children of tender years, unattended, are known to frequent, objects with which, in the exercise of their natural propensity, they will meddle and suffer injury from the concealed or hidden danger of which the licensor has knowledge. This is further illustrated by the observations of the learned Lord Justices in *Hawkins* v. *Coulsdon and Purley Urban District Council* (2), where at p. 132 Denning L.J. stated:

> I do not think that there is any difference between a child licensee and an adult licensee except that a child will meddle where an adult will not, and this fact must be taken into account in deciding whether the occupier has been negligent.

(1) [1922] 1 A.C. 44.
(2) [1954] 2 W.L.R. 122.

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In the same case Somervell L.J., referring to accidents to young children, stated at p. 127:

> They are, of course, in one sense in a class apart in that, for example, no adult who choose to play with a turntable would be able to recover damages if he injured himself.

Then in Pollock on Torts, 15th Ed. at p. 406, it is stated:

> . . . an occupier who knowingly allows young children to come and play on his land must not expose them to dangers which, though manifest enough to an adult of ordinary sense, are not manifest to them.

The word "allurement," as used in this connection, is incapable of precise meaning. Whatever is attractive to children, in the sense that its presence will lead them, as here, to the exercise of their natural tendency to climb, turn on the taps and throw water at each other, provides an allurement or an enticement. If, in so doing, they suffer an injury from a concealed or a hidden danger in contrast to that which is open and obvious, then the licensor is said to have maintained a trap on his premises and may be liable in damages to an injured child. As Lord Atkinson stated in *Cooke* v. *Midland Great Western Ry. of Ireland, supra,* at p. 237:

> . . . if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person . . .

What constitutes a trap, or a concealed or hidden danger, is a question of fact to be found by a jury upon a consideration of all the relevant facts in a particular case. In the present case, apart from any conclusion the jury might arrive at from the construction, appearance and position of the equipment in the washroom, and particularly its relation to the window, there is the evidence of the janitor that this was a "dangerous window" which, in the context, could only mean that a child climbing upon the equipment already described might slip and, as a consequence, fall through the closed window. There is also the evidence of the complaint made by Bernard Munroe when he requested a guard be

placed thereon and the answer of Louis Nezan. These, in my view, all support the verdict of the jury to the effect that this "combination" constituted a concealed or hidden danger. In the language of Hamilton L.J., in *Latham* v. *Johnson, supra,* at p. 415, this "combination" presented to the infant "an appearance of safety under circumstances cloaking a reality of danger," at least in so far as the possibility of his falling through a pane of glass in the window was concerned. That it was such is strengthened by the evidence of Louis Nezan, who was fully aware of the details of this room and failed to realize the danger to children without protection or guards on the window. The jury might well conclude that if Louis Nezan did not realize the danger children of tender years would not do so and could not be reasonably expected to do so.

We are not here concerned with how much an infant should know or realize the danger of his falling to the floor or upon another part of the equipment, or even the possibility of his falling out of the window, had it been up or open. We are concerned with whether an infant of tender years, with the window closed, would recognize or appreciate the possibility of his falling through it, as a consequence of climbing upon the equipment. The infant in *Yachuk* v. *Oliver Blais Co., Ltd.* (1), knew gasoline could be used to make a fire. In fact the boys had purchased it for that purpose. Their Lordships of the Judicial Committee, at p. 396, stated, referring to the infant plaintiff,

> He did not know, and there is no evidence that he had ever been told, that gasoline was a volatile liquid capable of producing a highly inflammable vapor likely to burst into flame if heat were brought near it.

Their Lordships then concluded:

> It is a fair inference from the evidence that it was the very property of gasoline which he neither knew, nor could be expected to know, which brought about his misadventure.

So here, however much the danger of falling may have been obvious to the infant respondent in other respects, the jury, in my view, were justified in finding that the "combination" was such as to hide or conceal from the infant the possibility of his falling through a pane of glass in a closed window.

(1) [1949] A.C. 386.

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In my opinion, and with great respect to those who entertain a contrary opinion, the jury, with all the circumstances before them, had evidence upon which they might conclude, as they did, that an allurement existed and that the "combination" constituted a hidden danger to the children. It follows that the judgment entered for the plaintiff at the trial, and maintained in the Court of Appeal, should be affirmed.

The appeal should be dismissed and the judgments below affirmed.

LOCKE J.:—In *Metropolitan Ry. Co.* v. *Jackson* (1), Lord Chancellor Cains, referring to the respective functions of the Judge and the jury, said in part:—

> The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether from those facts, when submitted to them, negligence *ought* to be inferred.

In my opinion, there was no such evidence in the present case and it should have been withdrawn from the jury: accordingly the appeal should be allowed.

The circumstances under which the child Daniel Munroe and his parents came to be living in the suite of rooms rented by his grandmother in Wallis House are described in other reasons to be delivered in this matter, as well as the layout of the so-called wash room from one of the windows of which the child fell.

There must be determined at the outset the status of the child when in the room. According to the evidence of the father and the mother, they both considered the window, with the adjoining basins, as a danger to little children. On the day of the accident, the mother took the little boy with her to a room where she proposed to wash some pots. According to her, there were two other little children in the hall and her son remained with them and, with her consent, went with them into the wash room. Mrs. Munroe said she permitted this as she could watch them from the room in which she was working. Unfortunately, she did not do so and there is no account by any eye witness of the manner in which the child struck or fell against the pane of glass, and so to the ground below. One Thomas, a tenant

(1) (1877) 3 App. Cas. 193 at 197.

in the building, had been in the room shortly before the accident and had seen young Munroe and one of the other children on the shelf or wash stand behind the wash basins and had told them to get down. The children were apparently considered as being too young to be called as witnesses and whether the little boy slipped when getting down from the shelf on to the sill of the window, or whether, having got on to the sill, he was inadvertently pushed or fell against it while playing, is a matter of surmise.

The window, with its four panes of glass, did not differ from windows ordinarily found in rooming or apartment houses. The sill was some 18 or 19 inches from the floor and along the wall, immediately in front of it, there was an ordinary radiator of the type used for hot water or steam heating which would appear from the photographs to have been approximately 12 inches in height. A child of the age of young Munroe could thus readily climb up on the radiator and thus on to the window sill and, either from that point or perhaps directly from the radiator, up on to the wash basin and the shelf behind it. The height of the window sill from the floor was the same as that of at least some other of the windows in the building and there is no evidence to suggest that it was any lower than the window sills in the rooms in which the child lived with his parents.

The wash room was not part of the demised premises and the child's parents were not tenants. Upon the evidence it is, however, clear that they, as well as the tenant, were permitted to use one of the basins in the wash room and it was known by the janitor that children of the tenants went to the room. In the case of very young children such as young Munroe, too small to use the basins unaided, I think any licence to them to use the room should be held to have been subject to the condition that they be accompanied there by some person who could look after them, as in the case of the children whose rights were considered in *Burchell* v. *Hickisson* (1), and *Dobson* v. *Horsley* (2).

If, however, it were to be conceded that the child was a licensee in the wash room without restriction, the obligation of the owner was as it is defined in the 11th Edition of Salmond on Torts at p. 571:—

(1) (1880) 50 L.T.C.P. 101. (2) [1915] 1 K.B. 634.

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Although the occupier is not bound to use any care to make the premises safe for the use of a mere licensee, he is under an obligation to give warning to such licensee of the existence of any concealed danger which exists on the premises and is known to the occupier. He is not entitled knowingly to lead even a bare licensee into a trap. By the term "concealed danger" is meant a danger which in the words of Lord Wrenbury in *Fairman's* Case (1), "is not known to the licensee or obvious to the licensee using reasonable care." . . . The licensee can recover only if he can prove that the occupier led him into a trap by permitting him to enter on premises which he, using due care on his own part, reasonably supposed to be safe.

No one has attempted to give an exhaustive definition of a trap in the sense that that expression is used in actions of this nature. The characteristics of a trap have, however, been described in a number of leading cases.

In *Latham* v. *Johnson & Nephew Ltd.* (2), Hamilton L.J. (afterwards Lord Sumner) said (p. 415) that a trap was a figure of speech not a formula, which involved the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger, and pointed out that (p. 416):—

it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal.

Continuing, referring to the facts in *Latham's* case, he said:—

No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap.

In considering the kind of chattel in respect of which an owner owes a duty of care to strangers, whether they are invited or only licensed, he said (p. 419):—

There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be.

It is to be noted that in the same case Farwell J., who agreed that there was nothing in the nature of a trap, said (p. 407):—

If the child is too young to understand danger, the licence ought not to be held to extend to such a child unless accompanied by a competent guardian.

(1) [1923] A.C. 74.

(2) [1913] 1 K.B. 398.

In *Fairman* v. *Perpetual Investment Building Society* (1), Lord Atkinson referred to a trap as a hidden peril of the existence of which the landlord knew or ought to have known and, in referring to *Smith* v. *London and St. Katharine Docks Co.* (2), which, he said, was one of the cases not very happily styled trap cases, said that it was a good example of an unusual or covert danger of which the plaintiff knew nothing but of which the defendants were well aware. Lord Wrenbury said (p. 96) that the term implied a concealed or hidden peril.

In 23 Halsbury, at p. 584, Note (*p*), where the duty in regard to children is considered and the cases summarized, it is said:—

> The object must be dangerous in itself, inherently or from the state in which its owner suffers it to be; the object may be dangerous through being actually in motion, or liable to be easily set in motion, or poisonous or deleterious to eat or handle, or explosive, or so defective in some way as to be inherently dangerous.

In *Donovan* v. *Union Cartage Co.* (3), Acton J., in delivering the judgment of the Court, referred to *Lynch* v. *Nurdin* (4), where the defendant left his horse and cart unattended on the street and the plaintiff, a child of seven years of age, got upon the cart to play and was injured when another child started to lead the horse, saying (p. 74):—

> To extend the principle of *Lynch* v. *Nurdin* to things in no way dangerous in themselves left unattended on the street (or in other places open to the public such as parks, pleasure grounds or open spaces) would be to impose burdens of responsibility so far reaching and incalculable as to be unreasonable and intolerable. It cannot be said that, even if such things are likely to attract children, there is in them anything in the nature of a trap or a concealed peril.

There was, in my opinion, nothing in the nature of a trap in the present case. The wash basins were of the type found in all dwellings equipped with running water: the radiator which stood between the shelf behind the basins and the window was the ordinary radiator in common use and there was nothing to distinguish the window sill or the windows from those to be found in other dwellings. There was no concealed danger, even to a child such as Daniel Munroe, though the risk of falling against the window pane from the shelf or platform adjacent to it may not have been, and no doubt was not, present in his mind. If this was a

(1) [1923] A.C. 74.
(2) (1868) L.R. 3 C.P. 326.
(3) [1933] 2 K.B. 71.
(4) (1841) 1 Q.B. 30.

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trap, then any window sill which a child might reach by the use of a foot stool and window looking out over an area which might be attractive to children such as a playground, or any chair or table or any step ladder upon which a small child might clamber out of curiosity and fall, could be so classified. To extend the liability of the owner or occupier of property to cases such as these would be, in my judgment, to "impose burdens of responsibility so far reaching and inculculable as to be unreasonable and intolerable."

I would allow this appeal, with costs throughout if they are demanded.

CARTWRIGHT J. (dissenting):—This is an appeal from an order of the Court of Appeal for Ontario affirming the judgment of Spence J., given in accordance with the answers of the jury, awarding damages of $9,000 to the infant respondent and $1040.50 to the adult respondent. Leave to appeal as to the judgment in favour of the adult respondent was granted by the Court of Appeal. The appellant asks that the action be dismissed *in toto* and states expressly that it does not seek a new trial. The amounts at which the damages were assessed are not questioned.

The infant respondent is the son of the adult respondent. He was born on May 25, 1945. On the afternoon of October 19, 1949, he fell through a window in a washroom on the third floor of a building in the City of Ottawa known as Wallis House and suffered serious injuries. The appellant was, at all relevant times, the lessee of this building, which was divided into fifty-four suites which were sub-let to tenants. By a written lease dated April 1, 1948, the appellant demised suite number 29 on the third floor to Mrs. Dorion who is the mother-in-law of the adult respondent and the grandmother of the infant respondent. The lease was from week to week and was still subsisting at the time of the accident. While this lease was dated April 1, 1948, Mrs. Dorion had in fact become the tenant of suite 29 some time in 1946 when she, her daughter and the respondents moved into it. Between the date on which they moved in and the date of the accident two other children were born to Mr. and Mrs. Munroe so that at the date of the accident suite 29 was occupied by Mrs. Dorion, Mr. and Mrs. Munroe and their three infant children.

The suites in Wallis House are described as "emergency shelter" provided by the appellant in an effort to alleviate the housing shortage and contained no bathrooms. There were on each floor lavatories and wash-rooms which were retained in the possession of the appellant. Permission to use one of these lavatory rooms and one of these wash-rooms in common with the tenants of several other suites was given orally to Mrs. Dorion. It is clear on the evidence that this permission extended to the Munroes as members of her "family or household", words which appear frequently in the lease and the written regulations attached thereto. It was from the wash-room which Mrs. Dorion had permission to use that the infant respondent fell.

Immediately before the infant respondent fell through the window he was in the wash-room in company with another little boy too young to give evidence. Mrs. Munroe was in the lavatory-room across the hall washing some pans and heard the crash of the breaking glass. The infant respondent was too young to give evidence. There was no eye-witness to testify as to how the accident occurred but the theory of the respondents, supported by the circumstantial evidence and accepted by the courts below, was that the infant respondent had climbed up on to a shelf which ran along behind and a little above the level of the row of four wash-basins which the room contained and had fallen from it through the window. The southerly end of this shelf was close to the window and somewhat higher than the window-sill which was one foot, seven inches from the floor. The whole situation is fully described in the evidence and illustrated in photographs filed as exhibits but it is not necessary to give a detailed description. It is sufficient to say that the jury were justified in finding, as they did, that the particular arrangement was alluring to a child of the respondent's age and constituted for him a hidden danger.

The position taken by the respondents is that the wash-room was in the occupation of the appellant, that the infant respondent was a licensee in the wash-room, that the appellant knowingly permitted the existence in the wash-room of a hidden danger or trap of a nature alluring to a child into which trap the infant respondent fell and was injured.

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The questions put to the jury and their answers are as follows:—

Q. 1. Was the infant plaintiff on the defendant's premises at Wallis House to the knowledge of and with the permission of the defendants? Answer "Yes" or "No".

The answer is "Yes".

Q. 2. How were the injuries to the infant plaintiff caused?

Answer: By a fall through the window pane shown broken in Exhibit No. 6.

Q. 3. Was there present in the washroom a hidden danger, an allurement or enticement to the infant plaintiff? Answer "Yes" or "No".

The answer is "Yes".

Q. 4. If your answer to Question No. 3 is "Yes", describe its nature.

Answer: A combination of a heating radiator, pipes, basins, bracket and platform adjacent to an unprotected window.

Q. 5. If your answer to Question No. 3 is "Yes"; did the defendant through its officials know of the danger which existed? Answer "Yes" or "No".

The answer is "Yes".

Q. 6. If your answer to Question No. 5 is "Yes", did the defendant use reasonable care to prevent injury from the hidden danger, allurement or enticement to the infant plaintiff? Answer "Yes" or "No".

The answer is "No".

Q. 7. If your answer to Question No. 6 is "No", state in detail the manner in which the defendant failed to use such reasonable care?

The answer is "failure to install protection guards on the washroom windows."

Q. 8. Regardless of your answers to any of the above questions, at what amount do you assess the damages suffered by:

(*a*) The plaintiff, Bernard Munroe $1,040.50

(*b*) The plaintiff, Daniel Munroe 9,000.00

The main contentions of the appellant are (i) that the infant respondent was a trespasser in the wash-room at the time he was injured, and (ii) that even if he were a licensee there was no breach of the duty owed to him.

The argument that the infant respondent was a trespasser is put alternatively. It is first said that he and his parents were lodgers with Mrs. Dorion, that she had no right to keep lodgers, and therefore they had no right to be living in Wallis House at all. This argument fails on the evidence and the answer of the jury to Question 1, whatever its precise meaning, is decisive against the appellant on this point. In the appellant's factum the effect of the jury's answer on this point is put as follows:—

There was no finding by the jury that the infant Plaintiff, admittedly too young to take care of himself, was a licensee in the washroom at the material time. There was only a finding that the infant Plaintiff was a licensee in Wallis House in which there were at least 28 other private apartments.

It is said, secondly, that assuming that the infant respondent as a member of Mrs. Dorion's household was permitted to live in suite 29 and to use the washroom his license to use it was, in view of his age, subject to an implied term that he would be accompanied by an adult person capable of looking after him and that as he was admittedly not so accompanied at the time of the accident he was a trespasser.

It is essential that the question whether the infant respondent was a licensee or a trespasser be first determined. In *Robert Addie & Sons* v. *Dumbreck* (1), at pages 371 and 372 Lord Dunedin speaks of the three classes, invitees, licensees and trespassers, and continues:—

> Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man's land between adjacent territories. When I say rigid, I mean rigid in law, When you come to the facts it may well be that there is great difficulty—such difficulty as may give rise to difference of judicial opinion—in deciding into which category a particular case falls, but a judge must decide and, having decided, then the law of that category will rule and there must be no looking to the law of the adjoining category. I cannot help thinking that the use of epithets, "bare licensee", "pure trespassers" and so on, has much to answer for in obscuring what I think is a vital proposition; that, in deciding cases of the class we are considering, the first duty of the tribunal is to fix once and for all into which of the three classes the person in question falls."

All the members of the Court of Appeal were of opinion that the answers made by the jury read as a whole amounted to a finding that the infant respondent was a licensee in the washroom on the occasion in question. With respect, I am much impressed by the submission quoted above from the factum of the appellant as to the meaning of the answer to question 1. I will assume for the purposes of this branch of the matter that the attention of the jury was not directed to the question whether or not it was an implied term of the permission to the infant respondent to be in the wash-room that he should be accompanied by an adult and that the point is left undecided by their answers. In such circumstances it became the right and duty of the Court of Appeal to decide this question of fact. Section 27 of the Ontario Judicature Act reads in part as follows:—

> 27(1) The court upon an appeal may give any judgment which ought to have been pronounced and may make such further or other order as may be deemed just.

(1) [1929] A.C. 358.

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(2) The court shall have power to draw inferences of fact not inconsistent with any finding of the jury which is not set aside, and if satisfied that there are before the court all the materials necessary for finally determining the matters in controversy, or any of them, or for awarding any relief sought, the court may given judgment accordingly.

Cartwright J.

I think it clear from the reasons of the learned Chief Justice of Ontario, with which Aylesworth J.A. agreed, that he was of opinion that the proper finding on the evidence was that the infant respondent was a licensee in the wash-room and that his license was not subject to the implied condition contended for by the appellant. After discussing the evidence and the authorities relied on by the appellant the learned Chief Justice says in part:—

> I do not think there are any circumstances in the instant case which would justify attaching to the permission to use the wash-basin room a condition that the infant plaintiff would have to be accompanied by an adult.

I respectfully agree with this conclusion and wish to mention some of those matters in the evidence which support it. The terms of the lease to Mrs. Dorion contemplate that the demised suite will be used not only by her but also by her "family and household". The regulations attached to the lease, particularly number 4, contemplate the use of "water-closets and other water apparatus" by the lessee's "family, guests, visitors, servants or agents." The fact that the Munroes were living with Mrs. Dorion as members of her household and of course making use of the lavatory-room and wash-room was known to the appellant. The fact that not only the infant respondent but a number of other children were often in the wash-room unaccompanied by any adult and played there frequently was well known to the appellant's janitor. His evidence is that he often saw children playing on the shelf or counter and told them to get off but there is no suggestion in his evidence or that of any other witness that the janitor, or anyone else employed by or representing the appellant, ever told any child or the parent of any child that the children must not use the room unless accompanied by an older person. In default of any evidence on the point I see no reason to hold that persons of ordinary common sense would not permit a little boy of four years and five months to go unaccompanied into a wash-room on the same floor of the building as that on which the apartment in which he was living was situate. I conclude

therefore that on the day of the accident the infant respondent, although unaccompanied by any older person, was a licensee in the wash-room of which the appellant was the occupant.

What then was the duty owed by the appellant to the infant respondent? In my opinion this duty is correctly stated in the passage in Pollock on Torts adopted by Scrutton L.J. in *Liddle* v. *Yorkshire (North Riding) County Council* (1). At page 111, the learned Lord Justice said:—

> I also agree with the passage in Pollock on Torts (13th ed.), p. 544, where it is said: "Some decisions in America have gone to great lengths in favour of infant licensees and even trespassers, and have been much discussed. In England they have been followed only to this extent, that an occupier who knowingly allows young children to come and play on his land must not expose them to dangers which, though manifest enough to an adult of ordinary sense, are not manifest to them."

The passage quoted from the 13th edition of Pollock on Torts appears in the same words in the 15th edition at page 406.

It is clear from the judgments delivered in the House of Lords in *Fairman* v. *Perpetual Investment Building Society* (2) that the duty owed by the occupant of premises to a licensee thereon is at least a duty to protect him from a concealed danger actually known to the occupant and not obvious to the licensee or, in other words, to protect him from a trap existing on the premises of which the occupant knows. It is also clear from a number of authorities, including *Latham* v. *Johnson* (3) and *Glasgow Corporation* v. *Taylor* (4), which are reviewed in the recent judgment of the Court of Appeal in England in *Gough* v. *National Coal Board* (5), that a defect in premises which would not be a trap for an adult may well be so for an infant. In each case there will be a preliminary question of law whether the condition of the premises could be a trap and if this be answered in the affirmative it becomes a question of fact for the jury whether it was so.

In the case at bar, I am of opinion that it was open to the jury to find that as regards the infant respondent a trap existed in the wash-room. It is true it would not have constituted a trap for an adult person, but the arrangement

(1) [1934] 2 K.B. 101.
(2) [1923] A.C. 74.
(3) [1913] 1 K.B. 398.
(4) [1922] 1 A.C. 63.
(5) [1953] 2 All E.R. 1283.

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described in the answer to Question 4 was just the sort of thing likely to tempt a reasonably active and adventurous child to climb to the shelf or platform and so to bring himself to the edge of an unguarded precipice.

The finding of the jury that the existence of this danger was actually known to the appellant is amply supported by the evidence.

The duty to protect a licensee from a trap can in some cases be discharged simply by the giving of a warning of the danger which is not obvious. The infant respondent was probably too young for a warning to be effective and there is no evidence that the appellant gave him any warning. Two courses, at least, remained open to the appellant. It might have forbidden the use of the room to children unaccompanied by adults or it might have installed some protective guard on the window. There is evidence that the appellant was asked to follow the latter course and that this could have been done at trifling expense. The appellant did nothing whatever. In my opinion the decision of the Court of Appeal as to the judgment in favour of the infant respondent was right. The position taken by the appellant that it does not ask for a new trial renders it unnecessary to consider the view expressed by Hogg J. A. that as regards the award to the adult respondent there should be a new trial.

Before parting with the matter I wish to mention the suggestion which has been made that the duty owed to the infant respondent as a licensee in the wash-room was in some way affected by the fact that the permission of the appellant that he should be there was given to him because he was a member of Mrs. Dorion's household. It is clear that there was no contractual relationship between him and the appellant and once it has been determined that he was neither an invitee nor a trespasser but a licensee the duty owing to him by the occupant is fixed by law and the reasons which prompted the giving of the license are irrelevant.

Reference has been made to the case of *Dobson* v. *Horsley* (1), but that case is clearly distinguishable on the facts. All members of the Court were of opinion that the condition there complained of was not a trap but an obvious danger. At page 640, Buckley L.J. said:—

> The defective railing was obvious to persons using the steps; it was no trap by the lessor.

(1) [1915] 1 K.B. 634.

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Phillimore L.J. at p. 642 and Pickford L.J. at 643 expressed similar views. All members of the Court affirm the existence of the duty described by Pickford L.J. at p. 643 as the "liability, which exists in every case, not to lay a trap or to do anything to cause a concealed danger." The true ground of decision in *Dobson* v. *Horsley* appears to be either that the defect complained of did not constitute a trap even for the injured child or that the proper finding on the facts of that case was that the child had no license to be on the stairway unless accompanied by a guardian. I cannot think that Buckley L.J. or Pickford L.J. intended to assert that there cannot be a condition which constitutes a trap for a licensee who is a young child although it would not be a trap for an adult licensee, or that there may not be cases in which a young child although unaccompanied by an older person may be found to be a licensee on premises where a trap exists. Such propositions would be at variance with *Glasgow Corporation* v. *Taylor, (supra), Cooke* v. *Midland Great Western Ry.* (1), *Williams* v. *Cardiff Corporation* (2) and *Gough* v. *National Coal Board, supra.*

I would dismiss the appeal with costs.

Appeal allowed, with costs, if demanded.

Solicitor for the appellant: *G. C. Medcalf.*

Solicitors for the respondents: *Hughes & Laishley.*

1954

*Nov. 10
*Nov. 18

SCULLY SIGNAL COMPANY .....APPELLANT;

AND

YORK MACHINE COMPANY .....RESPONDENT.

MOTION FOR LEAVE TO APPEAL

Appeal—Jurisdiction—Exchequer Court Judgment—Appeal as of right dismissed—Motion Renewed—Leave Granted—Provisions of s. 82 no bar to application made under s. 83 of the Exchequer Court Act R.S.C. 1927, c. 34.

The provisions of s. 82 of the *Exchequer Court Act* do not apply to an application made under s. 83 of that Act, any more than the jurisdiction of the Supreme Court in respect of an appeal in exercise of a

*PRESENT: Kerwin C.J. in Chambers.

(1) [1909] A.C. 229. (2) [1950] 1 K.B. 514.

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right of appeal given by the *Exchequer Court Act* is affected by what is now s. 44 of the *Supreme Court Act*. *British American Brewing Co. Ltd.* v. *The King* [1935] S.C.R. 569.

MOTION by appellant under s. 83 of the *Exchequer Court Act*, before Kerwin C.J. in Chambers, for leave to appeal from a judgment of the Exchequer Court. (1)

Christopher Robinson, Q.C. for the motion.

Gordon Henderson, Q.C. contra.

THE CHIEF JUSTICE (In Chambers):—The Court has decided that there was no appeal as of right from the judgment of the Exchequer Court in this case dated January 25, 1954, and the plaintiff now moves under s. 83 of the *Exchequer Court Act* for leave to appeal.

I have read and considered all the decisions referred to, particularly *Western Clock Co.* v. *Oris Watch Co.* (2), including Chief Justice Anglin's statement at 399:—

"Whether the time can now be extended and leave granted by virtue of such extension, under s. 83, is a question for the consideration of the appellant. (*Goodison* v. *McNab*).(3)

The *McNab* case was an appeal from a decision of the Court of Appeal for Ontario under the provisions of *The Supreme Court Act*. Section 82 of the *Exchequer Court Act* deals with appeals to the Supreme Court of Canada from judgments of the Exchequer Court. Sub-section 2 thereof provides that "an appeal under this section" shall be brought by serving a notice of appeal, and s-s. 2(*a*) provides that the notice of appeal "shall be served and filed and the security shall be deposited within sixty days . . . from the signing or entry or pronouncing of the judgment appealed from, or withtin such further time as a judge of the Exchequer Court . . . may either before or after the expiry of the said sixty days fix or allow." These provisions do not apply to an application under s. 83, any more than the jurisdiction of the Supreme Court in respect of appeals in exercise of a right of appeal given by the *Exchequer Court Act* is affected by what is now s. 44 of *The Supreme Court Act*. (*British American Brewing Co. Ltd.* v. *The King* (4)).

(1) [1954] 20 C.P.R. 27; 14 Fox Pat. C. 27.
(2) [1931] S.C.R. 397.
(3) (1910) 42 Can. S.C.R. 694.
(4) [1935] S.C.R. 569.

I, therefore, have jurisdiction to make the order requested. On the argument I intimated that if I came to this conclusion permission would be given, and the order may go accordingly. Costs in the cause.

Motion granted.

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Kerwin C.J.

GENERAL SECURITY INSURANCE COMPANY OF CANADA *(Defendant)* APPELLANT;

AND

HOWARD SAND & GRAVEL COMPANY LIMITED *(Plaintiff)* ..... RESPONDENT.

1954

*June 3, 4, 7

*Oct. 18

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Pleadings—Insurance—Public Commercial Vehicles Act (Ont.)—Form of action to recover money paid 3rd party induced by misrepresentation by insurer to insured—Applicability of The Public Commercial Vehicles Act R.S.O. 1950, c. 304 to commercial vehicle used by real owner solely for purposes of registered owner.

The respondent sued the appellant to recover money which it alleged it had paid under a mistake of fact by reason of misrepresentation by the appellant. The latter had issued a public liability policy covering a motor truck registered in the respondent's name and had undertaken the defence of an action for damages caused by the truck. Just before trial it advised the respondent that it had assumed the defence on the assumption that the respondent was the owner but, having now learned that one P was the real owner, the policy was invalid and it might be forced to withdraw from the action. It had however arranged a settlement for $25,000 plus costs and was prepared to pay $15,000 if the respondent paid the balance. The respondent did so and thereafter the present action was brought.

For some time P had been employed to haul exclusively for the respondent. In the belief that to continue to do so he would have to be licensed under *The Public Commercial Vehicles Act,* R.S.O. 1950, c. 304, an arrangement was entered into whereby P sold the truck to the respondent for one dollar subject to resale on the same terms at any time P desired, P to register and insure the truck in the respondent's name. The agent of the insurer was advised of the arrangement at the time the truck was insured, some nine months prior to the accident.

Held: 1. That the arrangement entered into between the respondent and P. did not infringe the provisions of *The Public Commercial Vehicles Act,* R.S.O. 1950, c. 304.

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

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2. That the appellant knew of the arrangement and by its misrepresentation induced the respondent to make a payment which the latter was entitled to recover as money paid by the respondent to the use of the appellant.

Per Locke J.: The appellant was estopped by its conduct from asserting that the right to indemnity had been lost by reason of misrepresentations. In consequence of the provisions of ss. 211 and 214 of the *Insurance Act,* R.S.O. 1950, c. 173, in the circumstances disclosed by the evidence the principle in *Moule* v. *Garrett* L.R. 7 Ex. 101 applied, and the moneys paid could be recovered as moneys paid to the appellant's use.

Decision of the Court of Appeal for Ontario [1954] 1 D.L.R. 99, affirmed.

APPEAL by defendant from the judgment of the Court of Appeal for Ontario (1) allowing an appeal from the judgment of Barlow J. (2) dismissing plaintiff's action for the recovery of money paid under mistake.

J. F. McGarry, Q.C. and *A. J. Campbell, Q.C.* for appellant.

T. N. Phelan, Q.C. for respondent.

The CHIEF JUSTICE:—The appellant mis-stated a fact when it stated through its solicitor's letter of October 10, 1951, that "it has been conducting the defence of this action on the assumption that Howard Sand & Gravel Company, Limited, was the owner of the truck involved in the accident". The appellant had not been conducting the defence of the Atkinson action on any such assumption and the appellant knew it. That being so, the payment made by the respondent which, no matter what the form, was in substance a payment to the appellant, was made under a mistake of fact and may be recovered from the appellant as money paid to its use, unless the trial judge was right in the view he took of the case.

Mr. Justice Barlow held that the action failed because, in his opinion, the appellant had entered into an illegal scheme in contravention of the *Public Commercial Vehicles Act,* R.S.O. 1950, c. 304. As to this, I agree with the Court of Appeal that the respondent was the owner of the truck for all relevant purposes; but, even if it be assumed that Patterson remained the owner, I also agree that he was not

(1) [1954] 1 D.L.R. 99. (2) [1953] 3 D.L.R. 633.

conducting upon a highway by means of a public commercial vehicle *the business* of transportation of goods and, therefore, there could be no effort to circumvent the provisions of the statute.

The appeal should be dismissed with costs.

RAND J.:—I agree that the license under the *Public Commercial Vehicles Act* is not necessary where the truck is used solely for the purposes of its registered owner. The title transferred to the respondent entailed the entire control of its use and in this aspect it becomes, for the purposes of the Act, a private vehicle. I desire to guard myself, however, against suggesting that it is only for trucks in common carrier service for which licenses are required; a truck owner may carry on trucking or carrier services short of holding himself out to carry for the public generally.

I agree also that the accord to share the loss with the insurance company was induced by the misrepresentation of a fact within the knowledge of the company. The company, through its authorized agents, knew the circumstances of the transfer of title to the respondent a few days after the insurance was effected. Although the letter containing this misrepresentation was written by the solicitor of the insurance company, it is clear that he is merely communicating the representations of his principals.

These were the two issues on which the case was fought out. The respondent is entitled therefore to have the accord rescinded: as the money was paid to the claimant at the request of the insurance company, it became, in the circumstances, paid to its use and can be recovered under that count.

The appeal must be dismissed with costs.

The judgment of Kellock and Estey JJ. was delivered by:—

KELLOCK J.:—The business of the respondent, carried on at two plants, one at Hamilton and the other at nearby Aldershot, is, *inter alia,* the production of ready-mixed concrete for which annually some 10,000 tons of Portland cement is required.

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Kellock J.

For these operations the respondent maintains a number of its own trucks, and prior to April, 1948, it had begun to employ also, one Patterson to haul cement with his truck. Howard, the president of the respondent, testified that at that time the police had begun to enforce the *Public Commercial Vehicles Act* and had warned Patterson, who did not have what is known as a P.C.V. licence, to discontinue hauling cement. The respondent and Patterson thereupon entered into an arrangement, set out in an exchange of letters dated the 12th of April, 1948, under which Patterson "sold" to the respondent company his truck, composed of a tractor and trailer, for $1.00 each, on terms that the respondent would "resell" the vehicles to him at any time on the same terms. It was agreed that Patterson would insure the truck against public liability and property damage, but the insurance was to be in the name of the respondent. Registration of the truck under the *Highway Traffic Act* was obtained in the name of the respondent.

While the respondent company placed its name upon the truck, it remained at all times in the possession of Patterson who used it exclusively, as arranged, in hauling cement for the respondent. Patterson was paid therefor "freight and haulage" in exactly the same way as the respondent paid other truckers who held P.C.V. licences and hauled for the respondent. Patterson was at no time paid wages by the respondent company and all expenses of operating the truck, including gas, oil and repairs, were paid by him. The learned trial judge, on this evidence, found that in reality Patterson remained the owner, and that the arrangement between him and the respondent was entered into in the belief that Patterson would otherwise have required a P.C.V. licence.

The agent for the then insurer of the truck was informed of these facts at the time, and the existing insurance was, through him, transferred into the name of the registered owner. Subsequently, a new tractor was purchased and paid for by Patterson in replacement of the former one and it was agreed between him and the respondent that the arrangement would continue to apply to it. The original insurance was not issued by the appellant but on June 15, 1950, the appellant became the insurer.

The policy was executed on behalf of the appellant by Anglo Canadian Underwriters Limited "authorized for the purpose" by the appellant. On the 28th of June following, Anglo Canadian Underwriters wrote the agent, one Edworthy, stating:

> We have recently ordered our usual investigation of this risk, and we have been advised to the effect that the Howard Sand & Gravel Company do not own the vehicle described under this policy. It has been suggested that a private owner who is doing some hauling for this Company may be insuring this truck.
>
> In view of this we would ask you to kindly let us have your further advice in this connection.

To this letter Edworthy replied as follows:

> Lynden, June 29/50
>
> Dear Sirs,—
>
> You are right, the actual owner of truck is B. Patterson, Rockton, whom we have had insured for years. The truck is licensed, & in the name of Howard Sand & Gravell for business reasons. I believe the above Co. has a Contract for cement, and Assured does all his work for the Co. & its customery for owners of trucks to have Co's name on truck, there is nothing underhand in the setup.
>
> (sgd.) S. Edworthy

This letter was produced at the trial from the custody of the appellant. It is therefore apparent that the "usual investigation of this risk" to which the letter refers, was carried out by Anglo Canadian Underwriters Limited on behalf of the appellant company, and the information it elicited from the agent was duly transmitted to the appellant.

Subsequently and following the accident of the 6th of March, 1951, out of which the present litigation has arisen, the appellant, with the knowledge of the situation above disclosed, paid to the respondent under the policy the amount of the damage sustained by the truck itself in the accident, as well as the amount of a fire loss to the truck in September, 1950. When, therefore, it was stated by the solicitors for the appellant in the letter of the 10th of October, 1951, to the solicitors for the respondent, that

> The insurer instructs us that it has been conducting the defence of this action on the assumption that Howard Sand & Gravel Company Limited was the owner of the truck involved in the accident.

this statement was not true and the "insurer" knew that.

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Kellock J.

The learned trial judge held that although the appellant was, in fact, aware of the real situation, nevertheless the *Public Commercial Vehicles Act* prohibited Patterson from operating his truck, as he did, without a P.C.V. licence and that the respondent, by accepting registration of the truck in its name, was a party to the breach of the statute with the result that the insurance was void. The action was accordingly dismissed.

This judgment was set aside on appeal. In the opinion of the Court of Appeal the transaction of April, 1948, between Patterson and the respondent was effective to constitute the respondent the owner of the vehicle, it being held that the statute had no application to "a vehicle used exclusively for the transportation of an owner's own goods", and did not affect the respondent as owner. The court allowed recovery on the footing of the appellant's misrepresentation.

In my opinion, the transaction of April, 1948, was, as the learned trial judge held, admittedly for the purpose of evading what was believed to be the operation of the statute, and I am content to assume that, as between the parties to this action, the proper view is that Patterson remained the owner of the vehicle. The first question to be determined is as to whether the statute was in fact infringed.

The statute is the *Public Commercial Vehicles Act*, R.S.O., 1950, c. 304. S. 2 provides as follows:

> 2. (1) No person shall conduct upon a highway by means of a *public* commercial vehicle the *business* of transportation of goods except under an operating licence.
>
> (2) No person shall operate a public commercial vehicle unless the vehicle is licensed as a public commercial vehicle under this Act.

"Public commercial vehicle" is defined by s. 1(*i*) as

> A *commercial* motor vehicle or trailer as defined in *The Highway Traffic Act*, operated on a highway by, for, or on behalf of any person for the transportation for compensation of goods . . .

The italics are mine.

The definition in the *Highway Traffic Act* referred to, deals only with the structure of vehicles.

Patterson, before the transaction of April, 1948, and afterwards, in the view that he remained the owner, was, of course, carrying goods for compensation by means of his

truck. In so doing, however, was his truck "a public commercial vehicle", and was he conducting upon a highway the "business" of transportation of goods by means of "a public commercial vehicle" within the meaning of the statute?

Other provisions of the statute are relevant to this inquiry. It is provided by s. 4, s-s. (1) that no operating licence (i.e., a "public commercial vehicle operating licence issued under this Act", (s. 1(*h*))), is to be issued without the approval of the Ontario Municipal Board, such approval being evidenced by a certificate of the Board of "public necessity and convenience". The Board is required by s-s. (1)(*a*) to take into consideration the construction, width and nature of the highway, as well as the volume and nature of the traffic "on the proposed route", the type, weight, nature and number and the proposed use of the vehicles for which the P.C.V. licence is required, and the effect upon traffic conditions of the issue of the licence, as well as "the public necessity and desirability" of furnishing the proposed services upon the highways in question.

It has not been shown in the first place, that Patterson, in hauling cement to one or other of the two plants of the respondent, was confined in his operations to any one route. Moreover, I do not think the statute contemplates prohibiting the owner of a single truck from carrying the goods of one person exclusively without the Ontario Municipal Board first having considered whether or not there were not already available sufficient trucks owned by others for the carriage of such goods, and so certifying. It would seem that what is contemplated by the words "public necessity and desirability", and the other provisions of the statute to which I have referred, is the operation over defined routes of common carriers holding themselves out to the public as such. This view is strengthened by the provisions of s. 15, which authorizes the Lieutenant-Governor in Council to make regulations covering such matters as

> (*d*) fixing the form, amount, nature, class, terms and conditions of insurance or bond that shall be provided and carried by persons licensed under this Act;
>
> (*g*) respecting the publication, filing and posting of tariffs of tolls, and the payment of tolls;

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(*l*) prescribing the method of bookkeeping or accounting to be used and the returns or statements to be filed, and providing for the examination by officers of the Department of all books, records and documents;

(*m*) prescribing the method of handling cash on delivery shipments and the collection and remittance of cash on delivery funds;

(*n*) prescribing the form of bill of lading to be used;

There would appear to be no object which the legislature could have had in mind in connection with an operation such as is here in question in requiring the "publication", "filing" and "posting" of "tariffs". Such provisions would, however, be apt in the case of a carrier holding itself out as willing to carry for the public generally, although in practice it might confine its operations to the goods of one person. Under the arrangement between Patterson and the respondent company, the former had no right, so long as the arrangement lasted, to carry goods for anyone else.

Accordingly, although the parties considered that in the arrangement which they made, they were avoiding the effect of the statute, I do not think that aspect of the matter relevant. In my opinion, the statute did not, in fact, apply. There was, consequently, no illegality attaching to the policy of insurance.

The respondent was induced to make the payment to the Atkinson Estate upon the representation of the solicitors instructed by the appellant, that "the insurer" had "been conducting the defence" of the action "on the assumption that Howard Sand & Gravel Company Limited was the owner of the truck", and had discovered, only on October 3, 1951, that that was not so but that Patterson was the owner. As already pointed out, this was an untrue statement to the knowledge of the insurer.

The respondent rested its case in argument upon the principle of *Kelly* v. *Solari* (1), for the recovery of money paid under a mistake of fact. In my view, however, that principle does not apply. When the settlement was made with the Atkinson Estate, the respondent issued its cheque payable to the solicitors for the estate for the agreed portion to be paid by the respondent and the balance of the settlement was paid by the appellant. The settlement was, of course, a settlement of the claim of the estate against the

(1) (1841) 9 M. & W. 53.

respondent. The appellant company did not receive these moneys from the respondent and accordingly, it is not liable in this form of action.

It may be that the action might have been framed in damages for deceit, but on the argument, Mr. Phelan expressly disclaimed that basis of claim. While he rested his claim as above, it is apparent that the "mistake" which the respondent at all times had in mind was mistake in accepting as true the misrepresentation put forward by the appellant as to its lack of knowledge. There was no other mistake. Misrepresentation accordingly has been throughout the real basis of the respondent's claim although it has been put forward as "mistake", and the only dispute between the parties on this branch of the case was as to whether or not misrepresentation on the part of the appellant had been in fact established. As put by the appellant in its factum:

> The burden is upon the respondent to show any misrepresentation in the letter of October 10th, 1951.

The issue according to the respondent's factum is:

> (*a*) that the Respondent was entitled to recover the monies paid to the Insurer because the monies were paid under a mistake and because the Respondent was induced to make the payments by the material misrepresentations in the letter;
>
> (*d*) that the Insurer was at all times well aware of the said transaction and of the ownership of the automobile, and with such knowledge paid and satisfied claims of the Respondent under the insurance policy.

The learned trial judge's express finding is that the appellant

> Must be found to have known and been well aware of the situation.

And this finding was affirmed by the Court of Appeal.

This being the situation, the respondent, in my opinion, is entitled to recover on the footing of an action for moneys paid by the respondent to the use of the appellant. The moneys which the respondent paid to the Atkinson Estate, it was induced to pay by reason of the misrepresentation. The representation being untrue, the respondent has paid moneys which the appellant had taken on itself to pay under the policy of insurance it had issued to the respondent. This is sufficient to establish the cause of action; 7 Halsbury, 2nd ed. p. 265, par. 367.

I would dismiss the appeal with costs.

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LOCKE J.:—I have had the advantage of reading the judgment to be delivered by my brother Kellock in this matter and, for the reasons given by him, I am of the opinion that the arrangement made between Patterson and the respondent company and the operation of the truck pursuant to that arrangement did not infringe the provisions of the *Public Commercial Vehicles Act* (c. 304, R.S.O. 1950 as amended).

I agree with the learned trial Judge that the respondent was not the owner of the insured vehicle at the time the insurance was effected. The arrangement made between Patterson and the respondent, as explained by the witness Howard, was simply for the purpose of enabling the company to obtain a licence for the truck in its name and to avoid what was thought by both parties to be the necessity of obtaining a licence under the *Public Commercial Vehicles Act*. As the evidence shows, the vehicle was not carried on the books of the respondent as one of its assets, for the sufficient reason that it was common ground that it was the property of Patterson. The bearing of this upon the claim under the policy raises a question quite distinct from that sought to be raised under the *Public Commercial Vehicles Act*.

The earlier policies issued in the name of another company upon the application of the respondent were not put in evidence. In the application for the insurance which was reproduced on the face of the policy, the respondent represented that the tractor which formed part of the insured vehicle had been purchased by it in January 1950, new, for $3,500 and declared that it was the registered owner of the vehicle. The tractor had not been purchased by the applicant at the time stated nor had the applicant paid the sum of $3,500 for it; rather it had been purchased by Patterson to replace the tractor which had been insured by another company at the commencement of the arrangement between the parties. While the effect of this misrepresentation was not argued before us, the appellant has contended on the authority of a decision of the Court of Appeal of Ontario in *Sleigh* v. *Stevenson* (1), that the representation that the respondent was the registered owner was untrue. Since the same considerations determine, in my

(1) [1943] O.W.N. 465.

opinion, the legal consequences of these statements, they may be properly treated as if both points had been taken before us.

By s. 200 of *The Insurance Act* it is provided that where an applicant knowingly misrepresents any fact required to be stated in the application, any claim by the insured shall be rendered invalid and the right of the insured to recover indemnity shall be forfeited. This section of the statute is reproduced as Item 8 in the application for the insurance signed by the respondent. If it be accepted that the representation that the respondent was the registered owner of the vehicle should be construed as meaning that the respondent was not merely registered as owner but was in truth the owner of the machine, the right to indemnity would be lost unless the right to set up this defence to a claim was waived by the appellant or if, for other reasons, the appellant was estopped from relying upon it.

The appellant pleaded in the Statement of Defence that the respondent had no insurable interest in the vehicle and that it was owned by Patterson. In the reply, these allegations were put in issue and it was alleged that the appellant had knowledge of the arrangement between the respondent and Patterson when the policy was issued and when the appellant had paid a collision loss under the policy in March of 1951. At the trial, the respondent was permitted to amend the reply by alleging that the appellant was estopped from denying the validity of the policy since the facts upon which the defence was based were known before or immediately after the issue of the policy on June 15, 1950, and by the defendant's silence until October 10, 1951, the respondent had been induced to believe that the policy was valid.

The policy issued by the appellant bore the printed signature of the appellant and that of Anglo-Canadian Underwriters Limited, under which appeared the words "authorized for the purpose". Other evidence as to the status of Anglo-Canadian Underwriters Limited is very slight. The application for the policy was taken by one Edworthy, an insurance agent who had for some ten years prior thereto submitted applications for insurance to the Anglo-Canadian Company. In cross-examination, he referred to that company as a broker but he really had no first hand information

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as to the nature of whatever arrangement existed between it and the appellant company. At the trial, the policy signed as above stated was put in evidence without objection and the appellant did not contend that it was not properly executed so as to be binding upon it. The appellant was aware that the respondent contended that notice to Anglo-Canadian Underwriters Limited of the facts as to the arrangements between it and Patterson was notice to it but elected to call no evidence. It is my opinion that in these circumstances there was prima facie evidence that Anglo-Canadian Underwriters Limited was the agent of the appellant in the negotiations which resulted in the issuance of the policy and at the time the enquiries were made of the agent Edworthy on June 28, 1950, shortly after the policy was issued which disclosed the nature of the arrangement between Patterson and the respondent and at the time of the occurrence of the accident in March, 1951.

It was shown that on August 9, 1950, the insured vehicle was damaged by fire and a claim for the loss was filed with the appellant. The risk of fire was by the policy insured by the Phoenix Fire Insurance Company of Paris, the portion of the risk assumed by the appellant excluding fire losses, and while the claim was made upon the appellant and Howard said that the loss was paid the amount was presumably paid by the Phoenix Company. The appellant, however, was manifestly made aware of the claim and no suggestion was made at that time that the policy was not in effect.

On March 6, 1951, the accident took place which gave rise to the action brought by the Atkinson Estate against the respondent and a claim for the loss caused to the insured vehicle by collision was made upon both of the insurance companies and paid. It was not until the following October that the appellant first raised the question as to the validity of the policy or of the respondent's right to indemnity.

It is my opinion that under these circumstances the appellant should be held to be estopped by its conduct from asserting that the right to indemnity had been lost by reason of the misrepresentations made in the application.

The claim of the respondent, as pleaded, was to recover the moneys paid by it to the solicitors for the Atkinson Estate as its contribution to the settlement, which amount

was said to have been paid in the belief that it was legally liable to contribute to the settlement, a belief induced by representations made by the defendant which were untrue in fact. As to one of these, the evidence adduced might support a claim that its falsity was known to the defendant and so justify an action for damages for deceit. Counsel for the respondent, however, disclaimed before us any such claim and rested the respondent's right to recovery upon the claim that the appellant was liable on the ground that the moneys had been paid by a mistake of fact.

Subject to certain exceptions which are pointed out in the 20th Edition of Chitty on Contracts, at p. 95, within none of which the present matter falls, it is of the gist of an action for the recovery of moneys paid by a mistake of fact that the moneys were received by the defendant to the use of the plaintiff. The customary form of pleading in actions for the recovery of moneys so paid may be found in the last Edition of Bullen and Leake at p. 228 where, in a note, the cases relating to this type of action are collected. These include *Kelly* v. *Solari* (1), *Jones* v. *Waring* (2), and other authorities upon which the respondent relied in the argument before us. These might support a claim for the recovery of the money from the Atkinson Estate but not from the appellant as, in them, the action was brought against the actual recipient of the money. It is, in my opinion, a sufficient answer to a claim to recover these moneys as moneys paid under a mistake of fact that the appellant did not receive them.

I have, however, come to the conclusion that this is a case where the moneys paid may be recovered as moneys paid by the respondent to the use of the appellant, upon the principle stated by Cockburn C.J. in *Moule* v. *Garrett* (3).

The position is affected, in my opinion, by the provisions of the *Insurance Act* (c. 183, R.S.O. 1950). While it was the respondent which was in the first instance liable to the Atkinson Estate, by reason of the provisions of that Act the appellant was liable to pay the amount of any judgment recovered against the respondent up to the sum of $5,000 in any event by virtue of s. 211 of the Act and to

(1) (1841) 9 M. & W. 53. (2) [1926] A.C. 670.
(3) (1872) L.R. 7 Ex. 101.

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the full extent of the policy limits under the provisions of s. 214, unless the insurer was not, for some reason, liable to indemnify the insured. By the latter section a person having a claim against an insured for which indemnity is provided shall, notwithstanding that such person is not a party to the contract, be entitled upon recovering a judgment against the insured to have the insurance moneys payable under the policy, to the extent above mentioned, applied in satisfaction of his judgment. At the time the solicitors for the insurance company approached the respondent, early in October 1951, the liability of the respondent to the Atkinson Estate had not been determined but, if liability existed, both the appellant and the respondent would become liable when judgment was recovered, the respondent to the full extent and the appellant to the extent limited by the policy and the provisions of the Act.

As I have indicated, I think there was no defence to the claim of the respondent to indemnity upon any of the grounds asserted and as between these parties liability to satisfy the claim to the extent of the insurance rested upon the appellant.

In *Moule* v. *Garrett,* Cockburn C.J., with whose judgment Willes, Blackburn, Mellor, Brett and Grove, JJ. agreed, quoted with approval a statement in the then current edition of Leake on Contracts which reads (p. 104):—

> Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.

Cockburn C.J. further said that whether the liability was put on the ground of an implied contract, or of an obligation imposed by law, is a matter of indifference and that it was such a duty as the law would enforce. This statement from the earlier edition of Leake referred to in *Moule* v. *Garrett* is repeated in the last edition of that work at p. 46 and a statement to the same effect appears in the last edition of Chitty on Contracts at p. 1023.

This principle is, in my opinion, applicable in the circumstances of this case and, while the claim was not thus expressed in the pleadings, it appears to me that all of the

evidence which would be relevant to the consideration of such a cause of action is before us. I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. F. McGarry.*

Solicitors for the respondent: *Phelan, O'Brien, Phelan & FitzPatrick.*

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