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Supreme Court of Canada

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S. EDWARD BOLTON

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1930

JUDGES

OF THE

SUPREME COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS

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

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Ernest Lapointe K.C.
The Hon. Hugh Guthrie K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Lucien Cannon K.C.
The Hon. Maurice Dupré K.C.

18010—1½

MEMORANDUM

On the fourteenth day of January, 1930, the Honourable Lawrence Arthur Cannon, one of the Judges of the Court of King's Bench of the Province of Quebec, was appointed a Puisne Judge of the Supreme Court of Canada in the room and stead of the Honourable Pierre Basile Mignault, retired.

ERRATA

Page 235, at the 24th line "The Hadley" should be "The Halley."

Page 248, foot-notes (2) and (5) should be L.R. 6 Q.B. 1.

Page 249, foot-note (1) should be L.R. 6 Q.B. 1.

Page 317, last line, foot-note (1) refers to foot-note (1) on page 318.

Page 449, at the 24th line, (1) should be (2); at the 30th line, (2) should be (3); at the 32nd line, (3) should be (4); and, at the bottom of the page, the second (1) should be (2), (2) should be (3) and (3) should be (4).

Page 474, at the bottom of the page, foot-note (2) should be (1841) 1 Web. Pat. Cas. 328.

Page 703, foot-note (2) should be [1896] A.C. 348, at p. 360.

Page 716, foot-note (5) should be [1912] A.C. 333.

Page 718, foot-note (1) should be [1912] A.C. 333.

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.

Canadian Pacific Railway Company v. *The King* ([1930] S.C.R. 574). Leave to appeal granted, 22nd July, 1930.

Christiani v. *Rice* ([1930] S.C.R. 443). Leave to appeal granted, 28th July, 1930.

Dominion Gresham Guarantee & Casualty Company v. *The Bank of Montreal* ([1930] S.C.R. 572). Appeal dismissed with costs, 12th July, 1930.

King, The, v. *Carling Export Brewing and Malting Company* ([1930] S.C.R. 361). Leave to appeal granted, 15th May, 1930.

Regent Taxi & Transport Company v. *Congrégation des Petits Frères de Marie* ([1930] S.C.R. 650). Leave to appeal granted, 6th February, 1930.

"Robert J. Paisley" v. *Canada Steamship Lines Limited* ([1929] S.C.R. 359). Appeal allowed with costs, 22nd January, 1930.

Steedman v. *Sparks* ([1930] S.C.R. 351). Leave to appeal refused, 16th May, 1930.

Taylor v. *Taylor* ([1930] S.C.R. 26). Leave to appeal refused, 5th November, 1929.

Toronto Transportation Commission v. Can. Nat. Rys., Can. Pac. Ry. Co. and City of Toronto. ([1930] S.C.R. 73, 94). Leave to appeal granted, 14th February, 1930. One appeal allowed and the other dismissed, 18th July, 1930.

Trustees of St. Luke's Presbyterian Congregation of Saltsprings v. *Cameron* ([1929] S.C.R. 452). Appeal dismissed, 23rd June, 1930.

Winnipeg, Selkirk and Lake Winnipeg Ry. Co. v. *Pronek* ([1929] S.C.R. 314). Leave to appeal granted, 17th February, 1930.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME

TABLE OF CASES CITED

A

B

B

C

C

D

E

F

G

H

H

I

J

K

K

L

M

M

Mc.

N

N

O

P

Q

R

R

S

S

T

V

V

W

Y

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

THE EMPLOYERS' LIABILITY ASSURANCE COMPANY (DEFENDANT). } APPELLANT;

AND

R. ERNEST LEFAIVRE (PLAINTIFF).....RESPONDENT.

1929
*Feb. 19.
*May 27.

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

Workmen's Compensation Act—Insurance company—Indemnity policy—Minimum and estimated premiums mentioned in the policy—Supplementary premium fixed and payable after the expiry of policy—Accident to employee during life of the policy—Notice to insurer after supplementary premium is due—Liability of the insurance company—Insolvency of the employer—Fyling of claim with the trustee for supplementary premium—Compensation between premium and indemnity.

The appellant company insured one Dubé under an indemnity policy against liabilities resulting from the *Workmen's Compensation Act* for a period of one year from the 26th of January, 1924. The premium was based upon the whole remuneration of the insured's employees during the period of the policy as follows: a "minimum" premium and an "estimated premium" were stipulated to be paid, and were in fact paid, in advance by the employer, and, at the expiry of the policy, an adjustment was to be made so that a supplementary premium may then be due by the insured or a reimbursement may be made by the company, according to the amount of wages paid by the insured during the life of the policy; but, in any case, the "minimum" premium was to be retained by the company. On the 2nd of August, 1924, an employee of Dubé, one Lévesque, was injured, but a petition to sue the employer under the Act was served only on the 28th of January, 1925, and, on the same day, Dubé made an assignment in bankruptcy. Lévesque, having been granted permission to sue the trustee, one Gagnon, obtained judgment for $5,300 and costs against the present respondent who had succeeded Gagnon as trustee. On the 27th of January, 1925, one day after the expiry of the policy and one day prior to the service of the petition on Dubé, an adjustment had been made as provided for in the policy and a supplementary premium of $1,020.58 was thereby shown to be due by Dubé. On the 22nd of January, 1927, the respondent sued the appellant com-

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith JJ.

1929

EMPLOYERS' LIABILITY ASSUR. CO. v. LEFAIVRE.

pany for the payment of $6,490, being Lévesque's claim of $5,300 and the costs, under the judgment secured against the respondent which he had not yet paid. The appellant company repudiated its liability on the ground that the supplementary premium of $1,020.58 had not been paid by the insured.

Held, Mignault J. dissenting, that the appellant company was liable for the amount claimed by the respondent. Under the terms of the policy, the obligations of each party were not simultaneous and that of the insurer to indemnify was not made subject to the obligation of the insured to pay the supplementary premium. The appellant's liability was complete and absolute on the date of the accident, i.e., on the 2nd of August, 1924; on that day, the appellant, having received all the premiums then due, became bound to pay to the employer the amount of the indemnity to be awarded to the injured employee under the *Workmen's Compensation Act.*

Held, also, that, at all events, the company could not repudiate the claim while it asserted its right to keep the premiums already paid and also while it persisted in maintaining a claim, filed with the trustee in bankruptcy, for the supplementary premium.

Held, also, that the supplementary premium may not be deducted from the indemnity on the ground of compensation, as at no time, before the bankruptcy, were they equally liquidated and demandable.

Per Mignault J. (dissenting).—The appellant company had a right to oppose the respondent's action with a plea of *non adimpleti contractus,* i.e., to ask that its liability to pay the amount claimed should be postponed until the payment by the insured of the supplementary premium. A right of action against the insurer does not exist in favour of the employer until the injured employee has filed his claim for compensation. On the date of the service by Lévesque of his petition to sue Dubé, the supplementary premium of $1,020.58 was due and unpaid by the latter and, therefore, the insurance company was not liable. It is not the accident itself, but the notice of the accident to the insurer, which creates against the latter an obligation to pay under the policy.

Judgment of the Court of King's Bench (Q.O.R. 45 K.B. 224) aff., Mignault J. dissenting.

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

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

Gustave Monette for the appellant.

P. E. Gagnon K.C. for the respondent.

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

(1) (1928) Q.O.R. 45 K.B. 224.

RINFRET, J.—Duncan N. Dubé, un industriel d'Amqui, province de Québec, avait pris une police d'assurance de la compagnie appelante contre tous les accidents du travail qui se produiraient dans son usine depuis le 26 janvier 1924 jusqu'au 26 janvier 1925.

Le 2 août 1924—par conséquent, pendant la période de temps couverte par la police et alors que cette police était en vigueur—un ouvrier du nom de Lévesque fut blessé dans l'usine de Dubé. Il fit, le 28 janvier 1925, signifier une requête pour être autorisé à assigner Dubé en recouvrement d'indemnité en vertu de la loi des accidents du travail; mais le même jour Dubé faisait cession de ses biens.

J.-P.-N. Gagnon fut d'abord nommé syndic à la faillite de Dubé; puis, Gagnon étant décédé, il fut remplacé par Lefaivre, le présent défendeur-intimé.

Lévesque avait reçu la permission de poursuivre sa réclamation contre Gagnon en sa qualité de syndic de Dubé, et il avait obtenu un jugement,—*ex parte* d'abord, puis à la suite d'une contestation par voie d'opposition à jugement, —pour la somme de $5,300 et les frais. La mort de Gagnon était survenue pendant cette dernière contestation, et Lefaivre, son successeur, avait repris l'instance.

Ce jugement définitif en faveur de Lévesque fut rendu le 8 mars 1926, et un bref d'exécution en satisfaction de ce jugement fut même émis contre le syndic le 20 avril de la même année. Il n'apparaît cependant nulle part qu'une saisie ait été pratiquée et nous n'avons au dossier aucun rapport du shérif ou d'un huissier à cet égard.

Les procédures prises par Lévesque ayant été portées à la connaissance de la compagnie d'assurance, elle refusa de s'en occuper, et encore plus de prendre le fait et cause du failli Dubé, en objectant que la prime totale qui était due en vertu de la police d'assurance n'avait pas été payée, soit par Dubé, soit par le syndic à sa faillite. Nous serons amenés par la suite à expliquer et à examiner cette objection davantage. Pour cette même raison, la compagnie d'assurance ne voulut pas payer la somme adjugée en faveur de Lévesque; et le syndic Lefaivre poursuivit alors la compagnie en recouvrement de cette somme en capital, intérêts et frais. La compagnie, par sa défense, réitéra son refus de payer pour les motifs déjà exposés.

1929

EMPLOYERS' LIABILITY ASSUR. CO. v. LEFAIVRE.

Rinfret J.

La Cour Supérieure et la Cour du Banc du Roi (1) ont maintenu l'action du syndic. M. le juge Tellier, toutefois, était favorable à l'idée de permettre à la compagnie de déduire le montant de la balance de prime restée impayée.

Pour décider si nous devons confirmer ces jugements, il nous faut premièrement analyser la police d'assurance sur laquelle est basée la poursuite.

On y voit que, de la part de la compagnie appelante, il s'agit d'un engagement *envers le patron.* C'est avec Dubé qu'elle a contracté et c'est vis-à-vis de Dubé qu'elle a assumé des obligations " en ce qui concerne ", dit la police,

les blessures corporelles, y compris la mort qui en est la conséquence, souffertes par les employés dudit patron.

Ces obligations sont:

(*a*) de payer "à toute personne qui y aura droit en vertu de la *Loi des Accidents du Travail,* promptement et de la manière y pourvue, le montant payable en entier ou les versements au fur et à mesure qu'ils seront payables, etc."

Dubé ou son syndic Lefaivre pouvait donc demander, par l'action, que la compagnie fût condamnée à payer à Lévesque lui-même le montant qui est présentement réclamé,

(*b*) de "dédommager ledit patron des pertes subies à cause de la responsabilité qui lui est imposée par la loi pour les dommages résultant de telles blessures souffertes par ceux desdits employés qui sont légalement employés, quel que soit le local où elles sont souffertes, pourvu que ce soit en dedans des limites territoriales de la Puissance du Canada ou des Etats-Unis d'Amérique."

Dubé ou son syndic pouvait donc demander que l'indemnité fût payée directement à eux par la compagnie d'assurance. Cette clause n'exige pas qu'ils aient préalablement payé Lévesque. On peut même ajouter que ce paiement préalable est l'une des choses contre lesquelles Dubé s'assure. Il suffit que la " perte " ait été " subie ", c'est-à-dire que la dette envers Lévesque ait été encourue. Une dette est une diminution de l'actif. Encourir une dette c'est subir une perte. De plus, en vertu de la clause E des conventions, Dubé a le droit de poursuivre pour obtenir ce dédommagement pourvu que

le montant de la réclamation ou de la perte soit fixé ou liquidé par un jugement final rendu contre ledit patron après l'audition de la cause (i.e. de l'action intentée par l'employé contre le patron) ou par un règlement entre les parties auquel la corporation aura donné son consentement par écrit.

(1) (1928) Q.O.R. 45 K.B. 224.

On remarquera que cette clause assimile la " réclamation " de l'employé à la " perte " du patron et n'exige pas le paiement préalable de la réclamation par le patron.

Il faut donc décider que l'appelante était dès lors tenue de payer, à moins que nous ne trouvions dans la suite de la police une condition qui vienne modifier cette convention principale. Par son texte, cette police se distingue de celle qui fut interprétée par cette cour dans la cause de *Melukhova* v. *The Employers' Liability-Assurance Corporation* (1) et présente plutôt de l'analogie avec celle de *North American Accident Insurance Company* v. *Newton* (2).

Cette condition qui modifierait son obligation de garantir et de payer Dubé, l'appelante nous invite à la trouver dans la stipulation relative au paiement de la prime. Cette clause est la suivante:

A.—La prime est basée sur la rémunération totale gagnée pendant la période de la police par tous les employés dudit patron engagés dans les opérations industrielles décrites dans lesdites déclarations, et dans celles qui y sont nécessaires, incidentes ou accessoires, localisées dans lesdites usines, ateliers ou chantier ou tout autre local en rapport avec eux; avec l'exception, toutefois, de la rémunération du président, du vice-président, du secrétaire et du trésorier dudit patron, si celui-ci est une corporation, à moins que cesdits officiers ne remplissent les devoirs de surintendant, de contremaître ou d'ouvrier. Si des opérations telles que ci-dessus définies sont entreprises par ledit patron et ne sont pas décrites ni fixées quant aux taux dans lesdites déclarations, le patron consent à en payer la prime, *au moment de l'ajustement définitif, d'après la condition "C"* ci-après énoncée, au taux du "Manuel de Taux", employé par la corporation au moment de l'émission de cette police, et selon les règlements y contenus. La période de la police terminée, le montant effectif de la rémunération gagnée par les employés pendant cette période sera exhibé à la corporation selon la condition "C" ci-dessous, *et la prime acquise sera ajustée proportionnellement, d'après ce montant, aux conditions et aux taux ici énoncés.* Si la prime acquise, ainsi calculée, dépasse la prime payée d'avance, le patron paiera immédiatement à la corporation le montant additionnel; si elle est moindre, la corporation rendra au patron la partie non acquise; mais en tout événement la corporation retiendra le montant de la prime minimum mentionnée dans lesdites déclarations. Toute prime pourvue par cette police ou par un supplément y annexé, sera considéré comme effectivement acquise, même dans le cas où la *Loi des Accidents du Travail* serait déclarée invalide ou inconstitutionnelle, en tout ou en partie.

Au moment de l'émission de la police, Dubé a donc payé la prime alors convenue. Moyennant cette prime, qu'elle a acceptée, la compagnie a pris les engagements que nous venons de voir. Et la clause A stipule que

(1) [1922] 63 Can. S.C.R. 511. (2) [1918] 57 Can. S.C.R. 577.

1929

EMPLOYERS' LIABILITY ASSUR. CO. v. LEFAIVRE.

Rinfret J.

> la période de la police terminée * * * la prime acquise sera ajustée proportionnellement d'après * * * le montant effectif de la rémunération gagnée par les employés durant cette période.

Cet ajustement a eu lieu. Il a démontré que la compagnie avait droit à une prime supplémentaire. Ce supplément n'a pas été payé par Dubé et, comme conséquence, la compagnie refuse maintenant de remplir son obligation d'indemniser Dubé pour l'accident de Lévesque et demande le renvoi de l'action. Nous comprenons qu'elle présente son argument sous la forme de l'exception *non adimpleti contractus* et qu'elle affirme son droit au paiement intégral de la prime supplémentaire avant d'être appelée à exécuter ses obligations en vertu du contrat d'assurance.

Nulle part notre code civil n'a posé le principe général sanctionné par cette exception du droit romain. La Cour du Banc du Roi a été d'avis qu'à tout événement il n'y avait pas lieu à son application à l'espèce. Le contrat y aurait pourvu dans les circonstances spéciales de cette cause. Si la compagnie n'a pas été payée par Dubé, et si elle ne l'a pas encore été par le syndic, si même elle risque de ne pas être entièrement payée, c'est à cause de la banqueroute de Dubé. Or, le contrat stipule:

> En cas de la banqueroute ou de la faillite dudit patron, la corporation ne sera pas relevée de l'obligation de payer l'indemnité qui serait autrement payable en vertu de cette police.

M. le juge Rivard, parlant au nom de la majorité de la Cour du Banc du Roi, a interprété cette clause comme voulant dire que, nonobstant l'inaccomplissement des obligations de l'assuré, et, en particulier, nonobstant son défaut de payer la prime supplémentaire comme conséquence de sa banqueroute ou de sa faillite, la compagnie d'assurance serait quand même tenue de payer l'indemnité. C'est donc précisément contre l'exception que l'appelante veut maintenant invoquer que le contrat aurait stipulé, dans le cas où surviendrait la banqueroute de l'assuré. Il serait impossible d'assigner un autre but à cette clause de la police; et sans cela, elle n'aurait aucun sens. En effet, la banqueroute ou la faillite ne pouvait pas d'elle-même mettre fin aux engagements de la compagnie. La raison d'être de cette stipulation serait donc de pourvoir contre le cas où la banqueroute empêcherait l'assuré de payer la prime additionnelle.

Nous sentons toute la force de cet argument et nous nous serions rangés de son côté, s'il ne nous paraissait pas faire abstraction, dans la clause en question, du membre de phrase: " qui serait autrement payable en vertu de la police ".

Suivant nous, ces derniers mots ont l'effet de restreindre la portée générale de la clause. La banqueroute ou la faillite ne doit pas empêcher l'effet de la police d'assurance pourvu que, indépendamment de cette banqueroute ou de cette faillite, elle soit " autrement " en vigueur; et l'indemnité sera quand même payable, si, par ailleurs, la police est en règle. Si elle n'est pas " autrement " en règle, l'indemnité ne sera pas payable. Et le but de cette stipulation s'explique par la suite de la clause, qui doit se lire avec elle. Pour le démontrer, nous allons reproduire toute la clause:

> En cas de la banqueroute ou de la faillite dudit patron, la corporation ne sera pas relevée de l'obligation de payer l'indemnité qui serait autrement payable en vertu de cette police. Dans le cas où, à cause de telle banqueroute ou faillite, une exécution contre ledit patron serait rapportée non satisfaite, dans une action intentée par le blessé ou par toute autre personne qui réclame en vertu d'un droit dérivant de lui, alors une action pourra être maintenue contre la corporation, en vertu des dispositions de cette police, pour le montant du jugement dans ladite action, jusqu'à concurrence du montant de cette police.

On ne saurait, suivant notre humble opinion, chercher le sens du premier membre de phrase en le détachant de son contexte. Il faut lire la clause dans son ensemble et alors son véritable sens devient clair. C'est une stipulation pour autrui. Dans le cas de banqueroute ou de faillite et dans les conditions spécifiées, elle donne à l'employé accidenté (ou à toute autre personne réclamant en vertu de la loi des accidents du travail) un recours direct et personnel contre la compagnie d'assurance.

Elle n'a donc pas pour effet d'écarter l'exception *non adimpleti contractus* si, par ailleurs, cette denière s'applique à l'espèce.

Mais, sans nous demander pour le moment si cette exception doit trouver place dans notre droit (et nous savons qu'il existe en faveur de l'affirmative des expressions d'opinion absolument respectables — voir *Kuppenheimer* v. *MacGowan* — (1) nous sommes d'avis qu'elle est repoussée ici par les conditions mêmes du contrat.

(1) (1908) Q.O.R. 18 K.B. 215.

1929

EMPLOYERS' LIABILITY ASSUR. CO. v. LEFAIVRE.

Rinfret J.

Dès que l'accident fut arrivé à Lévesque, l'obligation de dédommager Dubé a existé. Il y avait certaines formalités à remplir, mais la compagnie ne se plaint pas qu'elles ne l'aient pas été. Il restait encore à fixer le montant du dédommagement—et la police prévoit qu'il pourra l'être

par un jugement final rendu contre le patron * * * ou par un règlement entre les parties auquel la corporation (compagnie d'assurance) aura donné son consentement par écrit (Clause E),

mais, dès le moment de l'accident (2 août 1924), l'obligation de l'appelante, à raison de cet accident, fut complète et absolue. Elle ne pouvait être remplie immédiatement et son exécution restait suspendue jusqu'à ce que le montant fût liquidé. Cependant, l'obligation était entière dans ce sens que, en vertu du contrat, l'appelante ne pouvait plus s'y soustraire. Elle était dès lors liée envers l'assuré à lui payer le montant de l'indemnité dès qu'il serait établi. Rien de ce qui pouvait se passer ultérieurement ne pouvait plus priver Dubé de ce droit acquis. D'ailleurs, la fixation même du montant de l'indemnité avait, dans ce cas, un caractère rétroactif (Art. 1085 C.C.).

Le droit était entier dès l'accident. Autrement, il faudrait décider que l'existence de ce droit dépendrait des délais de procédure, comme, par exemple, si la compagnie eût été poursuivie dès l'accident mais que la cause n'eût pas été en état avant l'échéance de la prime supplémentaire, la compagnie eût pu, suivant cette prétention, faire valoir ce moyen avec succès par voie de plaidoyer *puis darrein continuans.*

D'accord avec tous les juges qui nous ont précédés en cette cause, nous croyons qu'il ne saurait en être ainsi.

La théorie de l'exécution simultanée, dans l'esprit même de ceux qui la préconisent,

ne s'applique qu'autant que la volonté des parties ne l'a pas écartée en réglant l'ordre d'exécution des obligations réciproquement assumées.

(Capitant—De la cause des obligations—1923—p. 264; Colin et Capitant—Droit civil Français, 5e éd., vol, 2, p. 336; Cassin, De l'exception tirée de l'inexécution, pp. 531 et 537.

Ici l'intention des parties n'était pas de subordonner une prestation à l'autre. L'engagement de la part de Dubé de payer la prime supplémentaire n'est pas le fondement de l'engagement de la compagnie d'assurance. La considération de l'engagement pris par la compagnie a été la prime

fixe qui a été payée au début. Moyennant le paiement de cette somme, la compagnie a assumé les obligations de la police et elle a consenti à devenir responsable du paiement des indemnités avant que la prime supplémentaire ne fût acquittée. En sorte que l'acquittement de ce montant additionnel n'était pas une condition préalable—ce qui est évident, puisqu'il ne devait s'effectuer qu'après l'expiration de la police—ni même une condition subséquente à laquelle fut subordonnée l'obligation de dédommager ou d'indemniser. La compagnie a entrepris de remplir cette obligation indépendamment de cette prime supplémentaire, pour laquelle elle s'en est rapportée exclusivement à la promesse de Dubé. Comme le dit l'appelante dans son factum:

> The assurer agreed to take the risk, on a chance of being paid at the end of the policy.

En plus, si, comme le fait remarquer Baudry-Lacantinerie (Traité de Droit civil, Des obligations, Tome 2, p. 143), l'exception peut être envisagée comme une forme adoucie du droit de résolution, et vu que la prime supplémentaire n'est payable qu'après le terme de la police, il est difficile de voir comment la compagnie pourrait en l'espèce obtenir la résolution du contrat pour cause d'inexécution d'une obligation postérieure à l'expiration du contrat. Elle ne peut opposer cette obligation à celle qu'elle a contractée de garantir et d'indemniser Dubé pendant la durée du contrat. Ce serait admettre que la résolution pourrait lui être accordée au détriment des droits acquis de Dubé.

En effet, il ne s'agit pas ici d'un défaut absolu de paiement; et il y a lieu de souligner la contradiction dans l'attitude de la compagnie d'assurance qui garderait la prime qu'elle a reçue lors de l'émission de la police, qui toucherait en outre sa part de dividende sur la prime supplémentaire et qui, malgré cela, n'aurait aucune obligation envers le syndic de son assuré.

Cette prime supplémentaire est devenue due la veille de la mise en banqueroute de Dubé. Ce jour-là, il ne pouvait payer la compagnie sans faire un paiement préférentiel, donc illégal. Par la suite, la compagnie n'avait pour cette prime aucune créance privilégiée. Elle l'a reconnu, en produisant elle-même entre les mains du syndic une réclamation ordinaire. Le syndic ne refuse pas de la reconnaître.

1929

EMPLOYERS' LIABILITY ASSUR. CO. v. LEFAIVRE.

Rinfret J.

Il a offert et il offre de la colloquer à son rang. C'est d'ailleurs son devoir.

La compagnie, qui refuse d'exécuter son contrat, n'en persiste pas moins dans le maintien de sa réclamation. Elle demande d'être payée sur le même plan que les autres créanciers. Bien plus, elle a reçu la prime initiale. Elle n'offre pas de la rembourser. Elle entend la garder. Cependant, restant en possession de cette prime, réclamant en outre suivant la loi de faillite la prime additionnelle et supplémentaire, elle prétend être en droit de répudier ses engagements. Comme les deux cours qui nous ont précédés, nous pensons que cela n'est pas possible en loi.

Nous en concluons que l'appelante est tenue de payer l'indemnité réclamée par l'intimée. Le quantum lui-même n'en a pas été discuté devant cette cour, sauf la question de savoir s'il y a lieu d'en déduire le montant de la prime supplémentaire. Cette déduction n'a pas été demandée par les plaidoiries écrites, et le procès ne s'est certainement pas engagé dans ce sens, la compagnie soutenant qu'elle n'était tenue à aucune obligation et concluant au rejet de l'action. Le jugement de la Cour Supérieure n'en contient aucune mention, non plus que celui auquel s'est ralliée la majorité des juges de la Cour du Banc du Roi. Mais c'est là le point qui fait l'objet de la dissidence de M. le juge Tellier. Il aurait déclaré les deux dettes compensées *pro tanto* parce qu'elles procèdent l'une et l'autre d'un même contrat. Nous croyons que cette suggestion se heurte à une objection de principe. A aucun moment avant la faillite de Dubé, les deux dettes n'ont été également liquides et exigibles (Arts. 1187 et suiv. C.C.). Après la faillite, la compensation n'était plus possible.

Au cours de l'argument, une question a été soulevée qui relève des conclusions de l'action. Le syndic y demande que la somme réclamée soit payée par l'appelante " pour le bénéfice de la faillite ". L'accidenté Lévesque n'a pas été payé. Comme il s'agit d'une police de garantie, nous croyons que l'intention du contrat est que le montant de l'assurance soit versé pour le bénéfice de la victime. Nous ne partageons pas la crainte de la compagnie qu'elle soit exposée à payer deux fois. Nous croyons que le droit de poursuite, qui est donné à l'employé dans le cas que nous avons discuté, ne constitue qu'une obligation alternative,

et que la compagnie est libérée en faisant l'une des deux choses qui en forme l'objet (Art. 1093 C.C.). Mais l'intérêt de la justice et l'esprit de la convention exigent que le montant de l'assurance serve à payer l'indemnité due à la victime de l'accident du travail. Les deux parties l'ont reconnu. L'appelant dit:

> Of course, the assured has a right of enforcement of that obligation, that is an action to force the assurer to pay direct to the beneficiary, at the assured's discharge, the amounts owing, but the assured has no right, under that obligation, to claim for him for the benefit of his bankrupt estate the amounts stipulated in the policy to be paid to third parties.

L'intimé dit:

> We submit that even on a judgment in favour of the trustee in our case it might give the capital direct to the injured plus the trustee's costs, in execution of the judgment.
>
> But, at all events, the trustee is an officer of justice acting under the authority of the court, guaranteed by a bond; he could not attribute legally the money paid by the assurance co. to any other purpose than the payment of Lévesque, a guaranteed creditor under the *Workmen's Compensation Act* and under the *Bankruptcy Act*. Any interested party could oppose the *bordereau*, if money should be applied to any other purpose.

Lévesque n'étant pas en cause, nous entrevoyons des difficultés d'exécution si nous ordonnions de payer à lui directement. Mais comme le demandeur est un officier de justice, nous maintenons l'action en déclarant cependant que le syndic recevra l'indemnité pour le bénéfice du créancier Lévesque et avec instruction de le tenir à part des autres fonds de la faillite, et d'en faire remise à Lévesque.

L'appel est rejeté avec dépens.

MIGNAULT, J. (dissenting).—L'appelante aurait pu éviter tout ce litige en prenant la précaution d'insérer, dans la police de garantie qu'elle a émise, une clause qu'on trouve dans la plupart des polices d'assurance, savoir que le droit de l'assuré de se faire indemniser serait subordonné au paiement intégral de la prime. Elle avait assuré pour une année le nommé Duncan N. Dubé, industriel, contre la responsabilité qui incombe aux patrons en vertu de la loi des accidents du travail. Il est vrai que la prime dans l'espèce présentait cette particularité que son montant ne pouvait être déterminé qu'à la fin de l'année d'assurance, car elle était basée sur la somme globale que l'assuré aurait payée à ses employés durant l'année. Le contrat fixait d'abord une prime *minimum*, dans l'espèce $125, et ensuite ce qu'on appelait une " prime estimée ", savoir $228, que

1929

EMPLOYERS' LIABILITY ASSUR. CO. v. LEFAIVRE.

Mignault J.

l'assuré payait à l'émission de la police. A la fin de l'année d'assurance il se faisait un ajustement, c'est-à-dire on calculait le montant entier de la prime proportionnellement aux salaires payés par le patron durant l'année. Si ce montant dépassait la " prime estimée ", le patron payait immédiatement la différence, savoir un supplément de prime. Si le montant calculé était inférieur à la " prime estimée ", l'assureur faisait une remise à l'assuré de tout ce qui dépassait la prime *minimum*, mais il gardait cette dernière prime quel que fût le résultat du calcul. Il y avait donc une prime *minimum* définitivement acquise à l'assureur, une " prime estimée " payable d'avance, et, si cette " prime estimée " se trouvait inférieure au montant calculé à la fin de l'année d'après les salaires payés par le patron, un supplément de prime que le patron devait immédiatement, c'est-à-dire aussitôt que le montant en serait déterminé, verser à l'assureur.

La police d'assurance expirait le 26 janvier 1925. A cette époque, on fit l'ajustement prévu, et Dubé se trouva alors débiteur envers l'appelant de la somme de $1,020.58, supplément de prime, payable immédiatement. Deux jours plus tard, le 28 janvier 1925, Dubé tomba en faillite sans avoir payé ce supplément de prime.

Or, durant l'année d'assurance, au mois d'août 1924, un nommé Lévesque, employé par Dubé, avait été victime d'un accident du travail. Il n'appert pas que Dubé ait donné à l'appelante l'avis de cet accident comme l'exigeait la police. L'appelante, cependant, ne se plaint pas de ce défaut d'avis comme cause d'annulation du contrat, mais c'est une circonstance qu'on doit mentionner dans l'exposé des faits de la cause. Le dossier ne fait pas voir non plus si Lévesque avait fait une réclamation contre Dubé antérieurement au 28 janvier 1925, date de la cession de biens de Dubé, alors qu'il lui fit signifier une requête pour permission d'intenter une poursuite sous la loi des accidents du travail. Il n'appert pas non plus qu'avis de cette requête ait été donné à l'appelante. Enfin, le 5 mars 1925, Lévesque demanda la permission de poursuivre le syndic de Dubé, et cette fois copie de la deuxième requête de Lévesque fut transmise à l'appelante.

Cependant, dans l'intervalle, savoir le 9 février 1925, l'appelante avait produit entre les mains du gardien provi-

soire de Dubé une réclamation dite non garantie pour le supplément de prime. En recevant du syndic copie de la deuxième requête de Lévesque, l'appelante répondit qu'elle se chargerait de la défense de la faillite Dubé sur paiement du supplément de prime, à quoi le syndic répliqua qu'elle serait payée avec les autres créanciers " au marc la livre ". Le 18 mars 1925, Lévesque intenta une action contre le syndic, et ce dernier en envoya copie à l'appelante, qui réitéra qu'elle ne défendrait la faillite Dubé que sur paiement de la prime. La poursuite de Lévesque suivit donc son cours et le demandeur obtint, le 19 mai 1925, un jugement *ex parte* contre le syndic pour $5,300. Alors celui-ci produisit une opposition à jugement, mais sur nouvelle instruction de la cause, Lévesque obtint, le 8 mars 1926, un nouveau jugement pour le même montant, avec, bien entendu, de nouveaux frais contre le syndic. Le 20 avril 1926, un bref d'exécution fut émis contre le syndic, mais on ne paraît pas avoir donné effet à ce bref.

Le 22 janvier 1927, le syndic poursuivit l'appelante lui réclamant, en vertu de la police d'assurance, $6,490 qu'il devait à Lévesque pour capital, intérêt et frais, et par ses conclusions il demanda que l'appelante fût condamnée à lui payer cette somme pour le bénéfice de la faillite Dubé.

L'appelante, en réponse à l'action, oppose à l'intimé l'exception dite *de non adimpleti contractus,* mais à tort elle s'en autorise pour demander le rejet pur et simple de la demande de l'intimé. Il est à remarquer que l'effet de cette exception est de suspendre l'exécution de l'obligation, et non pas d'anéantir l'obligation elle-même. On ne peut opposer l'exception que lorsqu'il s'agit d'un contrat synallagmatique, et que les prestations des deux parties sont également exigibles. Pour emprunter le langage de Planiol (*Traité élémentaire de Droit civil,* 10e édition, avec la collaboration de Georges Ripert, t. 2, n° 949), " dans tout rapport synallagmatique, chacune des deux parties ne peut exiger la prestation qui lui est due que si elle offre elle-même d'exécuter la sienne ". Ainsi le vendeur n'est obligé de livrer la chose vendue sans terme que si l'acheteur en paie le prix (art. 1496 C.C.), et l'acheteur qui a juste sujet de craindre d'être troublé par une action hypothécaire ou en revendication, peut différer le paiement du prix jusqu'à ce que le vendeur fasse cesser le trouble ou lui

1929

EMPLOYERS' LIABILITY ASSUR. CO. v. LEFAIVRE.

Mignault J.

fournisse caution (art. 1535 C.C.). Dans l'un et l'autre cas il n'y a que suspension de l'exécution de l'obligation.

Dans l'espèce qui nous est soumise, le supplément de prime n'était dû qu'à l'expiration de l'année, ce qui était moins un terme accordé à l'assuré que la fixation d'une date où il serait possible de calculer le montant de ce supplément. Cependant, durant l'année d'assurance, toutes les obligations de l'assureur existaient et, le cas échéant et aux conditions stipulées, l'assuré aurait pu en exiger l'accomplissement. Donc la possibilité que l'assuré se trouverait plus tard redevable d'un supplément de prime n'aurait pas permis à l'assureur, avant tout défaut de la part de l'assuré, de lui refuser l'exécution de son obligation.

Cette situation, cependant, se changeait du moment que le supplément de prime devenait exigible. Si après l'échéance de ce supplément, à un moment donc où l'assuré en était débiteur, il était survenu une réclamation contre l'assureur à raison d'une stipulation du contrat d'assurance, l'assureur, me semble-t-il, aurait pu suspendre l'exécution de son obligation jusqu'à ce que l'assuré eût rempli la sienne en versant le montant du supplément de prime. Je crois qu'il est indubitable que si Dubé n'eût pas fait faillite, toute réclamation de sa part en vertu d'un droit d'action prenant naissance au moment où Lévesque fit signifier sa requête pour permission de poursuivre en vertu de la loi des accidents du travail, aurait été subordonnée au paiement du supplément de prime.

En tout cela il ne s'agit pas de compensation, car il n'y a pas de compensation possible entre les prestations réciproques des parties en vertu d'un même contrat (Aubry et Rau, 5e éd., t. 4, p. 374, note 5*bis*; Demolombe, t. 28, n. 506; Baudry-Lacantinerie et Barde, *Obligations*, t. 3, no. 1825 *in fine*). Nous sommes en présence ici de prestations échues et qui doivent s'exécuter en même temps, et le défaut de l'une des parties de remplir sa part d'obligation autorise l'autre à suspendre l'exécution de la sienne.

La faillite change-t-elle cette situation? Je ne le crois pas. Ainsi supposons que le failli, avant sa faillite, avait acheté une maison. Pouvait-il en demander livraison sans en payer le prix? Certainement que non. Ou bien, le failli avait obtenu une promesse de vente; pouvait-il exiger la passation d'un contrat de vente sans offrir le prix? Qu'on

ne dise pas que payer ce prix serait un paiement préférentiel et partant impossible, car le failli, pas plus que tout autre, ne peut exiger l'accomplissement d'un contrat synallagmatique à moins de fournir la prestation que le contrat lui impose.

Revenons maintenant aux faits de cette cause. La réclamation de Lévesque n'est faite qu'après l'échéance de l'obligation de Dubé de payer le supplément de prime. L'accident seul ne fait pas naître une obligation à la charge de l'assureur, il faut encore qu'avis de cet accident lui ait été donné (Cassation, 27 janvier 1925, Sirey, 1925, 1, 14). Or, l'intimé ne prétend pas que cette notification ait été fournie à l'appelante. Tout ce qui appert au dossier, c'est que celle-ci a reçu, plusieurs semaines après l'échéance du supplément de prime, copie d'une requête par laquelle Lévesque demandait à être autorisé à poursuivre le syndic de Dubé. Il est vrai que l'appelante a produit à la faillite sa réclamation pour le supplément de prime, mais elle l'a fait avant toute notification de l'accident survenu à Lévesque, et, dans ces circonstances, la production de sa réclamation est sans portée décisive contre elle.

Quand même il s'agirait ici d'une créance payable à terme, il est certain qu'après l'échéance du terme la créance devient pure et simple (Baudry-Lacantinerie et Barde, *Obligations*, n° 1000). Et permettre à l'une des parties, après cette échéance, d'exiger l'accomplissement des obligations de l'autre partie sans fournir en même temps la prestation qu'elle avait elle-même promise, serait contraire à la règle qui exige l'exécution simultanée des obligations qui découlent d'un contrat synallagmatique.

Je regrette beaucoup de ne pouvoir partager l'opinion de mon collègue M. le juge Rinfret. Je ne crois pas qu'il y ait divergence entre nous quant aux principes que j'ai exposés plus haut. Je diffère de sa manière de voir parce que le droit d'action en vertu de la police, dans mon opinion, n'a pris naissance que lorsque Dubé était déjà en défaut de payer le supplément de prime.

Je puis terminer en citant un *dictum* du juge Brewer de la cour suprême des Etats-Unis dans la cause de *Mutual Life Insurance Co.* v. *Hill* (1)

(1) 193 U.S. 551, at p. 559.

1929

EMPLOYERS' LIABILITY ASSUR. CO. v. LEFAIVRE.

Mignault J.

Courts have always set their faces against an insurance company which, having received its premiums, has sought by technical defences to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid.

Je ferais droit à l'appel avec les frais de toutes les cours, et je n'obligerais l'appelante à indemniser l'intimé du jugement que Lévesque a obtenu contre elle que sur paiement intégral du supplément de prime.

Appeal dismissed with costs.

Solicitors for the appellant: *Patenaude, Monette, Filion & Boyer.*

Solicitors for the respondent: *Gagnon & Simard.*

1929

*May 27.
*Sept. 26.

THE MORTGAGE CORPORATION OF NOVA SCOTIA (PLAINTIFF).... } APPELLANT;

AND

AMBROSE ALLEN (DEFENDANT).... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA EN BANC

Mortgage—Order for foreclosure and sale—Terms of order

It is the proper practice in Nova Scotia, in an action by a mortgagee for foreclosure and sale, that the order provide for the advertisement and sale, not of the lands and premises in question *simpliciter*, but only of the interest of the defendant (mortgagor) and of persons claiming under or through him.

The court has full power and control over the advertising and the form of the deed which the sheriff is to execute.

Judgment of the Supreme Court of Nova Scotia *en banc* ([1929] 3 D.L.R. 225) settling the form of order in question, held to be clearly right, subject to certain slight changes in the wording of the order, which this Court suggested and to obtain which (and confined thereto) the plaintiff (mortgagee) was given leave to appeal (at its own cost) to this Court.

The proper wording of the order in such a case, and the meaning and effect thereof, discussed. Rules 8 (*d*) of Order XVI, 12 (*e*) of Order XIII, 10A (1) of Order LI, of the Rules of the Supreme Court of Nova Scotia, and R.S.N.S., 1923, c. 140 (*Law and Transfer of Real Property Act*), ss. 15, 16, 20, 24 (1), R.S.N.S., 1923, c. 144 (*Registry Act*), s. 18, and R.S.N.S., 5th series (1884), c. 123 (Act respecting *Sale of Lands under Foreclosure of Mortgage*), ss. 4, 6, considered.

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

1929

MORTGAGE CORPORATION OF NOVA SCOTIA v. ALLEN.

MOTION by the plaintiff for special leave to appeal from the judgment of the Supreme Court of Nova Scotia *en banc* (1) affirming the judgment of Paton J. refusing an order for foreclosure and sale in the particular terms asked for by the plaintiff.

The action was commenced on January 7, 1929, for the foreclosure of a mortgage, made by the defendant and his wife to the plaintiff, of lands at North Sydney, in the County of Cape Breton, Nova Scotia, for $5,500, and for the sale of the lands described in the mortgage in payment of the amount due on the mortgage, and for the possession of said lands, and recovery of the amount due on the covenants in the mortgage from the defendant. No appearance was entered by the defendant, and on February 19, 1929, application was made *ex parte* to Paton J. in Chambers for an order for foreclosure and sale. The form of order asked for by the plaintiff was, in part, as follows:—

> And it is further ordered that the equity of redemption of the defendant and of all persons claiming or entitled by, from or under the said defendant of, in and to the lands and premises sought to be foreclosed herein be barred and forever foreclosed.
>
> That the said lands and premises be advertised for sale * * *
>
> And unless before the day appointed for such sale the amount due * * * be paid * * * the said land and premises be sold at public auction * * * to the highest or best bidder. And that upon payment of the purchase money the said sheriff do make a good and sufficient deed to the purchaser thereof.
>
> * * * * *

PATON J. refused to grant the order in the form asked for, the objection being that the order directed the sale of the land instead of the sale of the right, title and interest of the mortgagor in the land.

Subsequently the plaintiff moved before the Supreme Court of Nova Scotia *en banc*, for the order, under the provisions of Order LVII, Rule 10, of the Rules of the Supreme Court. The Court affirmed the decision of Paton J., and settled the form of order. The order as thus settled read, in part, as follows:—

> And it is further ordered that the estate, interest and equity of redemption of the mortgagor in the said lands and premises described in the said mortgage be forever barred and foreclosed and that a sale of the said mortgaged premises be made by the sheriff * * * after notice * * * and unless before the day appointed for such sale the amount due to the plaintiff with its costs be paid to it or its solicitor the sheriff

(1) [1929] 3 D.L.R. 225.

1929

MORTGAGE CORPORATION OF NOVA SCOTIA v. ALLEN.

shall proceed to sell and shall execute to the purchaser or purchasers thereof at such sale a deed or deeds conveying and which shall convey to him or them all the estate right title interest claim property and demand of the mortgagor at the time of the making of the said mortgage foreclosed in this action, or at any time since, and of all persons claiming or entitled by from or under the mortgagor of in and to the lands respectively purchased at such sale.

* * * * *

The plaintiff applied to the Supreme Court of Nova Scotia *en banc* for special leave to appeal to the Supreme Court of Canada, which application was refused.

The plaintiff then moved before the Supreme Court of Canada for special leave to appeal, contending, *inter alia,* that the matter in controversy came within clauses (*c*), (*d*), and (*f*) of the proviso to s. 41 of the *Supreme Court Act*; that it was a matter of general public interest affecting the title to the great majority of real estate properties in the province of Nova Scotia; that it involved the substantial rights of the parties and was not merely a question of procedure and practice; that the judgment was erroneous in law; that the Supreme Court of Nova Scotia had no jurisdiction to make an order or decree for the sale merely of the estate, title and interest of the mortgagor in lands; that no court of equity will decree a sale merely of the estate, right, title and interest in land but must ascertain the interest to be sold; that the order or decree asked for by the plaintiff was the settled form of order or decree granted by the Court over a great period of years and could not now be changed; that the order sought to be appealed from purported to foreclose only the estate, interest and equity of redemption of the mortgagor in the land described in the mortgage, leaving unmentioned the interests of judgment creditors mentioned in the Registrar's certificates and all others claiming under the mortgagor whether equitably or otherwise and whether registered or unregistered; that the order sought to be appealed from purported to order a sale of "said mortgaged premises," which phrase had been construed by the judgment sought to be appealed from to mean only the "right, title and interest" of the mortgagor, and by said judgment plaintiffs in foreclosure suits who do not conform to the form settled and who advertise and sell more than such "estate, title and interest" are debarred from having their sales con-

firmed and their costs of advertising or sheriff's deed allowed; that a sale under the order would not carry the legal estate and title of the mortgagee and that a purchaser at such sale would take the mortgagor's estate and interest, if any, subject to all equities to which it was subject in his hands when the mortgage was made and subject to all encumbrances attaching thereto subsequent to the making of the mortgage whether registered or unregistered; that a purchaser would be unable to get a good title at the foreclosure sale, and the rights of the plaintiff and also of the defendant would be thereby prejudiced and the chance of holding a good sale destroyed, and that the titles of all properties hereafter sold in foreclosure actions pursuant to orders in the form fixed by the said judgment would be rendered defective; that it was important in the interests of the parties to the suit and of the owners of all real estate in the province and of mortgagees that the judgment of the highest court of appeal should be obtained as to whether, in actions for foreclosure and sale in Nova Scotia, the decree of the court should be for the sale of the land described in the mortgage or merely for the sale of the mortgagor's interest therein whether ascertained or unascertained, and also that the effect of the common form of decree for foreclosure and sale in use in the province should be determined.

A. Whitman K.C. for the motion.

No one *contra.*

The judgment of the Court was delivered by

ANGLIN, C. J. C.—The plaintiff has moved for special leave to appeal from a judgment of the Supreme Court *en banc* of Nova Scotia (1) affirming a judgment of Paton, J., refusing an order for foreclosure and sale in this action in the particular terms in which it was asked. The case appears to fall within one or more of the clauses of the proviso to s. 41 of the *Supreme Court Act;* and, although at first disposed to regard the questions raised as purely matters of procedure, which should not be made the subject of an appeal to this Court, on further consideration it

(1) [1929] 3 D.L.R. 225.

1929

MORTGAGE CORPORATION OF NOVA SCOTIA v. ALLEN.

Anglin C.J.C.

appears to us that they may affect some substantive rights and that, even if mere matters of procedure, they are of such general importance in Nova Scotia that they may properly be considered and dealt with here.

In the judgment of the Full Court the terms of the order proper, in the opinion of that Court, to cover a case such as this are settled and embodied. The chief complaint made against this order is that it provides for the advertisement and sale only of the interest of the mortgagor and of persons claiming under and through him, instead of, as the plaintiff desires, providing for the advertisement and sale of the lands and premises in question *simpliciter*.

The contention put forward on behalf of the plaintiff, in this respect, is, in our opinion, entirely wrong. It never was, and never could be, the purpose of the legislation and rules governing the matter that the court should do anything so misleading as to authorize the advertisement and sale of anything more than the interest of the mortgagor at the time the mortgage was made and any interest subsequently acquired by him and the interests of all persons claiming by, through or under him, including, of course, the plaintiff itself.

While we entirely agree with the view expressed by Chisholm, J., who dissented, that "either course" (i.e., that directed by the Court *en banc,* or that urged by Mr. Whitman)

> leads at least to this result, namely that nothing more than the interest of the mortgagor is or can be conveyed to the purchaser at the Sheriff's sale.

We are also fully in accord with the observation of the learned Chief Justice that

> the court will not and should not lend itself to any practice calculated to have the effect of deceiving unwary persons into believing that they were buying and getting something which they were not getting.

Ritchie, E. J., puts the matter very clearly in *Diocesan Synod of Nova Scotia* v. *O'Brien* (1).

Of course, as Chisholm, J., points out, the property is always sold and conveyed subject to paramount liens (if any) created by law (e.g., for taxes), whether they arose before or after the making of the mortgage, and the phrase, "the interest of the mortgagor at the time of the making of the mortgage" must be so understood. Moreover, we

(1) (1879) R.E.D., 352

agree with the learned Chief Justice that "the court has full power and control * * * over the advertising (and) the form of the deed which its officer, the sheriff, is to execute".

On the main ground of the plaintiff's appeal, therefore, we are of the opinion that the judgment below was clearly right and that special leave to appeal from it should not be granted.

There are, however, one or two subsidiary matters, not so much pressed at bar, but in regard to which slight improvements may, we think, be made in the wording of the order as settled by the Full Court.

The first paragraph of the order so settled reads as follows:

> It is ordered that the estate, interest and equity of redemption of the Mortgagor in the said lands and premises described in the said Mortgage be forever barred and foreclosed * * *

In this sentence we think the word "mortgagor" an undesirable substitute for the word "defendant", which is the word used in the English form as given in Seton's Judgments and Orders (7th Ed.), at p. 1825. An advantage of using the word "defendant" is that it makes more readily and obviously applicable the provisions of Rule 8 (d) of Order XVI of the Rules of the Supreme Court of Nova Scotia, which reads:

> 8 (*d*). It shall not be necessary to make beneficiaries or subsequent incumbrancers defendants, but the court or a judge may direct notice to be given to the beneficiaries or subsequent incumbrancers by mailing a notice of the order with a copy of the advertisement of the sale, and after such notice any such beneficiary or subsequent incumbrancer shall be bound by the proceedings in the same manner as if he had originally been made a party, and any person so notified may within one month thereafter apply to the court or a judge to discharge, vary or add to the said order, or for such other relief in the action as he is entitled to, and the court or a judge in addition to directing such notice to be given, may direct such proceedings as are necessary to protect the rights of the parties,*

and of the statute c. 140, R.S.N.S., 1923, s. 24 (1), which is in the following terms:

> (24 (1) Where by reason of any of the rules of the Supreme Court, providing that it shall not be necessary in certain cases to make incumbrancers, beneficiaries, widows, devisees, or heirs, parties to actions for foreclosure and sale of mortgaged lands, such persons are not made parties, and such lands are sold in any such action, and a deed thereof

*See R.S.N.S., 4th Series, (1873), c. 95, s. 20.

1929

MORTGAGE CORPORATION OF NOVA SCOTIA v. ALLEN.

Anglin C.J.C.

executed, such deed shall be effective to convey to the grantee all the interest in the land so sold of all such incumbrancers, beneficiaries, widows, devisees, and heirs at law as if they had been parties to such action. Prior unregistered instruments are ineffective as against a registered purchaser for valuable consideration without notice at a sale under a subsequent registered mortgage. R.S.N.S., 1923, c. 144, s. 18.

The effect of the rule and statute quoted, when applied to an order such as that before us (the word "defendant" being substituted for the word "mortgagor"), when served as prescribed by Rule 8 (d), clearly is to debar and foreclose the interests of all persons claiming by, through or under the mortgagor as well as of the mortgagor himself, who is the actual defendant.

With this verbal change, which we have no doubt would have been made by the Full Court had its attention been specifically drawn to the matter, the first clause of the order as settled seems unexceptionable. While in substance the same, it is, in our opinion, preferable to the clause suggested in the draft order, pressed for by counsel for the plaintiff, which reads:

> And it is further ordered that the equity of redemption of the defendant and of all persons claiming or entitled by, from or under the said defendant of, in and to the lands and premises sought to be foreclosed herein be barred and forever foreclosed.

The order settled by the court proceeds:

> That a sale of the said *mortgaged premises* be made by the Sheriff of the County of Cape Breton.

Objection is taken here to the term "mortgaged premises," for which the plaintiff would substitute "the *said* lands and premises," i.e. "the lands and premises sought to be foreclosed herein."

Rule 12 (*e*) of Order XIII of the Rules of the Supreme Court of Nova Scotia, dealing with foreclosure and sale proceedings, reads as follows:

> (*e*) The Court or judge may direct a sale of *the property* on such terms as the court or a judge thinks fit, and without previously determining the priorities of incumbrancers or the amount due on their incumbrances.

"The property" here, beyond doubt, means the interest which the mortgagor had in the lands immediately prior to the making of the mortgage sued upon, which alone could have been the subject of the mortgage—and, possibly, also any further or other interest therein subsequently acquired by him.

In his judgment the learned Chief Justice said:—"The practice to-day is what it was immediately preceding the first of October, 1884;" and he added that "so far as sales are concerned it was continued by s. 6 of the statute to which reference has been made" (c. 117, R.S.N.S. First Series, 1851; R.S.N.S. (1884) Fifth Series, c. 123, s. 6).

On reference to Rules Nos. 11 and 12 of the Supreme Court of Nova Scotia brought into force on the 1st of October, 1884,* as set out in the R.S.N.S., 5th Series, 1884, at p. 833, we find that they read as follows:

11. Where the action is in respect of a mortgage, and the plaintiff claims foreclosure or sale, or redemption, or where the action is for the administration of an estate, or for a partition, the plaintiff shall be entitled to a judgment on such evidence (if any) and in such cases (as nearly as may be) as provided for by the practice immediately preceding the first day of October, 1884, relative thereto.

12. Where the action is for the foreclosure or redemption of a mortgage, or sale of mortgaged premises, if the plaintiff is not entitled to a judgment or would not according to the practice immediately preceding the first day of October, 1884, be entitled to such a judgment or order as he desires, he shall be entitled to the proper judgment or order, on notice or otherwise, according to the said practice where a cause is heard or on an order to take the Bill *pro confesso* or otherwise.

These rules seem not quite to provide that the practice in mortgage actions which was prevalent immediately prior to the 1st of October, 1884, shall continue in its entirety, but rather that the plaintiff shall be entitled to a judgment "on such evidence and in such cases as provided for by the practice immediately preceding" that date. But, however that may be, it seems clear that, at all material times in the past, the property directed by the statute to be advertised and sold in Nova Scotia was not "*the lands and premises*" but "*the lands mortgaged*" (*Vide*: R.S.N.S., 5th Series (1884), c. 123, s. 4), i.e. the interest in the lands which had been mortgaged.

By the Rule of Court presently in force, however, above set forth, viz. Rule 12 (*e*) of Order XIII, the word "*property*" appears to be substituted for the word "*lands*" in earlier use. In order, therefore, to conform more precisely to the terms of the present rule and at the same time clearly to restrict the subject matter of the advertisement and sale to the interests of the mortgagee and of the mortgagor and those claiming by, through or under the latter, we would

*See 47 Vic. (1884) c. 26, s. 3; Royal Gazette Extraordinary of Nova Scotia, October 2, 1884; and 48 Vic., 1885, c. 1, s. 9.

1929

MORTGAGE CORPORATION OF NOVA SCOTIA v. ALLEN.

Anglin C.J.C.

suggest the substitution in the paragraph of the order as settled by the Full Court of the words "*the said mortgaged property*" for the words "*the said mortgaged premises.*" Again, however, we are satisfied that this purely verbal change would have been sanctioned by the Full Court had it been suggested on the settlement of the minutes of the judgment of that Court.

Finally, the form of order as settled by the Full Court directs that the sheriff

> shall execute to the purchaser or purchasers thereof (i.e. of the mortgaged property) at such sale a deed or deeds conveying and which shall convey to him or them all the estate, right, title, interest, claim, property and demand of the mortgagor at the time of the making of the said mortgage foreclosed in this action, or at any time since, and of all persons claiming or entitled by from or under the mortgagor of, in and to the lands respectively purchased at such sale.

In lieu of this provision the draft order prepared by the plaintiff, which it insists should be substituted for that settled by the Full Court, reads:

> And that upon payment of the purchase money the said sheriff do make a good and sufficient deed to the purchaser thereof.

i.e., presumably, of "the lands and premises sought to be foreclosed."

Order LI of the Rules of the Supreme Court of Nova Scotia, Rule 10A (1), reads as follows:

> 10A (1). In an action for foreclosure and sale, if the order directs a sale in default of payment, *the premises* shall be sold upon such default in accordance with the advertisement of sale by the sheriff of the county in which the lands lie, or by such other person as is authorized by the court to make such sale, and such sheriff or person so authorized may execute the deed of the premises to be given to such purchaser.

The Law and Transfer of Real Property Act, c. 140 of the R.S.N.S., 1923, contains the following pertinent provisions:

> Section 15. Where an order is made, whether in court or in chambers, directing any land to be sold, the same shall be sold, unless the court or a judge otherwise orders, by the sheriff of the county in which the land or part of the land lies.
>
> Section 16: In every such case the deed shall be executed by the person authorized to make such sale, and such deed, when delivered to the purchaser, *shall convey the land ordered to be sold.*
>
> Section 20: Every deed of land made by any person authorized by the court or a judge to sell the same shall be presumptive evidence of,
>
> (*a*) the regularity of the sale,
>
> (*b*) the validity of the order under which the sale was made, and
>
> (*c*) the regularity of the proceedings on which such order was founded.
>
> Section 24 (1): Where by reason of any of the rules of the Supreme Court, providing that it shall not be necessary in certain cases to make incumbrancers, beneficiaries, widows, devisees, or heirs, parties to actions for foreclosure and sale of mortgaged lands, such persons are not made

parties, and such lands are sold in any such action, and a deed thereof executed, such deed shall be *effective* to convey to the grantee all the interest in the land so sold of all such incumbrancers, beneficiaries, widows, devisees, and heirs at law as if they had been parties to such action.

The effect of these several provisions is, no doubt, to make the sheriff's deed "convey(ing) the land ordered to be sold" (s. 16) operate to convey "all the estate etc." mentioned in the form of order as settled by the Full Court, and it was apparently unnecessary to do more in that order than to direct that the sheriff should execute to the purchaser or purchasers a deed or deeds conveying "the *property*" or "the *premises*" directed to be sold. *Expressio eorum quae tacite insunt nihil operatur.* But no possible harm or prejudice can accrue to anybody from setting forth, as is done in the settled order, that which the statutes say shall be the effect of the deed or deeds executed by the sheriff. *Abundans cautela non nocet.* Moreover, while the words explanatory of the estate etc. to be conveyed may be regarded as *clausula inutilis* in their immediate collocation, they may affect the construction of earlier clauses which order foreclosure, advertisement and sale and, occurring where they do, they seem apt to declare and confirm the title acquired by the purchaser and also to remove any doubt that might affect the mind of anybody not learned in the law. 4 Co. Rep., 73b; Littleton's Tenures, s. 331. In order to comply more precisely, however, with the terms of the rules of court and the statutes governing, we think it better that a slight modification should be made in the form of order as settled by the Full Court by inserting after the words "shall convey to him or them" the words "the mortgaged property, and which shall be effective to convey" (*Vide:* R.S.N.S. (1923), c. 140, s. 24 (1), and R.S.N.S., 5th Series (1884), c. 123, s. 6.)

This, again, is a change, which, we have no doubt, would have been made by the Full Court had it been specifically requested on the settlement of the minutes of judgment.

On the whole, while not strictly necessary, we think it better, having regard to the doubts which have been suggested as to the prevalent practice in Nova Scotia and as to the effect of a judgment for sale in a foreclosure action, that the order should set forth, as it does in the form settled by the Full Court, subject to the modification suggested,

1929

MORTGAGE CORPORATION OF NOVA SCOTIA v. ALLEN.

Anglin C.J.C.

the extent of the estate, etc. which the purchaser acquires at the sale and by the sheriff's deed.

In view of the fact that we are convinced that the plaintiff cannot have any relief in respect of the principal matter urged at bar, and having regard to the more or less formal nature of the alterations we suggest in the terms of the order, while, if the plaintiff so desires, we will grant special leave to appeal confined to the latter matters, we do so only upon the terms that it must, in any event, carry on such appeal entirely at its own cost.

Under all the circumstances we do not think there should be any order as to the costs of the present motion. The defendant and those claiming under him were not represented, and the plaintiff has not, in our opinion, made out a case that would justify an order allowing it to add such costs to its claim for the mortgage debt.

It will have been observed that in dealing with this motion the merits of the proposed appeal have been discussed. This somewhat unusual course has been taken because such merits were fully argued by counsel representing the applicant for leave and also because of the terms on which, in our opinion, special leave should be granted and of the probability that further proceedings, if taken, will be purely formal.

Motion refused as to main ground of appeal, but allowed, on terms, as to certain matters indicated; no order as to costs of present motion.

Solicitor for the appellant: *Alfred Whitman.*

1929

*May 15.
*June 13.

THOMAS M. TAYLOR (DEFENDANT).....APPELLANT;

AND

FRANK SCOTT TAYLOR (PLAINTIFF)...RESPONDENT.

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

Domicile—Intention of the party—Marriage outside of the province—Circumstances—Change of domicile—Matrimonial status—Whether common or separate as to property—Evidence—Burden of proof—Art. 80 CC.

The appellant was born on June 30, 1865, in Mosquito, Newfoundland, where his parents were domiciled. He remained there until 1886, when he went to La Have River, in Nova Scotia, in order to seek better

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

employment as a mechanic. Then he worked his way on a ship to Sidney, Cape Breton and from there went to Montreal in October, 1886. He obtained employment in the Grand Trunk Railway Company's shops and boarded with a distant relative of his father. Some months later, he changed to one of the shops of the Canadian Pacific Railway Company in Montreal. He went to Toronto, worked there for a time and returned to Montreal, obtaining employment in another shop of the Canadian Pacific Railway. He then represented to his father and mother the advantages they would secure by coming to Montreal. The result was that, in 1887, the whole family came to Montreal, with the exception of a married sister who remained in the homestead; but she also came to Montreal the following year, the family home being rented to a neighbour. The father took a house in Montreal and the appellant boarded with him. In 1889, the father and mother decided to return to Newfoundland but failed to do so on account of the father's illness and subsequent death. In July, 1889, the appellant went to Newfoundland and married at Carbonnear the respondent's mother. He told the officiating minister that he came from Montreal and the marriage certificate describes him as "of Montreal, P.Q." After the marriage, the appellant and his wife went to Halifax; and, there being no work there, they both came on to Montreal where they lived until the death of appellant's wife. It is also in evidence that, after her death, the appellant caused an inventory to be made before a notary "of the community of property which formerly existed between him and his said late wife."

Held, affirming the judgment of the Court of King's Bench (Q.O.R. 45 K.B. 184), Newcombe and Smith JJ. dissenting, that all the circumstances of the case point to the fact that the appellant had abandoned his domicile of origin and had made Montreal his new domicile. (Art. 80 C.C.).

Per Newcombe and Smith JJ. (dissenting).—Upon the evidence, it must be held that, up to the time of the marriage, there had been no change of domicile. The burden of establishing as a fact the acquisition of a new domicile and the abandonment of the domicile of origin by the appellant was on the respondent and he has not discharged it. The evidence must be "unmistakable * * * that the party who has the domicile of origin intends to part with it * * *." (*The Lauderdale Peerage,* 10 App. Cas. 692).

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Surveyer J.—The appeal to the appellate court was upon leave of appeal granted by that court (2).

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

Charles Laurendeau K.C. and *E. G. Place K.C.* for the appellant.

T. Fortin K.C. and *Lorenzo Prince* for the respondent.

(1) (1928) Q.O.R. 45 K.B. 184. (2) (1928) Q.O.R. 44 K.B. 204.

1929

TAYLOR v. TAYLOR

The judgment of the majority of the court (Anglin C.J.C. and Mignault and Rinfret JJ.) was delivered by

MIGNAULT J.—This is a suit between father and son, the latter asking for an account of the administration of his father who had been appointed his tutor during his minority. The father confessed judgment, agreeing to render an account, but the account set up by him denied that he owed anything to his son, claiming on the contrary that the latter was indebted to him for maintenance and education until he reached the age of majority, for which the father reserved all his rights. This account was contested by the son.

The whole point in dispute is whether the appellant (the father) married his first wife, Dame Jael Davis, the respondent's mother, under the matrimonial *régime* of community of property, and that question in turn depends upon whether the appellant had lost his domicile of origin in Newfoundland and had acquired a domicile in the province of Quebec at the date of his first marriage.

At the trial the parties requested the court to decide first what was the domicile of the appellant at the time of his first marriage, and they admitted that according to the law of Newfoundland, at that date, the consorts would have been separate as to property, and that if, at the same date, the appellant had acquired a domicile in the province of Quebec, his matrimonial status would be that of community of property under the laws of that province. The Superior Court (Surveyer J.) found that the appellant had acquired a domicile in Montreal at the date of his first marriage, and maintained the respondent's contestation of the account. This judgment was affirmed by the Court of King's Bench, Mr. Justice Hall dissenting (1).

The appellant was born in Mosquito (now Bristol's Hope), Newfoundland, on June 30, 1865. He remained in Newfoundland until 1886, having worked at different places as a mechanic. He then, when aged 21, left that colony, seeking better employment, for, he says, he was a good mechanic, and he started at the bottom of the ladder and climbed up; that was his intention. On leaving Newfoundland he went first to Nova Scotia, at La Have River,

(1) Q.O.R. 45 K.B. 184.

and from there worked his way to Sidney, Cape Breton. He came to Montreal in October, 1886, where he obtained employment in the Grand Trunk shops and boarded with a distant relative of his father, a Mr. Edgecombe, on St. David street. Some months later, he changed to one of the shops of the Canadian Pacific Railway in Montreal. He says he also went to Toronto and worked there a couple of weeks, and then returned to Montreal, obtaining employment in another shop of the Canadian Pacific. From that time he remained in Montreal. He was in communication with his father and mother, brothers and sisters, and he told them of the advantages they would secure by coming to Montreal. The result was that the whole family came to Montreal, with the exception of a married sister who remained in the family home which the family continued to keep in Newfoundland, and sold some years later. The father took a house in Montreal and the appellant boarded with him.

In July, 1889, while still in the employment of the Canadian Pacific, the appellant went to Newfoundland and married at Carbonnear his first wife, Jael Davis, the respondent's mother. He told the officiating minister that he came from Montreal and the marriage certificate describes him as "of Montreal, P.Q." After the marriage, the appellant says he and his wife went to Halifax. There was no work there, so they both came on to Montreal where they lived thereafter until the first wife died. The children of the first marriage were born in Montreal. Some point is made in the evidence of the fact that the appellant's mother returned to Newfoundland, the father having died in Montreal. The mother however died in Montreal some years later. I do not think that the movements of the appellant's family are very material, but perhaps some significance may be placed on the fact that the appellant had caused them to come on to Montreal shortly after he had established himself there. He was apparently ambitious and eager to succeed, and he remained where work was available.

The testimony at the trial was mainly that of the appellant himself, as well as of his sister, Mrs. Peacock, and his brother, J. L. Taylor. Mrs. Peacock, who was in Montreal when the appellant went to Newfoundland in the summer

1929

TAYLOR v. TAYLOR

Mignault J.

of 1889, says he went there to be married to a girl whom he had known all his life, that he was absent from Montreal about three weeks, and that while he was away the family moved into a larger house in Montreal so as to be able to accommodate him and his wife on their arrival. This testimony is corroborated by the brother. The appellant denies in his testimony that he went to Newfoundland with the intention of marrying, but perhaps more weight may be placed on what he actually did, than on what he now states was his intention.

Some years after his marriage, the appellant opened a grocery business in Montreal which appears to have prospered, for he was able to purchase a corner property on Rosel street.

After the death of his first wife, the appellant caused an inventory to be made, before Cushing, N.P.,

of the community of property which formerly existed between him and his said late wife.

This the appellant did in his own name and also as tutor of his minor children among whom the respondent was the eldest. It is not necessary to treat this inventory as an admission by the appellant of what is really a question of law, namely, the legal effect of his first marriage, but it is a circumstance which along with others may help to show that the appellant had chosen Montreal as his home when he brought his first wife there.

On the evidence adduced the two courts have found that at the time of his first marriage (he remarried after his first wife's death), the appellant had changed his domicile from Mosquito, Newfoundland, to Montreal. Change of domicile involves a question of fact and requires actual residence in another place coupled with the intention of the person to make it the seat of his principal establishment (art. 80 C.C.). Proof of intention results from the declarations of the person and from the circumstances of the case (art. 81 C.C.).

Obviously the declarations must be contemporaneous ones, and not those which a party may make as a witness at the trial. It is argued that a declaration of intention may be found in the marriage certificate which states that Thomas Munden Taylor was " of Montreal ". But standing by itself it is not conclusive or unequivocal, for it may indicate a mere residence.

The circumstances of the case, however, all point to the fact that the appellant had chosen Montreal as his new home, and his bringing his wife there, after an unsuccessful attempt to find work in Halifax, strongly points to an existing intention on his part to abandon his domicile of origin. After his first marriage, he says he went three times to Newfoundland, the first time, he thinks, in 1910, the other times in 1914 and 1916, but as he was then in business in Montreal, these trips are without significance and do not weaken the inference that his home was in Montreal. Upon what is a question of fact, to wit, the abandonment by the appellant of his domicile of origin and his choice of a new domicile in Montreal, the two courts are in agreement. They do not appear to have taken an incorrect view of the problem before them, and I would not feel justified in interfering with their judgments.

The appeal fails and should be dismissed with costs.

SMITH J. (Newcombe J. concurring and both dissenting):—This case turns entirely on the determination of the question of fact as to whether or not the appellant, Thomas M. Taylor, had changed his domicile at the time of his marriage to the respondent's mother in 1889 from Newfoundland, where he was born, to Montreal, in the province of Quebec. His parents were domiciled in Newfoundland, where the appellant was born on 30th June, 1865, and where he remained until 1886, when he went to the La Have river, in Nova Scotia, and worked his way on a ship to Sydney, Cape Breton, and from there went to Montreal in October of that year. He obtained work in Montreal on the Grand Trunk Railway and the Canadian Pacific Railway; but went to Toronto and worked there for a time, and returned to Montreal.

He represented to his father and mother that work could be had in Montreal, and in 1887 the father, mother, one sister and five brothers went up to Montreal and took residence there. The homestead in Newfoundland was left in possession of a married sister, but she also came to Montreal the following year, and the homestead was then rented to a neighbour until it might be required. In 1889 the father and mother resolved to return to Newfoundland and to take some of the family with them. The mother started back in June, but took ill on the way, and returned to

1929

TAYLOR
v.
TAYLOR

Smith J.

Montreal, but she and two younger brothers and the appellant proceeded to Newfoundland some time in July of that year. The father was unable to go with them, because he had fallen ill, and the mother later on had to return to look after the sick husband, who died in October at Montreal.

The married sister who came up in 1889 remained in Montreal. The other sister apparently remained with the sick father, and became Mrs. Peacock, but at what time we are not informed. One brother had gone to the United States prior to 1889, two had returned to Newfoundland with the mother; there is no definite information as to the other two, but presumably they remained in Montreal. What seems definite and undisputed is that the father and mother had decided to return permanently to Newfoundland in 1889 with the members of the family still dependent on them, and that this intention was not carried out solely because of the father's illness, and subsequent death in October of that year. It is clear, therefore, that when the mother and two younger brothers went to Newfoundland along with the appellant, there was a definite intention, so far as the father and mother were concerned, to return permanently to their home in Newfoundland with the members of the family then dependent on them.

It is necessary, however, to examine other evidence in order to arrive at a conclusion as to the intentions at that time of the appellant. It is contended, on behalf of the respondent, that when leaving for Newfoundland he left with the definite intention of marrying the plaintiff's mother and bringing her back to Montreal, to resume his residence there, and that therefore, before the marriage, he had elected to change his domicile to the city of Montreal. The examination for discovery of the defendant was put in as evidence on behalf of the plaintiff, and at p. 22 of this evidence there is the following:

Q. Did you go to Newfoundland about the 28th, 29th, 30th or 31st of July, 1889?

A. I got it marked down in my bible at home the year I was married, and I went down there, but I did not intentionally go to get married, although I got married when there, and I saw that there was no work there.

By the court:—

Q. Between 1886 and July 1889, did you return to Newfoundland?

A. No, I did not go back; I went back in 1889 when I got married, but I did not know I was going to get married. I went down with my mother and two younger brothers.

His evidence is also that, after arriving at St. John's by boat, he stayed there about a week, then went to Carbonear, where he met the lady that he married, and where he remained probably a week. Then there is the question:

Q. How long before getting married did you propose to your lady?
A. I just met the girl, I had gone to school with her, and I said, "Will you marry me?" She said "Yes."

After the marriage, he went immediately to St. John's. On cross-examination, he testified that on going back to Newfoundland prior to being married, he tried to get work in Angel's Foundry in St. John's, and after his marriage he tried to get into the dry-dock, but failed; that then he decided to take the *Peruvian* for Halifax and endeavour to do better there, but he failed to find work there, and went back to Montreal. He says that he had gone to school with the respondent's mother, but during the three years that he was away before returning to Newfoundland in 1889, he had only written one letter to her.

The respondent then puts in the evidence of Mrs. Peacock, the appellant's sister, which is the evidence mainly relied on to sustain the respondent's case. She apparently lived with her father and mother up to the time of the father's death in October, 1889, after the appellant's marriage, and no doubt had it not been for her father's illness she would have returned with him and the mother to Newfoundland in 1889, but she is not asked as to this, and there is no evidence upon the point beyond the inference that may be drawn from the fact that she was living with him as a member of his household. She states that the mother and two younger brothers went down to Newfoundland with the appellant in July, 1889, with the intention of remaining there, and that the father intended to go back but was prevented by his illness, and died in October. She says that the appellant had known the respondent's mother all his life and that she had one letter from her in two years.

By the court:

Q. Did you know your brother intended to get married to her in Newfoundland?
A. Yes, we had all that intention.

By defendant's counsel:

Q. What did you know about his intention?
A. That is his intention, and he told us.

* * * * *

1929

TAYLOR v. TAYLOR

Smith J.

By the court:

Q. Talked in the family?

A. Yes, and I was the one who got the larger house, so as he would come and live with us.

By defendant's counsel:

Q. You got the larger house?

A. My father and I.

* * * * *

By the court:

Q. When he came back, the house was all ready to receive his wife and himself?

By the court:

Q. Rented in July or August?

A. I believe in August.

By the court:

Q. After the marriage or before?

A. Just about that time, but we intended to have him come back with his wife to stay with us.

The reliability of these statements must be tested by reference to what this witness previously swore to as stated above, namely, that in June of that year the father and mother had decided to go back permanently to Newfoundland; that with that intention the mother and two younger brothers did return to Newfoundland along with the appellant in July, and that the father only remained behind because of his illness. It seems to me, therefore, that there can be no truth in her statement that in August she and the father were getting a larger house because there was going to be one more person in the family, in the person of appellant's wife. It is not possible to reconcile this story with the unquestioned fact deposed to by herself and the other witnesses that at that time the father had a fixed intention of leaving Montreal and returning permanently to Newfoundland where his wife and two young children had already gone. It was not till October that this intention was abandoned because of the father's continued illness and that a telegram was sent to the mother to come back. The father certainly moved to new premises in August, because appellant, on his return, had difficulty in locating him, but it is evident that the change was not made with the object of accommodating the larger family since he had no intention then of remaining in Montreal himself.

The story of this witness as to it being understood in the family that appellant was going to marry plaintiff's mother,

and that he left for Newfoundland in July, 1889, with that intention, seems a very improbable one in the light of her own evidence as well as the other evidence.

When appellant left Newfoundland in 1886 he was just twenty-one and had been drifting about since serving his apprenticeship, working at different places, at blacksmithing and at fishing with his father. He left seeking work with no fixed idea as to the kind of work he would take up or as to his ultimate destination. No one says he was engaged to the lady before leaving and no one is asked as to that. This sister says she and the lady were great friends and she had only one letter from her in the two years between the time she left Newfoundland and the marriage which seems a very meagre correspondence with a great friend, and prospective sister-in-law.

The appellant giving evidence for plaintiff is asked by the court if he had carried on no correspondence with his future wife, and he says he wrote her just once during the three years. It seems very improbable that if there was an understanding in the family that appellant was going to marry this lady, the correspondence should be limited to these two letters. I think this sister's evidence on this point no more reliable than her evidence that at the time her father was intending to leave Montreal and join his wife and family permanently in Newfoundland he was renting a larger house with a view of taking appellant and his wife in as boarders in Montreal.

Turning, then, to the evidence of the brother, J. L. Taylor, also called on behalf of the plaintiff, he is asked if he heard Mrs. Peacock's evidence, and if he corroborates it, and his answer is,

A. As far as I know; my brother and sister covered all the information I could render in this case.

* * * * *

By the court:

Q. Do you remember your brother leaving for Newfoundland in 1889 with your mother and two brothers?

A. Yes.

By the court:

Q. What did they leave for?

A. They went down with the intention of staying, and my father was to join them in October, but unfortunately they had to telegraph her and bring her back, and she came back two weeks before he died.

* * * * *

1929

TAYLOR v. TAYLOR

Smith J.

By the court:

Q. What was your brother's intention?

A. My brother had perhaps two or three intentions; I do not just know what happened at the time. As far as I understand they covered all the information I could render.

By the court:

Q. Was there any talk of his marriage when he left?

A. Naturally, as far as I know; I could not say as much as the others.

On cross-examination:

Q. You said that your brother had perhaps two or three intentions; what do you mean by that?

A. I remember at the time, because one of my brothers had gone to the United States, and if he struck anything worth while down there, the probabilities were he would remain.

The "he" in this answer means appellant as appears from the next question and anwer.

Q. What do you mean by "down there"?

A. That is in Newfoundland or anywhere else where he might strike a position that would be of service; better than he might locate in Montreal; at that time we were all liable to move here, there and everywhere.

Q. At that time none of you were particularly settled anywhere?

A. No, we were largely boarding at home with our parents, but he had not bought any furniture or established himself anywhere.

All this evidence is by the plaintiff's own witnesses, and to my mind, if it establishes anything, it is that up to the time of the marriage there was no change of domicile. The burden of establishing as a fact the acquisition of a new domicile and the abandonment of the domicile of origin by the appellant was on the plaintiff, and the nature of the evidence required for that purpose is clearly set out in the appellant's factum in the quotation set out from *The Lauderdale Peerage* (1) (1885), as follows:

> The extent to which the evidence must be carried to put an end to the domicile of origin is explained in clear terms in the *Countess of Dalhousie* v. *McDonall* (2), and in *Munro* v. *Munro* (3). It is not upon light evidence or upon a light presumption that we must act, but it must clearly appear by unmistakable evidence that the party who has the domicile of origin intends to part with it and intends to establish his domicile elsewhere.

In my view, the appeal should be allowed with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *Tancrède Fortin.*

(1) (1885) 10 App. Cas. 692, at p. 758.

(2) (1840) 7 C. & F. 817.

(3) (1840) 7 C. & F. 842.

1929

*May 13.
*June 13.

THE MINISTER OF RAILWAYS AND CANALS (PLAINTIFF)

AND

THE HEREFORD RAILWAY COMPANY (DEFENDANT)

AND

THE MINISTER OF RAILWAYS AND CANALS (CLAIMANT)..... } APPELLANT;

AND

STEPHAN N. BOND AND JAMES MACKINNON (CONTESTING CLAIMANTS).. } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Railway—Incorporation under special Act—Bondholders—Subsidies—Sale of the railway—Proceeds of the sale—Priority

The Hereford Railway Company had been incorporated under the provisions of c. 93 of the Dominion Acts of 1887 and of c. 81 of the Dominion Acts of 1888. Under certain provisions of those Acts the company was empowered to issue bonds secured by a mortgage deed upon the property, assets, rents and revenues of the company. These bonds were to be a "first preferential claim" upon the property of the company. Bonds were issued in 1890 and a mortgage deed was duly executed between the company and the trustees of the bondholders. Subsequently, subsidies were granted from time to time by the Dominion Government to the company. On the company failing to operate its road, the Minister of Railways took the necessary steps under section 160 of the *Railway Act* of 1919 to create a first lien or mortgage upon the railway and its equipment in favour of the Crown for the amount of these subsidies, and for an order authorizing the sale of the railway. The railway was sold under order of court to the Canadian Pacific Railway Company on the condition that the latter would continue the operation of a portion of the original railway line, and the proceeds of the sale were paid into court in accordance with the judgment. The registrar of the Exchequer Court of Canada, acting as referee, under order of the court, in determining the respective ranks and privilege of the creditors, reported that, after the payment of three small claims, the balance of the proceeds of the sale should be paid to the trustee for the bondholders. The Minister of Railways appealed to the Exchequer Court of Canada on the ground that he was entitled to that money; but the report of the referee was upheld by that court.

Held, per Anglin C.J.C. and Mignault and Smith JJ., without hearing counsel for the respondents, and affirming the judgment of the Exchequer Court of Canada ([1928] Ex. C.R. 223), that the balance of

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

1929

THE MINISTER OF RAILWAYS AND CANALS v. BOND & MACKINNON

the proceeds of the sale has been rightly ordered to be paid to the trustees for the bondholders. The subsidies granted to the railway company were upon condition that the railway should be continuously operated. The fulfilment of that condition to the extent deemed necessary by the Minister of Railways having been secured by the terms of the sale, and no part of the purchase money being required for that purpose, and there being no claim for enforcement of the lien for the amount of the subsidies, the Minister of Railways had no right to claim the balance of the purchase money.

Newcombe J., on the other hand (with whom Rinfret J. concurred), while unwilling to conclude a question adversely to a party who had not been heard, said that he would be surprised to find that any subsidized Dominion railway, including the defendant company, which "cannot, by reason of the condition of such railway or of its equipment, be safely and efficiently operated," is not subject to the statutory provisions, and may not, when these have been complied with, * * * be sold to satisfy the first lien or mortgage which the statute creates, and which is, by its express direction, due and payable to His Majesty; and, moreover, if the statute applied, that he was not convinced that the Exchequer Court had authority to regulate the exercise of the Minister's powers as to the application and disposition of the proceeds.

APPEAL from the judgment of the Exchequer Court of Canada (1) affirming a report of the registrar of that court acting as referee.

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

W. Lazure K.C. for the appellant.

F. S. Rugg K.C. for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Mignault and Smith JJ.) was delivered by

SMITH J.—The defendant railway company was incorporated by Dominion statutes of 1887 and 1888, and was authorized to construct a railway in the counties of Compton and Wolfe from the international boundary at Hereford to Lime Ridge, a distance of 48 miles. The railway was built with the aid of subsidies from the Dominion, amounting to $170,560, and from the province, amounting to $84,226.36. One of the conditions of the grant of the Dominion subsidies was that the railroad should be continuously and faithfully operated and kept in good working and running order.

(1) [1928] Ex. C.R. 223.

By Dominion statute of 1890, the railway company was authorized to lease the railroad and its franchises to the Maine Central Railway Company, with which company's railroad in Maine the defendant's railway made connection at Hereford. A lease was accordingly made for 999 years, under which defendant's railroad was operated until 1st November, 1925.

Under authority of Dominion statutes of 1887 and 1889, bonds of the defendant company were issued to the amount of $800,000, and were constituted a mortgage and privilege on the property of the railway and its assets, rents and revenues, save as to working expenses. Pursuant to the terms of the lease, the lessee guaranteed and endorsed these bonds. Having, up to the end of 1923, operated the railroad at a loss of $1,639,359.63, and having become proprietor of the large majority of the shares of the lessor company, the lessee brought about an agreement between the two companies for cancellation of the lease, as provided by an indenture dated 8th September, 1925, without obtaining statutory authority for such cancellation. The rolling stock and all equipment were then removed to the United States, and operation of the railway ceased.

The municipalities petitioned the Minister of Railways and Canals for redress under s. 160 of the *Railway Act*, which is as follows:

160. Whenever it is made to appear to the Minister that any railway owned by a company incorporated by the Parliament of Canada, the construction of which has been aided by a subsidy from the Government of Canada, cannot by reason of the condition of such railway or of its equipment be safely and efficiently operated, the Minister may apply to the Board for an order that the said railway, or its equipment, or both, shall be put in a safe and efficient condition, which order the Board is hereby authorized to make after such notice to the president or manager of the company and the trustee of the bondholders, if any, as to the Board seems reasonable, and the Board may, by order, direct what repairs, improvements or additions shall be made to the said railway, or equipment, or both, and within what times the same shall be undertaken and completed respectively.

2. If the company fails to comply with such order of the Board, the Governor in Council may, upon the recommendation of the Minister, approve of such order, and direct that a copy of such order and of the order of the Governor in Council approving thereof, certified by the secretary of the Board and clerk of the Privy Council respectively, shall be filed by the Minister in the office of the registrar of deeds of each county through which such railway runs, and upon such order being so filed there shall, *ipso facto*, be created a first lien or mortgage upon the said railway

1929

THE MINISTER OF RAILWAYS AND CANALS v. BOND & MACKINNON

Smith J

and its equipment in favour of His Majesty for the amount of the said subsidy, which shall immediately thereupon become due and payable to His Majesty.

3. Such lien may be enforced by His Majesty in the same manner and by the like proceedings as any other lien upon property may be enforced by His Majesty in the Exchequer Court of Canada.

4. The said court may order such railway and its equipment to be sold to satisfy such lien, and pending such lien may appoint a receiver to manage and operate such railway.

5. Any money realized from such sale may, with the consent of the purchaser, be applied by the Minister under the direction of the chief engineer of Government railways towards the repair and improvement of such railway and equipment so far as the same may be deemed necessary by the Minister, and any moneys so realized, and not in the opinion of the Minister required for such repairs and improvements, may be paid to the company owning the railway at the time of the sale, or to the trustee for the holders of any outstanding bonds or other securities secured by mortgage or otherwise upon such railway.

All the proceedings provided for by sub-s. 1 were taken, and the defendant railway company having failed to comply with the order of the Board, the proceedings set out in the first part of paragraph 2 were taken for acquiring a first lien or mortgage on behalf of His Majesty for the amount of the subsidy.

The Minister then commenced this action, and filed a statement of claim by which, after recital of facts, he claims and demands that the sale of the railway be ordered and decreed by the court on the express condition that the purchaser thereof be required to provide rolling stock, and other accessories necessary to operate said railway, in compliance with the order of the Board of Railway Commissioners. Judgment was given, ordering the sale, and tenders were called for. The tender of the Canadian Pacific Railway Company was accepted, and by the judgment of the court of 25th May, 1927, the railroad and other assets of the defendant company were sold to the Canadian Pacific Railway Company for $46,378, upon the terms and conditions of the tender as follows:

1. That the Canadian Pacific Railway Company shall not be required to operate and shall not undertake to operate at any time those portions of the railway between Cookshire and Lime Ridge and between Malvina and the international boundary, but shall be at liberty to take up the rails and fastenings on the said portions of the railway and dispose of the same, or dispose of the whole of the said portions of the railway, or any part thereof, as it may see fit.

2. That the Canadian Pacific Railway Company will within three months from the completion of the purchase commence the operation of the portion of the railway between Cookshire and Malvina with at least

three mixed trains a week each way, but its obligations to continue the operation of such portion shall be subject to the law governing railways subject to the jurisdiction of the Parliament of Canada.

3. That the purchase price shall be paid to the registrar of the Exchequer Court of Canada upon the passing of title to the property upon the terms aforesaid.

The sale and transfer were carried out and the money paid into court in pursuance of this judgment upon the terms stated.

By an order of the court, it was referred to the registrar to enquire and report on all claims to the proceeds of the sale, and to determine the respective ranks and privileges of the creditors. The referee reported that three small claims should be first paid, and that the balance should be paid to the trustees for the bondholders. The Minister of Railways appealed from this report in so far as it directs the balance to be paid to the trustees for the bondholders, on the ground that he is entitled to have such balance paid out to him. This appeal was dismissed by judgment of the 18th October, 1928, and the Minister appeals to this court.

It has been argued that, as s. 160 of the *Railway Act* was first enacted in 1911, many years after the incorporation of the defendant railway company and the building of the railway, and after the bondholders had acquired vested rights under statutory authority, it should not be held to have any retroactive effect, and should be deemed to have reference only to railways subsequently built. It is also argued that this results from the proper construction of the wording of the Act.

It is not, however, necessary to deal here with that question. There was judgment for sale of the railroad under s. 160, and no appeal was taken from that judgment. The sole question, therefore, that need now be dealt with is as to the disposition of the balance of the proceeds of the sale now in court.

I am in accord with the learned referee in the disposition he has made of that balance, for the reasons fully and clearly stated by him.

The subsidies granted to defendant railway company were, as stated, upon condition that the railway should be continuously and faithfully operated and kept in good working and running order. Section 160 provides that, on proceedings taken under that section and default to comply

1929

THE MINISTER OF RAILWAYS AND CANALS v. BOND & MACKINNON

Smith J

with the order made by the Board of Railway Commissioners for the safe and efficient operation of the railway, there shall be created a first lien and mortgage upon the railway and its equipment for the amount of the subsidy, which may be enforced in the Exchequer Court. If proceedings were taken merely to enforce this lien and recover back the subsidies, the property covered by the lien would be sold with clear title, unencumbered by onerous conditions and undertakings to be assumed by the purchaser, and the amount of the subsidies would be first paid out of the proceeds of sale and the balance would go to the owner or its bondholders. The subsidies having been thus paid back, there would remain no further obligation to anyone to equip or operate the railway. This is not what the Minister asked to have done in the present case. He made no request in the statement of claim for enforcement of a first lien for the subsidies. What he asked for and what he and the municipalities evidently desired was such a sale as would bring about the fulfilment of the condition continuously and faithfully to operate the railway and keep it in good working and running order. That condition once fulfilled at the instance of the Minister by resort to the property of the defendant company, there would be no right to recover the subsidies, as s. 160 does not empower the Minister to recover the subsidies and also enforce performance of the conditions. The defendant company's railroad and assets were sold subject to and charged with the obligation of fulfilling the conditions on which the subsidies were granted to the extent to which the Minister judged it desirable to exact the fulfilment of these conditions. The fulfilment of these conditions to the extent deemed necessary by the Minister having been secured by the terms of the sale, and no part of the purchase money being required for that purpose, and there being no claim for enforcement of the lien for the amount of the subsidies, the balance of purchase money in question should, as found by the learned Referee, be paid, as directed by sub-s. 5 of the section, to the owners or the trustees for the bondholders. There can be no object in first handing it to the Minister, to be by him passed on to the trustees for the bondholders.

The appeal is therefore dismissed with costs.

NEWCOMBE J. (Rinfret J. concurring).—The facts are not in dispute, but it is well to have in mind the following particulars:

The Hereford Railway Company, declared to be a work for the general advantage of Canada, was incorporated by Dominion Acts of 1887, ch. 93, and 1888, c. 81, and constructed the railway in question, with the aid of Dominion and provincial subsidies. The Dominion subsidy agreements, which are statutory, as therein recited, are dated 31st March, 1888, and 3rd August, 1889. As stated in the recitals, the railway was to be constructed

according to descriptions and specifications and upon conditions to be approved by the Governor in Council, upon a report of the Minister of Railways and Canals, specified in an agreement to be made by the company with the Government,

and, in consideration of the subsidy to be paid, the company covenanted and agreed:

6. That the company will upon and after completion of the said line of railways and works appertaining thereto, truly and faithfully keep the same and the rolling stock required therefor, in good, efficient working and running order, and shall continuously and faithfully operate the same.

Under authority of the Dominion statutes above mentioned, the company issued bonds dated 1st May, 1890, payable in forty years, secured by mortgage of 24th October, 1890.

Section 160 of the *Railway Act* was enacted by c. 22, s. 13, of 1911, as s. 369A, and was introduced into the *Consolidated Railway Act*, c. 69 of 1919, as s. 160.

The railway ceased to be maintained or operated on 1st November, 1925, and so remained in a state of inactivity until after the proceedings which led to the sale under the above section 160.

The respondents admit in their factum:

That the appellant has carried out the procedure set forth in article 160 and that subsidies had been received by the Hereford Railway Company to the extent of $170,560.

The Minister proceeded in the Exchequer Court to enforce the lien, which, assuming the application of the statute, he admittedly possessed, and the court exercised the jurisdiction which it had to order the sale of the railway "to satisfy such lien." Lest there should be any error as to the footing upon which the proceedings were understood, considered and dealt with in the Exchequer Court, I introduce the following extract from the registrar's report.

1929

THE MINISTER OF RAILWAYS AND CANALS v. BOND & MACKINNON

Newcombe J.

Referring to the date, 1st November, 1925, when operation of the railway was abandoned, the report proceeds:

> In order that the operation of the railway should be continued the Minister of Railways and Canals petitioned the Board of Railway Commissioners for an order directing the Hereford Railway Company to operate the railway with the necessary equipment. On the 1st day of April, A.D. 1926, an order of the Board of Railway Commissioners was issued and served upon the Hereford Railway Company. The railway company having failed to comply with the said order the Minister took the necessary steps under paragraph 2 of section 160 of the *Railway Act* to create a first lien or mortgage upon the railway and its equipment in favour of His Majesty for the amount of the subsidies granted from time to time by the Dominion Government to the Hereford Railway Company, and for an order authorizing the sale of the said railway. The amount of the Dominion subsidies totals one hundred and seventy thousand five hundred and sixty dollars ($170,560) according to the claim of the Minister of Railways and Canals filed before the undersigned on the reference as exhibit 15. Thereafter proceedings were taken by the Minister of Railways and Canals on behalf of His Majesty under the provisions of subsection 2 of section 160 of the *Railway Act* 1919, to enforce the lien for the subsidies paid in the Exchequer Court of Canada.

Follows a discussion, extending to three printed pages of the record, intended to demonstrate that section 160 should not be applied retrospectively, or, as it is said, so as to affect vested rights; from which the conclusion seems to be drawn that the statute does not apply in this case. Nevertheless, it is directed that the proceeds of the sale realized under the statute shall be paid to the bondholders, because, as is said, it is unnecessary for the Minister to exercise the powers conferred upon him by subsection 2 of s. 160 and it is suggested that a spirit of equity should control.

The case was heard upon appeal in this court, and, after hearing the appellant's counsel, a majority of the court was so fully satisfied with the result below that it was considered unnecessary to hear counsel for the respondents.

For my own part, I would not conclude a question adversely to a party who has not been heard, but perhaps I may be permitted to say with propriety that I would be surprised to find that any subsidized Dominion railway, including the defendant company, which

> cannot, by reason of the condition of such railway or of its equipment, be safely and efficiently operated,

is not subject to the statutory provisions, and may not, when these have been complied with, as they admittedly have been in this case, and after notice to the president or manager of the company and the trustee of the bondholders, which is also for present purposes admitted, be sold

1929

THE MINISTER OF RAILWAYS AND CANALS v. BOND & MACKINNON

Newcombe J.

to satisfy the first lien or mortgage which the statute creates, and which is by its express direction due and payable to His Majesty. Moreover, if the statute applies, I am not convinced that the Exchequer Court has authority to regulate the exercise of the Minister's powers as to the application and disposition of the proceeds.

Appeal dismissed with costs.

Solicitors for the appellant: *Wilfrid Lazure.*

Solicitors for the respondents: *Frederick S. Rugg.*

1929

*June 4.
*June 5.
**June 13.
**June 14.

IN RE JOHN HENDERSON
IN RE JAMES STEWART
IN RE GEORGE BRODER
IN RE JOE GO GET

Criminal law—Habeas corpus—Excise Act, R.S.C. [1927], c. 60, ss. 127, 128, 176—Opium and Narcotic Drug Act, R.S.C. [1927], c. 144, s. 4—Information—Sufficiency as to description of informant—Whether informant authorized to act—Lack of evidence at trial—Order for imprisonment and fine—Conviction invalid in part—Order imposing less than minimum fine—Severance—Cost of conveying prisoner not mentioned in warrant—Criminal Code, ss. 654, 735, 754, 1135.

Per Rinfret J.—Under section 654 of the Criminal Code, any person, upon reasonable or probable grounds, may make a complaint or lay an information against an accused person in respect of the offences, relating to illicit distilling, mentioned in section 176 of the *Excise Act;* but even if it should be inferred from the provisions of that Act taken as a whole that officers of excise alone were competent to lay such information, it would not be necessary, though perhaps desirable, to specify particulars of the informant in the warrant of commitment. Moreover, the information laid against some of the applicants, which describes the informant, as a customs and excise officer acting "on behalf of His Majesty the King" was quite sufficient to justify the magistrate in proceeding with the trial. *R.* v. *Limerick* (37 C.C.C. 344) and *R.* v. *Ed.* (47 C.C.C. 196) dist.

Per Rinfret J.—On an application for *habeas corpus,* a contention by the petitioner that no proof of the authority of the informant was adduced at the trial does not raise a question of jurisdiction: if the judge before whom the application is made is right in his view that the magistrate had the right to enter on, and proceed with, the case, he had not to consider the sufficiency of the evidence on which the former was convicted. *R.* v. *Nat Bell Liquors* ([1922] 2 A.C. 128, at pp. 151, 152) foll.

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*Rinfret J. in chambers.

**Mignault, Newcombe, Lamont and Smith JJ.

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Per Rinfret J. Under sections 127 and 128 of the *Excise Act*, a magistrate has the power both to imprison and fine the accused by summary conviction and is not restricted to impose one penalty to the exclusion of the other.

Per Rinfret J.—When the order of imprisonment is absolute for a term and a further term is imposed in default of payment of a fine and costs, the conviction and commitment of the inferior tribunal are severable. Therefore, when a petitioner urges, as a ground for the issue of a writ of *habeas corpus*, the illegality of the part dealing with the further imprisonment, such application is premature before the expiration of the term for which the conviction imposed an absolute order of imprisonment; up to that time, the applicant cannot complain that he is illegally restrained of his liberty.

Per Rinfret J.—Where a warrant of commitment contains a valid order of imprisonment and also an order imposing a lighter fine than the minimum imposed by the statute, this order being illegal, the portion providing for imprisonment is nevertheless valid; and the illegal order can still be remedied by applying the provisions of sections 754 and 1125 of the Criminal Code.

Per Rinfret J.—A warrant of commitment requiring the payment of the costs of conveying the accused to jail is not invalid for failure to state the amount of these costs.

Per Rinfret J.—The word "penalties" in par. 2 of s. 4 of the *Opium and Narcotic Drugs Act* means the imprisonment and the fine and does not include the costs. Therefore, a condemnation to a fine of "two hundred dollars" will not be invalid as being a lighter fine than the minimum ($200 and costs), imposed by section 4, par. (*d*) (*b*)[2] of that section. Moreover, nothing in the Act compels the magistrate to award costs; and in such a case, section 735 of the Criminal Code, under which the costs are in the discretion of the magistrate, would apply.

The judgments of Rinfret J., in chambers, rendered upon these four applications for *habeas corpus*, were, on appeal, affirmed by the Court,

Held, that, in the cases of Henderson, Broder and Joe Go Get, the warrant of commitment shewed a valid conviction, and even assuming it to be defective because the amount of the costs is not stated, that would not be a ground for discharging the prisoners on *habeas corpus*: Section 1121, Criminal Code.

Held, also, that, in the Stewart case, assuming the defects alleged on behalf of the prisoner, he is not at present held under any of the defective clauses, and the application is at best premature.

APPEAL from the judgments of Rinfret J. dismissing petitions for a writ of *habeas corpus*.

The material facts, and the grounds of the petitions are sufficiently set out in the judgments of Rinfret J. now reported.

The appeal from the judgments was dismissed.

The petitions were heard by Rinfret J. on June 4, 1929.

Stuart Henderson for the applicants.

E. F. Newcombe K.C. for the Attorney-General for British Columbia.

P. D. Wilson, for the Minister of Justice and the Minister of National Revenue.

On June 5, 1929, Rinfret J. gave judgment as follows:

RINFRET J.:—

In re John Henderson.

In re John George Broder.

The applicant Henderson complains that he is illegally detained in custody in Oakalla Prison Farm, a common gaol for the county of Vancouver, and prays for the issue of a writ of *habeas corpus* directed to W. G. McMynn, the warden of the prison, and for his subsequent discharge.

The same relief has already been refused by the late Chief Justice of the Supreme Court of British Columbia and by Mr. Justice W. A. Macdonald, a judge of the same province (1).

According to the warrant of commitment by reason of which he is held prisoner, Henderson was convicted before H. O. Alexander, a stipendiary magistrate in and for the county of Vancouver, for that he,

on December 5, 1928, at Pocahontas Bay, in the county of Vancouver, unlawfully, without having a licence under the *Excise Act* then in force, did have in his possession a still suitable for the manufacture of spirits, without having given notice thereof as required by the *Excise Act,* such still not having been a duly registered chemical still of capacity not exceeding three gallons, as provided for in the *Excise Act,* contrary to the form of statute in such case made and provided

and he was adjudged

to be imprisoned in the common gaol for the said county of Vancouver at Oakalla Prison farm, Burnaby, in the county of Westminster, in the province of British Columbia, for the term of twelve months,

and also that he shall

forfeit and pay the sum of five hundred dollars ($500) to be paid and applied according to law, and, in default of payment of the said sum of $500, that he should be imprisoned in the said common gaol for the county of Vancouver in the county of Westminster for a further term of six months unless the said sum of $500 and the costs and charges of conveying (him) to the said common gaol should be sooner paid.

(1) [1929] 2 W.W.R. 209.

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

The warrant commanded the constables or peace officers in the county of Vancouver to take and convey Henderson

to the common gaol at Oakalla Prison Farm aforesaid and there to deliver him to the said keeper thereof, together with this precept;

and commanded the keeper to receive Henderson

into (his) custody in the said common gaol and there to imprison him for the term of twelve months.

The warrant further commanded the keeper to imprison Henderson

for the further term of six months to commence at the expiration of the said term of twelve months awarded by the sentence above set out unless the said sum of $500 and the costs and charges of the commitment and of the conveying of the said Henderson * * * to the said gaol are sooner paid unto the said keeper or until he shall be otherwise discharged in due course of law.

The application is based on a number of grounds and I will endeavour to consider and determine them in the order in which they are submitted to me:

1. The trial magistrate is alleged to have been

without jurisdiction to try the case and to take proceedings on the information sworn or to act thereon

because the informer

did not swear that he was an excise officer or acting under instructions from the Minister of National Revenue, and the proceedings were void *ab initio*, as no averment is sufficient in excise cases.

There is authority in this court for the proposition that, on the return of a writ of *habeas corpus*, the only consideration which can be entered upon by a judge of the Supreme Court of Canada is the sufficiency of the commitment. (*In re Trépanier* (1); *In re Sproule* (2); *Ex parte McDonald* (3).)

In this case, however, the applicant further complains that the magistrate neglected

to show in the warrant and conviction that the proceeding by summary conviction was by virtue of the authority of the Minister of National Revenue, Department of Excise, ss. 133 and 134 of the *Excise Act*.

And, in addition to a copy of the warrant of commitment, the petitioner has filed before me, without objection from the Crown, copies of the conviction, of the information and other papers accompanied by an affidavit, to show the alleged want of jurisdiction.

(1) (1885) 12 Can. S.C.R. 111. (2) (1886) 12 Can. S.C.R. 140.
(3) (1896) 27 Can. S.C.R. 683.

I find nothing in sections 133 and 134 of the *Excise Act* to the effect that the commitment must show the proceedings to have been held

by virtue of the authority of the Minister of National Revenue, Department of Excise.

The offence, of which Henderson is stated in the warrant to have been convicted, is covered by s. 176 (*e*) of the *Excise Act* where it is declared to be an indictable offence, (although by force of section 127 of the Act, the penalty or forfeiture and the punishment may be sued for and recovered or imposed by summary conviction). The offence is not in terms one which is only cognizable upon the information of a specified class of persons. All provisions of the criminal code relating to indictable offences apply to it (see *Interpretation Act,* c. 1 of R.S.C. 1927). It may therefore be argued with great force that anyone, upon reasonable or probable grounds, may make a complaint or lay an information against an accused person in respect of such offence. (Crim. Code, s. 654). There are sections of the *Excise Act* giving special powers to inspectors and officers appointed under it for the purposes of entry into buildings, or into the premises of any dealer, of inspection and examination of apparatus, works, stills, etc.; also, under the authority of a writ of assistance, for the purpose of searching for, seizing and securing goods or things liable to forfeiture under the Act and of arresting and detaining any person whom they detect in the commission of any offence against the provisions of the Act. No powers are stated to be required to lay an information in respect of an offence under s. 176; and counsel for the petitioner was unable to point to any section of the Act having that effect.

Should we, however, infer from the provisions of the *Excise Act* taken as a whole that officers of excise alone are competent to lay informations concerning offences against section 176, even then it is not necessary, though perhaps desirable, to specify particulars of the informant in the warrant of commitment (Paley on Summary Convictions, 9th ed. p. 470). This would dispose of the argument that the authority of the informant is not shown in the warrant of commitment.

Assuming however that "for the purpose of an inquiry into the case of commitment" (which is the extent of my

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

jurisdiction under s. 62 of the *Supreme Court Act*) I should go behind the warrant, I find in the information laid against Henderson, and of which he himself filed a copy before me, that the informant is therein described as a customs and excise officer acting "on behalf of His Majesty the King". The information was taken and sworn before the stipendiary magistrate and, in my view, the oath of the informant covered the particulars relating to his capacity and authority to act. This was quite sufficient (Crim. Code 1128) to justify the magistrate in proceeding with the trial, even if it be true that only an officer of excise could lay the information.

I will say nothing of the fact that, admittedly, this point was not taken at the trial.

I am not overlooking the decisions in *Rex* v. *Limerick* (1), and *Rex* v. *Ed.* (2). In addition to what I have already said upon the points which they cover, I may add that neither case was an application for *habeas corpus*. *Rex* v. *Limerick* (1) was a proceeding for the enforcement of the *Inland Revenue Act* and was before the court on an order for *certiorari*. It was there made to appear that the informant was not an officer of the department of Inland Revenue and, at the hearing, the magistrate's jurisdiction had been challenged. In *Rex* v. *Ed* (2), a case was stated for the opinion of the court after the appellant was found guilty in a prosecution under the *Income War Tax Act*, and as stated by the magistrate, it was not alleged in the information or shown in the evidence before him that (the informant) was authorized by the Finance Department or any other department of the Government to lay the information or otherwise to enforce the provisions of the *Income War Tax Act* (*Rex* v. *Ed.* (3)).

Both cases are distinguishable from the present one.

As to the contention that no proof of the authority of the informant was adduced at the trial, I would say that it does not raise the question of jurisdiction. If I am right in my view that the magistrate had the right to enter on the case, I am not to consider the sufficiency of the evidence on which he convicted. (*In re Trépanier* (4). In the words of Lord Sumner, *re Rex* v. *Nat. Bell Liquors* (5),

(1) (1921) 37 Can. Cr. Cas. 344.

(2) (1926) 47 Can. Cr. Cas. 196.

(3) 47 Can. Cr. Cas. 196, at p. 200.

(4) (1885) 12 Can. S.C.R. 111.

(5) [1922] 2 A.C. 128, at pp. 151-152.

A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not * * *. To say that there is no jurisdiction to convict without evidence is the same as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside, the real conclusion is that there never was jurisdiction.

For all these reasons the petitioner fails on the first ground of his application.

2. The second ground may be stated as follows: The information was first laid before P. C. Parker, stipendiary magistrate. It was afterwards withdrawn and a new information was laid before H. O. Alexander, another stipendiary magistrate whose jurisdiction, so it is contended, was barred by sections 85 (4) and 129 of the *Excise Act*.

Section 85 must be disregarded. It has no application to this case, which is not a prosecution under its provisions, but, as already stated, a proceeding by summary conviction under sections 176 and 127 of the Act (as amended by c. 24 of 18-19 Geo. V).

Section 129 reads as follows:

129. If any prosecution in respect of an offence against any provision of this Act is brought before a judge of a county court, or before a police or stipendiary magistrate, or before any two justices of the peace, no other justice of the peace shall sit or take part therein: Provided, however, that in any city or district in which there are more than one judge of a county court, or more than one police or stipendiary magistrate, such prosecution may be tried before any one of such judges or police or stipendiary magistrates.

It is not disputed that Alexander, the stipendiary magistrate who tried the case, found the conviction and signed the commitment, had jurisdiction territorially and otherwise to try a case of this kind, but it is contended that he could "not sit or take part therein", because the prosecution was brought first before P. C. Parker.

On the facts as stated, section 129 does not apply. The information laid before Parker having been withdrawn, Alexander cannot be said to have sat or taken part in a prosecution brought before Parker. But whatever the facts may have been, they are not apparent on the face of the warrant of commitment and, under the well settled jurisprudence of this court referred to in *Ex parte McDonald* (1)

(1) 27 Can. S.C.R. 683.

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

my jurisdiction in the present case "is limited to an inquiry into the cause of commitment, that is, as disclosed by the warrant of commitment".

The second ground of attack cannot therefore be entertained by me.

3. As a third ground for the application, it is contended that the magistrate

had no power to imprison and fine by summary conviction, but that he could only do one or the other.

Sections 127 and 128 of the *Excise Act* afford a complete answer to this contention. The offence of Henderson must be taken to have been his first offence, inasmuch as the commitment does not shew otherwise. Under section 176, the penalty for a first offence is

a penalty not exceeding $2,000 and not less than $200 and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month, and, in default of payment of the penalty, to a further term of imprisonment not exceeding twelve months and not less than six months.

Section 127 (as amended by c. 24 of 18-19 Geo. V.) reads in part as follows:

127. (1) Every penalty or forfeiture incurred and any punishment for any offence against the provisions of this Act, or any other law relating to excise, may be sued for and recovered, or may be imposed (*a*) before the Exchequer Court of Canada or any court of record having jurisdiction in the premises; or (*b*) if the amount or value of such penalty or forfeiture does not exceed five thousand dollars and such punishment does not exceed twelve months imprisonment with hard labour, whether the offence in respect of which it has been incurred is declared by this Act to be an indictable offence or not, by summary conviction, under the provisions of the Criminal Code relating thereto, before a judge of a county court, or before a police or stipendiary magistrate, or any two justices of the peace having jurisdiction in the place where the cause of prosecution arises, or wherein the defendant is served with process.

* * * * *

(3) Any such pecuniary penalty may, if not forthwith paid, be levied by distress and sale of goods and chattels of the offender, under the warrant of the court, judge, magistrate, or justices having cognizance of the case; or the said court, judge, magistrate, or justices may, in its or their discretion, commit the offender to the common gaol for a period not exceeding twelve months, unless the penalty and costs, including those of conveying the offender to such gaol and stated in the warrant of committal, are sooner paid.

Section 128 reads:

128. Any term of imprisonment imposed for any offence against the provisions of this Act, whether in conjunction with a pecuniary penalty or not, may be adjudged and ordered

(*a*) by the Exchequer Court of Canada, or any court of record having jurisdiction in the premises; or

(*b*) if such term of imprisonment does not exceed twelve months, exclusive of any term of imprisonment which may be adjudged or ordered for non-payment of any pecuniary penalty, whether the offence in respect of which the liability to imprisonment has been incurred is declared by this Act to be an indictable offence or not, by summary conviction under the provisions of the Criminal Code relating thereto by a judge of a county court, or by a police or stipendiary magistrate, or any two justices of the peace having jurisdiction in the place where the cause of prosecution arises, or wherein the defendant is served with process.

As will have been noticed, section 127 alone was sufficient in this case to found jurisdiction in the stipendiary magistrate; and section 128 applies when the term of imprisonment is imposed "whether in conjunction with a pecuniary penalty or not."

4. The next contention in support of the application is that the warrant of commitment is bad

in neglecting to state where the defendant was found or the cause of prosecution arises.

The warrant states

that the said John Henderson * * * on December 5, 1928, at Pocahontas Bay, in the county of Vancouver, unlawfully * * * did have in his possession a still, etc.

H. O. Alexander, before whom Henderson was found guilty and was convicted, is "a stipendiary magistrate in and for the said county of Vancouver." The jurisdiction appears on the face of the proceedings. Moreover, courts would take judicial notice of the "local divisions of their country." (Taylor on Evidence, 10th ed., 17; *Sleeth* v. *Hurlbert* (1).)

Nor was it necessary, as urged by counsel, that, at the time of the arrest, Henderson should have the still in his own actual possession at Pocahontas Bay. Having possession includes as well having in the custody of any other person or having in any place for the benefit or use of one's self or of any other person (Criminal Code, s. 5).

5. Then it is contended that the warrant is bad, "by neglecting to show to whom the fine is to be paid," the words used being: "to be paid and applied according to law."

The warrant shews that Henderson is condemned to an imprisonment of twelve months and also to a fine of $500, and to a further imprisonment of six months unless the said sum of $500 "should be sooner paid." The further term of six months is

(1) (1895) 25 Can. S.C.R. 620, at p. 626.

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

to commence at the expiration of the said term of twelve months awarded by the sentence above set out unless the said sum of $500 and the costs and charges of the commitment and of the conveying * * * to the said jail are sooner paid unto * * * the said keeper.

To avoid further imprisonment, Henderson knows from the warrant that he must pay to the keeper. Assuming that he is concerned with the subsequent appropriation of the fine, s.s. 133 and 134 of the *Excise Act* make a complete and determinate disposal of it. If they did not, art. 1036 of the Criminal Code would apply. So that the judgment can be unequivocally carried into effect by reference to the Act alone (*R.* v. *Seal* (1)).

6. The last objection taken by the petitioner is as to the question of costs. It is urged by him

that the conviction and warrant do not comply with the statutes in regard to "costs of conveying to gaol" or costs of "commitment."

Under s. 127 of the *Excise Act*, the magistrate could

commit the offender to the common gaol for a period not exceeding 12 months, unless the penalty and costs, including those of conveying the offender to such gaol and stated in the warrant of committal are sooner paid.

The adjudication in the warrant now before me, in default of payment of the fine of $500, is that Henderson should be imprisoned

for a further term of six months unless the said sum of $500 and the costs and charges of conveying (him) to the said common gaol should be sooner paid.

Then, in the operative part of the warrant, the keeper is commanded to imprison him for the further term of six months * * * unless the said sum of $500 and the costs of the commitment and of the conveying * * * to the said gaol are sooner paid unto * * * the said keeper. But the further term of six months is to commence (only) at the expiration of the said term of twelve months awarded by the sentence.

Henderson complains that:

(*a*) The costs of commitment were not adjudged against him and that yet, under the warrant, he will have to remain six months in prison, unless he pays them.

(*b*) The amount of the costs which he must pay is not stated in the commitment.

Henderson was validly convicted on the 5th January, 1929. It was then validly adjudged, for the offence of which he was legally found guilty, that he should be im-

(1) (1807) 8 East 569, at p. 573.

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

prisoned for the term of twelve months. It is not disputed that the punishment is perfectly good under the statute. The term of twelve months will expire only on the 5th day of January, 1930. Until then he cannot complain that he is illegally restrained of his liberty, nor kept in illegal confinement. The warrant of commitment is sufficient for the keeper to retain him in gaol until the expiration of the term of twelve months for which the conviction imposed an absolute order of imprisonment.

Where the order of imprisonment is absolute for a term and a further term is imposed in default of payment of a fine and costs, the conviction and commitment of an inferior tribunal are severable. This proposition has now been accepted by our courts. The court of appeal for Ontario in *The King* v. *Carlisle* (1); the Court of King's Bench (appeal side) of Quebec in *La Commission des Liqueurs de Québec* v. *Forcade* (2); and the Court of Appeal for British Columbia in *Rex* v. *Fox* (3); to which may be added the opinion of Mr. Justice Beck of the Court of Appeal for Alberta in *Rex* v. *Miller* (4). I see no reason to differ from these judgments.

Paley on Summary convictions (8th ed. at p. 201) admits that an order is divisible and "may be quashed in part", and, as said in *Rex* v. *Robinson* (5), quoted by Mr. Justice W. A. Macdonald in his judgment on a similar application (6),

> there is no reason worthy of the name to be found in the books why there should be any distinction in this respect between an order and a conviction.

I therefore think that, so far as concerns that portion of the warrant of commitment dealing with further imprisonment in default of payment of fine and costs, the application is premature. I do not want however to be understood as meaning that that part of the commitment is invalid. The writ of *habeas corpus* is a prerogative process available when "there is a deprivation of personal liberty without legal justification" (Halsbury, Laws of England, vol. 10, p. 48). Courts should not permit the use of this great writ to free criminals on mere technicalities. It is

(1) (1903) 7 Can. Crim. C. 470.
(2) (1923) 29 R.L.n.s. 294.
(3) [1929] 1 W.W.R. 542, at p. 544.
(4) (1913) 25 Can. Crim. Cas. 151.
(5) (1851) 17 Q.B. 466.
(6) [1929] 2 W.W.R. 209.

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

the spirit of our Criminal Laws and more particularly of our law on summary convictions that defects and informalities be corrected so as "to prevent a denial of justice" (Crim. Code 723, 753, 754, 1120, 1124, 1125 and 1129).

I have been referred to a number of judgments holding a warrant of commitment invalid because it required payment of conveyance to gaol and it did not state the amount of those costs. I have noticed that none of the learned judges who have so decided took the trouble of telling us at the same time how the magistrate, so as to insert the amount in the warrant, could determine in advance the costs of conveyance. I fully agree with what is said on that point by Murphy J. in *Rex* v. *Wong* (1). A proper method—and there should be others—for the determination of those costs is set out in *Poulin* v. *City of Quebec* (2) where Sir François Lemieux, at page 392, decides as follows:

> By this petition for *habeas corpus* (the petitioner) demands to be discharged on two main grounds, * * *;
> secondly, because the conviction should have stated the amount of conveying the petitioner to gaol.
>
> This last ground is without foundation.
>
> The condemnation for the costs includes the cost of conveyance, and these expenses, contrary to the claim of the petitioner, should not, and could not, be included in the conviction.
>
> When the law permits conviction for costs, it includes, not only the costs of the prosecution but also those of carrying out the judgment of the conviction.
>
> It is impossible for the magistrate or the Recorder's Court, and it is not in a position to fix and determine in advance the cost of conveyance. These costs are, or should be, stated or certified by the officer who executes the commitment upon the back of the commitment, which is the general practice and which was done in this very case. The certificate authorizes the jailer to require payment of the amount if the offender desires to be discharged from gaol.

In this case, I have, for the above reasons, come to the conclusion that the objections fail to support the application for the prisoner's release and the said application will therefore be dismissed.

In the case of George Broder, the conviction and the warrant of commitment are identical and for a similar offence; the application is based on exactly the same grounds as that of John Henderson and it will accordingly be dismissed for the same reasons.

(1) (1925) 44 Can. Crim. C. 343. (2) (1907) 13 Can. Crim. C. 391.

In re James Stewart

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

This is an application for *habeas corpus* by James Stewart, formerly of the city of Vancouver and at present imprisoned at Oakalla Prison Farm, Burnaby, county of Westminster, province of British Columbia.

The offence for which Stewart was convicted, the conviction and the warrant of commitment are similar to those in the cases of John Henderson and George Broder. The grounds of the application are the same, except one which I shall state presently. For the reasons already given in dismissing the petitions of Henderson and Broder, to which I refer the parties and their counsel, I think the similar objections raised in this case fail to support the application for Stewart's release.

The other ground, which was available neither to Henderson, nor to Broder, consists in the following:

It was adjudged by the conviction, as appears by the warrant of commitment, that Stewart should be imprisoned for the term of six months, and it was also adjudged that he should forfeit and pay the sum of $100 to be paid and applied according to law; and it was further adjudged that, in default of payment of the said sum, Stewart should be imprisoned

for a further term of two months, unless the said sum of $100 and the costs and charges of conveying (him) to the said common gaol should be sooner paid.

The operative part of the warrant of commitment is in the same terms, except that the keeper is commanded also to exact "the costs and charges of the commitment", in addition to those "of the conveying", before he discharges the prisoner.

Under section 176 (d) of the *Excise Act*, the offence of which Stewart was found guilty is an indictable offence (though triable by summary conviction—s. 127) and made him liable to a penalty

not exceeding $2,000, and not less than two hundred dollars, and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month, and, in default of payment of the penalty, to a further term of imprisonment not exceeding twelve months and not less than six months.

As will have been perceived, the absolute order of imprisonment for a term of six months is within the limitation contained in the enactment. Stewart is now detained in

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

gaol under a perfectly good award of imprisonment and the commitment, as well as the conviction, is a legal and sufficient warrant for the gaoler to keep him in prison.

There seems to be no doubt however that the magistrate had no power to impose less than the minimum fine or to order imprisonment, in default of payment of fine and costs, for a term shorter than prescribed by the statute.

According to the *Interpretation Act* (c. 1 of R.S.C. 1927, s. 28)

> Every Act shall be read and construed as if any offence for which the offender may be
>
> (*a*) prosecuted by indictment, howsoever such offence may be therein described or referred to, were described or referred to as an indictable offence;
>
> (*b*) punishable on summary conviction, were described or referred to as an offence; and
>
> all provisions of the Criminal Code relating to indictable offence, or offences, as the case may be, shall apply to every such offence.

By force of sections 1028 and 1029 of the Criminal Code the magistrate had no discretion to inflict a punishment or to award a fine or a penalty outside the limitations contained in s. 176 (*e*) of the *Excise Act*. And section 1054 of the same code provides

> that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

I think therefore that the conviction for a fine of $100 and the adjudication of imprisonment for a further term of two months, in default of payment of the fine and costs, were bad and illegal.

Had Stewart, at the present time, been kept in gaol because of his failure to pay the fine of $100 and costs, I would not however have maintained the writ of *habeas corpus*. Applying section 1120 of the Criminal Code, I would have made an order for the further detention of Stewart and have directed the magistrate, under whose warrant he is in custody,

> to do such further act as * * * may best further the ends of justice.

And it may not be out of place to draw the attention of the petitioner to the fact that by s. 1125 of the Criminal Code,

> the punishment imposed being less than the punishment by law assigned to the offence stated in the conviction or order

is treated as an irregularity which may be dealt with in all respects as the court may do upon appeal under section

754 of the Code. Section 1125 has reference to convictions removed by *certiorari,* but there is no apparent reason why an order to a similar effect could not be made on *habeas corpus* under s. 1120 of the code.

I am not however so deciding. In my reasons for judgment on the similar petitions of John Henderson and George Broder, I have explained why I thought that the conviction as made in this case was severable. It consists first in an absolute order for the payment of a fine. By the terms of the conviction and of the warrant, the term of two months, in default of payment of the fine, is "to commence (only) at the expiration of" the absolute term of imprisonment of six months. The conviction and warrant are dated the 5th day of January, 1929. The six months will expire only on the 5th day of July. In the meantime and at present a valid case of detention is shewn, the petitioner is legally in gaol and he cannot succeed in his present application. The application is therefore dismissed.

In re Joe Go Get

Joe Go Get, was, on the 23rd January, 1929, convicted before Thos. McClymont, a police magistrate, for that he

did have in his possession a drug, to wit prepared opium, without lawful authority, contrary to the provisions of section 4 (*d*) of the *Opium and Narcotic Drug Act,* 1923, and amendments thereto.

He was adjudged to be imprisoned for the term of six months. He was also adjudged to forfeit and pay the sum of $200, and he was further adjudged, if the said sum was not sooner paid, to be imprisoned

for the additional space of three months to commence at and from the expiration of the term of imprisonment aforesaid.

Joe Go Get was imprisoned under a warrant of commitment reciting the above conviction and now applies for his release from custody by *habeas corpus.* He says his conviction, as appears by the commitment, is incomplete and in improper form and contrary to the *Opium and Narcotic Act* because:

1. The penalty imposed is less than the minimum penalty which may be awarded under the Act.

2. There is no adjudication as to costs, which is necessary in such an offence.

3. The conviction and warrant of commitment do not "provide for costs and charges of commitment."

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Rinfret J.

The offence of which Joe Go Get was found guilty is covered by section 4 (*d*) of the *Opium and Narcotic Drug Act*, which made him liable

upon summary conviction, to imprisonment with or without hard labour for any term not exceeding eighteen months

and not less than six months, and to a fine not exceeding one thousand dollars and costs and not less than two hundred dollars and coss.

Then paragraph 2 of section 4 says:

2. Notwithstanding the provisions of the Criminal Code, or of any other statute or law, the court shall have no power to impose less than the minimum penalties herein prescribed, and shall, in all cases of conviction, impose both fine and imprisonment; * * *

In the present case, no objection is taken to the absolute term of imprisonment imposed, but the sum ordered to be forfeited and paid as a fine is only two hundred dollars, and it is argued that this was illegal and outside the jurisdiction of the magistrate because, under the Act, the fine may not be less than two hundred dollars and costs. The conclusion would be that either a fine for the minimum amount without costs is below the penalty imperatively prescribed or that the conviction is bad because it contains no adjudication as to costs.

I do not so understand the statute, and I read it as Murphy J. did in *Rex* v. *Wong Yet* (1).

Section 4 (2) of the *Opium and Narcotic Drug Act* must be applied

notwithstanding the provision of the Criminal Code, or of any other statute or law.

For the determination of this objection, I must therefore look only to the provisions of the Act. The Act says that

the court shall have no power to impose less than the minimum penalties herein prescribed.

I think the word "penalties" means the fine and the imprisonment and does not include the costs. The magistrate

shall, in all cases of conviction, impose both fine and imprisonment.

He may not impose a fine alone, or an imprisonment alone. He must not impose a term of imprisonment or a fine outside the limitations contained in the enactment, but the costs remain in his discretion. Applying this interpretation to the wording of the relevant section 4d (*b*), I would say that the magistrate could, as he has done in this case, impose a fine of $200, without speaking of the costs. The

(1) 44 Can. Crim. C. 343.

words " not less than " in the section apply to the " fine " only; and the " fine " does not comprise " the costs." This is shown by section twelve of the Act, whereby when " the conviction adjudges payment of *a fine,*" the sentence may direct that in default of payment of the fine

and costs, the person so convicted shall be imprisoned until such fine *and costs* are paid, etc.

The limitation in s. 4 applies therefore to the penalties, being the imprisonment and the fine, but not to the total amount of fine and costs. The object of the enactment " according to its true intent, meaning and spirit " is that the minimum fine may be imposed, outside of the costs.

Nor do I think that an adjudication as to costs is necessary for such an offence. There is no provision making it so. The effect of section 4d (*b*) even were I to put upon it the construction suggested by counsel for the petitioner, would not be that costs must be ordered to be paid by the person found guilty, it would be that the combined amounts of fine and costs may not be less than $200, a result which to my mind only goes to strengthen the view I have expressed on the first ground of this application.

Outside of section 4d (*b*), no other sections of the *Opium and Narcotic Drug Act* were pointed to me compelling the magistrate to award costs. In such a case the provisions of the Criminal Code apply (*Interpretation Act,* s. 28, c. 1 of R.S.C., 1927).

In summary matters under the Criminal Code, costs are in the discretion of the magistrate (s. 735) and, as said by my brother Mr. Justice Duff in the *Marino* case (22nd August, 1927, not reported), I cannot

assume that the police magistrate did not judicially consider and pass upon that question.

What I have just said also applies to the costs and charges of commitment. I may add that I fail to see what interest the petitioner may have of complaining on *habeas corpus* that the warrant of commitment makes no mention whatever of those costs. The only effect is that he will not have to pay them in order to escape restraint of liberty.

The application is dismissed without costs.

The appeal from the above judgments was heard by the court, composed of four judges (s. 28 (2), *Supreme Court Act*), on June 13, 1929.

1929

In re HENDERSON, STEWART, BRODER & JOE GO GET.

Stuart Henderson for the appellants.

J. A. Ritchie K.C. for the Attorney General for British Columbia.

P. D. Wilson for the Minister of Justice and the Minister of National Revenue.

On June 14, 1929, the court delivered its judgment affirming the judgments of Rinfret J.

THE COURT.—In the cases of Henderson, Broder and Joe Go Get, the warrant of commitment shews a valid conviction, and even assuming it to be defective because the amount of the costs is not stated, that would not be a ground for discharging the prisoners on *habeas corpus*: Section 1121, Criminal Code. It is not necessary to express any opinion on the question of severance. The appeals are dismissed.

In the Stewart case, assuming the defects alleged on behalf of the prisoner, he is not at present held under any of the defective clauses. The statute clearly contemplates that the proceedings are not wholly void, for there are curative provisions which, in the meantime, may be invoked. If these are not available to this court, they may nevertheless conveniently be resorted to elsewhere, and, in the interests of justice, it seems right that the Crown should not be deprived of its judicial remedies.

We think therefore that this application is at best premature, and should be dismissed.

Appeals dismissed.

1929

*May 17.

IN RE IRVING J. ISBELL

Habeas corpus—Criminal law—Person at large on bail—Not entitled to a writ

In order to make a case for *habeas corpus* in criminal matters, there must be an actual confinement or, at least, the present means of enforcing it. A person may apply for the writ while in the custody of a constable, immediately upon being arrested, and need not wait until he is actually incarcerated. But a person at large on bail is not so restrained of his liberty as to entitle him to the writ.

MOTION by the applicant for the issue of a writ of *habeas corpus*.

*PRESENT:—Mr. Justice Rinfret in chambers.

1929

In re ISBELL.

The facts are fully stated in the judgment of Mr. Justice Rinfret.

A. H. Tanner, K.C., for the applicant.

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

RINFRET J.—The application is for a writ of *habeas corpus*.

It is based on a number of grounds, most of which have already been submitted to the Supreme Court of Ontario upon motion to quash the information and other proceedings. The motion was heard by McEvoy J., in chambers, who confirmed the commitment in a very elaborate judgment (1). Upon appeal, his judgment was affirmed by the Appellate Division (2).

Under such circumstances, it is not usual for a judge of the Supreme Court of Canada to interfere with the decision of the provincial courts (*In re Patrick White* (3)), but see remarks of the Chief Justice quoting Lord Herschell in *In re Seeley* (4). Had I felt that the petition, on its face, presented serious grounds, I would have deemed it advisable to refer the matter to the full court (*In re Richard* (5); *In re Gray* (6)).

But there is, to my mind, a preponderating objection against the issue of the writ.

The prisoner is on bail.

The present Ontario Act (R.S.O. 1927, c. 116, s. 1) applies "where a person * * * is confined or restrained of his liberty".

The Act of 1866 (29-30 Vict. 45) was similar:

when any person shall be confined or restrained of his or her liberty, etc. (Sec. 1);

and the writ was to be

directed to the person or persons in whose custody or power the party so confined or restrained shall be, etc.

Blackstone, in his Commentaries dealing with the common law writ of *habeas corpus*, says:

The great and efficacious writ, in all manner of illegal confinement, is that of *habeas corpus ad subjiciendum* directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day

(1) (1928) 62 Ont. L.R. 489 to 541.
(2) (1928) 63 Ont. L.R. 384.
(3) (1901) 31 Can. S.C.R. 383.
(4) (1908) 41 Can. S.C.R. 5 at p. 6.
(5) (1907) 38 Can. S.C.R. 394.
(6) (1918) 57 Can. S.C.R. 150.

1929

In re ISBELL.

Rinfret J.

and cause of his caption and detention, and to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf.

Halsbury, Laws of England (vol. 10, no. 90), refers to the writ as

a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty.

There is a passage of Hawkins' Pleas of the Crown (vol. II, pp. 138-139) to the effect

that the person bailed is in the eye of the law, *for many purposes*, esteemed to be as much in the prison of the court by which he is bailed, as if he were in the actual custody of the proper gaoler.

I do not think however that, generally speaking, a person discharged on bail may be considered as restrained of his liberty for the "purpose" of entitling him to a writ of *habeas corpus*.

I was referred to a sentence in Lord Campbell's judgment re *Foxhall* v. *Barnett* (1), where he says:

The plaintiff was released only from imprisonment within four walls: he still had to restore himself to a state of freedom; which he did not do until he had the inquisition set aside: till then the imprisonment was not done away with.

But this was in an action for false imprisonment, where the "inquisition" was quashed on *certiorari;* and the question was whether plaintiff was entitled, under an allegation that he had incurred expenses in procuring his discharge from custody, to recover damages for the expense of quashing the inquisition. Having regard to the nature of the case, I would interpret the words of Lord Campbell as meaning that, until the "inquisition was set aside," the plaintiff was threatened with imprisonment and any expense incurred for the purpose of "doing away with" it was justifiably incurred.

The only decision in the Canadian courts that I have been able to find, and I was referred to no other, is that of *The Queen* v. *Cameron* (2); but there the petitioner was a physician who resided in the province of British Columbia. He was arrested in that province and brought to Montreal, in the province of Quebec, to answer a charge of defamatory libel. When he was committed for trial, the

(1) (1853) 2 E. & B. 928, at p. 932.

(2) (1897) 1 Can. Crim. Cas. 169.

judge admitted him to bail to appear at the November term of the Court of Queen's Bench, "*and in the meantime not to depart the court without leave.*" He had not therefore the privilege of going when and where he pleased. No bill of indictment was preferred against him during the two next ensuing terms of the court. He then moved, under a special provision of the statute of Lower Canada (*An Act respecting the writ of Habeas Corpus*—C.S.L.C., c. 95, s. 7), that his bondsmen be released, and that the recognizance entered into by them and himself be discharged and vacated. The provision of the Act was

> that when a person has been committed for a felony and, having prayed to be brought to trial, is not indicted during the next term of the Court of Queen's Bench after such commitment, the court shall, upon motion made in open court, set the prisoner at liberty upon bail, unless it be shown that the witnesses could not be procured for that term, and, after having asked to be brought to trial, if he be not indicted and tried at the second term after his commitment, that he be discharged from his imprisonment.

Wurtele J. granted the motion and discharged the prisoner. In so doing he used the following language:

> But bail is custody and he is constructively in gaol; and he has the same right to be released from his custody as he would have to be released from imprisonment.

The learned judge was addressing himself to the question whether the section applied, notwithstanding the fact that the petitioner was not actually in gaol, and he came to the conclusion that it did. He held that, under the section, a person, who was not indicted and tried for two consecutive terms after his commitment, had an equal "right to be released" whether in prison or under bail. The decision turned exclusively upon the construction of the statute and the very exceptional circumstances of the case.

In my view, in order to make a case for *habeas corpus* in criminal matters, there must be an actual confinement or, at least, the present means of enforcing it. A person may apply for the writ while in the custody of a constable, immediately upon being arrested, and need not wait until he is actually incarcerated. But a person at large on bail is not so restrained of his liberty as to entitle him to the writ. There are numerous decisions in that sense in the United States. They may be found conveniently collected in the American and English Encyclopedia of Law, 2nd ed., vol. 15, vo. *Habeas Corpus*, at p. 159.

1929

In re ISBELL.

Rinfret J.

In fact, bail is one of the alternative remedies which may be granted upon application for *habeas corpus*. See *The Habeas Corpus Act* (R.S.O. 1927, c. 116, s. 7):

7. Although the return to a writ of *habeas corpus* is good and sufficient in law the court or judge before whom the writ is returnable may examine into the truth of the facts set forth in the return, by affidavit or other evidence, and may order and determine touching the discharging, *bailing*, or remanding the person.

The Act of 1866 contained the following provision (29-30 Vict., c. 45, s. 3):

And if upon such return it shall appear doubtful on such examination, whether the material facts set forth in the return, or any of them, be true or not, in such case it shall and may be lawful for the said judge or the court to let to *bail* the said person so confined or restrained, upon his or her entering into a recognizance, with one or more sureties;

As to the statute 31 Car. 2, in *re Robert Evan Sproule* (1), Sir W. J. Ritchie C. J., said at p. 181:

The statute of 31 Car. 2 was to provide that persons committed for criminal, or supposed criminal matters in such cases where by law they were bailable should be left to bail speedily.

To the above may be added s. 63 of the *Supreme Court Act*:

63. In any *habeas corpus* matter before a judge of the Supreme Court, or on any appeal to the Supreme Court in any *habeas corpus* matter, the court or judge shall have the same power to *bail*, discharge or commit the prisoner or person, or to direct him to be detained in custody or otherwise to deal with him as any court, judge, or justice of the peace having jurisdiction in any such matters in any province of Canada.

At present, the prisoner is at liberty on bail. He has himself selected that means of avoiding confinement and incarceration. He is on bail on his own application since November, 1928. We are now in May, 1929, and his trial is now proceeding in Toronto.

I should not interfere. The application is dismissed without costs.

Motion dismissed without costs.

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(1) (1886) 12 Can. S.C.R. 140.

1929

PAUL L. TURGEON (PLAINTIFF).... APPELLANT;

*May 13, 14
*Sept. 26.

AND

THE DOMINION BANK (DEFENDANT) ..... RESPONDENT.

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

Bank and banking—Advances made to trader—Fire insurance policies—Transfer of eventual claim of loss as security—Validity—Interpretation of statutes—Observations on maxim "expressio unius est exclusio alterius"—Arts. 1981, 2472, 2474, 2432, 2568, 2571 C.C.—Bank Act, R.S.C., 1927, c. 12, s. 75—Bankruptcy Act, R.S.C., 1927, c. 11, ss. 63, 64.

L., a merchant, was a customer of, and, in due course of business, received advances from, the respondent bank. In order to secure the repayment of moneys which he had borrowed, or intended to borrow, L. took out various policies of fire insurance upon his stock, making the loss, if any, payable to the bank. The policies were kept in force, and a fire occurred whereby the stock insured was destroyed or damaged. L. then became bankrupt and the appellant was appointed trustee. The latter brought an action against the respondent bank to recover the proceeds of the fire insurance policies which had been paid to the bank, and which, the appellant alleged, amounted to a fraudulent preference.

Held, that a bank is authorized, under s. 75 of the *Bank Act,* R.S.C., 1927, c. 12, to make to an insured advances upon, or take from him as security, the obligations of fire insurance companies to pay to him the indemnities stipulated in case of loss. The enumeration, contained in clause (*c*) of subs. 1 of s. 75, of certain negotiable securities upon which the bank may lend money and make advances does not have the effect of limiting the generality of the comprehensive power separately conferred by clause (*d*), so as to exclude the general lending powers which appertain to banking. The maxim "*expressio unius est exclusio alterius*" enunciates a general rule of interpretation in the construction of statutes and written instruments in order to discover the intention; but that maxim is not of universal application.

Held, also, that the clause in the policy "Loss, if any, payable to the Dominion Bank" does not have the effect of creating an assignment of the insurance policies to the bank, which had no insurable interest in the goods insured; but that stipulation operates only in the event of loss, and gives effect to the intention of the parties that the indemnities to which the insured may become entitled shall be paid to the bank as the nominee of the insured, the latter remaining bound by and subject to the terms of the policies.

Judgment of the Court of King's Bench (Q.O.R. 47 K.B. 383) aff.

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

1929

TURGEON v. DOMINION BANK.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court, at Montreal, Archer J., and dismissing the appellant's action.

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

P. St. Germain K.C. for the appellant.

L. E. Beaulieu K.C. for the respondent.

The judgment of the court was delivered by

NEWCOMBE, J.—M. Lavut & Son, who were merchants, carrying on business in Montreal, had insured their stock in trade against fire in five insurance companies; the policies were issued severally at various times, and in different amounts, from 21st February, 1923, to 6th June, 1926; and, in order to secure the payment of moneys which the firm had borrowed, or intended to borrow, from the defendant bank, these policies, with one exception, contained the provision, in the body of the policy, " Loss, if any, payable to the Dominion Bank." The excepted policy was the first of the series, and it was issued to the assured, M. Lavut & Son, by the Alliance Assurance Company, Limited. By its terms,

> The company agree with the assured (subject to the terms and conditions endorsed hereon which are to be taken as part of this policy) that if, after payment of the premium, the property above described, or any part thereof, shall be destroyed or damaged by fire at any time between the hour of noon of the tenth day of January, 1923, and noon of the tenth day of January, 1924, (standard time at the place of location of the property insured), the company will make good by payment or reinstatement or repair all such loss or damage, to an amount not exceeding in respect of the several matters specified in this policy the sum set opposite thereto respectively. and not exceeding in the whole the sum of three thousand dollars.

Form 2 of the blank endorsements printed on the back of this policy was filled up and executed in August, 1924, as follows:

(1) (1928) Q.O.R. 47 K.B. 383.

Endorsements

Form no. 2,—Loss payable clause

In case of loss the amount for which the company shall be liable shall be payable to Dominion Bank of

Signed at Montreal the 8 August 1923 by

M. LAVUT & SON
per D. LAVUT,
Assured.

The company hereby accepts the above notice that the loss (if any) under this policy shall be payable to the said Dominion Bank.

Signed at Montreal, the 11th August, 1924, by

E. E. KENYON,
Per R. STEWART,
Manager.

The policies were kept in force, and a fire occurred on 20th September, 1926, whereby the stock insured was destroyed or damaged; the firm became bankrupt, presenting a petition on 13th October, 1926, which was granted on that day, and, on 11th November, 1926, the plaintiff became the trustee.

The following facts, among others, are stated in the admissions:

4. All these fire insurance policies were remitted to the defendant at the dates of the issue of the policies for those which were originally made "loss payable if any to the Dominion Bank" and on August 8, 1924, in so far as the Alliance Assurance Company Limited is concerned, and were all held by the defendant as security for advances made and to be made by the defendant to M. Lavut & Son, until the occurrence of the fire, on September 20, 1926.

5. At the time of the bankruptcy of the said J. Lavut & Son and of the fire, the latter was indebted to the defendant in the sum of $8,731 (as shown by sworn proof of claim now in the hands of the plaintiff, èsqualité).

6. The said sum of $8,731 was the balance of an account on advances made from time to time by defendant to the said M. Lavut & Son against the securities held by defendant.

7. After the fire the defendant received out of the fire insurance policies a total of $3,436.79, by cheque made by those fire insurance companies, each cheque payable to M. Lavut & Son and to the defendant, at the different dates mentioned in the evidence, and endorsed by M. Lavut & Son.

The purpose of the action is to have it declared

* * * que les cessions des indemnités par l'assuré M. Lavut & Son, à la défenderesse. provenant des diverses polices d'assurance ci-dessus mentionnées, soient déclarées frauduleuses, nulles et illégales;

and that the plaintiff trustee be adjudged to recover the indemnities for distribution among the creditors.

1929

TURGEON v. DOMINION BANK.

Newcombe J.

Archer J., the learned trial judge, dismissed the action, and, upon appeal, he was upheld unanimously by the Court of King's Bench (1).

The errors now alleged are three; it is contended, first, that the courts below erred in holding that the bank was authorized, under s. 75 of *The Bank Act,* R.S.C. 1927, c. 12, to make advances upon, or to take as security, the obligations of fire insurance companies to pay the indemnities stipulated in case of loss; secondly, that the clause, "Loss, if any, payable to the Dominion Bank," did not operate otherwise than as an assignment of the insurance policies to the bank, and could not have that operation, inasmuch as the bank had no insurable interest in the property insured; and, thirdly, to use the words in which the point is stated, that the courts were wrong

> In finding that such an assignment of the eventual indemnities arising out of the fire insurance policies did not constitute an illegal preference towards the other creditors of the insured, inasmuch as it was made in prevision of an event which necessarily had to render said insured insolvent.

Respecting the first point, I should be reluctant to suggest a doubt as to the right of a trader to make his fire insurance available as a security to a bank in the manner adopted in this case, or as to the power or capacity of a bank to take or hold such a security. The argument arises upon the interpretation of s. 75 of *The Bank Act,* and it is said that, inasmuch as clause (*c*) of subs. 1 expressly mentions certain securities, including "bills of exchange, promissory notes and other negotiable securities," upon which the bank may lend money and make advances, it could not have been intended that the next following clause (*d*), of the same subsection, should extend to securities not included in the preceding specific description. But that is practically, and unnecessarily, to limit the generality of the comprehensive power separately defined by clause (*d*) so as to exclude the lending powers which appertain to banking. The words of the clause are these:

> The bank may * * *
>
> (*d*) engage in and carry on such business generally as appertains to the business of banking.

The maxim, *expressio unius est exclusio alterius,* enunciates a principle which has its application in the construc-

(1) (128) Q.O.R. 47 K.B. 383.

tion of statutes and written instruments, and no doubt it has its uses when it aids to discover the intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context. One has to realize that a general rule of interpretation is not always in the mind of a draughtsman; that accidents occur; that there may be inadvertence; that sometimes unnecessary expressions are introduced, *ex abundanti cautela,* by way of least resistance, to satisfy an insistent interest, without any thought of limiting the general provision; and so the axiom is held not to be of universal application.

> It depends upon the intention of the parties, as it can be discovered upon the face of the instrument or upon the transaction;

per Lord Campbell, L.C., in *Saunders* v. *Evans* (1); *McLaughlin* v. *Westgrath* (2).

It is not denied that the transaction in question belongs to the business of banking within the meaning of clause (*d*), if that clause be not limited by the implied exception for which the plaintiff contends, and it must be remembered that, according to the frame of the Act, exceptions or prohibitions are intended to be expressed by subs. 2 of s. 75. These do not suggest any intention to exclude the lending of money upon securities, merely because the securities are not of the class which is described as negotiable; and the maxim is thus, perhaps, more aptly available to the bank when it contends that, since certain securities not foreign to the business of banking are expressly prohibited, it may be inferred that other securities of that character remain within the scope and operation of the general clause. Several provincial decisions of high authority are cited by the learned judges of the Court of King's Bench in support of the bank's power, and there is none to the contrary. My own view is that the Parliament, in introducing the securities enumerated by clause (*c*) of subs. 1, evidently did not intend to make those enumerations comprehensive, and that, so far as any question arising in this case is concerned, clause (*d*) was meant to have its full effect, subject to the provisions of subs. 2. Moreover, it is difficult to escape the

(1) (1861) 8 H.L.C. 721, at pp. 728, 729.

(2) (1906) 75 L.J.P.C. 117, at p. 118.

1929

TURGEON v. DOMINION BANK.

Newcombe J.

inference from subs. 3 that insurance may be placed for the security of a bank; on the contrary, it is expressly provided that

> Nothing herein contained shall prevent such bank from requiring such insurance to be placed with an insurance company which it may approve.

Secondly, it is urged that the bank, having no insurable interest in the goods insured, was not qualified to receive payment of the amount of the loss under the direction to that effect embodied in or endorsed upon the policies, and the plaintiff relied upon several articles of the Quebec Civil Code, namely, 2472, 2474, 2482, 2568 and 2571, but they do not support his contention. It is said that the words under which the bank claims have effect as an assignment of the policies, but that is not so. The stipulations operate only in the event of loss, and give effect to the intention of the parties that the indemnities to which the assured have become entitled shall be paid to the bank as the nominee of the assured, the latter remaining bound by and subject to the terms of the policies which have been contracted. It seems unnecessary to add to the discussion which this question received in the reasons given by the learned judges of the Court of King's Bench; but it may be observed that the considerations which they advanced are supported, not only as matter of fair interpretation, but also by the authorities in Ontario and in the United States. See, *inter alia*, *McPhillips* v. *London Mutual Fire Insurance Company* (1); *Fogg* v. *Middlesex Mutual Fire Insurance Co.* (2); *Minturn* v. *Manufacturers' Insurance Co.* (3); *Frink* v. *The Hampden Insurance Co.* (4).

I find it somewhat difficult to realize the authority or principle which underlies the third objection. We are referred to art. 1981 of the Civil Code, and it is said that the transaction amounts to an illegal preference under the *Bankruptcy Act*, R.S.C., 1927, c. 11; but the article in question is not intended to prevent a debtor from creating a valid security; and, as to the *Bankruptcy Act*, admittedly none of these securities was given within the period of three months limited by s. 64 of that Act; and, moreover, there

(1) (1896) 23 Ont. App. Rep. 524.
(2) (1852) 10 Cushing (Mass.) 337.
(3) (1858) 10 Gray (Mass.) 501.
(4) (1865) 45 Barbour (N.Y.) 384.

1929

TURGEON v. DOMINION BANK.

Newcombe J.

is evidence uncontradicted that the assured were not insolvent previously to the fire. It was also said that the claim of the bank was invalidated as a transfer of future book-debts under s. 63, which seems to be a hopeless contention. The good faith of the transaction is not justly impeached, and our attention has not been directed to any invalidating provision which applies.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. Germain, Raymond & St. Germain.*

Solicitors for the respondent: *Myerson & Sigler.*

1929

*May 29, 30.
*Sept. 26.

THE TORONTO TRANSPORTATION COMMISSION ..... APPELLANT;

AND

CANADIAN NATIONAL RAILWAYS, THE CANADIAN PACIFIC RAILWAY COMPANY AND THE CORPORATION OF THE CITY OF TORONTO ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Order of Board of Railway Commissioners for Canada against corporation operating street railway system for contribution to cost of subways constructed under steam railway tracks—Railway Act, R.S.C., 1927, c. 170, ss. 39, 257, 259, 44 (3)—Jurisdiction of Board under the Act—Appeal from Board's order for contribution—Whether appellant "interested or affected by" the order for construction of the subways—Jurisdiction of Parliament of Canada to enact legislation in question.

The Toronto Transportation Commission, which operates the street railways in Toronto, appealed from the order of the Board of Railway Commissioners for Canada requiring it to contribute to the cost of two subways on Bloor Street and one on Royce Avenue, which were constructed under certain steam railway crossings by order of the Board under its powers under s. 257 of the Dominion *Railway Act*. The appellant, whose Bloor Street lines had not previously crossed

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

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

the railway tracks, but had led towards them on each side thereof, constructed its tracks through the Bloor Street subways, thus establishing a continuous line along Bloor Street, and now operates cars thereon. It does not operate through the Royce Avenue subway, nor are there any tracks on that street.

Held, as to the Bloor Street subways, that the appellant was "interested or affected by" (*Railway Act,* s. 39) the order directing the work, and the Board had jurisdiction under said Act to order it to contribute to its cost. (As to appellant's contention that in operating the street railways it was a mere agent of the city corporation and could not be required to contribute, it was held that, whatever might be its rights and remedies against the city, the appellant, as an operating corporation in control of the street railways, and entrusted with their full management, could be treated by the Board as a company or person to which s. 39 of said Act applied, subject, of course, to its interest being shewn).

Held, as to the Royce Avenue subway, that the appellant was not "interested or affected by" the order directing the work, and the Board had not jurisdiction under said Act to order it to contribute. This was so, notwithstanding that the construction of the subway involved a certain diversion of Dundas Street, which street had been, and is now in its diverted course, used by appellant. (*Per* Mignault and Lamont JJ.: Not being interested in the subway, appellant could not be said to have an interest in the diversion. Moreover, the contribution exacted from appellant took no account of the cost of the diversion as distinguished from the cost of the subway, the contribution being to the whole expenditure. *Per* Newcombe J.: There was no finding that appellant derives a benefit from the method provided for the approach or discharge of traffic from and to the subway as between Dundas Street and Royce Avenue; and there was no reason to believe that the Board intended to impose part of the subway cost as compensation for advantages said to accrue by reason of the diversion of Dundas Street. If, on the contrary, as the case seemed to suggest, the Board was anticipating value which might be realized when, if ever, a branch of the tramway is constructed through the subway, the Board would not have jurisdiction to order payment under s. 39 of the *Railway Act;* it cannot be said that a person is interested merely because in the future he may become so). Anglin C.J.C. and Smith J. dissented on this question, holding that, in connection with the construction of the subway, the diversion of the *situs* of appellant's tracks on Dundas Street involved such a division and diversion of traffic as probably to effect an improvement for the street railway over conditions theretofore existing; and it was impossible to hold that it had been shewn that appellant had not a present interest, different in kind from that of the ordinary residents in, or users of, the city streets, in the changes effected by the Board's order for construction of the subway, still less that it was wholly unaffected by that order; as to whether such interest or affection was too slender to justify the order for contribution, that was a question of degree, involving the sufficiency in extent of the interest or affection, as to which the discretion exercised by the Board could not be interfered with.

The *Railway Act,* R.S.C. 1927, c. 170, ss. 39, 257, 259, 44 (3), 33 (5), considered. *Toronto Ry. Co.* v. *Toronto,* [1920] A.C. 426, cited.

Held, also, that the Parliament of Canada had jurisdiction to confer upon the Board the authority held to be given by the provisions of the Act to compel contribution, under the circumstances of the case, from the appellant, a provincial corporation. *Toronto* v. *Can. Pac. Ry. Co.*, [1908] A.C. 54; *Toronto Ry. Co.* v. *Toronto,* 53 Can. S.C.R. 222.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

APPEAL by the Toronto Transportation Commission (by leave of a judge of this Court, and upon a settled statement of facts) from an order of the Board of Railway Commissioners for Canada directing that the appellant contribute a certain portion of the cost of certain subways, constructed by order of the Board, in the city of Toronto.

The appellant is a corporation established under c. 144 of the Statutes of Ontario of the year 1920, and is the administrative body charged with the operation of the street railways in the city of Toronto, all of which belong to the City. There were three subways in question, two on Bloor street (between Lansdowne avenue and Dundas street), and one on Royce avenue. One of the Bloor street subways is under the tracks of the Galt subdivision of the Canadian Pacific, the Brampton subdivision of the Canadian National, and the Toronto, Grey & Bruce subdivision of the Canadian Pacific (which cross Bloor street side by side). The other Bloor street subway is under the tracks of the Newmarket subdivision of the Canadian National. The subway on Royce avenue is under the tracks of the said Galt, Brampton, and Toronto, Grey and Bruce subdivisions.

The description and location of the streets and railway lines in question and the situation with regard to them prior to the scheme for construction of the subways in question sufficiently appear in the judgments now reported. The settled statement of facts contained, *inter alia,* statements, in effect, as follows:

On November 21, 1922, the City of Toronto applied to the Board of Railway Commissioners for Canada for an order requiring the Canadian National to collaborate with the City in the preparation of a joint plan for the separation of grades at Bloor street and Royce avenue as well as at a number of other streets in the northwestern section of the city.

A hearing of the said application was held by the Board in Toronto on February 14, 1923. As a result of the hear-

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

ing the parties agreed to study the matter and submit a report to the Board.

At a hearing by the Board held in Toronto on January 8, 1924, plans were submitted by the City and the Railways and discussed. Various organizations and ratepayers' associations in the city of Toronto which were affected were represented at the hearing, and it was urged by them as well as the City of Toronto that one of the reasons requiring protection by grade separation at these crossings was to enable the Transportation Commission to extend its lines of street railway across the tracks so as to give the residents of the northwestern section of the city a better and more continuous street car service. It was also stated that the Transportation Commission would possibly in the future extend its lines of street railway across the tracks of the steam railways at Royce avenue. The hearing was adjourned for the purpose of allowing further study of the plans submitted.

A further hearing of the Board was held in Toronto on February 19, 1924, notice of which was sent by direction of the Board to the Transportion Commission, which had not previously appeared, and the bodies operating other public utilities interested in or affected by the plans submitted. The Transportation Commission appeared at this and subsequent hearings, reserving its rights, and took part in the final argument, as to the distribution of cost, at the same time stating that it was immaterial to it whether the subways in question were constructed or not. At these hearings exhaustive enquiry and discussion took place covering the various general schemes submitted, including the proposed methods of dealing with the crossings at Bloor street and the proposal of the Canadian Pacific to divert Dundas street as part of the Royce avenue grade separation. It was shown that Dundas street was a heavily travelled main artery with a double track street railway, extending along and immediately adjacent to the westerly limit of the steam railway right of way from a point some distance south of Royce avenue to a point just north of that crossing. The Canadian Pacific proposal, which provided for the diversion of Dundas street, including the street railway tracks, at its then level with easy approaches to the subway in both directions on the original location

of the street, was supported by the evidence of an independent experienced engineer, called on behalf of a body of citizens of West Toronto, and was adopted by the Board. The diversion runs from the corner of Humberside avenue and Dundas street on a tangent through to Dundas street at the corner of Indian road, thus avoiding the dangerous condition of heavy traffic coming upon a busy street with street car tracks which would have resulted from the construction of the subway at Royce avenue, if Dundas street and the street railway tracks had not been diverted.

As a result of these hearings the Board, acting under its powers for the protection, safety and convenience of the public, issued its order no. 35037, dated May 9, 1924, approving the general plans submitted by the Canadian Pacific for grade separation in the northwestern section of the city including subways under the tracks of the Canadian Pacific Galt and Toronto, Grey & Bruce Subdivisions and the Canadian National Brampton Subdivision at Bloor street and Royce avenue and under the tracks of the Canadian National Newmarket Subdivision at Bloor street.

On May 21, 1924, a further hearing of the Board was held in Toronto to discuss the details of the works from an engineering standpoint, to give directions as to the portions to be undertaken forthwith and to hear arguments on the question of distribution of the cost of the subways ordered to be constructed. Following this hearing the Board issued its order no. 35153, dated June 5, 1924 (amended by order no. 35308, issued July 10, 1924), which directed that work on the subways be undertaken and provided *inter alia* as follows:

> That all questions of distribution of costs, interest or other matters involved in the construction of the said work be reserved for further order of the Board.

On July 15, 1925, the Transportation Commission applied to the Board for an order under s. 252 of the *Railway Act*, granting it leave to construct for the Corporation of the City of Toronto, a double track line of street railway, between Dundas street and Lansdowne avenue along Bloor street.

By order no. 36693, dated August 13, 1925, the Board granted the said application and reserved for further consideration the question of contribution to the cost of said subways by the applicant.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

Under the authority so granted to it, the Transportation Commission did, during the course of construction of the subways, construct a double line of street railway tracks along Bloor street from Lansdowne avenue to Dundas street and through the subways constructed pursuant to the Board's order and the Transportation Commission now operates street cars through the said subways.*

The Transportation Commission does not operate street cars through the subway at Royce avenue.

Orders of the Board were issued authorizing the Canadian Pacific and the Canadian National to use and operate the subways carrying their tracks over the streets as aforesaid.

On November 15, 1926, the Board issued its formal order no. 38424, distributing the cost of construction of the said subways and directing that the Transportation Commission should contribute to the cost thereof as therein set forth. This order was rescinded by order no. 40367, issued on February 16, 1928, which altered the distribution of cost in so far as the contribution from the railway grade crossing fund was concerned, but not otherwise. The distribution of the cost as provided by the said order is stated in the judgment of Mignault J.† The Toronto Transportation Commission (appellant) was to pay 10% of the cost of the work, after deducting the amount available from the railway grade crossing fund.

Leave to appeal to this Court was given upon the following questions:

(1) Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16, 1928, that the Toronto Transportation Commission should contribute to the cost of—

(*a*) the Bloor Street Subways,

(*b*) the Royce Avenue Subway.

or either of such works referred to in such order.

(2) If the above question should be answered in the affirmative as to either or both of the said works, had

*A description of the construction through the Bloor Street subways appears on p. 81 *infra*.

†At pp. 88, 89 *infra*.

the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial corporation, in respect of—

(*a*) the Bloor Street Subways,

(*b*) the Royce Avenue Subway,

or either of such works referred to in such order, under the circumstances of this case?

As to the Bloor street subways, the appeal was dismissed. As to the Royce avenue subway, the appeal was allowed, Anglin C.J.C. and Smith J. dissenting. Success being divided, no order was made as to costs.

D. L. McCarthy, K.C., and *I. S. Fairty, K.C.*, for the appellant.

E. Lafleur, K.C., for the respondent, Canadian National Railways.

W. N. Tilley, K.C., for the respondent, the Canadian Pacific Railway Company.

G. R. Geary, K.C., for the respondent, the City of Toronto.

The judgment of Anglin C.J.C. and Smith J. (dissenting in part) was delivered by

ANGLIN C.J.C.—The appeal case opens with a comprehensive statement of facts settled by the Board of Railway Commissioners, much of which is historical and, while, no doubt, entirely relevant to the matters which the Board had to consider in exercising the discretion entrusted to it, is scarcely material to the question of its jurisdiction to order the Toronto Transportation Commission to pay a part of the cost of the construction of each of the three subways, two on Bloor Street and the other on Royce Avenue. The facts bearing at all directly on that question lie within a comparatively narrow compass.

As in the Main Street case (1), leave to appeal has been granted on two questions, viz.: (*a*) Does the *Railway Act** purport to confer on the Board jurisdiction to make the impugned Order?; (*b*) If it does, is it, in that respect, *intra vires?*

(1) Reported *infra*, p. 94.

* For convenience references are made to the R.S.C., 1927, c. 170, which reproduces the Railway Act, 1919, c. 68.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

Anglin C.J.C.

Bloor Street is a main artery of the city of Toronto, running East and West, which is paralleled by Royce Avenue, about three-quarters of a mile farther north. Both streets are intersected by Dundas Street—itself also an important thoroughfare running northwesterly. On Dundas Street there was a double track street railway line of the Toronto Transportation Commission, which extended along and adjacent to the right of way of the Canadian Pacific Railway Company from a point somewhat farther south to a point northwest of the intersection of Royce Avenue and Dundas Street. On Bloor Street there was also, prior to the making of the subway under consideration, a line of street railway operated by the appellant Commission which terminated at Lansdowne Avenue, about one-half a mile east of Dundas Street.

The Transportation Commission has never operated a street railway on Royce Avenue; and it is uncertain when, if ever, such a line will be constructed.

Between Lansdowne Avenue and Dundas Street, and adjacently to the latter, Bloor Street is crossed by three important railway lines, two operated by the Canadian Pacific Railway Company and one by the Canadian National Railways System. The "settled statement" of facts, in paragraph 12, says:

> Up to the closing of the street for subway construction no line of street railway existed on that portion of Bloor Street between Lansdowne Avenue and Dundas Street, but passengers on the street railway travelling west along Bloor Street as far as Lansdowne Avenue, who wished to continue west and north, instead of travelling south and transferring at the corner of Lansdowne Avenue and Dundas Street, could obtain transfers and walk along Bloor Street across the steam railway tracks to the intersection of Bloor and Dundas Streets and continue their journey on the street railway from that point, and similar privileges were given to those travelling in the opposite direction.

Provision had been made by orders of the Railway Committee of the Privy Council and of the Board of Railway Commissioners for the protection by gates and watchmen of the level-crossings both on Bloor Street and on Royce Avenue, which is also crossed by the same lines of steam railway. As part of a general scheme of grade separation in Northwest Toronto, the Railway Board

> acting under its powers for the protection, safety and convenience of the public, issued its Order No. 35037, dated May 9, 1924, approving the general plans submitted by the Canadian Pacific for grade separation in the northwestern section of the city including subways under the tracks of

the Canadian Pacific Galt and Toronto, Grey and Bruce Subdivisions and the Canadian National Brampton Subdivision at Bloor Street and Royce Avenue * * * (Paragraph 26).

In paragraph 24 of the "settled statement" it is said,

One of the reasons requiring protection by grade separation at these crossings was to enable the Transportation Commission to extend its lines of street railway across the tracks so as to give the residents of the north-western section of the city a better and more continuous street car service. It was also stated that the Transportation Commission would possibly in the future extend its lines of street railway across the tracks of the steam railways at Royce Avenue.

By further order No. 35153, the Board, on the 5th of June, 1924, directed that the work on the subways now in question be undertaken, and provided, *inter alia*, as follows:

That all questions of distribution of costs, interest, or other matters involved in the construction of the said work be reserved for further Order of the Board.

On the 15th of July, 1925, the Transportation Commission applied to the Board of Railway Commissioners for an order under s. 252 of the *Railway Act* granting it leave to construct, for the corporation of the City of Toronto, a double track line of street railway, between Dundas Street and Lansdowne Avenue along Bloor Street.

By order of the 30th of August, No. 36693, the Board granted this application, again reserving "the question of contribution to the cost of said subways by the applicant."

Under the authority thus granted, the Transportation Commission constructed its tramway lines along Bloor Street and has since operated such lines through these subways, thus crossing under the steam railways, as is more fully stated in paragraph No. 32 of the "settled statement".

Par. 32 of the Statement of Facts reads as follows:

32. Under the authority so granted to it, the Transportation Commission did, during the course of construction of the subways, construct a double line of street railway tracks along Bloor Street from Lansdowne Avenue to Dundas Street and through the subways constructed pursuant to the Board's Order and the Transportation Commission now operates street cars through the said subways. The trolley wires of such street railway are carried through the subways in a wooden trough which is supported by the span cables strung across the subways at intervals and hooked to the top of the steel bents at the centre of the subways and at the sidewalk line. In addition to the trolley wires an insulated feed cable for supplying current to them is carried through the subways, being suspended by oak blocks bolted at intervals to the lower flange of the steel superstructure, and connected at intervals with the trolley wires. A plan illustrating the method of construction is attached hereto * * *.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

Anglin C.J.C.

Finally, (paragraph No. 36).

On November 15, 1926, the Board issued its formal Order No. 38424, distributing the cost of construction of the said subways, and directing that the Transportation Commission should contribute to the cost thereof as therein set forth,

i.e., one-tenth thereof, after deducting the amount available from the Railway Grade Crossing Fund.

From this order the present appeal is taken by the Transportation Commission.

The jurisdiction of the Board to order the appellant Commission to bear a part of the cost of the subways under consideration, the construction of which was ordered by the Board, as the "settled statement" says, "acting under its powers for the protection, safety and convenience of the public", depends upon whether the Commission is a company "interested or affected by (the) order" so made, since s. 39 applies to every such order of the Board, whether s. 259 may or may not also be invoked in support of the disposition here made of the cost. The *Queen Street East* case (1).

That the Transportation Commission was vitally "interested" in the construction of the Bloor Street subway and was "affected by" the order made therefor is, in our opinion, beyond doubt. It benefits directly because it was thus enabled to substitute a continuous line of railway along Bloor Street, connecting directly with the Dundas Street lines, for the *disjecta membra* operated before the subway was built and which entailed both inconvenience and danger to its patrons in having to walk about half a mile, involving their crossing on the level three lines of steam railway.

The interest of the Commission in the Royce Avenue subway is, perhaps, not so obvious. We, however, are not concerned with the quantum of its interest or with the extent to which it is affected by the order for the construction of that subway. That the Transportation Commission should have had some appreciable interest or that its undertaking should be in some tangible way "affected by" the order, for construction, suffices to give jurisdiction to the Board to require it to contribute to the cost. Whether that jurisdiction should be exercised, in so far as it

(1) *Toronto Ry. Co.* v. *City of Toronto*, [1920] A.C. 426, at pp. 435-6, 437-8.

may depend upon the quantum of interest or affection, it is exclusively for the Board, in its discretion, to determine (s. 44 (3)). While the Transportation Commission does not now carry, and may never carry, its lines through the Royce Avenue subway, the *situs* of its tracks on Dundas Street has been so diverted in connection with the construction of that subway, that, whereas formerly traffic coming from Royce Avenue was thrown upon them approximately at a right angle and in a single stream, whether intended to go north or south on Dundas Street, it is now divided and comes up to the tracks not, as formerly, about at right angles, but by two ramps or approaches so constructed that the portion going northerly goes up one ramp and approaches the railway at a very acute angle, while that going southerly ascends by another ramp and also approaches the railway at a very acute angle. That this division and diversion of traffic involves some improvement for the street railway over the conditions theretofore existing, seems altogether probable. While, therefore, if the interest of the Transportation Commission and its being affected by the order for the construction of the Royce Avenue subway depended upon its making use of that subway for its tracks, we might be disposed to say that the case would seem rather to be one for the application of s. 45 of the *Railway Act,* we find it impossible to hold that it has been shewn that the Transportation Commission has not a present interest, different in kind from that of the ordinary residents in, or users of, the city streets, in the changes effected by the order of the Board in connection with the subway, still less that it is wholly unaffected by an order which provides for the removal of its tracks somewhat to the west and for the construction of the two ramps above referred to, thus dividing the traffic from Royce Avenue so that it will approach the lines of the street railway at angles much more acute than theretofore. While there may be not a little to be said for such an " interest " and " affection " being too slender to justify the order of the Board requiring the Transportation Commission to bear 10 per cent. of the cost of the Royce Avenue subway, that is rather a question of degree involving the sufficiency in extent of the " interest " and " affection ", in regard to which the discretion exercised by the Board cannot be interfered with here.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS. CAN. PAC. RY. CO., AND CITY OF TORONTO.

The disposition of question (b) is indicated in the judgment in the Main Street case (1).

We are, for these reasons, of the opinion that this appeal fails and must be dismissed with costs.

The judgment of Mignault and Lamont JJ. was delivered by

MIGNAULT J.—The appellant is the administrative body charged with the operation of the street railways in Toronto, all of which belong to that city. It was incorporated in 1920 by the Ontario Legislature, by chapter 144 of the statutes of that year, on petition of the city corporation, which was empowered to establish by by-law a commission for the operation of the street railways already belonging to it or to be taken over by it from the Toronto Railway Company. This commission has the control, maintenance, operation and management of these railways, and it is authorized in particular to construct, operate and manage new lines of street railway in addition to or in extension of existing lines; to fix such tolls and fares so as to render its system self-sustaining; and to make requisitions upon the council for all sums of money necessary to carry out its powers. It reports yearly to the council with a complete audited and certified financial statement of its affairs. In a rather restricted sense, the commission, when constituted, may perhaps be said to be the agent, with very wide powers, of the city corporation for the operation of the street railways, the title to which is in the city. The policy apparent by the terms of the statute is to entrust the control and management of these street railways to this commission, which is itself a body corporate, and which is to so operate them as to render the railways self-supporting.

The respondents are two Dominion railway companies, subject to the statutes incorporating them and to the Dominion *Railway Act,* 1919, and also the corporation of the City of Toronto.

Leave to appeal from an order of the Board of Railway Commissioners for Canada, hereinafter called the Board, was obtained by the appellant from a judge of this Court.

(1) Reported *infra,* p. 94.

Before stating the questions raised under this appeal, it will be convenient to summarize as briefly as possible the facts which have been agreed upon by the parties.

Bloor Street is an original concession road extending in an east and west direction through the northwest section of Toronto, and Royce Avenue is parallel to, and about three-quarters of a mile north of, Bloor Street. Dundas Street is an old established highway extending in a northwesterly direction through Toronto. It crosses Bloor Street, and, at a point just north of Royce Avenue, veers to the west. It is one of the main arteries over which traffic from the districts north and west of Toronto enters the city.

Bloor Street, at a point a short distance east of its intersection with Dundas Street, is crossed by three lines of steam railways side by side, to wit, the Galt subdivision of the Canadian Pacific, the Brampton subdivision of the Canadian National, and the Toronto, Grey and Bruce subdivision of the Canadian Pacific. These lines run parallel to each other in a northwesterly direction, and before the construction of the subways here in question crossed Bloor Street and also Royce Avenue on the level. They are parallel to (but do not cross) Dundas Street, for a distance of approximately 1,783 feet, to a point immediately north of Royce Avenue where, as stated, Dundas Street veers to the west.

Bloor Street is also crossed, some 1,200 feet east of these three lines of steam railways, by the Newmarket subdivision of the Canadian National extending in a northerly direction. Prior to the construction of a subway here, this crossing was on the level.

The Toronto street railways were originally operated in part by the Toronto Railway Company and in part by the city corporation, and for a number of years prior to 1920 included in this locality lines extending from the centre of the city. Along Bloor Street the street railway ran from the east to the corner of Lansdowne Avenue, a north and south highway, being at that point about half a mile east of the intersection of Dundas Street with Bloor Street, and also a short distance east of the crossing of the Newmarket subdivision. Dundas Street interects Lansdowne Avenue at a point which appears by the map to be a little more

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

Mignault J.

than a half-mile south of Bloor Street. West of the three steam railways above described, and west of Dundas Street at its intersection with Bloor Street, there had been for a number of years a line of street railway on Bloor Street. There were also, and still are, street railways on Lansdowne Avenue and on Dundas Street. Street railway passengers going towards the west along Bloor Street were provided, for the same fare, with transfers allowing them to take the cars running south on Lansdowne Avenue, thence the cars going northwest on Dundas Street, and they then transferred to the Bloor Street line running west. This process was reversed for passengers going from the west to the east on Bloor Street. Or they could disembark at Lansdowne Avenue, walk along Bloor Street, cross all the steam railways, and at Dundas Street continue their journey with their transfers by the Bloor Street cars, or reverse the process. There was then, as is apparent from what I have just said, no street railway on Bloor Street, between Lansdowne Avenue and Dundas Street, crossing the four lines of steam railways.

Pursuant to the Act incorporating the appellant, the city corporation, in 1921, acquired the property of the Toronto Railway Company, and entrusted the operation and management of the latter's lines of street railways, and also of the street railways theretofore operated by the city, to the appellant, which has since operated them.

By order of the Railway Committee of the Privy Council, dated January 8, 1891, gates and watchmen were installed for the protection of the public at the crossing on Bloor Street of the three steam railways above described. An order of the Board (which succeeded the Railway Committee of the Privy Council) of May 18, 1908, No. 4795, provided for the protection by gates and watchmen of the crossing on Bloor street of the Newmarket subdivision of the Canadian National (then the Grand Trunk), and by a further order of the Board of May 23, 1910, No. 10782, a similar provision was made for the protection of the crossing of Royce Avenue by the three steam railways above described. This protection of all these crossings was maintained until the level crossings were closed for the purpose of subway construction under the scheme authorized by the Board known as the Northwest Grade Separation.

On November 21, 1922, the city corporation applied to the Board for an order requiring the Canadian National to collaborate with the city in the preparation of a joint plan for the separation of grades on, among other streets, Bloor Street and Royce Avenue, and this application was heard and plans submitted by the railways at several hearings by the Board in Toronto. Finally a further hearing was held by the Board on February 19, 1924, of which the appellant received notice and at which it was represented. Among other proposals submitted, one by the Canadian Pacific provided for the diversion of Dundas Street on a tangent in the vicinity of the crossing of the railways on Royce Avenue, and this is the diversion which is an important feature of the case. On May 9, 1924, by order 35037, the Board approved the general plans submitted for grade separation in the northwest section of the city, including subways on Bloor Street under the three lines of railway above described and under the Newmarket subdivision of the Canadian National. It sanctioned also a subway on Royce Avenue, involving the acquisition of additional land and the construction of the diversion of Dundas Street. This diversion, as shown by the plan, extends from the intersection of Humberside Avenue with Dundas Street in a northwesterly direction to the intersection of Indian Road with the same street, a distance, as I measure it, according to the scale of the plan, of approximately 1,000 feet.

On June 5, 1924, the Board issued an order, No. 35153, directing the construction of the works, and this order provided that all questions of distribution of cost, interest or other matters involved in the construction be reserved for further order of the Board. This order was subsequently amended on July 10, 1924, by order of the Board No. 35308.

We next have an application to the Board by the appellant, dated July 15, 1925, for an order under section 252 of the *Railway Act* granting it leave to construct for the corporation of the city a double track of street railway between Dundas Street and Lansdowne Avenue on Bloor Street and through the subways on that street. The Board granted this application by order No. 36693, of August 13, 1925, and reserved for further consideration the question of contribution by the applicant to the cost of the subways. The appellant under this authority constructed a double

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

Mignault J.

line of street railway tracks along Bloor Street through the subways, between the two points above indicated, on which it now operates its cars. A full description of this construction through the Bloor Street subways is contained in paragraph 32 of the statement of facts (*a*). No street cars are operated by the appellant through the subway at Royce Avenue, nor are there any lines of street railway on that avenue.

An order of the Board, No. 36737, of August 22, 1925, authorized the Canadian Pacific and the Canadian National to use and operate the subway carrying their tracks, to wit, the three railways above described, over Bloor Street, and a similar order, No. 36738, dated August 21, 1925, gave leave to the Canadian National to use and operate the subway carrying the tracks of its Newmarket subdivision over Bloor Street. There was also a like order of the Board, No. 37239, bearing date January 15, 1926, authorizing the Canadian Pacific and the Canadian National to make use of the subway carrying their tracks over Royce Avenue.

After all this was done, the Board, on November 15, 1926, issued a formal order, No. 38424, distributing the cost of construction of the subways. This order was rescinded by the Board on February 16, 1928, by its order of that date, No. 40367, which altered the distribution of cost in so far as the contribution from the railway grade crossing fund was concerned, but not otherwise. It is from order No. 40367 that this appeal is asserted.

It will be convenient to state here how the cost of construction of the subways was distributed by the order just mentioned. The order is concerned with three subways, two on Bloor Street, and one on Royce Avenue.

Subways on Bloor Street. Forty per cent. of the annual expenditure, commencing in 1924 and not exceeding in any one year $75,000, in connection with the crossings under the tracks of the three railways above described, and 40 per cent. of the annual expenditure, commencing in the same year, and not exceeding in any one year $25,000, in connection with the crossing under the tracks of the Newmarket subdivision of the Canadian National,—to be paid out of the railway grade crossing fund.

Subway on Royce Avenue. To be paid out of the same fund, 40 per cent. of the annual expenditure, commencing

(*a*) See on page 81, *ante*.

in the same year, and not exceeding in any one year $75,000, in connection with the crossing under the tracks of the three railways above described.

The order provides that the Bell Telephone Co., the Hydro-Electric Power Commission of Ontario, the Toronto Hydro-Electric System, and the Consumers' Gas Company shall bear and pay the cost of any changes in their plant necessitated by changes in the streets. These public utilities do not otherwise contribute to the cost of the subways.

It is then ordered that the appellant shall pay 10 per cent. of the cost of the work (which obviously includes the three subways and incidental expenses), after deducting the amount available from the railway grade crossing fund.

The rest of the expenditure is to be borne as follows:—As to the crossings of Bloor Street and Royce Avenue by the three railways above described, 50 per cent. by these railways and 50 per cent. by the City of Toronto; and as to the crossing of Bloor Street by the Newmarket subdivision of the Canadian National, 50 per cent. by that railway and 50 per cent. by the City of Toronto.

Leave to appeal from this order of the Board was given upon the two following questions:—

(1) Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act of Canada to provide in Order No. 40367, dated February 16, 1928, that the Toronto Transportation Commission should contribute to the cost of—
   (*a*) the Bloor Street Subways,
   (*b*) the Royce Avenue Subway,
   or either of such works referred to in such order.

(2) If the above question be answered in the affirmative as to either or both of the said works, had the Parliament of Canada jurisdiction to confer upon the Board of Railway Commissioners for Canada authority to compel contribution from the Toronto Transportation Commission, a Provincial corporation, in respect of—
   (*a*) the Bloor Street Subways,
   (*b*) the Royce Avenue Subway,
   or either of such works referred to in such order, under the circumstances of this case?

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

Mignault J.

In dealing with the jurisdiction of the Board to order that the appellant should contribute to the cost of these subways, it is important to note that no question is raised here as to its power to direct the construction of the works themselves, the controversy being narrowed down to the point whether the appellant could be called upon to contribute to their cost. The application to the Board of the city corporation (November 21, 1922) was made under section 257 of the *Railway Act*. It must therefore be taken as granted that in ordering these works the Board acted within the ample powers which that section confers on it for "the protection, safety and convenience of the public". Having exercised a power vested in it, the Board could, under section 39, subsection 1, of the *Railway Act*, order "by what company, municipality or person, *interested or affected* by such order" (the order directing or permitting the works) the works should be constructed, and, under subsection 2 of the same section, "by whom, in what proportion, and when" the cost and expenses involved should be paid. It is now settled that the words "by whom" in subsection 2, "must be read with reference to the immediately preceding provision", and that an order directing payment or contribution "may be made only on a company, municipality or person interested in or affected by the order directing the works" (*Toronto Railway Co.* v. *City of Toronto* (1)).

The question is therefore whether this appellant is a company or person "interested in or affected by the order directing the works". This enquiry is open to us on this proceeding, for it is the basis of the jurisdiction asserted by the Board. Some reference was made to subsection 5 of section 33, but it is restricted by its terms to that section. In a case like this one, the finding of the Board that a company or person is interested in or affected by the order directing the works, may certainly be reviewed by this Court on an appeal from the order distributing the cost.

This, of course, should not be lightly done, and therefore I am not disposed to disturb the finding of the Board that the appellant was interested in the construction of the two subways of Bloor Street. It is true that the appellant's lines on that street had never crossed the railways, but by

(1) [1920] A.C. 426, at pp. 435, 436.

reason of the construction of the subways it was enabled to establish a continuous line of street railway along Bloor Street. Its passengers were no longer obliged to follow the circuitous route I have described, or to run the risk of crossing four lines of steam railway on foot. Although it was so suggested to us, I do not regard the order requiring the appellant to contribute to the cost of construction as a term of the unconditional authorization it had previously obtained to extend its lines through the subways. The soil of the subways is a public highway of the city. It would not have been within reason for the Board to refuse to allow the appellant to construct its lines of street railway through the subway, subject to such protective measures as might be prescribed for the preservation of the structure or the safety of the public. So I would be very slow to construe the subsequent order to contribute as a term of the authorization which the Board granted to the appellant. However no such argument is necessary to support the order of contribution in respect of the Bloor Street subways.

But the appellant cannot be said to have been interested in or affected by the construction of the Royce Avenue subway. Its tracks merely ran, and still run, along Dundas Street, which for some distance parallels the three lines of steam railways, but they never came into contact therewith. The appellant does not use the subway, nor has it any line on Royce Avenue. And as to the diversion on Dundas Street which it now uses, it suffices to say that this diversion was decided upon to afford an easy approach to the subway. Not being interested in the latter, the appellant cannot be said to have an interest in the diversion, which was, moreover, the cause of additional expense to it, for it became necessary to lay new tracks along the diverted road.* It may be further added that the ten per

*The preceding two sentences (beginning with the words "And as to the diversion on Dundas Street which it now uses," etc.) were complained of by the respondent railway companies as being erroneous as to the facts, and a motion was made before the Court (Anglin, C.J.C., and Duff, Newcombe, Rinfret, Lamont and Smith, JJ.,) on November 18, 1929, for an order directing a re-hearing of the appeal on the ground that the Court had been under a misapprehension as to the facts of the case with regard to the Royce Avenue subway. Judgment was delivered on December 9, 1929, as follows: "The Court is of the opinion that this is not a proper case in which to direct a re-hearing of the appeal as asked for. The motion will therefore be refused with costs."

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RYS., CAN. PAC. RY. CO., AND CITY OF TORONTO.

Mignault J.

cent. contribution exacted from the appellant takes no account of the cost of the diversion as distinguished from the cost of the subway, the contribution being to the whole expenditure. My conclusion is that the order of contribution to the cost of the Royce Avenue subway and the diversion cannot be supported.

The respondents referred us to section 259 of the *Railway Act* which reads as follows:

> 259. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of the next following section of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board, under any of the last three preceding sections, and such order shall be binding on and enforcible against any railway company, municipal or other corporation or person named in such order.

It is to be observed, however, that section 259 is to the same effect as section 238, subsection 3, introduced into the *Railway Act* as enacted by R.S.C., c. 37, by 8 & 9 Edw. VII, c. 32 (1909). Subsection 3 was considered by their Lordships of the Judicial Committee in *Toronto Ry. Co.* v. *Toronto* (1), and they stated that there was "nothing in it to put an end to the application of section 59 (now section 39) to orders under ss. 237 and 238" (now, as far as material here, sections 256 and 257 of the *Railway Act*, 1919, the third subsection of section 238 of the former Act being section 259 of the present Act).

The appellant contended that in operating the street railways, it was a mere agent of the city corporation, and that for this reason it could not be called upon to contribute to the cost of any of these subways. I think it suffices to say that, whatever may be its rights and remedies against the city corporation, the appellant, as an operating corporation in control of the street railways, and entrusted with their full management, could be treated by the Board as a company or person to which section 39 of the *Railway Act* applies, subject, of course, to its interest being shewn.

I would therefore answer question (1) in the affirmative as to the Bloor Street subways, and in the negative as to the Royce Avenue subway.

By its terms question (2) requires an answer merely with respect to the Bloor Street subways. I think this answer must be in the affirmative. It is now settled that in such

(1) [1920] A.C. 426, at p. 437.

a matter the jurisdiction of Parliament cannot be questioned. *Toronto* v. *Canadian Pacific Ry. Co.* (1); *Toronto Railway Co.* v. *Toronto* (the Avenue Road case) (2).

I would allow the appeal as to the Royce Avenue subway, and dismiss it in respect of the Bloor Street subways. Success being divided, I would make no order as to costs.

NEWCOMBE J.—I agree in the conclusions of my brother Mignault with respect to these subways. It is said that the appellant Commission derives a benefit from the method provided for the approach or discharge of traffic from and to the subway as between Dundas Street and Royce Avenue. It may be so; but there is no finding to that effect, and I see no reason to believe that the Commissioners intended to impose a percentage of the cost of the subway on Royce Avenue as compensation for advantages said to accrue by reason of the diversion of Dundas Street. If, on the contrary, as the case seems to suggest, the Board was anticipating value which might be realized when, if ever, a branch of the tramway is constructed upon the subway, I do not think that the Board would have jurisdiction to order payment under s. 39 of the *Railway Act*. It cannot be said that a person is interested merely because, in the future, he may become so; and that, as I understand the case, is the position of the appellant with respect to Royce Avenue.

Appeal dismissed as to Bloor Street case. Appeal allowed as to Royce Avenue case.

Solicitor for the appellant: *Irving S. Fairty.*

Solicitor for the respondent, Canadian National Railways: *Allistair Fraser.*

Solicitor for the respondent, the Canadian Pacific Railway Company: *E. P. Flintoft.*

Solicitor for the respondent, the Corporation of the City of Toronto: *C. M. Colquhoun.*

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(1) [1908] A.C. 54.

(2) (1916) 53 Can. S.C.R. 222.

1929

*May 29. 30.
*Sept. 26.

THE TORONTO TRANSPORTATION COMMISSION ..... APPELLANT;

AND

CANADIAN NATIONAL RAILWAYS AND THE CORPORATION OF THE CITY OF TORONTO ..... RESPONDENTS.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Railways—Order of Board of Railway Commissioners for Canada against corporation operating street railway system for contribution to cost of reconstruction of bridge over steam railway tracks—Railway Act, R.S.C., 1927, c. 170, ss. 257, 259, 252, 51, 37, 39, 44 (3)—Jurisdiction to make the order under the Act—Jurisdiction of Parliament of Canada to confer such jurisdiction on the Board.

By an agreement in 1884, involving the closing of a road and the substitution of what is now Main street in the city of Toronto (the area in question being later annexed to the city), the respondent railway company's predecessor undertook at its own expense to erect and maintain a bridge to carry the new highway (Main street) over its tracks. In 1919 the City applied to the Board of Railway Commissioners for Canada for an order requiring the railway company to construct a new bridge, the old bridge, though sufficiently strong, being then too narrow to accommodate the traffic. By order of July 3, 1920, the Board directed construction of a new bridge at the sole cost of the railway company. Up to that time no street railway had crossed said tracks, but the approved plans of the new bridge were so drawn that it would have sufficient strength to carry street railway traffic. Appellant took over the operation of the street railways of the city in 1921. It built a line crossing over the new bridge, completing it in July, 1922, and, the Board having held that such crossing was within the prohibition of s. 252 of the Dominion *Railway Act*, the appellant (on application made without prejudice to its claim that leave of the Board was unnecessary) obtained, in October, 1922, temporary permission so to cross. The railway company had, in June, 1922, applied for an order requiring appellant to contribute to the cost of the bridge and for re-opening of the whole question of cost, alleging mistake of the Board as to the facts when making its order of July 3, 1920; and said permission to appellant to cross was expressly made "pending decision of the Board" upon those matters. Since that time appellant has continuously operated its cars over the bridge. In 1926 the Board granted the railway company's application (on said grounds alleged) for reconsideration of the order of July 3, 1920, and in January, 1928, made an amending order requiring certain contributions from the City and from appellant. From this order appellant appealed on the ground of want of jurisdiction.

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

Held (Mignault J. dissenting): The order in appeal was within the Board's jurisdiction under the *Railway Act,* whether viewed as an exercise of its powers under ss. 257 and 259 upon an application for permission to cross under s. 252 made by appellant, or viewed merely as a case in which the Board was "reviewing" and "altering or varying" (s. 51) its former order as to payment of the cost of the bridge. S. 39 applied to the order for construction of the bridge (*Toronto Ry. Co.* v. *Toronto,* [1920] A.C. 426, at pp. 435, 6, 437-8); appellant was a company "interested or affected by" that order within the meaning of s. 39 (1), and it was within the Board's jurisdiction under s. 39 (2) to determine by whom, and in what proportions the cost should be borne. (The *Vancouver* case, [1914] A.C. 1067, distinguished). The order for contribution complained of could have been made when the order for construction was made in 1920, had the present circumstances then existed, and ss. 37 and 51 enabled it to be made in 1928. The Board having jurisdiction, the mode of its exercise and the consequent burdens imposed were not matters open for consideration in this Court (s. 44 (3)).

Per Mignault J., dissenting: The Board had not jurisdiction under the Act to make the order complained of. A mere benefit to be derived by appellant from the reconstruction of the bridge would not give such jurisdiction (the existence of such a benefit would not constitute an interest within the meaning of s. 39). An application under s. 252 for permission to cross a Dominion railway does not by itself confer jurisdiction to make the applicant contribute; so the appellant's application for leave to lay its tracks on the widened bridge could not be relied on as a foundation for the jurisdiction. The facts did not come within the language of s. 257; there was no railway "already constructed upon, along or across any highway" (under the 1884 agreement the highway was carried over the railway by the bridge which was part of the highway); the order for reconstruction was not made for "the protection, safety and convenience of the public" (any danger to the public had been eliminated by the existing bridge). The application for reconstruction was "a matter between the corporation and the railway company alone," that is to say, between the parties to the agreement of 1884. The matter was "one merely of street improvement" (Reasons in the *Vancouver* case, [1914] A.C. 1067, as explained in the *Toronto* case, [1920] A.C. 426, applied).

Held, also, that the Parliament of Canada had jurisdiction to confer upon the Board the authority to compel contribution from the appellant, a provincial corporation, under the circumstances of the case.

APPEAL (by leave given as hereinafter mentioned; and upon a settled statement of facts) by the Toronto Transportation Commission (a corporation established under c. 144 of the Ontario statutes of 1920, and being the administrative body charged with the operation of the street railways in the city of Toronto, all of which belong to the City) from an order of the Board of Railway Commissioners for Canada directing that the appellant pay ten per cent. of the cost of a bridge over the tracks of the

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RAILWAYS AND CITY OF TORONTO.

respondent, Canadian National Railways, on Main street, in the city of Toronto. The material facts of the case are sufficiently stated in the judgments now reported, and are indicated in the above headnote. Leave to appeal was given by the Board on the following question:

> "Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act (Canada) to provide in order No. 40120, dated January 3, 1928, that the Toronto Transportation Commission should contribute to the cost of the work referred to in such order?"

and leave to appeal was given by Mignault J. on the following further question

> "Should the answer to the question submitted by leave of the Board of Railway Commissioners for Canada be in the affirmative, had the Parliament of Canada jurisdiction to confer upon the said Board authority to compel contribution from the Toronto Transportation Commission, a provincial corporation, towards the cost of the above described work under the circumstances of this case?"

The appeal was dismissed with costs, Mignault J. dissenting.

D. L. McCarthy, K.C., and *I. S. Fairty, K.C.*, for the appellant.

E. Lafleur, K.C., for the respondent, Canadian National Railways.

G. R. Geary, K.C., for the respondent, the City of Toronto.

The judgment of the majority of the court (Anglin C.J.C. and Newcombe, Lamont and Smith JJ.) was delivered by

ANGLIN C.J.C.—The question before us is whether the Board of Railway Commissioners for Canada had jurisdiction to require the appellant Transportation Commission to contribute one-tenth of the cost of a bridge which crosses Main Street over the tracks of the respondent Railway System at a point in the eastern part of the City of Toronto.

By an order of a judge of this Court, giving leave to appeal, two questions are propounded:

(1) Whether the *Railway Act*, R.S.C., 1927, c. 170,* purports to confer such jurisdiction;

(2) Whether, if it does so, that legislation is *intra vires* of the Parliament of Canada?

The material facts may be stated as follows:

Dawes Road formerly crossed on the level the tracks of the Grand Trunk Railway Company, a predecessor of the present Canadian National Railways System. In 1884, by an agreement between the Railway Company and the Township of York, in which the *situs* was at that time, Dawes Road was closed and the portion thereof lying between the lines of its right of way projected was conveyed to the Grand Trunk Railway Co., the present Main Street, which crosses the railway tracks at right angles, being substituted therefor; and the railway company then undertook at its own expense to erect and maintain a bridge to carry the new highway over its tracks.

In 1919, the area in question having in the interval been annexed to the city, the City of Toronto applied to the Board for an order requiring the Grand Trunk Railway Co. to construct a new bridge at Main Street; although the bridge theretofore in use was sufficiently strong, it was then too narrow to accommodate the traffic using it.

On July 3, 1920, by order No. 29923, the Board directed the construction of the new bridge, at the sole cost of the Railway Company; and plans for this bridge were subsequently approved by the Board.

Although, up to this time, no street railway had crossed the tracks of the G.T.R. at Main Street, the plans and specifications of the new bridge were, at the instance of the City, so drawn that it would have sufficient strength to carry street railway traffic, to provide for which, as the Chief Commissioner points out, it was then contemplated might be necessary. This involved additional outlay.

The appellant corporation took over the operation of the street railways of the City of Toronto in September, 1921. It found two unconnected street railway lines existing, one on Danforth Avenue and the other on Gerrard Street; and,

*For convenience references are made to the R.S.C., 1927, c. 170, which reproduces the Railway Act, 1919, c. 68.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RAILWAYS AND CITY OF TORONTO.

Anglin C.J.C.

in, or prior to June, 1922, it determined to build a line on Main Street, to be carried over the new bridge, for the purpose of connecting those two existing lines. The new tracks over the bridge were completed about the 15th of July, 1922. Meantime, the Grand Trunk Railway Co. had applied to the Board, on the 19th of June, for a declaration that the Board's consent for the crossing of its tracks by the street railway system had not been had and for an order requiring the appellant to pay a share of the cost of the bridge, and, on the 22nd of June, for an order to permit the re-opening of the whole question of cost of the bridge, alleging that there had been mistake as to the facts, on the part of the Board, when making its former order No. 29923, imposing such cost wholly on the Railway Company.

Upholding the contention of the Railway Company that the case fell within the prohibition of s. 252 of the *Railway Act* and that the approval of the Board must be obtained before the intended crossing could be made, the Board suggested that the Transportation Commission should seek a temporary permission to cross with its street cars. Such application having been made by that Commission, the Board, by order No. 32956, made on the 10th of October, 1922, granted it permission to use the Main Street bridge to cross the Grand Trunk tracks

> temporarily, and pending decision of the Board upon all matters involved in the application of the Railway Company herein that the Board review the question of the allocation of the cost of the bridge.

Since that time the appellant has continuously operated its street cars over the bridge.

By subsequent order No. 37366, made on the 4th of March, 1926, the Board granted the application of the Grand Trunk Railway Co. for a reconsideration of order No. 29923 of the 3rd of July, 1920, dealing with the cost of the Main Street bridge, holding that it had been shewn that that order had been made under a misapprehension of then existing facts; and, by order No. 40120, made on the 3rd of January, 1928, the Board directed that order No. 29923 be amended so as to provide that the cost of reconstructing the bridge over the tracks of the Canadian National Railways at Main Street shall be borne and paid "60 per cent. by the applicants, 30 per cent. by the City of Toronto and 10 per cent.

by the Toronto Transportation Commission". It is from this latter order that the present appeal is taken by the Transportation Commission.

Section 39 of the *Railway Act* reads as follows:

39. When the Board, in the exercise of any power vested in it, in and by any order directs or permits any structure, appliances, equipment, works, renewals, or repairs to be provided, constructed, reconstructed, altered, installed, operated, used or maintained, it may, except as otherwise expressly provided, order by what company, municipality or person, interested or affected by such order, as the case may be, and when or within what time and upon what terms and conditions as to the payment of compensation or otherwise, and under what supervision, the same shall be provided, constructed, reconstructed, altered, installed, operated, used and maintained.

2. The Board may, except as otherwise expressly provided, order by whom, in what proportion, and when, the cost and expenses of providing, constructing, reconstructing, altering, installing, and executing such structures, equipment, works, renewals, or repairs, or of the supervision, if any, of the continued operation, use or maintenance thereof, or of otherwise complying with such order, shall be paid.

By s. 51 the Board is empowered to "review, rescind, change, alter or vary any order or decision made by it * * * ." With respect to any matter already dealt with by it, this section enables the Board to make any order in review which it might have made were such matter *res integra*. No doubt this power should be exercised sparingly and circumspectly, as the Chief Commissioner's judgment shews he realized. But whether circumstances exist which justify its use must be a matter almost exclusively within the Board's discretion. It is difficult to appreciate how the exercise of this power in an order otherwise unexceptionable can *per se* give rise to a question of jurisdiction.

Section 252 prohibits the railway lines or tracks of any railway company (s. 2 (21)) being carried across any railway lines or tracks other than those of such company unless leave therefor has been obtained from the Board.

Section 257 empowers the Board, in cases of existing crossings, to make stipulations "as to the protection, safety and convenience of the public as it deems expedient * * *."

Section 259 is as follows:

259. Notwithstanding anything in this Act, or in any other Act, the Board may, subject to the provisions of the next following section of this Act, order what portion, if any, of cost is to be borne respectively by the company, municipal or other corporation, or person in respect of any order made by the Board, under any of the last three preceding sections, and such order shall be binding on and enforcible against any railway company, municipal or other corporation or person named in such order.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RAILWAYS AND CITY OF TORONTO.

Anglin C.J.C.

Whether the order against which this appeal is taken be viewed as an exercise by the Board of the powers conferred by ss. 257 and 259 upon an application for permission to cross under s. 252 made by the appellants, or whether it should be viewed merely as a case in which the Board is "reviewing * * * and altering or varying" (s. 51) an order or decision already made by it in regard to the payment of the cost of the bridge in question, its jurisdiction to make the order now in appeal seems to us to be indubitable.

The appellant Transportation Commission was, in our opinion, clearly a company "interested or affected by" the order for the construction of the new bridge within the meaning of subs. 1 of s. 39. That section applies to such an order (*Toronto Ry. Co.* v. *Toronto* (1)), and, therefore, it was within the jurisdiction of the Board under subs. 2 thereof to determine by whom, and in what proportions, the cost and expense of the construction thereby directed should be borne. That the appellant is not a company "interested or affected by" order No. 29923 is scarcely arguable. If the present circumstances had existed in 1920, the Board might have made order No. 40120 when making order No. 29923. Sections 37 and 51 enabled it to make order No. 40120 in 1928.

In the *Vancouver* case (2), the order of the Board was not made under s. 39 (then s. 59) and did not come within its provisions (p. 1075), as Lord Finlay points out in the *Toronto* case (3). The order made in the case at bar was, as was held in regard to that before the Judicial Committee in the case last cited,

> in substance mandatory and (was) made for the convenience and protection of the public with regard to the crossing of the railways. What was done may have improved the street, but it was certainly not a mere matter of street improvement.

Whether the circumstances justified the discretion exercised by the Board in apportioning the cost of the bridge as it did is a matter with which we are not concerned, the only question before us being that of jurisdiction. If, as we find, the Board is given jurisdiction in the premises, the mode of its exercise of such jurisdiction and the consequent

(1) [1920] A.C. 426, at pp. 435, 6, 437-8.

(2) [1914] A.C. 1067.

(3) [1920] A.C. 426, at pp. 442-3.

burdens imposed are not matters open for consideration here. (s. 44 (3)).

This disposes of the first question submitted, dependent for its solution on the construction of the relevant railway legislation.

On the other question:—Of the constitutional validity of the railway legislation under discussion, there is, in our opinion, not the slightest doubt. *Toronto Ry. Co.* v. *Toronto* (1).

The appeal fails and must be dismissed with costs.

MIGNAULT J. (dissenting).—This is an appeal by leave partly of the Board of Railway Commissioners for Canada, hereinafter called the Board, and partly of a judge of this Court, from an order of the Board of January 3, 1928, No. 40120, directing that the appellant pay 10 per cent. of the cost of a bridge over the tracks of the Canadian National Railways at Main Street in the city of Toronto. It was argued at the same time as the appeal of this appellant in the case of the Bloor Street and Royce Avenue subways (2), and the statement of facts in the latter case will be here supplemented in so far only as the present case differs from the other one.

The respondent, Canadian National Railways, is the successor of the Grand Trunk Ry. Company of Canada. Prior to 1884, a public highway, Dawes Road, crossed on the level the tracks of the Grand Trunk from southwest to northeast, at a pronounced angle. By an agreement of June 25, 1884, between the Corporation of the Township of York, where this crossing then lay, and the Grand Trunk, Dawes Road was closed up and conveyed to the Railway, and a new highway opened, now Main Street, crossing the railway at right angles by means of a bridge which the Grand Trunk agreed to build and keep in repair at its own expense.

The district was then a suburban one, but it has since been annexed to the city of Toronto, and its population has very notably increased. In 1914 the City of Toronto made an application to the Board for authority to construct a subway under the tracks of the Grand Trunk at Main Street. The application remained in abeyance during the

(1) [1920] A.C. 426, at p. 438. (1) Reported *ante*, p. 73.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RAILWAYS AND CITY OF TORONTO.

Mignault J.

war, and in 1919 the City applied to the Board for the reconstruction of the bridge. This bridge was physically strong enough for any traffic offering, but it was inadequate in width for such traffic. On June 17, 1920, the Board delivered judgment ordering the construction of the new bridge at the sole cost of the Railway. Pursuant to this judgment, on July 3, 1920, the Board issued its order, No. 29923, requiring the Railway to construct before September 30, 1921, a bridge with a 46 foot roadway, and with ten foot sidewalks on each side. Plans for the bridge were approved by the Board and the bridge was completed and opened for traffic on December 1, 1921.

The appellant, the character and functions of which were described in the other case (1), was constituted on August 3, 1920, but did not assume the management of the Toronto street railways until September 1, 1921. The city had street railway lines on Danforth Avenue and Gerrard street, and in June, 1922, the appellant decided to connect these lines with a line on Main Street running over the new bridge.

It accordingly commenced to lay tracks on Main Street, which tracks were practically completed on July 15, 1922. Permission for the crossing had not been obtained from the Board, and on June 19, 1922, the Grand Trunk applied to the Board for an order declaring that the Board's consent for the crossing had not been obtained, and for an order that the appellant pay a share of the cost of the bridge, and on June 26, 1922, for an order re-opening the whole question of cost upon the ground that the Board. in its former judgment, had been in error on the facts.

It should be mentioned here that when the Board ordered the construction of the new bridge at the sole expense of the Railway, it had declined to follow the decision of the House of Lords in *Sharpness New Docks* v. *Attorney General* (2), and had applied instead a principle it had laid down in a previous case (*City of Hamilton* v. *Canadian Pacific et al* (3)), expressed as follows:

> When a railway company excavates and cuts away a portion of a highway, they should be compelled to replace that highway by a substructure capable of carrying everything which the earth itself as it then existed would carry.

(1) Reported *ante*, p. 73. (2) [1915] A.C. 654.
(3) (1920) 25 C.R.C. 379

When the application of the railway company asking that the appellant be ordered to pay a share of the cost of the bridge came before the Board, the appellant took the ground that the Board's approval for the crossing was unnecessary, but the Board ruled against this contention, and suggested that the appellant might apply, without prejudice, for a temporary permission to cross with its cars. This application was made and the Board, by order 32956, permitted the appellant,

temporarily, and pending decision of the Board upon all matters involved in the application of the Railway Company herein that the Board review the question of the allocation of the cost of the bridge,

to cross the railway upon the highway known as Main Street. Since then the appellant has operated its cars over the new bridge.

By order No. 37366 of March 4, 1926, the Board reopened the question of the cost of the bridge upon the ground that it had proceeded in error in assuming that the facts of the case brought it within the principle of *City of Hamilton* v. *Canadian Pacific* (1) above referred to.

Finally the order appealed from, No. 40120, of January 3, 1928, distributed the cost of the bridge as follows: 60 per cent. to be paid by the Canadian National, 30 per cent. by the City of Toronto, and 10 per cent. by the present appellant.

By order No. 41782, of November 21, 1928, the Board gave to the appellant leave to appeal to this Court from the order just mentioned on the following question:

> "Had the Board of Railway Commissioners for Canada, under the circumstances of this case, jurisdiction under the Railway Act (Canada) to provide in order No. 40120, dated January 3, 1928, that the Toronto Transportation Commission should contribute to the cost of the work referred to in such order?"

Leave to appeal was granted by me to the appellant on the further question expressed as follows:

> "Should the answer to the question submitted by leave of the Board of Railway Commissioners for Canada be in the affirmative, had the Parliament of Canada jurisdiction to confer upon the said Board authority to compel contribution from the Toronto

(1) (1920) 25 C.R.C. 379.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RAILWAYS AND CITY OF TORONTO.

Mignault J.

Transportation Commission, a provincial corporation, towards the cost of the above described work under the circumstances of this case?"

A preliminary point must be disposed of before discussing the merits of the appeal. Could the Board, after having ordered that the Grand Trunk should construct the new bridge, which, the statement of facts admits, involved its construction "at the sole cost and expense of the Railway", re-open the question of cost and order the appellant to pay ten per cent. of the expenditure?

Section 51 of the *Railway Act* enacts that

the Board may review, rescind, change, alter or vary any order or decision made by it, or may rehear any application before deciding it.

This language seems wide enough to allow the Board to alter or vary its decision. Of course, as observed by Mr. Commissioner Boyce, the power to re-open or review any matter already passed upon should not be exercised unless there is clearly a doubt in the mind of the Board as to the correctness of the former decision, or there be submitted new facts not before the Board at the time the decision was made, or unless the conditions have changed. But this does not go to the jurisdiction of the Board, which is the only point with which we are concerned. And I think section 51 permitted the Board to alter its previous decision, if it had jurisdiction otherwise to make the order complained of.

There is, however, a much more serious point which did not arise in the other case (1) where it was obvious that in replacing the level crossings by subways, the Board had acted under section 257 of the *Railway Act* for "the protection, safety and convenience of the public."

The question involved is whether under the circumstances there was jurisdiction in the Board to order the appellant to contribute to the cost of the widened bridge. This requires consideration of two judgments of the Judicial Committee:—*British Columbia Electric Ry. Co.* v. *Vancouver, Victoria and Eastern Ry. and Navigation Co.* (2), (hereinafter called the *Vancouver* case), and *Toronto Railway Co.* v. *Toronto* (3), (hereinafter called the *Toronto* case). The binding effect of the former decision must be

(2) Reported *ante*, p. 73. (2) [1914] A.C. 1067.
(3) [1920] A.C. 426.

taken to be that stated by their Lordships in the latter case, pp. 440 and following.

There was, however, a deliberate pronouncement by the Privy Council in the *Vancouver* case (1), as to the jurisdiction of the Board, which was not dissented from by their Lordships in the *Toronto* case (2). Speaking of the order under review in the former case, Lord Moulton said (p. 1075):—

> The fundamental error underlying the decision of the Railway Board is that they have considered that the fact that the tramway company would be benefited by the works gave them jurisdiction to make them pay the cost or a portion of it. There is nothing in the Railway Act which gives any such jurisdiction.

We must therefore take it that a mere benefit to be derived by a body in the position of this appellant from the reconstruction of the widened bridge would not give the Board jurisdiction to order it to pay a portion of the cost. In other words, the existence of such a benefit would not constitute an interest within the meaning of section 39 of the *Railway Act*. The jurisdiction of the Board to order that a person or corporation contribute to the cost of a construction must exist independently of any benefit which that person or corporation may derive from the construction contemplated.

It should also be noted that in the *Toronto* case (2) the purport of the decision in the *Vancouver* case (1) was thus stated by Lord Finlay (p. 442):—

> The judgment (in the *Vancouver* case (1)) proceeds on the principle that the assent of the Board was asked merely because the viaduct would cross the Dominion railway, *and that this gave no jurisdiction to make the Electric Company pay the costs of construction.* (The italics are mine.)

This must mean that an application under section 252 of the *Railway Act* for permission to cross a Dominion railway does not by itself confer jurisdiction on the Board to make the applicant contribute to the cost of the construction. So the application by the appellant for leave to lay its tracks on the widened bridge—and this application was made under reserve of all its rights—cannot be relied on as a foundation for the jurisdiction which the Board has assumed in ordering the appellant to pay a portion of these costs.

(1) [1914] A.C. 1067. (2) [1920] A.C. 426.

1929

TORONTO TRANSPORTATION COMMISSION v. CAN. NAT. RAILWAYS AND CITY OF TORONTO.

Mignault J.

Section 257 of the *Railway Act* must now be considered. It is predicated on the assumption that a railway "is already constructed upon, along or across any highway". The facts here do not come within this language, nor can it be said that the order with which we are concerned was made for "the protection, safety and convenience of the public", as contemplated by section 257. The railway in question was not constructed upon or across the highway. Since 1884, under an agreement with the municipality, the highway was carried over the railway by means of a bridge which the Grand Trunk undertook to build and maintain at its own expense, and which was a part of the highway. At the date of the order this bridge was in every way of sufficient strength for any traffic offering, but to accommodate an increase of traffic occasioned by an increase in population, a much wider bridge was considered necessary.

It follows therefore, to use Lord Moulton's language, quoted in the *Toronto* case (1), "that the application was a matter between the corporation and the railway company alone", that is to say between the parties to the agreement of 1884, and this, as Lord Finlay said, was "the keynote" of the judgment in the *Vancouver* case (2). It is pertinent to add that the matter was so considered when the Board made its first order for the reconstruction of the bridge. Certainly, to borrow again Lord Finlay's language, the order here, as well as in the *Vancouver* case (2), did not proceed "on any consideration of danger arising from the level crossing (there was no level crossing in this case), or as having anything to do with the railway as such". If in the *Vancouver* case (2) the matter could be treated "as one merely of street improvement", we have certainly here a "street improvement" effected in order to accommodate increased traffic upon the highway. No question arose as to "the protection, safety and convenience of the public" in connection with a railway crossing, any danger to the public having been eliminated by the existing bridge.

The only distinction I can find between the *Vancouver* case (2) and the present one (That the proper grade of the streets was a consideration in the former case does not,

(1) [1920] A.C. 426. (2) [1914] A.C. 1067.

in my opinion, amount to a substantial difference), is that in the *Vancouver* case (1) the order was permissive while here it is mandatory. However, it seems clear that if the circumstances do not give the Board jurisdiction to make a permissive order, they could hardly be relied on to confer upon it jurisdiction to render its order mandatory.

In substance the *Railway Act,* as far as applicable to a case like the one under consideration, has not been changed since the two decisions of the Judicial Committee. It is true that section 39 (the former section 59) now refers to the case where the Board, in the exercise of any power vested in it, " directs or permits " any structure, etc., and this probably makes any distinction between a permissive and a mandatory order immaterial. But as the matter stands, I cannot see how it can be contended that the *Vancouver* case (1), as explained in the *Toronto* case (2), does not fully apply here.

This appears to me decisive of the issue, and I am unable to support the jurisdiction of the Board to make the order complained of.

I would answer the first question in the negative. The second question by its terms does not require to be answered.

I would allow the appeal with costs and set aside the order in so far as the appellant is concerned.

Appeal dismissed with costs.

Solicitor for the appellant: *Irving S. Fairty.*

Solicitor for the respondent, Canadian National Railways: *Allistair Fraser.*

Solicitor for the respondent, the Corporation of the City of Toronto: *C. M. Colquhoun.*

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(1) [1914] A.C. 1067.

(2) [1920] A.C. 426.

1929
*Oct. 8.

McCUTCHEON *v.* LIGHTFOOT

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Conversion, action for damages for—Chattels left by plaintiff on defendant's land—Failure to remove—Circumstances justifying assumption of abandonment—Extent of onus of proof as to plaintiff's title.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Manitoba (1) which allowed the defendant's appeal from the judgment of Dysart J. (2) in favour of the plaintiff for damages for alleged conversion of certain chattels, and directed that the plaintiff's action be dismissed.

On the appeal to the Supreme Court of Canada, on the conclusion of the argument, the judgment of the Court was orally delivered by the Chief Justice, dismissing the appeal with costs. The Court expressed the view that the litigation lacked merit (remarking also that it might well be that the pallets, the sole matter in controversy on the appeal, were worth less than $2,000) and agreed substantially with Trueman J. (who delivered the judgment of the Court of Appeal) where he said that " His (McCutcheon's) failure to notice the letters, and the derelict condition of the plant after the Gunns had removed, in 1924, the additions they made to it in 1921, could well lead the defendant to believe that it was abandoned." This Court was of opinion that the plant was really abandoned by the plaintiff.

While dismissing the appeal on the above ground, this Court stated that it was not prepared to concur with the view expressed in the judgment of the Court of Appeal that the plaintiff's title in the property would have to be strictly proved.

Appeal dismissed with costs.

B. L. Deacon for the appellant.

H. A. Robson K.C. for the respondent.

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

(1) 38 Man. R. 160; [1929] 1 W.W.R. 694.

(2) [1928] 2 W.W.R. 240.

1929

*May 2, 3.
*June 13.

THOMAS THOMPSON (DEFENDANT).....APPELLANT;

AND

FRASER COMPANIES, LIMITED (PLAINTIFF) ..... } RESPONDENT.

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

Real property—Boundaries—Trespass—Title—Construction of Crown grant as to land conveyed—Construction of exception from grant—Distances marked on plan attached to grant—Exception described in grant with reference to description in prior grant—Actual situations and measurements on the ground—Controlling factors in determining extent of exception—Trial—Non-direction in charge to jury, as ground for new trial—Failure to ask judge to give direction.

By Crown grant, in 1786, known as the "Prince William grant," certain lots were granted in York County, New Brunswick, according to a plan. The plan showed many lots "not granted," including those numbered 247, 249 and 251, which were side by side and went back from the river St. John to a "designed road," the distances back not being designated. In a Crown grant, known as the "Saunders grant," in 1819, under which the plaintiff claimed, there were excepted lots 247, 249, and 251 "as described in the said Prince William grant, being reserved by us for a glebe." Attached to the Saunders grant was a plan which showed the side lines of said excepted land as running back from the river 92 chains and 81 chains respectively. A grant in 1836 conveyed to a church for a glebe land of which the description therein coincided in effect with lots 247, 249 and 251 for a distance measured back from the river of 92 chains on one side and of 81 chains on the other. As found on the evidence, the distances along said side lines from the river to the "designed road" in the Prince William grant plan extended, by ground measurement, much beyond said 92 and 81 chains; and it was the area so beyond that was in dispute, the plaintiff, which claimed damages for trespass, contending that the Saunders plan regulated the locality and area of the excepted lots and that the disputed land passed under the Saunders grant.

Held: It was the Prince William grant that determined the dimensions and locality of the excepted lots; and as it mentioned no distances for their side lines, which were otherwise limited by the designed road, upon which the lots were based; and as the position of these lots, as inset upon the Saunders plan, with regard to a certain lake and to the designed road, corresponded with that shown upon the Prince William grant plan; and in view of the actual situation and measurements on the ground, the distances of 92 and 81 chains mentioned in the Saunders grant plan should not control, but should give way to more definite and convincing evidence of intention arising from the relative physical situations. Furthermore, as it is a rule of interpretation that Crown grants of this character ought to be con-

*PRESENT:—Mignault, Newcombe, Rinfret, Lamont and Smith JJ.

1929

THOMPSON v. FRASER COMPANIES, LTD.

strued most favourably to the Crown, it should follow that the statement of erroneous distances, tending to reduce the excepted area, upon the inset of the Saunders grant plan, ought not to control the interpretation of the exception as derived by express reference to the Prince William grant. Plaintiff, therefore, had not shewn title to the disputed land.

Judgment of the Supreme Court of New Brunswick ([1929] 1 D.L.R. 168), which set aside verdict at trial in defendant's favour and gave judgment for plaintiff, reversed.

A party should not be granted a new trial on the ground of non-direction in the trial judge's charge to the jury, where, having opportunity to do so, he did not ask the judge to give the direction the omission of which he complains of. (*Neville* v. *Fine Art & Gen. Ins. Co.*, [1897] A.C. 68, at p. 76, cited).

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), which allowed the plaintiff's appeal from the judgment of Le Blanc J., upon the verdict of a jury, in favour of the defendant, in an action by the plaintiff to recover damages for alleged trespass. The judgment of the Appeal Division ordered that the verdict entered for the defendant be set aside and that a verdict be entered for the plaintiff for damages, the amount thereof to be ascertained by a new trial (confined to that question) unless the parties reached an agreement in respect thereof.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed, with costs in this Court and the Appeal Division, and the verdict of the jury and judgment of the trial judge restored.

J. B. McNair for the appellant.

P. J. Hughes K.C. and *C. L. Dougherty* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The question at issue depends upon the extent of the exception in the grant of King George III, on behalf of the Province of New Brunswick, to the Honourable John Saunders, dated 11th February, 1819. The exception is expressed in these words:

And excepting. * * * Also the lots number Two Hundred and Forty-seven, number Two Hundred and Forty-nine and number Two Hundred and Fifty-one as described in the said Prince William Grant, being reserved by us for a glebe.

(1) [1929] 1 D.L.R. 168.

The validity of the exception is not in controversy.

The plaintiff claims under the Saunders grant, and seeks to recover damages for trespass for the cutting of trees upon the area in dispute, which, if not comprised within the exception, would be within the limits of the Saunders grant. The cutting is established, or admitted, and the *locus* is sufficiently identified, but the defendant denies the plaintiff's alleged title and possession or right to possession.

It is necessary to look at the earlier instrument, known as the Prince William grant. By letters patent of New Brunswick of 19th May, 1786, the King granted

unto the several Grantees hereinafter named in severalty to each of them and unto each and every of their several and respective Heirs and Assigns certain Lots or Plantations of Land known and distinguished by their respective numbers herein mentioned, that is to say, unto Francis Horsman the Lot Number One, unto John Alloway the Lots Number Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five, and Twenty-six,

etc. The grant proceeds to mention the names of a great many other grantees, with the numbers of the respective lots granted to each, followed by an explanatory clause, and the description, reading as follows:

The said Lots hereby granted as aforesaid being part of Two Hundred and Sixty-two lots described on the Plan hereunto annexed and contained within a certain Tract or Parcel of Land situate, lying and being in the Parish of Prince William in the County of York in our Province of New Brunswick in America and abutted and bounded as follows, to wit, beginning at a Cedar Tree marked KAD on the Northwest bank of the River Saint John nearly opposite the lower end of Scoodewabscook Island and Twenty-five chains (of four poles each) and fifty Links measured on a right line distant from the point which forms the entrance of Scoodewabscook Creek or River to the Westward, the said Cedar being the Upper or Northwesterly boundary of a Tract of Land granted to Colonel Isaac Allen and Associates, thence running (by the magnetic needle) South forty-five degrees West, One hundred and fifty-two Chains (of four Poles each) or until it meets the Northeast Corner of a Tract of Land reserved for His Majesty's use by His Majesty's Surveyor General of Woods at a Hemlock Tree marked IW, thence along the northerly line of the said reserve North forty-five degrees West, one hundred and Twenty chains to a Spruce Tree marked IW at the northwest corner thereof, thence along the westerly Line of the said reserve, South forty-five degrees west one hundred and ten chains, thence North forty-five degrees West nine hundred and forty chains or until it meets the westerly line of a designed road, to run from the northwest bank of the River Saint John sixteen poles wide parallel to and adjoining the westerly or upper line of the Lots Number Two Hundred and Sixty-one and Two hundred and Sixty-two, thence along the westerly line of the said designed road North forty-five degrees east two hundred and Thirty chains or until it meets the westerly bank or shore of the River Saint John, thence

1929

THOMPSON v. FRASER COMPANIES, LTD.

Newcombe J.

along the said bank or shore following the several courses of the said river down stream to the bounds first mentioned, containing in the whole twenty thousand two hundred and forty-one acres, more or less, with an allowance of four thousand two hundred and fifty acres for roads and waste, each of the said Lots (contained as aforesaid within the Tract above described) measuring in breadth on a right line at right angles to the sides thereof thirty-two poles and the division lines of the said lots running from their respective boundaries (marked on each side of a designed road sixteen poles wide described on the said Plan hereunto annexed) north forty-five degrees east (by the magnet) to the bank or shore of the River Saint John and South forty-five degrees west to the rear or westerly line of the whole Tract, the said road dividing the lots into two ranges and the lower or easterly line of the said road running (by the magnet) north forty-five degrees west through the whole Tract from a Cedar Sapling on the first described line of the said Tract marked KAD and distant on the said Line from the first mentioned bounds One hundred and three chains (of four poles each) which said tract above described and the said lots therein contained have such shape form and marks as appear by the actual Survey thereof made under the directions of our Surveyor General of our said Province, of which Survey the said Plan hereunto annexed is a representation, whereon is also noted the quantity of land respectively contained in each and every of the said lots.

It will be observed that this description includes a tract of considerable extent, and that the lots enumerated are divided into two tiers, upper and lower, separated by "a designed road" for which, as shewn by the plan accompanying the grant, there is a reservation of 16 rods in width. The lots are laid out to abut upon this road on either hand, and the side lines of the lots are not projected across it; the lower lots bear the odd numbers, and the upper lots, the even. It thus becomes obvious that, in order to locate the lots in accordance with the survey, description and plan of the Prince William grant, it is necessary to find the location of the designed road.

The plan shews a lake about 160 chains in length by 100 chains in breadth, within the bounds of the tract granted, and towards its northwesterly end; it is called Prince William Lake, or, sometimes, Davidson Lake. This is a natural feature of much importance, because the lake, on its lower side, intersects the road, and extends below the road for a distance of about 15 chains, thus impinging upon, or overlying, or reducing the lower tier of lots for that width, and for nearly the entire length of the lake.

Another noteworthy fact is that many of the delineated and enumerated lots, especially at the northwesterly end of the tract, do not bear the names of grantees, but, on the

contrary, are expressly marked "not granted." As to these, so far as I can perceive, the grant did not operate to affect the Crown's title, and they remained Crown lands; and of this character are lots 247, 249 and 251, already mentioned.

Now it will be found that if the plan of the Saunders grant be superimposed upon the Prince William grant, beginning at the northwesterly line of Peter Ganter's lot, No. 219, where it touches the river on the latter plan, the Saunders plan will occupy the entire area of the Prince William grant to the northwest of lots 219 and 220, and to that extent it overlies, subject, of course, to the exceptions. That part of the waters of the lake which lie within the bounds of the Saunders grant is, however, excepted, as well as some lots, which had been previously granted, and so we come to the exception above quoted, of lots 247, 249 and 251, "as described in the said Prince William grant, being reserved by us for a glebe." These lots therefore did not pass under the Saunders grant; but, by letters patent of 15th September, 1836, lands described as follows were granted to the Rector, Church Wardens and Vestry of Saint Paul's Church of the Parish of Dumfries,

for a Glebe a Tract of Land situate in the Parish of Dumfries in the County of York in our Province of New Brunswick and bounded as follows, to wit, Beginning at the Northerly angle of Lot number Two hundred and forty-five, in the Grant to The Honourable John Saunders, and on the Southeasterly side of the River Saint John; thence by the magnetic needle south forty-six degrees and thirty minutes West ninety-two chains of four poles each; thence North forty-three degrees and thirty minutes West twenty-four chains; thence North forty-six degrees and thirty minutes East eighty-one chains to the said side of the aforesaid River Saint John and thence along the Bank or Shore of said River down Stream to the place of beginning, containing two hundred and twenty-eight acres, more or less, and also particularly described and marked on the Plot or Plan of Survey hereunto annexed; * * *

This grant conveys the excepted lots, 247, 249 and 251, for the distance of 92 chains on the lower side-line, and 81 chains on the upper side-line, leaving still ungranted the rear portion of these lots between the line of the Church grant, described as "north 43 degrees and 30 minutes west 24 chains," and the designed road, or "Alma Road," as it is frequently spoken of in the case, and this rear portion constitutes the area or *locus* of the alleged trespass. Upon the assumption that the plaintiff company has not acquired title to this parcel, its action fails.

1929

THOMPSON v. FRASER COMPANIES, LTD.

Newcombe J.

It is shewn that the actual width of the Prince William grant at the locality in question exceeds its width as ascertained by the scale of the grant by about 40 chains, and this excess was admitted at the argument before us. In 1882, a surveyor named Bellamy traced on the ground the rear line of the Church grant at the distance from the river called for by that grant. There is no dispute as to that line, and it is the area extending from it for 40 chains to the southwestward that is in dispute. At the trial, the plaintiff's counsel, in opening his case to the jury, referred to the Church grant as corresponding with the glebe reservation in the Saunders grant, but he said, very frankly, that he thought that the lots in the Prince William grant went back very much farther than 92 chains from the river; that the real issue was the establishing of the rear line; and that, if the defendant were right in going back to the extension of the "old road running through Prince William in the Prince William grant," there had been no trespass.

We are told that the trial of the case occupied seven days, and there are 350 pages of testimony, exclusive of the documents. The locality of the designed road upon the ground, particularly on the northwesterly side of the lake, so far as lines are concerned which indicate its position, is somewhat confused and obscure, because the road has not been constructed there and put into use, but considerable testimony was introduced.

The plaintiff relied upon the plan attached to the Saunders grant, upon which are traced the lines of the excepted lots, shewing the outside or lower line of lot 247 as running from its starting point at the river, south 46 degrees and 30 minutes west, in 1818, 92 chains, thence at right angles 24 chains until it meets the outside or upper line of lot 251, which is drawn from the river to the point of intersection, parallel to the side-line of lot 247, a distance of 81 chains; and the force of the plaintiff's argument lies in the contention that this plan regulates the locality and area of the excepted lots, and that, as they are shewn by the Saunders grant plan to extend from the river only 92 chains on the one side, and 81 chains on the other, the land beyond these distances passed under the latter grant, and belongs to the plaintiff company, which has succeeded, under the

conveyances in proof, to the Saunders title. But there are governing considerations which conflict with this view. It is the Prince William grant that determines the dimensions and locality of the excepted lots, and it mentions no distances for their side-lines, which are otherwise limited by the designed road, upon which the lots are based; and moreover, the position of these lots, as inset upon the Saunders plan, with regard to the lake and to the designed road, corresponds with that shewn upon the Prince William grant. Consequently, when it is shewn that the lake is more than 92 chains from the river, and that the front line of the designed road, as shewn on the Saunders plan, on the left or northeasterly side of the lake, when produced across the lake, coincides with the rear limit of the excepted lot, it becomes unreasonable to permit the distances of 92 chains and 81 chains to control; and, upon general principles, these distances must give way to more definite and convincing evidence of intention, arising from the relative situation of the lake and the projected road upon which these lots are based.

Furthermore, it is a rule of interpretation of Crown grants of this character that they shall be construed most favourably to the Crown; wherefore it should follow that the statement of erroneous distances, tending to reduce the excepted area, upon the inset of the plan accompanying the Saunders grant, ought not to control the interpretation of the exception as derived by express reference to the Prince William grant, by which the excepted lots were constituted and defined, and extend from the river by ground measurement 40 chains farther.

The action was tried before LeBlanc J. with a jury. The learned judge in his charge pointed out that the plaintiff relied upon a documentary title; but he said that he would not withdraw from the consideration of the jury a title by possession, inasmuch as both sides had attempted to produce evidence of possession. He explained that in order to interpret the Saunders grant it was necessary to go back to the Prince William grant, to see what was excluded, and that it was for the jury to find, by the evidence, the location upon the ground of the designed road, which limited, at the rear, the excepted lots; that the Saunders grant took effect at the time it was made, and if it were found

1929

THOMPSON v. FRASER COMPANIES, LTD.

Newcombe J.

that there was an ungranted area between the Alma road and the Bellamy line, the jury should further consider whether the plaintiff had proved such possession as would establish a prescriptive title; and he directed the jury's attention to the evidence. He told the jury that the defendant had no documentary title, although he admitted the cutting upon the *locus*. The plaintiff's counsel made several suggestions during the course of the charge, but he does not appear to have requested the learned judge to give any material instruction to the jury which was not submitted.

The judgment of the Appeal Division was pronounced by Grimmer J., and the principal difference between the trial judge and the Appeal Division, as I understand their respective views, appears to be that, whereas the jury were told in effect that if they found the designed road to be where it was shewn to be by the Prince William plan, there would be 40 chains ungranted between that and the Bellamy line, the Appeal Division, on the other hand, would limit the length of the excepted area to 92 chains on one side and 81 chains on the other, leaving the excess to pass under the grant. I am disposed, with great deference, to reject the latter view, for the reasons which I have stated; and the verdict must, I think, be held to imply that the road is found to be where it is depicted in relation to the lake, as shewn on the Prince William grant, and at the ascertained distance of 40 chains above the Bellamy line, and so to justify, according to the submissions of the parties, the general verdict for the defendant.

The learned judge of appeal was, I think, unduly impressed by the fact that the road was not, on the Saunders plan, projected across the lake or shewn within the limits of the Saunders grant, but that, in my view, is a circumstance of no importance, if, as I apprehend, we must look to the earlier grant to ascertain what was intended to be included within the excepted lots.

The question of possession was also considered in the appeal judgment, but with the preliminary passage:

> That there was controversy between the different owners of the Glebe lots and the owners of the adjoining lots in the rear is evident from the great mass of evidence that was produced relating thereto, and the number of lines that were run, and that there was more or less cutting upon some of the rear lots by different persons at different times is also evident, but this case rests entirely upon the title of the plaintiff in Lots 2 and 3.

The reference here to lots 2 and 3 relates to a subdivision of the Saunders property after the death of the grantee, and these two lots, which belong to the subdivision, appear to occupy the space which was covered by the lower end of lots 248, 250 and 252 in the upper tier of the Prince William grant, opposite to the disputed area, and which, wherever they were situate, were separated from the *locus* by the road; and the court would have been right in affirming the plaintiff's title only if the road were found to coincide on its lower side with the Bellamy line, or to lie below it. The learned judge proceeds to premise his observations upon the question of possession by saying that,

> While so far as this judgment is concerned the question of possession does not enter into it to any great extent yet the effect of the charge which in my opinion was clearly wrong, upon a jury that might be wavering over the question of a documentary title might readily be all that was needed to enable them to render the verdict appealed from.

Follow some references to cases with regard to possessory title, and to the testimony in the case, and the learned judge says that:

> There was much evidence given by the Crown Land surveyors who were respectively employed to run the lines of the parties to the action from time to time, but from the continued repetition that was made by both counsel on the trial it is a matter of practical impossibility to me to follow and I do not well see how the jury after a seven days trial could possibly have followed and intelligently understood the meanderings of these men.

But, if I do not misapprehend the purpose of the learned judge, I am disposed to think that, in speaking of misdirection, he refers to the omission of the trial judge to instruct the jury on the footing that the plaintiff company, being in possession, under deeds of the subdivisions, lots 2 and 3, was entitled to refer the acts of possession of itself or its predecessors to the whole area included within the subdivisions, and that if, according to the metes and bounds, the disputed area was part of the subdivisions, these acts of possession would be referable to the latter area, as well as to the upper portions of the lots upon which the acts of possession actually took place. But in answer to this it is in effect said, and I think justly, that, in the first place, the learned judge at the trial was not asked to submit any such instruction to the jury; and, as was said in *Nevill* v. *Fine Art and General Insurance Company* (1):

(1) [1897] A.C., 68, per Halsbury L.C., at p. 76.

1929

THOMPSON v. FRASER COMPANIES, LTD.

Newcombe J.

That would, but for what I am about to say, give the appellant only a right to ask for a new trial, which, though he has not asked for it, it is no doubt within your Lordships' competence to give him; but what puts him out of court in that respect is this, that where you are complaining of non-direction of the judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect.

And, secondly, if such a direction as I have indicated had been given, it could have served no useful purpose, because all the difficulties of location which are incident to the case would have attended upon the attempt to locate the boundaries of the subdivisions, which seem to have been intended to affect nothing which had not passed to Saunders under his original grant; and there is evidence that no cutting was done on the part of the plaintiff below the road; and moreover, that any cutting which was done below the road was on behalf of the proprietors or occupants of the lower lots.

In conclusion, Grimmer J. says:

The conclusion I have reached is that under ordinary circumstances a new trial would be granted by reason of the misdirection of the learned trial judge as pointed out, but as I am satisfied the plaintiff has fully proved its title in the *locus* and this Court has before it all the materials necessary for finally determining the questions in dispute, and in order to prevent further appeals and costly litigation, the verdict for the defendant should be set aside and a verdict entered for the plaintiff. But inasmuch as there has been no finding by the jury on the matter of damages there shall be a new trial to be confined exclusively to ascertain the amount of damages, if any, the plaintiff is entitled to, unless the parties in interest within thirty days from the date of this judgment reach an agreement between themselves in respect thereof.

I do not think, however, that the Court of Appeal was justified in substituting its finding for that of the jury; I think, moreover, that there was evidence before the jury which reasonably supports its finding; and I see no sufficient reason to set that finding aside.

In the result, therefore, I would allow the appeal, with costs here and in the court below.

Appeal allowed with costs.

Solicitors for the appellant: *Winslow & McNair.*

Solicitor for the respondent: *Charles L. Dougherty.*

1929

THE FIDELITY TRUST COMPANY OF ONTARIO (DEFENDANT AND THIRD PARTY) ..... APPELLANT; *May 28, 29. *June 13.

AND

MARGARET PURDOM (PLAINTIFF) ..... RESPONDENT;

AND

THE NORTHERN LIFE ASSURANCE COMPANY OF CANADA (DEFENDANT) ..... RESPONDENT.

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

Mortgage—Trusts and trustees—Construction and effect of declaration of trust—Plaintiff's interest thereunder—Right of mortgagor to make mortgage in question as against plaintiff's interest—Notice to mortgagee—Mortgagee's right to indemnity against mortgagor.

APPEAL by the Fidelity Trust Company of Ontario, defendant and third party, from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which allowed the plaintiff's appeal from the judgment of Orde J.A. (1), dismissing her action as against both defendants. By the judgment of the Appellate Division (1) it was declared that a certain mortgage made by the present appellant to the defendant, The Northern Life Assurance Company of Canada, was not binding upon the plaintiff's interest in certain lands included in the mortgage; and it was also declared that the defendant, The Northern Life Assurance Company of Canada, was entitled to indemnity and relief over against the present appellant.

On appeal to the Supreme Court of Canada, after hearing counsel on behalf of all parties, the Court reserved judgment and, on a subsequent day, delivered judgment (no written reasons being given) dismissing the appeal with costs.

Appeal dismissed with costs.

A. C. McMaster K.C. and *J. M. Bullen* for the appellant.

W. N. Tilley K.C. and *J. W. G. Winnett K.C.* for the respondent (plaintiff) Margaret Purdom.

J. G. Gillanders for the respondent (defendant) The Northern Life Assurance Company of Canada.

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

(1) 63 Ont. L.R. 12.

1929

*Nov. 4.

IN THE MATTER OF AN ARBITRATION

THE CORPORATION OF THE CITY OF TORONTO (LESSOR)..... APPELLANT;

AND

FLORENCE MARION THOMPSON, ET AL. (LESSEES)..... RESPONDENTS.

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

Appeal—Jurisdiction—Supreme Court Act, R.S.C., 1927, c. 35, ss. 2 (b), 36—"Final judgment"—Appeal from judgment setting aside arbitrator's award and referring matter back for reconsideration.

An appeal from the judgment of the Appellate Division, Ont. (35 Ont. W.N. 126), setting aside the awards of the official arbitrator fixing the rentals to be paid upon the renewal of certain leases, and referring the matter back to him for reconsideration, with liberty to supplement the evidence already given, was quashed for want of jurisdiction, on the ground that the judgment appealed from was not a "final judgment" within ss. 2 (*b*) and 36 of the *Supreme Court Act.*

APPEAL by the City of Toronto from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which allowed the present respondents' appeals from the awards of T. H. Barton, Esquire, K.C., Official Arbitrator, fixing the respective rentals to be paid by the present respondents, as tenants, upon the renewal of certain leases by the City of properties in the city of Toronto.

The Appellate Division set aside the awards and referred the matter back to the Official Arbitrator for reconsideration, from the viewpoint of certain aspects of the case discussed in the judgment of the Appellate Division, with liberty to the parties to supplement the evidence already given.

Special leave to appeal to the Supreme Court of Canada was granted by the Appellate Division to the City, with a direction that the costs of such appeal should be costs in the cause payable by the City in any event.

G. R. Geary K.C. and *J. P. Kent* for the appellant.

Fred G. McBrien for the respondents.

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

(1) (1928) 35 Ont. W.N. 126.

1929

CITY OF TORONTO v. THOMPSON.

In the course of the argument of counsel for the appellant, the Court mentioned the question of its jurisdiction to entertain the appeal, notwithstanding the order giving special leave, and argument was heard on this question as well as on the merits. At the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondent, the judgment of the Court was delivered orally by

ANGLIN C.J.C.—We are all of the opinion that the judgment appealed from is not a final judgment within the meaning of s. 36 of the *Supreme Court Act*. The definition of a final judgment is given in s. 2 (*b*) of the Act, and it is perfectly clear that there must be a determination of some substantive right between the parties. In view of the fact that by the judgment appealed from all the rights of the parties are left open, this Court is without jurisdiction, and the appeal must be quashed.

Appeal quashed.

Solicitor for the appellant: *C. M. Colquhoun.*

Solicitor for the respondents: *F. G. McBrien.*

BRETTINGEN *v.* EVANS AND McKAY

1929

*Oct. 8.

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

Malicious prosecution—Want of reasonable and probable cause—Malice—Findings as to ownership of chattels—Damages for wrongful detention.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Alberta (1), dismissing (subject to certain variations of the judgment below) his appeal from the judgment of Boyle J. in favour of the plaintiffs as to the ownership of certain chattels and for damages against the defendant for wrongful taking and unjust detention thereof and for damages for malicious prosecution.

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

(1) [1929] 1 W.W.R. 1.

1929

BRETTINGEN v. EVANS AND McKAY.

At the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondent, the Court orally delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Geo. F. Macdonnell K.C. for the appellant.

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

1929

*Oct. 10.
*Nov. 4.

THE DOMINION OF CANADA GUARANTEE AND ACCIDENT INSURANCE COMPANY (DEFENDANT)..... } APPELLANT;

AND

ELLEN A. MAHONEY (PLAINTIFF).....RESPONDENT.

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

Accident insurance—Provision for reduction of insurer's liability if insured injured "while engaged either temporarily, casually or permanently" in more hazardous "occupation"—Isolated act of extra hazard—Exception to risk described by different wording in policy and application—Jury's findings as to circumstances of accident.

Defendant insured M. against accident. In his application for insurance M. warranted that "my occupation and specific duties are fully described as president and general manager of lumber company, office duty only and travelling," and agreed to have his occupation classed as "select," and for reduction of insurer's liability if insured was injured "while engaged in any occupation or exposure to danger" classed as more hazardous than that stated. A term of the policy provided for such reduction of liability if insured was injured "while engaged either temporarily, casually or permanently in an occupation classed as more hazardous" than that stated. M. was crushed between two railway box cars, resulting in his death. Defendant alleged that M. at the time of the accident was trying to engineer the movement of a box car, and therefore, under the contract, plaintiff (beneficiary thereunder) was not entitled to the full amount of the policy, which she claimed. The jury, in answer to questions submitted, found that M. died by accidental injury, that at the time of injury he was not engaged in any occupation other than that of "president and general manager of lumber company, office duty only and travelling," and was not "engaged in any exposure to danger more hazardous than office duty." They expressed inability to find what act M. was

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

doing at the time of the accident. Judgment was given for plaintiff, which was affirmed by the Appeal Division (N.B.).

Held (1) On the evidence, it could not be said that the jury erred in failing to find what M. was doing, or whether or not he was on a box car, at the time of the accident; and that, on the jury's findings, judgment for plaintiff was the only possible outcome of the action.

(2) Even had M. been trying to engineer the movement of a box car at the time of the accident, that fact alone would not warrant judgment for defendant. The doing of that single isolated act, ordinarily forming part of the duties of a more hazardous occupation, would not amount to "engaging in" such occupation "either temporarily, casually or permanently."

(3) If a specific exception to the risk undertaken in an insurance policy be described in the policy itself, as well as in the application therefor (although the latter be incorporated in the former), the insured is ordinarily justified in insisting that, as between him and the insurer, the words of the policy shall, if they differ from those of the application, be taken as evidencing, in that particular, the contract by which both are bound. And where the terms employed in the policy are reasonably susceptible of a construction which does not include in the exception, stipulated by the insurer in its own interest, the doing of an isolated act of extra hazard, that construction must prevail. *Ontario Metal Products Co.* v. *Mutual Life Ins. Co.*, [1924] S.C.R. 35, at p. 41; [1925] A.C. 344; *Victory* v. *Saskatchewan Guarantee & Fidelity Co.*, [1928] S.C.R. 264, at p. 273, cited.

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division, affirming the judgment of Byrne J. (on the findings of a jury) for the plaintiff at trial.

The defendant issued a policy of accident insurance to one Frederick B. Mahoney. The plaintiff, his sister, was named in the policy as beneficiary in case of his death by accident under the provisions of the policy. The application for the policy (set out in the policy under the heading "Schedule of Warranties") contained, *inter alia*, the following statements, warranted to be true, by the insured:

7. My occupation and specific duties are fully described as President and General Manager of Lumber Company, office duty only and travelling.

8. I understand the classification of risks and agree to have my occupation classed as Select, and I further agree that for any injury received by me while engaged in any occupation or exposure to danger classed by the Company as more hazardous than that above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rates fixed for such increased hazard.

The policy contained the following provision:

(2) If the injury is sustained by (or sickness happens to) the Insured while engaged either temporarily, casually or permanently in an occupation classed as more hazardous than that stated herein (other than as provided for injury in Section G [not material in this case]), liability here-

1929

DOMINION OF CANADA GUARANTEE & ACCIDENT INS. CO. v. MAHONEY.

under shall be limited to such amount as the premium paid would have purchased for the increased hazard according to the Company's table of rates and classification of risks last filed by the Company, with the Superintendent of Insurance; Provided, that the performance of ordinary duties about his residence or while engaged in recreation shall not be regarded as a change of occupation.

The insured was injured by being crushed between two railway box cars (as found by this Court, and also by the Appeal Division which held that the jury's answer, "Don't know," on this point, was perverse), and died as the result. The defendant alleged that at the time of the accident the insured was trying to engineer the movement of a box car, and that, therefore, under the terms of the application and policy above quoted, the plaintiff was not entitled to recover the full amount named in the policy, for which full amount the plaintiff sued.

On the answers by the jury to questions submitted (which are set out in the judgment now reported), judgment was given for the plaintiff, which was affirmed by the Appeal Division. The defendant appealed to this Court.

Gideon Grant K.C. and *W. H. Harrison K.C.*, for the appellant.

J. F. H. Teed for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—Omitting what is contentious, the following "statement of facts" is taken, practically verbatim, from that given by the appellant in its factum:

"This is an appeal by the defendant from the judgment of the Appeal Division of the Supreme Court of New Brunswick, confirming the judgment of Mr. Justice Byrne and a jury, awarding the plaintiff the sum of Ten Thousand Dollars ($10,000) payable in instalments.

"The action was brought to recover the amount of an accident insurance policy issued by the defendant to Frederick B. Mahoney dated January 4, 1926, and renewed January 4, 1927. The policy was made payable to the plaintiff, Ellen A. Mahoney, a sister of the insured.

"On the 17th day of August, 1927, the insured, Frederick B. Mahoney, was accidentally injured by being caught and crushed between two railway cars at Calhoun's Mills, Westmorland County, New Brunswick, and the injuries sustained by him resulted in his death on August 30, 1927.

"The application for the insurance policy, which is stated to form part of the policy, contains the following warranties:

7. My occupation and specific duties are fully described as President and General Manager of Lumber Company, office duty only and travelling.

8. I understand the classification of risks and agree to have my occupation classed as Select, and I further agree that for any injury received by me while engaged in any occupation or exposure to danger classed by the Company as more hazardous than that above stated, I shall be entitled to recover only such amount as the premium paid by me would purchase at the rates fixed for such increased hazard.

"The policy also contained the following amongst other conditions:

(2) If the injury is sustained by (or sickness happens to) the insured *while engaged either temporarily, casually or permanently in an occupation classed as more hazardous* than that stated herein (other than as provided for injury in Section G), liability hereunder shall be limited to such amount as the premium paid would have purchased for the increased hazard according to the Company's table of rates and classification of risks last filed by the Company, with the Superintendent of Insurance; Provided, that the performance of ordinary duties about his residence or while engaged in recreation shall not be regarded as a change of occupation.

(The qualifications in Section G are not at present material.)

* * * *

"Frederick B. Mahoney was the President and General Manager of P. G. Mahoney, Limited, a lumber company having a mill at Calhoun's Mills, Westmorland County. The accident occurred in the mill yard of P. G. Mahoney, Limited.

"A blue print (in evidence) shows a small railway or trolley track in front and to the east of the mill. Farther to the east is a railway designated on the plan 'Loading Siding,' and between the two is a piling ground for lumber. To the east of the loading siding is the main line of the Canadian National Railway running from Moncton southwesterly to Memramcook and Dorchester.

"The mill was operated by one, Alfie T. LeBlanc, under a contract with the Mahoney Company, whereby he sawed the company's lumber in their mill and piled it out in the mill yard alongside the loading siding. The company sold the lumber, loaded it in cars and delivered it.

"On August 17, 1927, there was a big rush on in the mill yard. It was the last day to get certain cars loaded for a

1929

DOMINION OF CANADA GUARANTEE & ACCIDENT INS. CO. v. MAHONEY.

Anglin C.J.C.

steamer in St. John. LeBlanc tried to get men for Mahoney, the General Manager of the company, but could not get enough, so he closed down the mill and turned over his men to Mahoney.

"The men were divided into three crews of about five each, one crew to a car. Three box cars were being loaded on the loading siding in the afternoon. This loading siding runs from Calhoun's Station on the main line through the piling ground to the south, past the warehouse marked on the plan and thence by a fairly steep grade across the highway road, and then in front of the mill to the end of the piling ground, where the siding ended.

"It was customary when a car was loaded to move it down the siding by gravity. The movement of the car was controlled altogether by a hand brake operated by a wheel on the end of the car. There is a brakeman's platform three feet or more below the top of the car on which the brakeman stands to handle the wheel. When the brake is released, the car can be started and when loaded it requires careful braking to check the speed. Stewart Smith, one of the millmen, who was accustomed to handling cars, said it was necessary to be very careful to prevent injury to another car as there was quite a lot of grade.

"On the day in question, one loaded car had been stopped about one car length south of the highway on the loading siding. Three other cars were being loaded above the highway on the loading siding. The one nearest the highway was in charge of George Mahoney, brother of Fred B. Mahoney. Shortly before four o'clock this car started to move down the siding, got out of control and crashed into the car on the south side of the highway.

"Fred Mahoney had been talking to Paul Bourque, his foreman, who was in charge of loading the car farthest to the north of the highway, about twenty or thirty minutes before the accident.

"Leon Bourque was at the bunk house behind the mill and saw the car moving down the grade with a man on the brakeman's platform trying to put the brake on.

"Philias Richard heard the crash when he was in the mill and looking out, saw Mr. Mahoney on the ground with no one near him. He went out to pick up Mr. Mahoney

and later told someone to blow the fire whistle. He asked Mahoney where he was hurt and Mahoney said, 'I got jammed between the cars.'

"Alfie LeBlanc came up later while Mahoney was still lying on the ground near the junction of the cars, and, speaking to LeBlanc, Mahoney said,—'How near do the two boards come together?' and LeBlanc answered Mahoney's question,—'About eighteen inches.' When the cars come together, the evidence shows that the draw bars or springs in the couplings compressed to the extent of 4 or 5 inches on each car, which would bring the boards within 8 or 10 inches of each other when two cars came together.

"Mahoney's pelvic bones were crushed and broken on both sides—an injury which could only be accounted for by being crushed between two heavy bodies. The medical evidence did state that the injuries could be produced by a fall from a great height, but could not be sustained by a fall from the top of a box car.

* * * *

"As to classification of risks,—these are found in the Company's Rate Book (Exhibit "G") at pages 47 and 65. On page 47 the following classifications are found:—

Lumber Dealer or Salesman not in yards or woods, office duties and travelling only is classed as Select.

"It was under this classification that the insured was placed by the company.

"By reference to page VI of the Rate Book, the premiums for the different classifications are found. Thus the premium for a 'Select' risk is $4. The premium for an 'Ordinary' risk is $7.50. The premium for a 'Special' risk is $12.50 and the premium for an 'Extra-Hazardous' risk is $20.

"Other classifications on page 47 are,—'Lumber Dealer, Loading, Piling or Delivering,' classified as 'Special.'

"Also, 'Lumber Mill Proprietor or Manager, superintending only,' classified as, 'Ordinary.'

"On page 65 of the Rate Book is found the classification of a railway brakeman, where the railway is operated by gravity:—'Brakeman, freight or mixed train,' classified as 'Extra-Hazardous.'

"The amount recoverable under this policy if the insured came under the classification 'Ordinary' would be

1929

DOMINION OF CANADA GUARANTEE & ACCIDENT INS. CO. v. MAHONEY.

Anglin C.J.C.

$5,333.33. If his classification was 'Special,' the amount recoverable would be $3,200, and if 'Extra-Hazardous,' the amount recoverable would be $2,000.

"All these amounts would be payable by instalments, consisting of an immediate payment of 10% and the balance in fifteen equal annual payments.

"The questions to, and answers by, the jury are as follows:

"*Questions by the Court.—*

'Q. Did the deceased Fred. Mahoney die by accidental injury?

A. Yes.

Q. If so, was the deceased at, or immediately before, the time he received the injuries which caused his death, engaged in any occupation other than that which is stated in the policy, namely, President and General Manager of Lumber Company, office duty only and travelling?

A. No.

Q. If you answer "Yes", to number 2, then state what was such other occupation? A. (No answer).

Q. What act or thing was deceased doing at the time he received the injury which caused his death?

A. Not disclosed in evidence.'

"*Questions by Defendant's Counsel.—*

'Q. Was the insured injured by being crushed between two box cars?

A. Don't know.

Q. Was the insured trying to engineer the movement of a box car at the time of the accident?

A. Don't know.

Q. Was the insured on a box car at the time of the accident?

A. Don't know.

Q. Was the insured at the time of the accident engaged in any exposure to danger more hazardous than office duty?

A. No.'

"Upon these answers judgment was given for the plaintiff (respondent) on the 9th day of November, 1928, for the sum of $1,048.47, and a declaration that the defendant (appellant) is liable to pay to the plaintiff (respondent) the further sum of $600 on the 20th day of November in each of the years 1928 to 1942 inclusive.

"The defendant (appellant) appealed from the judgment to the Appeal Division of the Supreme Court which said appeal was on the 14th day of June, 1929, dismissed with costs.

"The reasons for judgment of the Appeal Division were delivered by Grimmer, J. for the Court."

* * * *

The Appeal Division affirmed the conclusions of the jury as to the effect of the evidence upon all the questions of fact submitted to them except the first of the "Questions by Defendant' Counsel", to which they considered the answer, "Don't know", perverse. We are agreed that that answer should have been "Yes"; but, after a careful study, we are satisfied that it is not possible to say that the jury erred in deeming the evidence insufficient to justify its answering the fourth question put by the Court and the second and third questions of the defendant's counsel otherwise than as they did, i.e., "Not disclosed in evidence"; and, "Don't know."

Their answers in the negative to the second question of the Court and to the last question of defendant's counsel may be read as meaning that the defendant had failed to prove that these questions should be answered in the affirmative.

The plaintiff having obtained a finding (not now challenged) that the assured had died "by accidental injury", and the defendant having failed to establish the facts necessary to support its defence, that, when injured, the assured was "*engaged*, either temporarily, casually or permanently, in an occupation classed as more hazardous than that stated herein", i.e., in the application incorporated in the policy, to be his occupation, viz., "President and General Manager of Lumber Company, office duty only and travelling", it follows that judgment for the plaintiff, was the only possible outcome of the action.

But we think we should add, that had the jury been able to make an affirmative finding in answer to the second question of the defendant"s counsel, the consequence would not be that there should have been judgment for the defendant. On the contrary, we are of the opinion that the doing of the single isolated act, which is all that such an answer would imply,—it may have been in an emergency—and which ordinarily forms part of the duties of a more

1929

DOMINION OF CANADA GUARANTEE & ACCIDENT INS. CO. v. MAHONEY.

Anglin C.J.C.

hazardous occupation, cannot be said to amount to "engaging in" such more hazardous occupation "either temporarily, casually or permanently". If the defendant company had meant so to provide, it easily could, and certainly should, have used terms which would have made that intention unmistakably clear.

If a specific exception to the risk undertaken in an insurance policy be described in the policy itself, as well as in the application therefor (although the latter be incorporated in the former), the assured is, we think, ordinarily justified in insisting, that, as between him and the Insurance Company, the words of the policy shall, if they differ from those of the application, be taken as evidencing, in that particular, the contract by which both are bound. And, where, as here, the terms employed in the policy are reasonably susceptible of a construction which does not include in the exception, stipulated by the Insurance Company in its own interest, the doing of an isolated act of extra hazard, such as we shall assume the evidence here, viewed most favourably for the defendant, might have been found to establish, that construction must prevail. *Ontario Metal Products Co.* vs. *Mutual Life Insurance Co.* (1); *Victory (R.M. of)* vs. *Saskatchewan Guarantee & Fidelity Co.* (2).

The appeal fails and must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Sanford, Harrison & Anglin.*
Solicitor for the respondent: *E. A. Reilly.*

1929

*Nov. 13.

HIS MAJESTY THE KING (RESPONDENT) ..... } APPELLANT;

AND

ADAM B. MACKAY, ET AL. (CLAIMANTS) .. RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Interest—Disallowance of, in fixing compensation for ship requisitioned by Crown under War Measures Act, 1914 (D.)—Governing principles as to allowance of interest.

The Crown, in April, 1918, pursuant to Order in Council passed under the *War Measures Act, 1914,* requisitioned the respondents' ship. The Exchequer Court of Canada ([1928] Ex. C.R., 149) fixed the compensation at $11,000 (as being the ship's value at time of requisition)

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

(1) [1924] S.C.R. 35, at p. 41; (2) [1928] S.C.R. 264, at p. 273. [1925] A.C. 344.

with interest thereon from date of requisition to date of judgment. The Crown appealed against the allowance of interest.

Held: The allowance for interest should be set aside. The right to interest does not depend on the income earning capacity of the property requisitioned. Where interest is allowed, it is on the ground of express or implied contract or by virtue of a statute; and no such ground existed here (the case was distinguishable from those where interest is allowed on value of land expropriated). Interest was really asked for here as damages for detention of the compensation money pending the ascertainment of what was due; and as such it could not be recovered.

APPEAL from the judgment of the Exchequer Court of Canada (Audette J.) (1), upon a reference under s. 7 of the *War Measures Act, 1914* (Dom.), fixing the compensation to be paid by the Crown for the requisition of the respondents' steamship *Sarnor;* which requisition was made by the Canadian Government on April 25, 1918, pursuant to an Order in Council passed by virtue of the said Act. The judgment appealed from fixed the compensation at $11,000 (as being the value of the ship at the time of requisition) with interest thereon, at the rate of 5% per annum, from April 25, 1918 (the date of requisition) to the date of judgment.

The appeal to the Supreme Court of Canada was limited to the question of said allowance of interest, the Crown contending that interest was not allowable.

O. M. Biggar, K.C., for the appellant, submitted that the question was concluded in appellant's favour by *Canadian Drug Co.* v. *Board of the Lieutenant-Governor in Council* (2) and *Swift & Co.* v. *Board of Trade* (3).

W. F. Chipman, K.C., and *Christopher C. Robinson, K.C.,* for the respondents, submitted that the question was whether there was anything to prevent the court from awarding interest as part of the compensation; that the principle which was applied to cases of expropriation of land (as to which see *Inglewood Pulp & Paper Co.* v. *New Brunswick Electric Power Commission* (4), and *Seabord Air Line Ry. Co.* v. *United States* (5)) is applicable also to a ship; and that the case of goods (as in *Swift & Co.* v. *Board of Trade* (6)), where the only ground for claiming interest is that the claimant has been kept out of his

(1) [1928] Ex. C.R. 149.
(2) [1925] S.C.R. 23, at p. 39.
(3) [1925] A.C. 520. See especially pp. 532, 544, 548.
(4) [1928] A.C. 492.
(5) (1923) 261 U.S. 299.
(6) [1925] A.C. 520.

1929

THE KING v. MACKAY.

money, is not analogous; a ship, like land, is income earning property; the expropriator is both in possession of the ship and in receipt of the earnings, and the former owner is deprived of both; the reasons for awarding interest in the case of land exist equally in the case of a ship, and, since there is no statutory provision to prevent it, the same rule should be applied.

Newcombe J., in the course of the argument, referred to *Maine & New Brunswick Electrical Power Co. Ltd.* v. *Hart* (1).

Upon the conclusion of the argument, the judgment of the Court was delivered orally by

ANGLIN C.J.C.—We are all of the opinion that the appeal must succeed. The allowance for interest will be set aside. Otherwise, of course, the judgment below stands, there being no appeal as to the principal sum.

The right to interest does not depend on the income earning capacity of the property requisitioned. Where interest is allowed, it is on the ground of contract, express or implied, or by virtue of a statute. It is allowed on the purchase money of land which is the subject of a sale; or on the value of land which is the subject of expropriation under certain statutes—but that is upon the ground of implied contract which is deemed to arise on the giving of "notice to treat."

Here there is nothing of the kind. This is a case of appropriation of personal property. No provision is made for payment of interest. There is no case of implied contract; and the statute under which the requisition was made does not provide for interest.

Interest is really asked for here as damages for detention of the compensation money pending the ascertainment of what is due. As such, it cannot be recovered.

The appeal is allowed with costs.

Appeal allowed with costs.

Solicitor for the appellant: *O. M. Biggar.*

Solicitors for respondent MacKay: *Langs, Binkley & Morwick.*

Solicitors for Canada Steamship Lines, Limited, successors in interests to respondents, Bonham and Johnson: *Brown, Montgomery & McMichael.*

(1) [1929] A.C. 631.

DAVID McKEE AND ELIZABETH McKEE (PLAINTIFFS) ..... } APPELLANTS;

AND

THE CITY OF WINNIPEG (DEFENDANT) ..... } RESPONDENT.

1929
*Oct. 7, 8.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Appeal—Jurisdiction—Appellants, husband and wife, asking for restoration of judgment at trial for damages, awarded by separate amount to each, for injury to wife—Separate causes of action—Insufficiency of each amount to give jurisdiction to Supreme Court of Canada—Appeal quashed—Special leave to appeal refused.

Plaintiffs, husband and wife, sued for damages by reason of injury to the wife through her slipping on an icy sidewalk, owing, as alleged, to defendant's gross negligence. At trial, on the jury's findings, judgment was recovered against defendant, by the husband for $1,000, and by the wife for $1,500. This judgment was reversed by the Court of Appeal (38 Man. R. 1), which directed that the action be dismissed. Plaintiffs appealed to this Court, asking that the judgment at trial be restored.

Held: The appeal must be quashed for want of jurisdiction. In the statement of claim the claims of the two plaintiffs were distinct, the husband claiming in respect of loss personal to him only, and the wife in respect of her personal loss. There were two separate causes of action, though in respect of the same tort (*Admiralty Commissioners* v. *SS. Amerika*, [1917] A.C. 38, at pp. 54-55, referred to). The judgment at trial, now sought to be restored, while in form only one judgment, was in substance and effect two judgments; and the amount awarded to each plaintiff must be looked at separately to determine, in each case, as to its sufficiency to give jurisdiction to this Court.

Quaere as to the case (the present case was not one) of a joint action in which the husband claimed on behalf of himself and his wife.

Application to this Court for special leave to appeal (special leave had been refused by the Court below) was refused.

APPEAL by the plaintiffs from the judgment of the Court of Appeal for Manitoba (1), which reversed the judgment of Kilgour J. (on the verdict of a jury) for recovery of damages against the defendant.

The plaintiffs were husband and wife. By paragraph 2 of the statement of claim it was alleged that the plaintiff Elizabeth McKee, while walking on a sidewalk in the city of Winnipeg, and owing to the gross negligence of the de-

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

(1) 38 Man. R. 1; [1928] 3 W.W.R. 561.

1929

McKEE v. CITY OF WINNIPEG.

fendant, slipped on the sidewalk, which was covered with ice and snow, and was thrown violently to the ground. Paragraphs 3 and 4 set out her injuries and sufferings. Paragraphs 5, 6, 7 and 8 set out the alleged condition of the sidewalk and the alleged gross negligence of the defendant in respect thereof. By paragraph 9 it was alleged that

By reason of the said accident the plaintiff David McKee was deprived of and will lose the comfort, society, assistance and service of his wife and was obliged to pay hospital bills, to employ a nurse and a servant, and will in future be obliged to pay a nurse and a servant, and has incurred and will incur expenses and liability for medical, surgical, nursing and other attendance for his wife and has been and will be put to further and other expenses.

Paragraph 10 gave the "particulars of the present and estimated loss, expenses and liability incurred by the plaintiffs" in an itemized list, including hospital bill, ambulance, medical attendance, nurse, housekeeper, etc., totalling $1,046.25. Paragraph 11 dealt with the notice to the City of the accident.

The prayer for relief claimed

(*a*) [Declaration with regard to notice given defendant of the accident.]

(*b*) Special damages in the amount of $1,046.25;

(*c*) For the plaintiff Elizabeth McKee general damages in the sum of $25,000;

(*d*) For the plaintiff David McKee general damages in the sum of $2,000;

(*e*) The costs of this action;

(*f*) Such further and other relief as the nature of the case may require or as to this Honourable Court may seem meet.

The jury found that the accident was attributable to gross negligence on the part of the City, and, on the questions as to damages, answered as follows:

4. In what amounts do you assess damages? (*a*) For the male plaintiff? Answer: One thousand dollars.

(*b*) For the female plaintiff? Answer: Fifteen hundred dollars.

Judgment was entered for the plaintiffs in accordance with said verdict, with costs of suit, and it was adjudged that the plaintiff David McKee recover against the defendant one thousand dollars ($1,000) and the plaintiff Elizabeth McKee recover against the defendant fifteen hundred dollars ($1,500), and that the said plaintiffs recover against the defendant their costs of suit * * *.

The defendant appealed to the Court of Appeal, which held (1) that, on the evidence and the law, the jury were not justified in finding the defendant guilty of gross negligence, and that it was not liable. The defendant's appeal

(1) 38 Man. R. 1; [1928] 3 W.W.R. 561.

was allowed and the action dismissed. The plaintiffs appealed to the Supreme Court of Canada, and asked that the verdict of the jury and the judgment thereon in favour of the plaintiffs be restored.

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

J. Preudhomme K.C. for the respondent.

At the opening of the argument the Court raised the question of its jurisdiction, and argument was heard upon this point, the appellants' counsel also asking for special leave to appeal (special leave to appeal to this Court had been refused by the Court of Appeal, as stated *infra,* in the judgment now reported). Judgment on these questions was reserved, and at the opening of Court on the following day the judgment of the Court was orally delivered by

ANGLIN C.J.C.—As to the case of *McKee* v. *The City of Winnipeg,* which was partly heard yesterday afternoon—on the question of jurisdiction (raised by the Court) and on an application for special leave to appeal—the Court is now prepared to dispose of it, having had an opportunity to consider it overnight.

In this action, David McKee and Elizabeth McKee are both plaintiffs, the latter being the wife of the former.

The statement of claim sets out the circumstances of the accident which happened to Mrs. McKee, and goes on to specify her injuries and sufferings, etc., as the result of the fall which she sustained; then the 9th paragraph sets out, as the basis of the claim of the male plaintiff, loss of comfort, society, assistance and services of his wife, and expenses for hospital bills, nurse, servant, medical attendance for her, etc.

When we come to the prayer for relief, we find that both plaintiffs claim special damages in the amount of $1,046.25, being the total of the items for hospital and other expenses incurred stated in paragraph 9, as particularized in paragraph 10. Then the prayer proceeds "For the plaintiff Elizabeth McKee general damages in the sum of $25,000," and "For the plaintiff David McKee general damages in the sum of $2,000."

So that in the statement of claim it is made quite apparent that the claims of the two plaintiffs are distinct. David

1929

McKEE v. CITY OF WINNIPEG.

Anglin C.J.C.

McKee claims in respect of loss personal to him only; and his wife claims in respect of her personal loss.

On that state of the pleadings the case went to trial, and the jury brought in a verdict for both plaintiffs for damages, awarding to the male plaintiff—very apparently on his claim as set out in paragraph 9—the sum of $1,000, and to the female plaintiff the sum of $1,500, on her claim for general damages.

It is quite obvious that neither award is enough to give jurisdiction to this Court, the appellants' claim here being to have these awards, which were set aside in the Court of Appeal, restored.

In that state of affairs, application was made to the Court below for special leave to appeal to this Court, which was refused on two grounds:

(1) That leave was unnecessary, as over $2,000 was involved;

(2) That, in any event, there was no matter of public interest involved which would justify such leave being given.

In the refusal on the second ground we entirely concur.

As to the first ground—not only the verdict, as I have stated, but the judgment based on that verdict provides that the several damages respectively found by the jury be recovered by each plaintiff, and is, in effect, two judgments in one. While in form there is only one judgment, we must get at the substance of the matter; and if, in substance, there are two judgments, we must look, as has been frequently decided, at each separately and each appellant must have had judgment for an amount sufficient to give jurisdiction here, when they ask to have such judgments restored.

A joint action in which the husband claimed on behalf of himself and his wife is conceivable; and if such a case were before us it might require careful consideration. Mr. Tilley ingeniously argued that we have here such a case. But that is not the case here. There are two separate causes of action, though in respect of the same tort. *Admiralty Commissioners* v. *SS. Amerika* (1). One thousand dollars

(1) [1917] A.C. 38, at pp. 54-5.

1929

McKEE v. CITY OF WINNIPEG.

Anglin C.J.C.

was recovered by one claimant and fifteen hundred by the other; and that is the judgment they would have restored.

Counsel for the respondent stated at bar that he had on the application for special leave below, taken the objection to the jurisdiction of this Court which I have stated. He may have done so; but he failed to take that ground here, in his factum or otherwise. As he might have moved to quash the appeal, so the appellant might have moved to affirm jurisdiction. Either motion would have obviated great expense.

Under all the circumstances, the appeal must be quashed and there will be no order as to costs.

The application for leave to appeal will also be refused without costs.

Appeal quashed.

Solicitors for the appellants: *Anderson, Guy, Chappell & Turner.*

Solicitor for the respondent: *Jules Preudhomme.*

1929

*April 26, 29.
*Nov. 4.

EDWIN I. CLARKE (PLAINTIFF)..... APPELLANT;

AND

CITY OF EDMONTON (DEFENDANT).. RESPONDENT;

AND

ATTORNEY-GENERAL OF CANADA (INTERVENANT)..... } RESPONDENT.

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

Accretion—Bench formed by action of water at river bank claimed by riparian owner—Whether bench still part of river bed—Whether true accretion—Formation in a "gradual and imperceptible manner"—Ownership of river bed—Alberta law as to accretion—Boundary of land at the river—Construction of title and plan—Part of original river bank still visible above bench; effect thereof as to rule of accretion applying.

Plaintiff, as riparian owner, claimed as an accretion to his land (in Edmonton, Alberta) a bench which, through action of the water of the North Saskatchewan river in depositing sand, silt, etc., had accumulated against and permanently united with the bank at the river, and he sued defendant city for damages for trespass thereon.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

1929

CLARKE v. CITY OF EDMONTON.

Held (1) On the evidence as to the nature of the soil and vegetation on the bench, it no longer formed part of the river bed. Criteria for determining what is and what is not the bed of a river discussed.

(2) The bench (on the evidence as to manner of its formation) was a true accretion. (What constitutes an accretion discussed). The fact that the bench was formed in 15 years or less was not inconsistent with the view that it was formed in a "gradual and imperceptible" manner. Also, there may be a true accretion notwithstanding that after a flood it can be ascertained by measurement or even observed by visual examination that a few inches, or even a few feet, have been added laterally to the border line. The test is, not the number of years it took the bench to form, nor yet whether an addition to the shore line may be apparent after each flood, but whether, taking into consideration all the incidents contributing to the addition, it properly comes within what was known to the Roman law as "alluvion," which implies a gradual increment imperceptibly deposited, as distinguished from "avulsion" which implies a sudden and visible removal of a quantity of soil from one man's land to that of another, which may be followed and identified, or the sudden alteration of the river's channel. The rule that accretions must be "gradual, slow and imperceptible" only defines a test relative to the physical conditions of the place to which it is applied.

(3) Assuming (but not deciding) that the common law presumption that a riparian owner owned the bed of a non-tidal but navigable river *usque ad medium filum aquae* was not incorporated into the law of the Territories (because not "applicable"—i.e., suitable to the conditions existing—within R.S.C., 1886, c. 50, s. 11), and that the Crown owned the bed of the river in question, yet the English law as to accretions did become the law of the Territories (its "applicability" discussed; the right to accretions from a navigable river does not depend upon the ownership of the bed thereof) and is the law of Alberta; and by that law (which was binding on the Crown) all accretions became the property of the riparian owner to whose land they attached.

(4) Plaintiff's title gave him "all that portion of" lot 21 "lying north of" a certain road, and, upon construction of the plan with reference to which Crown patent of lot 21 had been issued, the northern boundary thereof was the river, i.e., the edge of the river bed. Assuming, on the evidence and admissions, that at one time the most northerly part of lot 21 comprised a steep bank to the foot of which the water came (but the line to which the water then came, wherever it was, and which then constituted the northern boundary of lot 21, had since been obliterated by deposit of sand and silt), the fact that the upper part of that old bank was still plainly visible above the bench did not prevent the rule as to accretions applying (*Hindson* v. *Ashby*, [1896] 2 Chy. 1, at p. 27, distinguished on the facts).

(5) The bench, therefore, belonged to plaintiff, and he was entitled to damages for trespass thereon.

Judgment of the Appellate Division, Alta. (23 Alta. L.R. 233) reversed.

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1)

(1) 23 Alta. L.R. 233; [1928] 1 W.W.R. 553.

which, affirming in the result the judgment of Tweedie J., held that the plaintiff was not entitled to a certain bench of land, claimed by him to have become part of his land by accretion, and in respect of which bench he had sued the defendant city for damages for trespass in depositing garbage thereon.

By direction of the Appellate Division, the Attorney-General of Canada was notified, and counsel for him appeared before it and presented argument.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was allowed with costs.

G. H. Steer for the appellant.

H. H. Parlee, K.C., for the respondent, the City of Edmonton.

E. Lafleur, K.C., for the Attorney-General of Canada.

The judgment of the Court was delivered by

LAMONT J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (Beck, J.A. dissenting) (1) dismissing an appeal by the plaintiff from a judgment of Tweedie, J., in an action for damages for trespass to the plaintiff's land. The material facts are as follows:—

About the year 1920 the plaintiff purchased a piece of land on the south side of the North Saskatchewan river in the city of Edmonton and, on July 24, 1924, he became the registered owner thereof. This land is described in the plaintiff's certificate of title as

> All that portion of River Lot Twenty-one (21) of the Edmonton Settlement, in the said Province, lying North of the North boundary of the Dowler Hill Road, as the said Road is shewn on Plan 7258X, of record in the Land Titles Office for this Land Registration District.

Plan 7258X is a plan of subdivision of the northern part of Lot 21, and it shews Dowler Hill Road as running along the Saskatchewan river close to the river on the east side of the lot but not so close on the west. The plaintiff's land is, therefore, in the shape of a narrow triangle. It is a portion of what is known as Gallagher's Flats, which, as the evidence shews, are situated on what was formerly a part

(1) 23 Alta. L.R. 233; [1928] 1 W.W.R. 553.

1929

CLARKE v. CITY OF EDMONTON.

Lamont J.

of the bed of the river, but which, years ago, was reclaimed therefrom. On the river side of the plaintiff's land at its western boundary there was, in 1910 when the land at that point was examined by Mr. Haddow, the defendant's engineer, a steep bank or slope 24·7 feet high, the drop being made in a horizontal distance of twenty feet. It does not appear that Mr. Haddow measured any other part of the northern boundary of Lot 21, but it is not disputed that there was a bank along that boundary. At the time of Mr. Haddow's examination, the water's edge was 131 feet from the toe of the bank on an almost imperceptible slope which had a drop of only two and a half feet in that distance. Through the action of the water since 1910 there has accumulated against the bank and permanently united with it a ridge or bench comprised of soil, sand, silt and other substances. This bench is some 1,400 feet long and attains at one point a width of 80 feet. Near the western boundary of Lot 21 the top of this bench is 13 feet above the level of the water, but the bench gradually decreases in height until, near the eastern boundary, it is only some seven feet above the water level. On a portion of the bench toward its eastern end and covering an area 275 feet long by from 35 to 56 feet wide, the City of Edmonton had, since 1920, been depositing ashes and other garbage. In order to reach the bench the city's teams had to cross a portion of the land described in the plaintiff's certificate of title. In June, 1925, the plaintiff discovered for the first time as he says, that the city was depositing its garbage on the bench. He immediately interviewed the city authorities and claimed the bench as his own property on the ground that as riparian owner it constituted an accretion to his land. In September, 1925, he brought this action against the city, claiming damages for trespass to his property. The trial judge awarded the plaintiff $50 damages for trespass to the land included in his certificate of title which the city's teams had crossed, but dismissed that part of his action in which he claimed damages for trespass to the accretion or bench, holding, in effect, that the plaintiff did not own nor had he possession of the bench. From that dismissal the plaintiff appealed to the Appellate Division. That court, after hearing argument on behalf of both parties, considered that the Crown, as owner of the bed of the river, should be given

an opportunity of being heard, and, consequently, directed notice to be served upon the Attorney-General of Canada. The Attorney-General intervened and was heard by his counsel. After argument the members of the court viewed the bench, examined its soil and vegetation, and unanimously came to the conclusion that the bench no longer constituted part of the river bed. The majority of the court, however, held that as the bench had been formed within the last twelve or fifteen years there could not have been, in this case, that gradual and imperceptible addition to the plaintiff's land in the ordinary course of the operations of nature which a true accretion requires. The majority of the court also seem to have been of the opinion that there could be no accretion in its true legal sense without the obliteration of the original boundary line and that in this case the original boundary line was still in existence and plainly visible. The plaintiff's appeal was, therefore, dismissed. From that dismissal the plaintiff now appeals to this court.

Two questions arise in this appeal: (1) Had the bench at the time the city dumped its garbage thereon become a true accretion, and (2) If so, had the plaintiff acquired the ownership thereof so as to enable him to maintain an action for trespass against the city?

(1) The matters to be considered in determining whether a given piece of land forms part of the bed of a river or has been wrested therefrom were stated by Romer, J. in *Hindson* v. *Ashby* (1) as follows:—

> I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growth and its user.

His Lordship also quoted the following passages from the judgment of Curtis, J., of the Supreme Court of the United States, in the case of *Howard* v. *Ingersoll* (2), which he said were in accordance with English law on the point. Curtis, J., said:—

> The banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually

(1) [1896] 1 Chy. 78. at p. 84.

(2) (1851) 13 Howard, 381, at pp. 427-428.

1929

CLARKE v. CITY OF EDMONTON.

Lamont J.

covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. * * *

But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water.

The case of *Hindson* v. *Ashby* (1) was, on appeal, reversed on the facts (2), but the criteria laid down by Romer, J., for determining what is and what is not the bed of a river were approved by the Court of Appeal.

The bench in question was formed by the action of the waters of the river in depositing sand, silt and other substances, against the bank or slope on the north side of the plaintiff's land. This deposit kept increasing in height until it required an excessive flood to cover it with water. The bench is 13 feet high at the west or upstream end; 11 feet high where the garbage is dumped and some seven feet high at its eastern end, and it covers the lower part of the bank or slope to the extent of these varying heights. On its north or river side it is a cut bank dropping straight down to the water. The top of the steep slope which, prior to the formation of the bench, was popularly referred to as the "south bank of the river" is higher than the bench and stands out above it varying in height from 11 feet at the west end to from six to eight feet at the east. It is thus clearly visible above the bench for its whole length.

At the trial considerable evidence was given as to the nature of the soil of the bench; the character and extent of the vegetation thereon and the fluctuations to which the river was, and is, subject. This evidence, in my opinion, established that the soil of the bench was precisely of the

(1) [1896] 1 Chy. 78. (2) [1896] 2 Chy. 1.

same nature as the soil of Gallagher's Flats, which, admittedly, is upland, and that the vegetation of the bench was similar in character to that of the uplands to the south but much younger. Some vegetation on the bench shewed a growth of six or seven years, while on Gallagher's Flats the trees would require for their growth some 20 or 30 years. None of the vegetation on the bench was water vegetation. Mr. Haddow admitted that the soil and vegetation of the bench were of the same character as the land to the south, and further admitted that the westerly 30 or 40 feet of the bench had been wrested from the river and no longer constituted part of the river bed. But he contended that the part of the bench on which the city's garbage had been dumped was still under the influence of the river. On cross examination he gave the following testimony:—

Q. Your contention is that because this land is flooded two or three days during the summer, which is the longest period since 1915, that it is not wrested from the river?

A. That is my contention exactly, that certainly is my sole contention.

The evidence of Mr. Pinder shews that in 1915 there was an excessive flood which covered not only the bench but Gallagher's Flats as well. In 1916 and 1917 the bench was flooded for a day each year. In 1918 and 1919 it was not flooded. In 1920 the water may have rested on the top of the bench for a day or two in May, but this is not certain. In 1921 and 1922 the bench was not flooded. In 1923 it was flooded for two days. In 1924 it was not flooded. In 1925 the flood was exceptional and for two days the waters covered the bench. The bench, therefore, is liable to be covered with water for a day or two in any year in which there is an exceptional flood. Taking the evidence as a whole, it, in my opinion, strongly supports the view that the bench no longer formed part of the river bed as the Appellate Division unanimously found.

The bench being no longer a part of the river bed the next consideration is, was it formed by that slow and gradual operation of the waters of the river in the course of nature which is necessary to the formation of a true accretion?

What constitutes an accretion has received judicial consideration in many cases, among others, *Attorney-General*

1929

CLARKE v. CITY OF EDMONTON.

Lamont J.

of Southern Nigeria v. *John Holt & Co. (Liverpool) Ltd.* (1); *Attorney-General* v. *McCarthy* (2); *Rex* v. *Yarborough* (3); *Foster* v. *Wright* (4); *Brighton and Hove General Gas Company* v. *Hove Bungalows, Limited* (5); *Trafford* v. *Thrower* (6). The result of the discussions may, I think, be stated as follows:

The term "accretion" denotes the increase which land bordering on a river or on the sea undergoes through the silting up of soil, sand or other substance, or the permanent retiral of the waters. This increase must be formed by a process so slow and gradual as to be, in a practical sense, imperceptible, by which is meant that the addition cannot be observed in its actual progress from moment to moment or from hour to hour, although, after a certain period, it can be observed that there has been a fresh addition to the shore line. The increase must also result from the action of the water in the ordinary course of the operations of nature and not from some unusual or unnatural action by which a considerable quantity of soil is suddenly swept from the land of one man and deposited on, or annexed to, the land of another.

The fact that the increase is brought about in whole or in part by the water, as the result of the employment of artificial means, does not prevent it from being a true accretion, provided the artificial means are employed lawfully and not with the intention of producing an accretion, for the doctrine of accretion applies to the result and not to the manner of its production. *Stanley* v. *Perry* (7); *Brighton and Hove General Gas Co.* v. *Hove Bungalows, Limited* (8).

There was evidence that in 1925 a deposit of silt had been made on the bench amounting in places to a depth of six inches, as a result of that year's flood, and the test pit dug by Mr. Haddow gave indication of an equal or greater deposit in a former year. Whether or not this latter deposit was due to flood conditions or to imperceptible accumulation in the course of nature, or to a combination of both, we can only conjecture. It was, however, argued

(1) [1915] A.C. 599.
(2) [1911] 2 Ir. R. 260.
(3) (1824) 3 B. & C. 91.
(4) (1878) 4 C.P.D. 438.
(5) [1924] 1 Chy. 372.
(6) (1929) 45 T.L.R. 502.
(7) (1879) 3 Can. S.C.R. 356.
(8) [1924] 1 Chy. 372.

that such extensive deposits could not reasonably be said to have been gradual and imperceptible in their formation. What amount of alluvial matter might, by imperceptible deposit, be added to the plaintiff's land in any one year has not been disclosed by the evidence. Much, it seems to me, would depend upon the river itself, its volume, the rate of the current and how densely it was saturated with alluvial matter. But, although these conditions might influence the deposit of alluvial matter, the important question is: Was the formation of the deposit perceptible in its actual progress from moment to moment?

In his evidence Mr. Haddow said that the bench had been formed by sediment which had been deposited as a result of the slackening of the current, and that its slackening had been caused by the current being thrown out in the river towards the north, causing the water towards the south side to slacken. He explained what, in his opinion, had taken place, as follows:—

> In 1915 exceptionally heavy flood conditions occurred and there was about eighty or one hundred feet of the northerly end of River Lot 17 scoured away and washed completely down stream. This perhaps had the effect of opening out the channel so that the main flow would follow more nearly the centre or north side of the river, leaving the south side of the river adjoining River Lot 21 in comparatively quiet water, affording facilities for the deposit.

Mr. Pinder, a surveyor, who gave evidence for the plaintiff, on cross examination testified as follows:

> Q. Would you be safe in saying that there has been a new bank forming gradually from time to time?
>
> A. There has been a gradual alluvial deposit from year to year.
>
> Q. How long have you been out here?
>
> A. I came out in 1907.

and Mr. Pearson, likewise a surveyor, said:

> Q. In what way, in your opinion, has that bench been built up?
>
> A. By silt from the river deposited in the course of high water.
>
> Q. Has it been built up in such a way, in your opinion, as to be perceptible from moment to moment?
>
> A. Not in my opinion.

He could not say, however, how gradually the accumulation had taken place.

Another surveyor, Mr. Belyea, who gave evidence for the city, stated that "it had gradually grown up." The test pit disclosed that the deposit contained layers of alluvial matters of various thicknesses, one, at least, of which was 12 inches. But the time it took these layers to accumulate, whether months or years, we do not know. The

1929

CLARKE v. CITY OF EDMONTON.

Lamont J.

proper inference to be drawn from all the evidence, in my opinion, is that for some 10 or 11 months in each year from the time the accumulation began until the bench had attained a considerable height, the sand and silt of the river was gradually and imperceptibly deposited against the steep bank or slope on the northern part of the plaintiff's land. Then for a few days or perhaps weeks flood conditions prevailed, during which an increased quantity of alluvial matter was brought down by the river. Much of this additional matter would, in all probability, be carried down by the current, but some of it, no doubt, would find a resting place upon the bench with the result that the deposit there at such time would be greater than if flood conditions had not existed. But even so, that does not prove that the deposit was perceptible in its actual progress, and the only evidence we have, in my opinion, points the other way. Neither can it affect the ownership of the deposit made gradually to the plaintiff's land during ten or eleven months in each year when there was an absence of flood conditions, for, as said by Gibson J. in *Attorney-General* v. *McCarthy* (1):

> each insensible addition attaches to the principal land, and though in result, the aggregate of additions may shew a substantial enlargement of the original territory, that cannot displace retrospectively the ownership of the previous minute accruing accretions.

In other words, where the increase is imperceptible in its progress, that increase becomes the property of the owner to whose land it attaches as it is formed; it is vested in him *de die in diem* and no additional increase resulting from flood conditions can deprive the owner of the increase which had already vested in him. Flood conditions in the North Saskatchewan river must be expected every year when the summer sun or the rains melt the snows in the mountains through which the river has its course.

That the bench as it exists to-day was formed between the year 1910 and the date of the trial in 1925, in my opinion admits of no doubt. Mr. Haddow says it did not exist in 1910. The evidence of the plaintiff is that in 1920 it was in existence and was then very much as it is to-day. The test pit dug by Mr. Haddow shewed ashes—presumably from the dump made by the city—at a depth of three

(1) [1911] 2 Ir. R. 260, at pp. 298-299.

feet from the top. The bench therefore, at any rate except its upper three feet, was formed between 1910 and 1920. Where the city dumped its garbage the bench is 11 feet high. Does the fact that the lower eight feet of the bench was formed in ten years justify the conclusion that the accumulation must have been perceptible in its progress from moment to moment or from hour to hour during that time? With great deference I do not think it does. The river in its long course west of Edmonton is fed by a great many streams, these, in turn, except during the winter, are fed by innumerable rivulets of melted snow which flow down the sides of the mountains, each carrying with it some of the soil of the mountain down which it runs. This soil is borne to the river and is carried along by the current until it comes to a place where the current slackens, when it sinks to the bottom. The only evidence before us of a considerable quantity of soil being washed up by the sudden action of the waters of the river is that related by Mr. Haddow when he says, that in 1915 an unusual flood "scoured away and washed completely down stream" 80 or 100 feet of the point on Lot 17. Mr. Haddow's evidence. however, is to the effect that the soil from this point was not deposited against the plaintiff's land, for he says that the bench was formed by sediment which had been deposited as a result of the slackening of the current. This itself was due to the fact that after the point had been washed away the current ran farther to the north leaving the water on the plaintiff's side quieter than before, and that this quiet water facilitated the deposit. The fact that the bench was formed in fifteen years, or less, is not, in my opinion, inconsistent with the evidence of the witnesses who gave it as their opinion that the formation of the bench had been gradual and had not been perceptible from moment to moment. The test, in my opinion, is not the number of years it took the bench to form, nor yet whether an addition to the shore line may be apparent after each flood, but whether, taking into consideration all the incidents contributing to the addition, it properly comes within what was known to the Roman law as "alluvion", which implies a gradual increment imperceptibly deposited, as distinguished from "avulsion", which implies a sudden and visible removal of a quantity of soil from one man's land to that of another,

1929

CLARKE v. CITY OF EDMONTON.

Lamont J.

which may be followed and identified, or the sudden alteration of the river's channel.

Considering that in this case there is no evidence that the formation of the bench has been assisted by anything in the nature of an "avulsion", and considering that there is evidence pointing to its formation in a gradual and imperceptible manner; and, furthermore, that the additional alluvial matter deposited during flood time was only what was to be expected in the couse of nature, I agree with the late Mr. Justice Beck, who, in his able dissenting judgment said (1):—

> It is far from enough to prevent a true accretion to be able to say that, for instance, after a flood it can be ascertained by measurement or even observed by visual examination that a few inches or even a few feet have been added laterally to the border line.

This view is in accord with what was laid down by the Privy Council in *Secretary of State for India* v. *Raja of Vizianagaram* (2), where their Lordships said:—

> The extent of the river and the operation of its currents in forming alluvial tracts during the flood season must be borne in mind with reference to questions arising in this case.
>
> * * * * *
>
> In dealing with the great rivers in India and comparing them with the rivers in this country, it is necessary to bear in mind the comparative rapidity with which formations and additions take place in the former.
>
> * * * * *
>
> Their Lordships do not find it necessary * * * to discuss the exact meaning of the word "imperceptible" in the English rule which provides that all accretions must be "gradual, slow and imperceptible," for assuming the applicability of the English rule, "slow" and "imperceptible" are only qualifications of the word "gradual," and this word with its qualifications only defines a test relative to the conditions to which it is applied. In other words, the actual rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India. The application of the rule is, in their Lordships' opinion, correctly laid down in the judgment of Ayling J. in the present case when he says: "It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the accretion is due to the normal action of physical forces; and the conditions of Indian and English rivers differ so much that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (3)."

In this latter case their Lordships point out that in proposing to apply the juristic rules of a distant time or

(1) 23 Alta. L.R., at p. 254.

(2) (1921) 49 Indian Appeals, 67, at pp. 71-73.

(3) L.R. 41 I.A. 221, at pp. 243 *et seq.*

country to the conditions of a particular place at the present day, regard must be had to the physical conditions to which the rule is to be adapted.

The bench being a true accretion the next question is, to whom did it belong?

The Saskatchewan river is admittedly non-tidal and navigable in fact. The Province of Alberta, through which it flows, was formerly a part of Rupert's Land, and the North Western Territory, which became a part of the Dominion of Canada on July 15, 1870. From that date they were under the jurisdiction of the Parliament of Canada.

By s. 3 of c. 25 of the Statutes of 1886 (s. 11 of the *North West Territories Act*, R.S.C. 1886, c. 50) the Parliament of Canada enacted as follows:—

> 11. Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as the same existed on the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy, shall be in force in the Territories, in so far as the same are applicable to the Territories. * * *

That Act was assented to by the Crown, so all the rights which the law of England applicable to the Territories gave to a subject as against the Crown in respect of the ownership of the bed of a river, and the accretions to its banks, were binding on the Crown in the North West Territories. The laws of England thus introduced included both the common law and the statutory enactments as far as either were applicable. By "applicable" here is meant suitable to the conditions existing in the Territories. It is, therefore, essential to ascertain what was the law of England on July 15, 1870, in respect of accretions to the land of a riparian owner bordering on a river non-tidal but navigable in fact.

The law of England, as stated by Coulson & Forbes, in Law of Waters, 4th ed., at pp. 77 and 91, is as follows:—

> The bed of all navigable rivers where the tide flows and reflows, and of all estuaries and arms of the sea is by law vested *primâ facie* in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the right of navigation which belongs by law to the subjects of the realm, or the right of fishery, which is *primâ facie* common to all.
>
> * * * * *
>
> All rivers and streams above the flow and reflow of the tide are *primâ facie* private, though many have become by immemorial user or by Act of Parliament subject to the public rights of navigation.

1929

CLARKE v. CITY OF EDMONTON.

Lamont J.

There are two presumptions with regard to the ownership of the bed of non-tidal waters—one, that the riparian owners own half the bed of the river *usque ad medium filum aquae;* the other, that the owner of the right of fishing in the river is owner of the soil, and this displaces the presumption that would otherwise arise in favour of the riparian owners being the owners of the bed of the river *usque ad medium filum aquae.* The presumption that the riparian proprietor owned to the centre of the bed of all non-tidal waters applied to navigable as well as non-navigable rivers. Notwithstanding, however, that the bed of tidal waters was vested in the Crown and the bed of non-tidal waters was vested in the riparian proprietors, the law of England was that all accretions formed gradually and imperceptibly in the ordinary course of the natural operation of the water became the property of the owner of the land to which the accretion became attached, but if an accretion was the result of a sudden and considerable accumulation of soil, it could not be claimed by the riparian owner against whose land it accumulated. Blackstone, Vol. 2, at p. 262; *Rex* v. *Yarborough* (1).

In *In re Hull and Selby Railway* (2), the law as to accretions was held to apply alike to King and subject.

It was, however, argued that the common law presumption that a riparian proprietor owned the bed of a non-tidal but navigable river *usque ad medium filum aquae* did not become the law of the North West Territories because unsuitable to the conditions there existing, and reference was made to a number of cases including *Keewatin Power Co.* v. *Kenora* (3), in which the arguments and authorities on the point were exhaustively examined by my Lord the Chief Justice (then Anglin J.). In my opinion, it is not necessary in this case to pass upon that question, for, assuming against the plaintiff that the presumption was not incorporated into the law of the Territories and admitting that the Crown is the owner of the bed of the Saskatchewan River, the city has still to meet the law as to the ownership of accretions, which, as I have said, was, in England, binding on the Crown. If the law of England as to accretions was applicable to the Territories, then all accretions there became the property of the riparian owner to whose land they attached. The applicability of the law

(1) (1824) 3 B. & C. 91. (2) (1839) 5 M. & W. 327.
(3) (1906) 13 Ont. L.R. 237.

was challenged on the ground that the law depended for its vitality on the fact that the riparian proprietor was the owner of the bed of the river. In my opinion this is not so. The right to accretions is one of the riparian rights incident to all land bordering on the water. The rule is dependent, as set out in *In re Hull & Selby Railway* (1), on two principles: viz., (1) that that which cannot be perceived in its progress is taken to be as if it had never existed, and (2) the necessity for some such rule of law for the permanent protection and adjustment of property. That the right to accretions from a navigable river does not depend upon the ownership of the bed thereof is made clear in *Lyon* v. *Fishmongers' Company* (2), where, at p. 683, Lord Selborne said:—

> With respect to the ownership of the bed of the river, this cannot be the natural foundation of riparian rights properly so called, because the word "riparian" is relative to the bank, and not the bed, of the stream; * * *

It was also urged that if the court held that the *ad medium filum* presumption of the common law was not applicable to fresh water conditions in the Territories, then, inasmuch as that presumption and the rule as to accretions had both been adopted from the civil law the court should hold the rule as to accretions also inapplicable. This contention is untenable. In enacting s. 11 Parliament was adopting the law of England as it actually existed irrespective of the sources from which it had been derived, and the only limitation placed on the adoption of that law was as to its applicability. In my opinion the English law as to accretions was applicable and became the law of the Territories.

In this connection it is interesting to note that in India, where a number of the rivers more nearly approximate in size and character to the North Saskatchewan than do those of England, the law applicable to accretions was laid down by the Privy Council in *Sri Balsu Ramalaksmamma* v. *Collector of Godaveri District* (3), as follows:—

> There does not appear to be in Madras, as in Bengal, an express law embodying the principle that gradual accretion enures to the land *which attracts it;* but the rule, though unwritten, is equally well established.

(1) (1839) 5 M. & W. 327. (2) (1876) 1 App. Cas. 662.
(3) (1899) L.R. 26 I.A. 107, at p. 111.

1929

CLARKE v. CITY OF EDMONTON.

Lamont J.

There remains to consider only the argument that because some six or eight feet at the top of the old bank still stands out clear and visible above the bench, the rule as to accretions has no application. In support of the argument we were referred to the dictum of A. L. Smith L.J., in *Hindson* v. *Ashby* (1), where, at p. 27, His Lordship said:—

> I very much doubt if the plaintiffs can invoke the doctrine of accretion as applying to a case where, as here, the old line of demarcation between the plaintiffs' land and the river has always been in existence and still remains patent for all to see. I allude to the old 6 ft. bank.

The argument as applied in the present case is, in my opinion, based upon a misconception as to what constituted the northern boundary of the plaintiff's land. His title gives him " all that portion of River lot 21 * * * lying north of the north boundary of the Dowler Hill Road."

The patent of Lot 21 was issued by the Crown to George Donnell on June 26, 1887, and conveyed

> Lot numbered twenty-one, in Edmonton Settlement aforesaid, as shown upon a map or plan of the said Settlement, signed by Andrew Russell, for the Surveyor General of Dominion Lands, dated 25th May, 1883, and of record in the Department of the Interior, containing by admeasurement, One Hundred and Sixty-three Acres, more or less.

This map or plan which is the only evidence we have as to the boundary of Lot 21, shews that lot to have been twenty chains in width and to have been bounded on the south by a surveyed road. The west boundary is also a surveyed road running in a northerly direction at right angles to the south boundary a distance of 82·76 chains. The east boundary is parallel to the west boundary and is 79·02 chains in length. Both the east and west boundary lines run to the line which marks the river and no other delimitation of the northern boundary of the lot is given. This boundary line must, therefore, be determined by the rules of law and the construction to be placed upon the plan. A plan of land abutting on a river which shews the east and west boundary lines of a lot as running northerly to the river line and having no defined northern boundary, is, in my opinion, to be construed as having the river (i.e., the edge of the river bed) for the northern boundary of such lot. If, on the survey of Lot 21, the east and west boundary lines had stopped short of the river bed, there would have been a piece of land between the northern limit of Lot 21

(1) [1896] 2 Chy. 1.

and the bed of the river, in which case it would have been necessary for the surveyor to define the northern boundary of Lot 21. Not having done so, the presumption, in my opinion, is that the river was intended to be the northern boundary. This was the opinion of Mr. Haddow, who, on being shewn Plan 7258X, gave it as his opinion that the Saskatchewan river was the northern boundary of Lot 21. This view is also in harmony with the instructions given by the Department of the Interior to surveyors for their guidance in surveying Dominion lands, as shewn by extracts from the Manual of Instructions put in evidence at the trial, and which, in part, read as follows:—

193. Land abutting on tidal waters is bounded by the line of *ordinary high water*. In the case of an inland lake or stream, the boundary, if the parcel does not include the bed, is the *edge of the bed* of the lake or stream which edge is called the *bank*.

It was not shewn that these or similar instructions were in force at the time Lot 21 was surveyed or the original plan prepared, but as their admissibility and applicability were not questioned at the trial and as they support the construction which the plan otherwise would bear, it seems not unreasonable that they should now be received as indicating the meaning which the surveyor who made the plan intended to convey. I am of opinion, therefore, that the northern boundary of Lot 21 as shewn on the Russell plan was the edge of the river bed. Where that edge was in 1883 we do not know. We have no evidence whatever as to its location before 1910 at which time the water was 131 feet from the toe of the bank on a slope which dropped only $2\frac{1}{2}$ feet in that distance. From 1910 to 1920 there is an absence of evidence as to where the edge was to be found. On the argument before the Appellate Division counsel for the plaintiff, as appears from the judgment of the learned Chief Justice, admitted

that the evidence established that at the time of the survey in 1883 and of the grant by the Crown in 1887, the northern boundary of the lot was a high steep bank to the foot of which the river came, and that such bank still exists as before, plainly visible.

The material part of this admission is that "the northern boundary of the lot was a high steep bank", that is that the bank and not the river constituted the boundary line. As, however, the learned Chief Justice in his judgment expresses the opinion that the admission was not intended in that sense, and as all parties knew that the evidence did

1929

CLARKE v. CITY OF EDMONTON.

Lamont J.

not shew such to be the fact, I think we must conclude that all that the admission was intended and was understood to mean was that counsel for the plaintiff was willing to rest his case on the assumption that in 1883 the most northerly part of Lot 21 comprised a steep bank; that the water of the river came up to the foot of that bank, and that the upper part of that bank was still plainly visible. If it meant more than that it is contrary to the evidence. By that evidence it was clearly established that the only part of the bank still visible is the upper six or eight feet. Taking against the plaintiff the assumption here made, where was the edge of the river bed in 1883? Clearly it was not the top of the old bank nor yet its upper six or eight feet. It was the line at the foot to which the water came. That line, wherever it was, constituted the northern boundary of Lot 21. That line, however, was buried out of sight by eleven feet of sand and silt when the city dumped its garbage on the bench. This fact clearly distinguishes the case before us from *Hindson* v. *Ashby* (1), where it was established in evidence that the almost perpendicular six-foot bank there in question, to the foot of which the water came in 1803, still stood, and to the foot of which for a considerable part of the year the waters still came. The authorities on the question as to the application of the doctrine of accretion being conditional upon the non-existence of marks sufficient to distinguish the former water line, were reviewed by Pallas, C. B., in *Attorney-General* v. *McCarthy* (2), and he arrived at the conclusion that so long as the decision of the House of Lords in *Gifford* v. *Yarborough* (3) remains unchallenged, no lesser court is entitled to impose any such condition on its application. With this conclusion Romer J. in the *Hove Bungalows* case (4) agreed. As I have already pointed out, we are here not concerned with that question, because, not only has the edge of the river bed been obliterated, but also the most northerly part of Lot 21 to the extent of 11 feet up the slope. This slope or bank cannot be described as perpendicular, nor can its upper part be said to have been the edge of the river bed.

(1) [1896] 2 Chy. 1.
(2) [1911] 2 Ir. R. 260.
(3) (1828) 5 Bing., 163.
(4) [1924] 1 Chy. 372.

I am, therefore, of opinion that the bench in question was a true accretion; that it attached to the plaintiff's land by gradual and imperceptible degrees and obliterated the former line of demarcation between his land and the water. The bench, therefore, belongs to him and he is entitled to maintain this action against the city for trespass thereon.

As to damages: These are difficult to fix. The plaintiff claims the sum it would take to have the garbage removed from the bench although some of it is now buried three feet in the sand. The necessity for its removal is claimed by the plaintiff upon the ground that unless removed it will interfere with his obtaining gravel from the bed of the river opposite the place on which it is dumped. During the five years that the city was dumping garbage on the bench the plaintiff did not have any permit to remove gravel from the river and, without a permit, he could not lawfully remove it, and it was only a few weeks before the trial that he obtained a permit. It was further established that while there may be gravel at a certain place in the river during one year, the river may, the next year, wash it away. Under all the circumstances, I think $500 would amply repay the plaintiff for the damages he suffered through the trespass by the city to the bench.

The appeal should be allowed with costs here and below, the judgment set aside and judgment entered for the plaintiff for $500 and costs.

Appeal allowed with costs.

Solicitors for the appellant: *McDonald, Weaver & Steer.*

Solicitor for the respondent, the City of Edmonton: *John C. F. Bown.*

Solicitor for the respondent, the Attorney-General of Canada: *H. H. Parlee.*

1929

*May 27, 28.
*Oct. 1.

J. E. CARTER (DEFENDANT)..... APPELLANT;

AND

IDA VAN CAMP, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, BY HER NEXT FRIEND, SILAS EZRA VAN CAMP, AND THE SAID SILAS EZRA VAN CAMP (PLAINTIFFS), AND J. C. ANDERSON (DEFENDANT). } RESPONDENTS.

IDA VAN CAMP, AN INFANT UNDER THE AGE OF TWENTY-ONE YEARS, BY HER NEXT FRIEND, SILAS EZRA VAN CAMP, AND THE SAID SILAS EZRA VAN CAMP (PLAINTIFFS). } APPELLANTS;

AND

J. E. CARTER AND J. C. ANDERSON (DEFENDANTS). ..... } RESPONDENTS.

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

Motor vehicles—Negligence—Collision between motor cars, resulting in one of them striking and injuring pedestrian—Responsibility for injury—Violation of s. 35 (1) of Highway Traffic Act, R.S.O. 1927, c. 251—Whether driver whose car struck pedestrian liable by reason of conduct after collision—Conduct in emergency—Evidence—Onus of proof (Application and effect of s. 42 of Highway Traffic Act)—New trial.

C. and A., driving motor cars, collided at a street intersection, and A.'s car then struck the infant plaintiff who was on the sidewalk. Plaintiffs sued C. and A. for damages. Both the trial judge (Meredith C.J.C.P.) and the Appellate Division, Ont. (63 Ont. L.R. 257) took the view that A.'s conduct after the collision did not amount to a *novus actus interveniens*, but was an involuntary outcome of the collision, and that the negligence which caused the collision was in law the cause of the plaintiff's injury. The trial judge held that A. and C. were each to blame for the collision; but the Appellate Division held that C. alone was to blame. C. and the plaintiffs appealed to this Court.

Held (1) C., who had violated s. 35 (1) (right of way) of the *Highway Traffic Act* (R.S.O. 1927, c. 251), was guilty of fault causing the collision, and was liable to plaintiffs.

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

(2) A. was not to blame up to the moment of the collision; he was entitled to rely on C.'s observing s. 35 (1), and when he became aware of C.'s disregard thereof, it was not possible for him to avoid the collision.

(3) If plaintiffs desired, there should be a new trial, confined to the question whether A. was, or was not, by reason of what occurred after the collision, responsible (jointly with C.) to plaintiffs. Anglin C.J.C. and Rinfret J. so held on the ground that, in view of the unsatisfactory nature of the evidence on the point, and in view of the reasons for its judgment by the Appellate Division, it was doubtful whether sufficient regard had been paid to s. 42 (1) (onus of proof) of the *Highway Traffic Act,* as it applied to the issue between A. and plaintiffs. Smith J. was of opinion that the finding below that A. was not guilty of negligence after the collision was a proper finding on the evidence (expressing the opinion, also, that if A. were held liable, C. could not also be held liable, because, A. not being in fault as to the collision, they were in no sense joint tort-feasors; A.'s liability would have to be based on the fact that. by his own independent act after he was, or should have been, free from the influence of the emergency, he, by negligent handling of his car, injured the plaintiff); that C. alone was responsible to plaintiffs, and the appeals should be dismissed; but, being alone in this opinion, he concurred in disposing of the case as proposed by Anglin C.J.C. and Rinfret J.

Per Anglin C.J.C. and Rinfret J.: Subs. 1 of s. 42 of said Act is *ex facie* applicable to the case of persons in the position of the plaintiffs (*Perusse* v. *Stafford,* [1928] S.C.R. 416). Its application was not prevented by subs. 2, which excludes from the operation of subs. 1 only cases in which the loss or damage is sustained by an occupant of one of the motor vehicles in collision or by the owner thereof, or, possibly, also by the owner of property being carried in it at the time. (*Moreau* v. *Rodrigue,* Q.R. 29 K.B. 300). Therefore the "onus of proof" was on A. to establish that the injury to the infant plaintiff "did not arise through (his) negligence or improper conduct."

Duff and Lamont, JJ., dissented, holding that, on the evidence, the trial judge's finding that A. was partly to blame for the collision should not have been set aside; moreover, even assuming the contrary, A. was at fault in respect of his conduct after the collision; having undertaken to drive a motor car through a street frequented by pedestrians, he was bound, at his peril, so to conduct himself as not to expose them to unnecessary risk of harm by default in management of his car in respect of reasonable care, skill and self possession, whether in emergencies or ordinary circumstances; on the evidence, A.'s manoeuvres after the collision were those of one who had "lost his head"; there was nothing in the circumstances of the collision to have so deprived a reasonably competent driver of his mental equilibrium; that being so, A. had failed to acquit himself of the statutory onus of shewing that the infant plaintiff's injury was not due to any "improper conduct" of his; to hold A. liable on this ground was not inconsistent with a judgment against C., who owed a duty to persons situated as was the infant plaintiff to anticipate such incidents as here occurred as the result of the collision (*Scott's Trustees* v. *Moss.* 17 S.C., 32, and other authorities referred to); plaintiffs should have judgment against both A. and C.; it was not a case for a new trial.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

APPEALS from the judgment of the Appellate Division of the Supreme Court of Ontario (1), which reversed in part the judgment of Meredith, C.J.C.P. (1).

The action arose out of an accident which occurred in the afternoon of October 6, 1927, at or near the intersection of Harbord and Borden streets, in the city of Toronto. The defendant Carter was driving a motor car westward on Harbord street, and the defendant Anderson was driving a motor car southward on Borden street. The cars collided at the intersection of the streets, and then Anderson's car struck and injured the infant plaintiff who was on the sidewalk near the south-west corner of the intersection. The plaintiffs (the infant plaintiff aforesaid and her father) sued both Carter and Anderson for damages.

The trial judge, Meredith, C.J.C.P. (1), held that the infant plaintiff's injury was caused by the negligence of each of the defendants, and that each of them was answerable for the damages; that Carter was guilty of negligence in breaking the statutory rule of the road giving the driver on the right-hand side the right of way; and that Anderson was guilty of negligence in carelessly making a left-hand turn against the traffic on such a street as Harbord street; that, seeing Carter's car and the danger, he should have stopped or taken some other means of avoiding the accident, even though he might have been in the right in regard to the right of way. He awarded $7,500 damages to the infant plaintiff, and $1,400 to the other plaintiff.

The plaintiffs appealed, and both defendants cross-appealed, to the Appellate Division; the plaintiffs on the ground that the damages allowed the infant plaintiff were inadequate; the defendant Anderson on the ground that the trial judge, having found that after the collision there was no negligence on his part which caused the plaintiff's damage, erred in holding that there was any negligence on his part which brought about the collision; and the defendant Carter on the ground that, admitting he was partly responsible for the collision, he was not responsible for the injury to the infant plaintiff; that the whole weight of evidence was that, after the collision, a new situation arose in which, if anybody, the defendant Anderson was severably

(1) (1928) 63 Ont. L.R. 257.

and ultimately and solely negligent, as a result of which the infant plaintiff was injured.

The Appellate Division (1) held that Anderson was not guilty of negligence causing the collision nor of negligence after the collision; that the collision was the result of Carter's negligence; and directed that the action be dismissed as against Anderson, that the plaintiffs recover damages against the defendant Carter, and that the infant plaintiff's damages be increased to the sum of $10,000.

The defendant Carter appealed to the Supreme Court of Canada, claiming that he should not have been held liable to the plaintiffs, but that the defendant Anderson should have been held solely liable for the injuries and damages occasioned to the plaintiffs, and, in the alternative, and at the worst for the defendant Carter, the judgment of the trial judge should be restored. The plaintiffs also appealed, claiming that both defendants, and not Carter alone, should be held guilty of negligence, and that the action should not have been dismissed as against Anderson, as directed by the Appellate Division.

D. L. McCarthy, K.C., and *J. O. Plaxton* for (defendant) appellant Carter.

Gideon Grant, K.C., and *Ernest A. Harris* for plaintiffs, appellants.

T. N. Phelan, K.C., for respondent Anderson.

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

ANGLIN C.J.C.—A new trial in a case such as that now before us is always fraught with grave danger. As a result of the former trial and the hearing of appeals by a provincial appellate court and afterwards by this court, not only have the issues become crystallized and the difficulties arising from the course of the first trial been pointed out, but the points on which there seem to be lacunae in the evidence and the precise matters to which proof should be directed have been unavoidably emphasized in a way to bring them forcibly to the attention of the parties and their witnesses. The ordering of even a partial new trial, where,

(1) (1928) 63 Ont. L.R. 257.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Anglin C.J.C.

as here, the result must largely depend upon new or further evidence concerning a somewhat involved situation, should be resorted to only when the ends of justice clearly require it. But the trial of this action, which has already been had and which resulted in a judgment for the plaintiffs against both defendants, was, in my opinion, so unsatisfactory that a partial new trial is inevitable. The fact that in the Appellate Divisional Court the judgment against one of the defendants was set aside (Grant, J.A., dissenting) and his co-defendant was held solely responsible, unfortunately does not, under the circumstances, enable us to avoid this result. As is usual when a new trial is directed, we refrain from discussion of the facts and the evidence before us further than seems necessary to indicate the grounds on which we proceed.

The infant plaintiff, admittedly without any contributory negligence on her part, while standing on the side-walk on the south side of Harbord street, a little to the west of Borden street, in the city of Toronto, was struck by a motor vehicle driven by the defendant Anderson and seriously injured. This happened almost immediately after Anderson's car had been in collision with that of his co-defendant, Carter, at the intersection; and one of the questions presented for decision was whether Anderson's car being upon the Harbord street side-walk and hitting the infant plaintiff was a consequence of such collision, or was due to some act or omission on his part subsequent thereto which broke the causal connection between those occurrences and the collision, so that negligence which caused the collision could not be said to have been, in law, the cause of the infant plaintiff's injury. Both provincial courts have taken the view that Anderson's conduct subsequent to the collision did not amount to a *novus actus interveniens*, but was an involuntary outcome of the collision, for which, in the opinion of the trial court, he was jointly to blame with Carter, and, in the view taken by the appellate court, was not at all to blame. Both courts agreed that the negligence that caused the collision was, in law, the cause of the infant plaintiff's being injured.

The right of the plaintiffs to recover against one or both of the defendants is clear; indeed it is not seriously contested by either of them. The real issue is whether they

are both liable and, if not, which of them is legally responsible.

An outstanding fact is that the defendant Carter was to blame for an admitted violation of s. 35 (1) of the *Highway Traffic Act* (R.S.O., 1927, c. 251) and was, therefore, guilty of fault causing the collision, either solely, or jointly with his co-defendant. Anderson, who had been found by the trial judge more to blame for the collision than Carter because of his failure to avoid the consequences of the latter's breach of s. 35 (1), was held not to have been at all at fault, up to the moment of the collision, by the Appellate Divisional Court, whose view was that he was entitled to rely upon Carter's observing the rule of the road laid down by s. 35 (1), and that, when he became aware of Carter's disregard of that rule, it was not possible for him to avoid the collision. In that view we respectfully agree.

As to the conclusion of the Appellate Divisional Court, however, that Anderson's subsequent conduct entailed no responsibility on his part, although the trial judge took the same view, we are not certain that in reaching it sufficient regard was paid to the provision of subs. 1 of s. 42 of the *Highway Traffic Act,* as it applied to the issue between Anderson and the plaintiffs. That subsection, in our opinion, is *ex facie* applicable to the case of persons in the position of the plaintiffs, who suffered loss or damage which "resulted from a motor vehicle on the highway." *Perusse* v. *Stafford* (1). That Anderson's vehicle was on the highway and that it was the instrument which immediately caused the infant plaintiff's injury are facts not in dispute. The application of subs. (1) of s. 42 is not prevented by the provision of subs. (2) which, in our opinion, excludes from the operation of subs. (1) only cases in which the loss or damage sued for is sustained by an occupant of one of the motor vehicles in collision or by the owner thereof, or, possibly, also by the owner of property being carried in it at the time. (*Moreau* v. *Rodrique* (2)). The result is that the "onus of proof" was on Anderson to establish that the injury to the infant plaintiff "did not arise through (his) negligence or improper conduct"; and, in our view,

(1) [1928] S.C.R. 416. (2) (1919) Q.R. 29 K.B. 300.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Anglin C.J.C.

unless Anderson's subsequent conduct should be held to have been the sole cause of the injury to the plaintiff, a like onus would have rested on Carter as to his responsibility for the collision, had it been in issue. Having regard, however, to Carter's admission of a distinct violation of s. 35 (1), the only issue open on that branch of the case really was as to the concurrent responsibility of Anderson. That, as already stated, was, we think, properly determined in his favour by the Appellate Divisional Court.

In disposing of the issue as to the character and effect of Anderson's subsequent conduct, the learned Chief Justice of Ontario says:

> A moment before the impact Anderson discovered that a collision was imminent and at once turned his car towards his right. This was the only direction in which he could have turned with any chance of avoiding a collision and any reasonable person would have taken that chance. It is not improbable, though there is no evidence on the point, that, in the excitement caused by an impending accident, Anderson put his foot on the accelerator thus imparting additional speed to his car which when struck was within ten feet of the curb and mounted the sidewalk taking the course above set forth. Anderson had to deal with a serious and sudden emergency wherein human life was imperilled and his conduct must not be judged as in a case of voluntary negligence. *Jones* v. *Boyce* (1).

With the utmost respect, it would seem at least doubtful whether the "onus of proof" as between him and the plaintiffs, cast on Anderson by s. 42 (1), is sufficiently met by the assumption "that in the excitement caused by an impending accident Anderson put his foot on the accelerator, etc." Had Anderson given this evidence at the trial, it may well be that it would be quite proper to accept his explanation of what occurred. But it is scarcely satisfactory, when, for one reason or another, he did not take advantage of his opportunity to testify at the trial, without any evidence to make such an important assumption in his favour. On the other hand, we are not prepared, on the evidence now before us—more especially because it does not include testimony which, we think, should have been given at the trial by Anderson, whereas it contains extracts from his discovery evidence calculated to confuse rather than to elucidate the issue—to say that the concurrent findings of the learned trial judge and of the appellate court acquitting Anderson of fault subsequent to the collision are

(1) (1816) 1 Stark., 493.

so clearly erroneous that we would be justified in reversing them and holding Anderson responsible to the plaintiffs notwithstanding Carter's admitted initial negligence. Whether the intervening act of another person (Anderson) is an act of conscious volition amounting to a *novus actus interveniens* is often a very nice question. The following cases afford illustrations: *S.S. Singleton Abbey* v. *S.S. Paludina* (1); *Can. Pac. Ry. Co.* v. *Kelvin Shipping Co. Ltd.* (2); *Harding* v. *Edwards et al* (3); *Admiralty Commissioners* v. *S.S. Volute* (4); *Steele* v. *Belfast Corpn.* (5); *Dominion Natural Gas Co. Ltd.* v. *Collins & Perkins* (6); *Sullivan* v. *Creed* (7); *Bull* v. *Mayor, etc., of Shoreditch* (8); *Paterson* v. *Mayor, etc., of Blackburn* (9); *Clark* v. *Chambers* (10); *Burrows* v. *March Gas & Coke Co.* (11); *Hughes* v. *Macfie et al., Abbott* v. *Macfie et al.* (12); *Greenland* v. *Chaplin* (13); *Louisville Auto Supply Co.* v. *Irvine* (14).

On the whole case, therefore, we would, in the exercise of our discretion, order a new trial, if the plaintiffs so desire, merely to determine whether the defendant Anderson is jointly responsible with Carter for the damages sustained by the plaintiffs. These damages were increased by the Appellate Divisional Court, in the case of the infant plaintiff, from the $7,500 awarded at the trial to $10,000, and in this Court the correctness of this assessment was not controverted; nor was the quantum of the allowance of $1,400 made to the adult plaintiff challenged. The plaintiffs' right to recover from the defendant Carter being clear and the amount of damages awarded them not being questioned, we see no reason why those aspects of the case should be again tried out. The appeal of Carter will, accordingly, be dismissed.

We would, however, direct a new trial (if the plaintiffs elect to have it) confined to the question, whether the defendant Anderson is, or is not, by reason of what occurred

(1) [1927] A.C. 16, at pp. 28-29.
(2) (1927) 138 L.T.R. 369.
(3) (1929) 64 Ont. L.R. 98, at p. 108, per Middleton J.A.
(4) [1922] 1 A.C. 129, at p. 136.
(5) [1920] 2 Ir. R., 125.
(6) [1909] A.C. 640, at p. 646.
(7) [1904] 2 Ir. R., 317, at p. 356.
(8) (1902) 19 T.L.R. 64.
(9) (1892) 9 T.L.R. 55.
(10) (1878) 3 Q.B.D. 327.
(11) (1872) L.R. 7 Exch. 96.
(12) (1863) 2 H. & C. 744.
(13) (1850) 5 Exch. 243.
(14) (1925) 212 Ky. 60, at p. 64.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Anglin C.J.C.

after the collision, responsible to the plaintiffs, as well as his co-defendant Carter. The plaintiffs' election must be filed with the Registrar of this Court within 20 days, otherwise they will be taken to have abandoned their claim against Anderson.

As against the defendant Carter, the plaintiffs are clearly entitled, in any event, to all their costs throughout. They are also entitled to the costs of their appeal to this Court against the defendant Anderson. Should they elect for a new trial as against Anderson, the disposition of all other costs as between them and him should be in the discretion of the judge who shall preside at the new trial. Should they not so elect, save in this Court and the Appellate Division, there will be no costs of the proceedings heretofore had as between Anderson and the plaintiffs, Anderson's costs in the Appellate Division being set off against the plaintiffs' costs here, and the judgment of the Appellate Divisional Court will be modified accordingly.

The judgment of Duff and Lamont JJ. (dissenting) was delivered by

DUFF J.—The learned trial judge took the view that Anderson and Carter were both in part responsible for the collision. In other words, that by the exercise of reasonable care Anderson could have avoided it, and that this absence of reasonable care contributed directly, together with Carter's fault in driving recklessly into a street intersection, in producing the collision. His language is this:

> I find that Anderson was guilty of negligence in carelessly making a left-hand turn against the traffic on such a street as Harbord street. I think it is a common law and common sense duty that no one should turn against the traffic without great care in such a place as that where this accident happened.
>
> Anderson saw Carter's car, he saw the danger, and ought to have stopped or taken some other means of avoiding the accident, even though he may have been in the right in regard to the right of way, because everyone must take reasonable care to avoid injury by another even if that other is in the wrong.

In support of these findings there is a substantial body of evidence. There is the evidence of Long:

> Q. Apparently Carter was turning off to his left to avoid Anderson at the time they touched, is that right?—A. Yes.
>
> Q. And Harbord street to your right-hand side and to the right-hand side of Anderson was entirely free from traffic, wasn't it?—A. Yes.

Q. He had the whole street to turn off to the right and avoid Carter? His LORDSHIP: The whole intersection was free I understand at all times?—A. Yes.

And there is Izon's statement:

Q. I do not know whether you told me exactly which way the Anderson car was facing at the moment of the impact.—A. I should say it was the southeast.

Moreover, the considerations advanced by Grant, J.A., seem quite adequate to support the conclusion that Anderson, if he had been driving with proper circumspection, must have realized that, in proceeding as he did, he was incurring grave risk of a collision, if one accepts the testimony of the witnesses who speak to the facts mentioned by Grant, J.A., as the learned trial judge did. I cannot perceive any ground upon which this finding of the learned trial judge, whose province it was to evaluate the testimony of the witnesses, can be set aside or disregarded.

Anderson himself refrained from giving evidence at the trial, and left uncontradicted the testimony upon which the learned trial judge and Grant, J.A., proceeded.

If I may say so with the greatest respect, I think the learned Chief Justice of Ontario was influenced by the testimony of Carter, in reaching the conclusion that Anderson was free from blame at this phase of the events preceding the disaster. Carter's evidence on discovery was not available either for or against Anderson. The controversy was not a controversy between Anderson and Carter.

This is sufficient to dispose of the appeal, but other aspects of the case seem to call for some further observations.

Assuming Anderson to have been free from blame in his conduct antecedent to the collision, there appears to be no good reason for granting a new trial. First, there seems, in the evidence before us, to be no escape from the conclusion that Anderson's manoeuvres after the collision were those of a man who had lost his self-control and self-possession. The evidence of the two companions of the infant plaintiff is uncontradicted. Anderson's car, when they first noticed it, appeared to be headed south, down Borden street. Suddenly it turned to the west and was driven directly towards the group of three girls, who were standing on the sidewalk a few feet—one says two and another six—west of the Borden street kerb. The girls ran west as fast as they

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Duff J.

could, and one of them, Miss MacFarlane, narrowly escaped being struck down.

Q. Did the car catch up to you?—A. It touched the back of my leg every time I lifted it for two or three steps.

Another, Miss Hall, fell, but is unable to say whether she was struck by the car. The infant plaintiff was struck, she says, after she had run about six feet. So great was the force of the blow that there was "considerable, I suppose it would be flesh" on the bumper, according to one of the witnesses, Long, and some on the radiator; and moreover "it" (flesh) "was all on the road." The testimony on which these facts rest was not contradicted nor was there any cross-examination upon it. The full significance of them can only be appreciated when the evidence of Anderson, given on discovery, is looked at. Although it was evidently the middle of the bumper which struck the infant plaintiff, Anderson expressly states that he was not aware that she had been hit; and his evidence as a whole indicates clearly that he did not see the group of girls towards whom he was directing his car.

His own account is that his car was driven on to the sidewalk by the force of Carter's blow. This could not be reconciled with the condition of Anderson's car, or with the testimony of Miss Hall and Miss MacFarlane, and is explicitly denied by Izon, who was within a few yards of the place where the collision occurred, and who says that at that moment Anderson's car was facing south-east.

Anderson attempts no explanation of his failure to apply his brakes or to continue down Borden street, which was the course on which Carter, who was behind him, proceeded. It seems probable that, in the mental confusion which supervened upon the collision, his own actions left no impression upon Anderson's memory.

If Anderson did not quite lose his head, his conduct in driving his car into a group of girls on the sidewalk, without so much as attempting to apply his brakes, would demand a severity of comment which would be indeed painful to utter. His reference to some small children, whom he says he tried to avoid by swerving his car, is beside the point; the plaintiff and her companions were at the extreme east of the sidewalk and must have been the first persons he encountered.

Anderson owed a duty not only to persons using the carriage way, but to persons on the sidewalk as well. Such persons, everyone of them, had an independent right to be free from unnecessary molestation in their use of the King's highway; and Anderson's duty as the driver of a motor car—his duty to such pedestrians—was so to conduct himself as not to expose them to unnecessary risk of harm by default in the management of his car in respect of reasonable care, reasonable skill or reasonable self-possession, whether in emergencies or in ordinary circumstances. All this is involved in the proposition, that having assumed the responsibility of driving a motor car through a street frequented by pedestrians, he was under a duty to act reasonably with a view to the safety of such persons. If he was not a person of competent skill or competent self-command, he ought not to have attempted to drive a motor car in such a place. Having undertaken to do so, he was bound at his peril to exercise those qualities. If he did not, he is answerable in precisely the same way as if he had been driving a car, which he knew, or ought to have known, to be insufficiently equipped with brakes or other ordinary safety appliances.

There seems to have been nothing in the circumstances of the collision which would have so completely deprived a reasonably competent driver of his mental equilibrium. That being so, Anderson has failed to acquit himself of the onus resting upon him in virtue of the Ontario statute, of shewing that the injury to the infant plaintiff was not due to any "improper conduct" of his.

I do not agree that to hold Anderson liable is inconsistent with a judgment against Carter. Knowledge must be imputed to Carter, that collisions between automobiles in a public street are frequently attended by collateral incidents of an injurious, not to say destructive character, affecting third persons unconnected with either automobile. Such incidents may arise from various immediate causes. The machinery of a motor may become so deranged in consequence of such an accident, as to deprive the most competent driver of the control of his car; a car improperly equipped may for that reason be forced into some manoeuvre of a dangerous character; a driver may, as Anderson did, lose his head. Such incidents are to be anticipated

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Duff J.

and the driver of a motor car owes a duty to people using the same street (at least in the immediate vicinity) to anticipate them. The driver of the car (for example, with defective brakes) which is the immediate cause of the injury, may be responsible, but if what happened was something the negligent person responsible for the collision was under a duty to anticipate as the result of a collision, he also is liable.

The principle has been frequently applied. One of the most striking examples is *Scott's Trustees* v. *Moss* (1), where a person responsible for a balloon ascent was held liable for damage done to a cultivated field into which the balloon descended by the crowd which collected. The individuals constituting the crowd were, of course, themselves liable as trespassers. It is broadly stated by Lord Moulton in *Rickards* v. *Lothian* (2).

The present state of the law on this subject is, I think, fairly summarized in two well known text-books: *1st,* in Clerk & Lindsell on Torts, 8th ed., at p. 133,

> It is submitted that a voluntary act will be held to be new and independent, and the author of the prior wrongful act will thus be free from responsibility for the subsequent damage unless either he fails in carrying out a duty to foresee the possibility of the intervening act and guard against its consequences; or he authorizes or instigates it; or he is found by the Court to have intended the consequences which actually follow.

2nd, in Mayne On Damages, 10th ed., at p. 42,

> The Courts have not been consistent in the tests by which they have determined the limits of responsibility, and the law cannot be regarded as settled, but the present position may be summarized in three rules:—
>
> (1) Damage is recoverable if, without intervening causes, it is the direct result of a wrongful act operating in the physical conditions existing at the time of the wrongful act, even although the conditions are peculiar conditions of which the wrongdoer had no knowledge, and the existence of which he would not reasonably anticipate.
>
> (2) Damage is recoverable if, despite intervening causes, it was intended by the wrongdoer as the consequence of his wrongful act.
>
> (3) Damage is recoverable if, despite intervening causes, it is the natural and probable result of the wrongful act, that is, a result which the wrongdoer contemplated or should have contemplated.

Two judgments of the Supreme Court of Massachusetts throw light upon the point, *Leahy* v. *Standard Oil Co. of New York* (3), and *Meech* v. *Sewall* (4).

Second, whatever view may be taken of the evidence as it stands, it is the duty of this Court to deal with the appeal

(1) (1889) 17 S.C. 32.
(2) [1913] A.C. 263, at p. 273.
(3) (1916) 224 Mass., 352.
(4) (1919) 122 N.E.R., 447.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Duff J.

by passing on that evidence. There has not at any stage of the case been any suggestion that any further evidence would be forthcoming at a new trial. Carter and Anderson both refrained from giving evidence; the plaintiffs, no doubt for good reasons, refrained from calling them as witnesses. All was done deliberately, there was nothing in the nature of surprise; nor has there been at any stage of the proceedings any complaint as to the conduct of the trial. In *Brown* v. *Dean* (1), Lord Loreburn, L.C., called attention to " the extreme value of the old doctrine, *Interest rei publicae ut sit finis litium,* remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist."

The plaintiffs' appeal should be allowed, and Carter's appeal dismissed with costs to the plaintiffs in all the courts.

SMITH J.—I have gone over all the evidence bearing on the question of liability, which, to my mind, establishes beyond doubt that the defendant Carter was solely responsible for the collision between the two cars. His own examination for discovery read as evidence against him fully establishes this, even if accepted as absolutely correct. He says that he was approaching the intersection of Harbord and Borden streets when travelling, at 12 or 15 miles an hour, west, on the northerly part of the former, with his left wheel over the north rail of the northerly track of the street railway, that, when 30 or 40 feet from the easterly curb of Borden street, he saw Anderson's car coming south, pretty well on the west side of Borden street, at about the same distance from the northerly curb of Harbord street, going at about the same speed, and that he had him in view all the time up to the time of the impact, which he says occurred on the south tracks, a little to the west of the intersection. He further says that both increased their speed, and that there were no other vehicles ahead, on or approaching the intersection, which they had practically to themselves, and that they reached the intersection at practically the same time. On this statement Anderson had the right of way under the statute, and Carter says he increased his speed, instead, as the law re-

(1) [1910] A.C. 373, at p. 374.

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Smith J

quires, of yielding the right of way to Anderson. The excuse he gives is, "I wouldn't expect any man would make a left-hand turn without seeing the coast was clear, especially on a through street". There is no evidence that either street was a through street where there was a legal obligation to stop before crossing, and the excuse amounts to nothing. These statements of Carter do not greatly differ from the evidence of Long, a teacher in the Technical School, who was driving in his car behind Anderson, and who is entirely disinterested, and whose evidence in some respects is stronger against Carter.

He says Anderson was travelling south on the west side of Borden street with his right wheels two or three feet from the curb at a little over eight miles per hour, and on approaching the north side of Harbord street he slowed down to about eight miles per hour, extending his left arm, and on reaching the north limit of Harbord street, accelerated his speed to 12 miles per hour and inclined slightly to the left, bringing the left of his car at the time of impact a little to the left of the centre line of Borden street, and pretty well over the south set of rails or between the two sets of rails. He says Carter was coming west along the north side of Harbord street at between 15 to 20 miles an hour when he first saw him, 40 or 50 feet to the east, and that he slowed down to about 15 miles per hour. First he says the two approached the intersection about the same time, but at page 35 [of the Appeal Case] he says Anderson's car got there first, and that the rear of Anderson's car would be about in line with the north side of Harbord street when Carter's was approximately 40 or 50 feet to the east, and that Carter turned to the southwest. If, as Carter says, he and Anderson reached the intersection about the same time, it was clearly his duty to yield the right of way to Anderson, and if, as Long says, Anderson had entered on the intersection when Carter was approximately 40 or 50 feet to the east, then Carter's fault was still greater.

The learned trial judge, however, finds that Anderson also "was guilty of negligence in carelessly making a left-hand turn against the traffic on such a street as Harbord street". I am unable to find any evidence to support this finding. Anderson, going at a moderate speed as all the

evidence shows, slowed down on approaching the intersection, held out his left arm and inclined slightly towards the centre of the street, according to the uncontradicted evidence of Long. All this was the proper thing to do in order to make the left turn with due care, and he had no reason to anticipate that Carter, with this in full view, would disregard the rule of the road by attempting to pass in front. Anderson, in making a left turn, would not be making a turn against the traffic, as the learned judge puts it, had there been any. He would be crossing, as was his right, in front of west-bound traffic on Harbord street, and into and with east-bound traffic. There was, however, no other vehicular traffic on the intersection, and to say that it was Anderson's duty to take more care than he did is to say that he should have kept out of Carter's way when he had, in fact, a clear right over Carter to proceed, and a right to suppose that Carter would yield him that right.

If, therefore, Anderson is to be held guilty of any negligence, it must be negligence in control of his car after the collision, at a time when he should have been free from the influence of that collision to such an extent that with reasonable care under the circumstances suddenly and unexpectedly forced on him he could have controlled his car so as to avoid hitting the plaintiff. The line of the curb of Harbord street, according to the plan, is 13 feet south of the south rail, and Borden street from curb to curb is 24 feet wide. The collision took place on the south track a little west of the centre line of Borden street. From the front of Anderson's car southeast to the point of intersection of the two curbs shown on the plan would be about 15 feet, and from there to the hydrant is 32 feet 8 inches, making a total distance travelled by Anderson's car after the impact of about 47 feet 8 inches, or less if, as Carter says, the rear part of Anderson's car was hit on the south track, because in that case the front would be considerably past the south rail.

Alexander, the brake tester, says that a driver with his mind set on making as quick a stop as possible, and with brakes working right at 20 miles per hour, should stop in 37 feet, and at 15 miles per hour, in 20 feet 8 inches. These tests, he says, are with a new car and brakes in perfect condition. The average car on the road, he says, stops in

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Smith J.

50 to 55 feet, and Anderson's was better than the average car. Again he says, when prepared to act the average stop at 20 miles per hour is from 55 to 60 feet, and that in an emergency, and with his mind unprepared, a man would go further; how much further depending on the condition of brakes and the mental make-up of the man. He would expect a person confronted with a sudden emergency to go a considerable distance further.

Anderson was certainly confronted with a sudden emergency. The witness Izon says (p. 46 of the case) that Anderson's car after the impact wobbled much in a very indefinite course towards the southwest corner. This was manifestly the direct result of the impact. His first thought, on seeing the other car about to hit him, would be to avoid the collision or lessen its force, and he naturally attempted to swerve to the right, away from the approaching car, as he says he did. He then receives the impact of the other car, which cuts through his running board and dints his rear door, causing his car to wobble in an indefinite course, as described by Izon. At the time of impact his mind is naturally centred on the car that is bearing down on him. Then he must recover control of the car's direction. Next he observes that he is heading for some children on the sidewalk and makes a move to avoid them which is successful, but which brings him in collision with the plaintiff, whom he had not seen, and the hydrant. At 15 miles per hour the car would go 22 feet in a second, and at 12 miles per hour, 17·60 feet, so that to recover from the effect of the emergency and make the necessary moves to avoid the accident to the plaintiff, he had at best three seconds of time.

I agree with the remarks of the learned trial judge where he says,

> I am not able to say that in this emergency a driver of ordinary ability could have saved the situation. As I have often said, although there should be no need to say it, we are not to judge the driver in an emergency of that kind as if we were sitting in Court here quietly saying what he should and should not have done.

A man licensed to drive must, of course, exercise in an emergency that degree of skill in controlling a car under the circumstances that a reasonably skilful holder of such a licence should exercise, but to hold that Anderson, under the circumstances of this case, should have, in the space of

some 48 feet, and within three seconds from the emergency, have so fully recovered himself and the control of the car as to successfully steer clear of all the dangers that suddenly confronted him is, in my opinion, to cast upon him liability to exercise a degree of skill that the most skilful might have failed to command. It must be remembered too that Anderson should not be expected to exercise the high degree of skill that might be expected from a licenced professional chauffeur wholly employed in driving cars.

It is argued that Anderson should have put on his brakes, but that would not have saved the children in front of him on the sidewalk. He had instantly to get rid of the wobble and avoid the children. To seize the emergency brake he would have to let go the steering wheel with the right hand, when it was urgently needed on the wheel. He was suddenly, when in a perturbed state of mind produced by the collision, called on to make instantly several precautional movements. It is easy, as the learned trial judge observes, for us, sitting here quietly, with minds unperturbed by any emergency, to say that he could have applied at least his foot brake, but with the other things calling at the same moment for decision and action, within what part of the three seconds should he have had this brake on? On Anderson's evidence it is not likely that the application of the foot brake, at the earliest it could reasonably be expected to be applied, would have saved the plaintiff.

Much was said about the breaking of the hydrant, but as this is made of thin cast-iron, it would not stand much of an impact from a weight of one or one and a half tons.

If Anderson were to be held liable, it seems to me that Carter could not also be held liable, because, Anderson not being in fault as to the collision, they were in no sense joint tort-feasors. Anderson's liability would have to be based on the fact that, by his own independent act after being free or after he should have been free from the influence of the emergency so far as control of his car was concerned, he, by negligent handling of his car, injured the plaintiff.

The learned trial judge held that Anderson was not guilty of negligence in the control of his car subsequent to the collision, and this finding of fact is concurred in by the Appellate Division, and should not, under these circum-

1929

CARTER v. VAN CAMP ET AL.

VAN CAMP v. CARTER AND ANDERSON.

Smith J.

stances, be lightly interfered with. My personal opinion is, as indicated above, that it was a proper finding on the evidence before the court. I am therefore of opinion that Carter alone is responsible to the plaintiff, and that the appeal should be dismissed with costs. However, as I am alone in this opinion, I concur in disposing of the case as proposed by the Chief Justice.

Appeal of the defendant Carter dismissed with costs.

Appeal of the plaintiffs allowed to the extent and on the terms set out in the judgment of the Chief Justice.

Solicitors for the plaintiffs, appellants: *Harris & Keachie.*

Solicitors for the defendant, appellant, Carter: *Plaxton & Plaxton.*

Solicitors for the defendant, respondent, Anderson: *Phelan & Richardson.*

1929

*Nov. 19.
*Dec. 9.

BANK OF NOVA SCOTIA (DEFENDANT)...APPELLANT;

AND

HIS MAJESTY THE KING (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Special War Revenue Act, R.S.C., 1927, c. 179, ss. 86 (a), 87 (d)—Bank printing books and stationery for its own use—"Manufacturer or producer"—Liability for sales tax.

The defendant bank maintained a stationery department through which it supplied its various offices with stationery and supplies required in the conduct of its business, and in said department it had, without any object of gain, but for convenience, expedition, and to secure secrecy, a printing plant with which it printed and made up ledgers, etc., forms, by-laws, letter papers and other printed material, required in carrying on its business.

Held, that in respect of said printed material the bank was a "manufacturer or producer," and liable for consumption or sales tax, under ss. 86 (*a*) and 87 (*d*) of the *Special War Revenue Act,* R.S.C., 1927, c. 179 (and under the corresponding provisions in the earlier legislation contained in s. 19BBB of the *Special War Revenue Act, 1915,* as amended by 13-14 Geo. V, c. 70, s. 6), and was also liable for licence fee (under said s. 19BBB as amended; now R.S.C., 1927, c. 179, s. 95).

Judgment of the Exchequer Court of Canada, [1929] Ex. C.R., 155, affirmed.

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

1929

BANK OF NOVA SCOTIA v. THE KING.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada, (1) holding that the defendant was liable for sales tax on certain account books, stationery, etc., printed and made up in its stationery department and furnished to its various offices and branches; and that it was also liable for licence fee. The tax was levied, and the licence fee demanded, under the *Special War Revenue Act, 1915* (as amended), now R.S.C., 1927, c. 179.

The defendant is an incorporated bank, having its head office at Halifax, Nova Scotia, and its chief executive office at Toronto, Ontario. It maintained in Toronto a stationery department through which it supplied its various offices, including head office, executive office and branch offices, with stationery and supplies required in the conduct of the bank's business. Without any object of gain but for convenience and expedition and to secure secrecy, it had in its stationery department a printing plant with which it printed and made up ledgers, tellers' cash books, pass books, legal forms, by-laws, letter paper, ruled and printed forms, return forms of branches to the head office, minute books, stationery, pamphlets and other printed material required in carrying on the bank's business at its various offices throughout Canada and elsewhere.

In the bank's system of accounting, every office bore its share of all expenses incurred by the bank for such office, including salaries, rental of premises, and cost of stationery and supplies. The stationery and supplies were furnished to the various offices on their requisitions sent to the stationery department and were shipped to such offices direct from the stationery department. On making the shipment, the stationery department rendered statements to the receiving office and to the chief executive office showing the amount to be charged against the receiving office as the cost or estimated cost of the articles furnished.

The questions for the court were: (1) whether the defendant was liable to pay a consumption or sales tax on or in respect of the printed material aforesaid; and (2) whether the defendant was liable for a licence fee under s. 19BBB (6) of the *Special War Revenue Act, 1915* (as amended) (now R.S.C., 1927, c. 179, s. 95).

(1) [1929] Ex. C.R. 155.

1929

BANK OF NOVA SCOTIA v. THE KING.

W. N. Tilley, K.C., for the appellant, contended that from the history of the legislation, and the changes therein, it was indicated that the intention was, as to printers, to apply the tax to those who were in the business of manufacturing or producing printed matter; that the bank was not in any sense a manufacturer or producer within the meaning of the Act; that the tax was meant to apply only to a company or individual who was in the business of manufacturing or producing goods for sale, and did not apply to a bank merely because it made up into a form convenient for its own purposes materials on which the sales tax had already been paid; the printing of headings and column lines on ledgers, deposit slips and the like is a convenient way of doing what might otherwise be done by hand or by a typewriter. The tax was imposed by subs. 1 of s. 19BBB, and not by subs. 13 added in 1923. Subs. 13 merely enabled the value of taxable goods to be determined when a manufacturer used some articles of his own manufacture. The tax was really payable by a manufacturer or producer who was a manufacturer or producer by trade or calling and not by all persons who made up articles for their own convenient use.

M. H. Ludwig, K.C., for the respondent, relied upon the reasons in the judgment below. He contended that the bank, in carrying on a printing plant and making said printed material, was a producer or manufacturer of goods in Canada within the meaning of the legislation in question; a manufacturer or producer does not necessarily make things for sale; it has become the custom of many industries to maintain manufacturing departments for the production of articles essential to the conduct of the main business which may be quite remote from manufacturing; and such a department is as much a manufacturing establishment as if it were a distinct and separate enterprise (38 Corpus Juris, p. 975); the interpretation sought by the appellant to be placed on the legislation would exempt a corporation financially able to equip itself with a plant to make things, while one without sufficient means to acquire such equipment would have its burden increased at the expense of relieving its more opulent competitor from payment of any tax (in this connection, he referred to *Hogg* v.

Parochial Board of Auchtermuchty (1)); s. 87 (of R.S.C., 1927, c. 179) in effect provides that if a manufacturer uses goods made by him such use shall be deemed a sale and a tax to be fixed by the minister is to be paid in respect of such goods.

The judgment of the court was delivered by

ANGLIN, C.J.C.—The bank appeals from the judgment of the Exchequer Court, delivered on the 17th of May last, and reported in [1929] Ex. C. R. at p. 155. The material facts are there fully stated in the terms of the special case submitted for the consideration of the court.

While the special case purports to submit two questions, viz.,

(1) Whether on the facts as stated and admitted herein the Defendant is liable to pay His Majesty the King a consumption or sales tax on or in respect of the stationery referred to in paragraph 3 hereof for the period aforesaid.

(2) Whether the Defendant is liable for the licence fee mentioned in paragraph 5 hereof.

in reality, there is only one question to be determined, viz., whether or not the appellant bank is a manufacturer or producer of the stationery supplies, furnished by it to its head office and branches, within the meaning of that term as used in the *Special War Revenue Act,* because it is admitted that if the appellant bank is such a manufacturer or producer it is liable for consumption or sales tax, and paragraph 9 of the special case provides as follows:

9. If this Honourable Court shall hold that the Defendant is liable to pay His Majesty the King a consumption or sales tax as aforesaid, it is admitted that the Plaintiff shall have:

(1) Judgment for consumption or sales tax in the sum of $10,205.72, in respect of the said stationery, referred to in paragraph 3 hereof for the period aforesaid.

(2) Judgment for $10, licence fee mentioned in paragraph 4 hereof.

(3) Judgment for interest at the rate of five per centum (5%) per annum from the dates when the taxes became due and owing to the first day of June, 1927, and thereafter, at the rate of two-thirds of one per centum (1%) per month, as provided by Section 106, subsection 3 of the Special War Revenue Act.

The Exchequer Court would appear to have dealt with the case as governed by ss. 86 (*a*) and 87 (*d*) of the R.S.C. 1927, c. 179. But that statute came into force only on the 1st of February, 1928, and the claim is for taxes on " sales "

(1) (1880) 7 Rettie, 986, at p. 996.

1929

BANK OF NOVA SCOTIA v. THE KING.

Anglin C.J.C.

between the 1st of January, 1924, and the 30th of April, 1928. It is, therefore, obvious that, except for transactions during the months of February, March and April, 1928, the liability must be determined by reference to the earlier law. That law is to be found in s. 6 of c. 70 of the Statutes of 13-14 Geo. V (1923), amending the *Special War Revenue Act* of 1915.

Under s. 19BBB (1), as there enacted, a consumption or sales tax of 6 per cent. is imposed on "the sale price of all goods produced or manufactured in Canada * * * payable by the producer or manufacturer at the time of the sale thereof by him."

"Sale price" is defined to mean "the price before any amount payable in respect of the consumption or sales tax is added thereto."

Subs. 6 of s. 19BBB (as enacted by 13-14 Geo. V, c. 70, s. 6) provides for the taking out of an annual licence by manufacturers or producers. Subs. 13 reads:

(13) Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because, * * *

(*d*) such goods are for use by the manufacturer or producer and not for sale

the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

Under the legislation, as it then stood, it was determined in *Minister of Customs and Excise* v. *Dominion Press Limited* (1), that a job printer is a "producer" within the meaning of the statute.

By amendment of 1926-27, 17 Geo. V., c. 36, s. 4, it was enacted that, for the purposes of s. 19BBB,

printers, publishers, lithographers and engravers shall be regarded as producers or manufacturers.

This section has been carried into the R.S.C. (1927) as clause (*f*) of s. 85.

The effect of these several provisions is that a construction of the clauses of ss. 85, 86 and 87 of the *Special War Revenue Act*, c. 179, R.S.C. 1927, suffices to determine the question at issue, because if the appellant bank is "a manufacturer or producer in Canada," within the meaning of those earlier provisions, it must also be regarded as such a manufacturer or producer within the legislation of 1927.

(1) [1927] S.C.R. 583, at p. 587; [1928] A.C. 340.

Having regard to the foregoing, we are of the opinion that the bank is liable as claimed and that the appeal therefore fails.

We agree with the learned President of the Exchequer Court that as a printer, lithographer or engraver, which produced, for its own use and not for sale, the goods in question, viz., stationery supplies for its head office and branches, the bank was a producer within the meaning of that term, as used in clause (*a*) of s. 86 of the *Special War Revenue Act,* R.S.C. 1927, c. 179, and that the goods in question were produced in Canada by it within the meaning of that clause.

We cannot find anything in the statute to support the view put forward by counsel for the appellant that its application is confined to a manufacturer or producer whose business is manufacturing or producing for sale. That construction of the Act would involve the exclusion from our consideration of clause (*d*) of s. 87, which, in our opinion, was introduced to remove any doubt that the statute was intended to apply to a case such as that at bar.

For these reasons we dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the Appellant: *Tilley, Johnston, Thomson & Parmenter.*

Solicitor for the respondent: *W. Stuart Edwards.*

1929
*Nov. 8.
*Dec. 9.

THE CONTINENTAL CASUALTY COMPANY (DEFENDANT) ..... APPELLANT;

AND

JEANNE YORKE (PLAINTIFF) ..... RESPONDENT.

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

Motor vehicles—Insurance against liability for injury—Action, by person injured by automobile whose owner is insured, against the insurer—Insurance Act, R.S.O., 1927, c. 222, s. 85—Establishment of liability against insurer on the policy—Facts to be proved and manner of proof—Condition in policy for no liability while automobile "with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law"—Insurer's onus of proof as to consent—Amount recoverable against insurer—Inclusion of costs of appeal taken by insured in plaintiff's action against insured.

Plaintiff had been injured by S.'s automobile and had recovered judgment for damages and costs against S. and issued execution which was returned unsatisfied. Plaintiff, under s. 85 of the *Insurance Act*, R.S.O., 1927, c. 222, sued defendant, which had insured S. against liability for injury to another, for the amount of her judgment.

Held: The right of action given by s. 85 is simply a right to sue on the policy in the place and stead of the insured; the plaintiff must establish liability on the policy against the insurer in the same manner and to the same extent as if the action had been brought by the insured; and the facts, required to be established as part of the plaintiff's case, that the bodily injury to another, insured against, had been inflicted by the insured's automobile, and that the insured was legally liable in damages to the plaintiff for the injury, are not established as against the insurer by the production of the judgment obtained by plaintiff against the insured. But in the present case the defendant, by reason of an admission at the trial. was precluded from contending that the liability of S. to plaintiff had not been established by production of the judgment against S.

The injury was inflicted while the automobile was being driven by S.'s son, who was only 16 years of age, and had no permit or licence to drive. The policy contained the statutory condition that the insurer should not be liable "while the automobile, with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law."

Held, without deciding what was "the age limit fixed by law" (see the *Highway Traffic Act*, R.S.O., 1927, c. 251, s. 43) within the meaning of said condition, and assuming it to be 18 years, the defendant, to escape liability under the condition, must shew that the boy was driving with the knowledge, consent or connivance of S., and this it had failed to do. Such consent could not be presumed as against the plaintiff by reason of the judgment obtained by plaintiff against S.; it did not necessarily follow that because judgment was given against

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

S., the latter had any knowledge that her son was driving her automobile, or that she consented thereto (among other things in this connection, ss. 41 (1) and 42 (1) of the *Highway Traffic Act*, R.S.O., 1927, c. 251, were considered).

Judgment of the Appellate Division, Ont. (64 Ont. L.R. 109) affirming, in the result, the judgment of Raney J., for recovery by the plaintiff against the defendant of the amount claimed, affirmed. This amount included the plaintiff's costs of an appeal taken by S. from the judgment at trial in the action against S.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which dismissed its appeal from the judgment of Raney J. (2).

The defendant had issued a policy of insurance on an automobile of one Elizabeth Schwartz, insuring her to the extent of $5,000 against liabilities for bodily injuries or death caused to one person by reason of the operation of the automobile.

The plaintiff, in her statement of claim, alleged that she had been run down and injured by said automobile, the property of said Elizabeth Schwartz, which automobile at the time of the accident was being operated by A. C. Schwartz, the son of said Elizabeth Schwartz; that the accident and injuries were caused wholly by the negligence of A. C. Schwartz; that the plaintiff had brought action against Elizabeth Schwartz and A. C. Schwartz and had recovered judgment against them for damages in the sum of $2,067.25 and costs; that Elizabeth Schwartz and A. C. Schwartz had appealed to the Appellate Division and the appeal had been dismissed with costs; that the plaintiff's costs at trial and on the appeal in said action had been taxed at $633.40; that execution for the amount of the judgment and costs was placed with the sheriff who made a return of *nulla bona;* that plaintiff then notified the present defendant of the accident, the amount of the judgment, the taxed costs and the return of *nulla bona,* and made formal claim to the defendant, who disputed it.

The plaintiff's claim against the present defendant was by virtue of the provisions of s. 85 of the Ontario *Insurance*

(1) (1929) 64 Ont. L.R. 109.

(2) Raney J., on November 29, 1928, gave "judgment for the plaintiff as claimed, with costs of the action," and referred to his "reasons for judgment in *Donald* v. *Lewis* of this date." See *Donald* v. *Lewis,* 63 Ont. L.R. 310; judgment on appeal: 64 Ont. L.R. 301.

1929

CONTINENTAL CASUALTY CO. v. YORKE.

Act, R.S.O., 1927, c. 222. She claimed $2,700.65 (being the sum of said $2,067.25 and said $633.40 costs) and interest thereon from the date of her said demand upon defendant.

Raney J. gave judgment for the plaintiff as claimed, with costs, and the defendant's appeal to the Appellate Division was dismissed with costs. The defendant then appealed to this Court. The questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

R. S. Robertson K.C. for the appellant.

Gideon Grant K.C. for the respondent.

The judgment of the court was delivered by

LAMONT J.—On May 28, 1926, the appellant company issued a policy of insurance, in favour of one Elizabeth Schwartz, by which it agreed to indemnify her to the extent of $5,000 against liability for bodily injury or death caused to any one person injured by her automobile described in the policy.

On November 17, 1926, Mrs. Schwartz' automobile, while being driven by her son Alfred Schwartz, a boy of sixteen years of age, ran down and severely injured one Jeanne Yorke. To recover damages for the injuries she sustained Jeanne Yorke brought an action in the Supreme Court of Ontario against Mrs. Schwartz and her son and recovered judgment therein for $2,067.25 and the costs of the action. An appeal taken by Mrs. Schwartz was dismissed. Jeanne Yorke then issued execution on her judgment, to which the sheriff made a return of *nulla bona*. Not being able to obtain satisfaction for her judgment out of the property of Mrs. Schwartz or her son, Jeanne Yorke brought this action against the appellant company, claiming that it was liable to her in the amount of her judgment and costs, by virtue of a section in the *Insurance Act* (now s. 85 (1) R.S.O., 1927, c. 222), which section reads as follows:—

85. (1) In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the

amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied.

In answer to the claim the appellant set up the following defences:—

2. The defendant further says that at the time of the accident in question the automobile covered by the contract of insurance was being driven and operated by one A. C. Schwartz, a person under the age of eighteen years, with the knowledge, consent and connivance of the Assured, the said Elizabeth Schwartz.

3. The defendant further says that the said A. C. Schwartz had not passed an examination and obtained a licence to operate a motor vehicle, as provided by the Highway Traffic Act, 13-14 Geo. V, Chapter 48, Section 44, and was, therefore, prohibited from so driving or operating a motor vehicle on a highway in the Province of Ontario. The defendant says that there is no liability upon it to indemnify the said Elizabeth Schwartz in respect to the accident in question and the plaintiff has no claim against it.

4. The defendant pleads the Statutory Conditions embodied in the said Contract of Insurance and the provisions of the Ontario Insurance Act, R.S.O. (1927), Chapter 22, as a defence to this action.

Section 44 of the *Highway Traffic Act* (now s. 43 of the R.S.O., 1927, c. 251) reads as follows:—

44. (1) No person under the age of sixteen years shall drive or operate a motor vehicle, and no person over the age of sixteen years and under the age of eighteen years shall drive or operate a motor vehicle on the highway unless and until such person has passed an examination and obtained a licence as provided by section 16 of this Act.

(2) No person shall employ or permit anyone under the age of sixteen years to drive or operate a motor vehicle and no person shall employ or permit anyone over the age of sixteen and under the age of eighteen years to drive or operate a motor vehicle unless and until he has passed an examination and obtained a licence as provided by section 16.

Section 16 makes provision for the granting of chauffeurs' licences, and subsec. (1) is as follows:—

16. (1) No person shall operate or drive a motor vehicle on a highway as a chauffeur unless he is licensed so to do, and no person shall employ anyone to drive a motor vehicle who is not a licensed chauffeur.

Incorporated in the insurance policy were certain statutory conditions, of which no. 5 reads as follows:—

5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law, or, in any event, under the age of sixteen years, or by an intoxicated person.

The learned trial judge held that the respondent was entitled to recover against the appellant the amount of her judgment and costs, on the ground that the only "age limit fixed by law" in Ontario was sixteen years, and, as Alfred Schwartz was over that age at the time of the accident, statutory condition no. 5 afforded the appellant no relief from liability.

1929

CONTINENTAL CASUALTY CO. v. YORKE.

Lamont J.

On appeal the First Appellate Division (1) affirmed the judgment, the Chief Justice of Ontario and Mr. Justice Middleton for the reasons given by the trial judge, while Mr. Justice Hodgins and Mr. Justice Magee, although of opinion that eighteen years was the age limit fixed by law where a driver had no licence, held that, to escape liability by reason of statutory condition no. 5, the appellant must establish that the boy was driving the automobile with the knowledge, consent or connivance of Mrs. Schwartz, and this had not been established. From the judgment of the Appellate Division this appeal is brought.

The respondent's right of action against the appellant depends upon s. 85 above quoted. That section gives the person injured by an automobile in respect of which the owner has been insured against liability for injury, a "right of action" against the insurance company issuing the policy, provided such injured person has obtained a judgment against the person insured in respect of such injury and has issued execution thereon, and the execution has been returned unsatisfied. At the trial the respondent established that these statutory conditions precedent to her right of action against the appellant had been fulfilled. She then filed the formal judgment she had recovered against Mrs. Schwartz; the certificate of the Appellate Division that the appeal therefrom had been dismissed; the certificate of the taxing office as to the amount of the taxed costs, and the policy of insurance issued by the appellant to Mrs. Schwartz. She then closed her case. The appellant called no witnesses, but it filed a certificate under the hand of the Registrar General that Alfred Schwartz was born September 3rd, 1910, and Mr. Grant, on behalf of respondent, admitted that at the time of the accident Alfred Schwartz had no permit or licence to drive.

The first question that arises, therefore, is: On the material put before the court by the respondent, had she established a *prima facie* case? Section 85 gives the respondent a right of action against the appellant in the same manner and subject to the same equities as the insured would have if she herself had satisfied the judgment. What is the "right of action" here given? In my opinion it is simply

(1) (1929) 64 Ont. L.R. 109.

a right to sue. The statute gives the respondent a right to sue the appellant on its policy in the place and stead of the insured, which right she would not have had but for the statute. The right to sue may be exercised by the respondent in the same manner as if the insured had paid the judgment and brought the action. This, I take it, refers to procedure. It is also to be exercised subject to equities which would prevail between the appellant and the insured. This, in my opinion, means that the respondent must establish liability on the policy against the appellant to the same extent as if the action had been brought by the insured, and that whatever defences the appellant would have been entitled to raise against the insured it may raise against the respondent. Had Mrs. Schwartz paid the judgment and brought action against the appellant, she must, in my opinion, in order to succeed, have established (1) the agreement to indemnify; (2) that the bodily injury to another insured against had been inflicted by her automobile, and (3) that she was legally liable in damages to the respondent for the injuries received by her.

In the present action the respondent established the agreement to indemnify by the production of the policy. The fact that an injury of the kind insured against had resulted from the operation of Mrs. Schwartz' automobile, and Mrs. Schwartz' liability therefor, the respondent attempted to establish by the production of her judgment. In my opinion neither the injury nor the liability can, as against the appellant, be established in this manner. In 13 Halsbury, at pp. 542-543, the learned author says:—

> A judgment *in personam* is conclusive proof as against parties and privies of the truth of the facts upon which such judgment is based, but, excepting as above stated to prove its existence, date, and consequences, it is inadmissible in evidence as against strangers, except (1) where it determines a question of public right and is admissible as evidence of reputation; (2) in bankruptcy or administration proceedings; (3) in divorce cases; and (4) to some extent in patent actions.

In *Allan* v. *McTavish* (1), Burton J. A. points out that a judgment is conclusive upon third parties as well as upon the defendant to establish the relationship of debtor and creditor, and the amount of the debt and the date of its recovery; but that it furnishes no evidence whatever as regards third persons of the allegations in it on which re-

(1) (1883) 8 Ont. A.R. 440, at pp. 442-3.

1929

CONTINENTAL CASUALTY CO. v. YORKE.

Lamont J.

covery proceeded. "Those facts," his Lordship says "if material to the plaintiff's case, have to be established by appropriate evidence." See also *Ballantyne* v. *Mackinnon* (1); *Castrique* v. *Imrie* (2); *Duchess of Kingston's* case (3).

If the judgment was evidence as against the appellant of the existence of the injury insured against and of the liability of the insured therefor, the appellant would be liable on the policy if the insured, having a good defence to the claim for damages, failed to set it up in her pleadings, and prove it at the trial, and judgment went against her on that account. This would be to expose the appellant to the obligation of indemnifying the insured not only where it had agreed to do so, but also where it had not agreed to do so but judgment had been obtained against the insured through failure on her part to set up or establish an available defence.

The respondent's judgment not being evidence as against the appellant of the circumstances upon which it was founded, there was no evidence before the court that the conditions, upon which liability under the policy arose, had been fulfilled. Had the matter rested there the plaintiff would have been in the position of not having proved her case. The matter, however, did not rest there. At the trial counsel for both parties were of opinion that the appellant was precluded by the judgment from raising the question of Mrs. Schwartz' liability to the respondent. After Mr. Grant, who appeared for the respondent, had read to his Lordship s. 85 of the *Insurance Act*, the following discussion took place:—

HIS LORDSHIP: Does that mean that the plaintiff will have to make her case over again?

Mr. GRANT: Oh, no, she sues on the judgment.

HIS LORDSHIP: The insurance company have (had) an opportunity to come in, and they are practically precluded by the judgment.

Mr. GRANT: Yes, my Lord.

Mr. WALSH: Yes, nothing turns on that; *I am ready to admit all that.*

In view of this admission it is not now open to the appellant to contend that the liability of Mrs. Swartz to the re-

(1) [1896] 2 Q.B. 455.

(2) (1869-70) L.R. 4 H.L. 414, at p. 434.

(3) (1704) 2 Smith's Leading Cases, 1929 ed., at p. 666.

spondent for injuries received has not been established by the judgment.

Before the learned trial judge counsel for the appellant contended that the only point in controversy was the construction to be put on statutory condition no. 5. This appears from the following statement by Mr. Walsh:

MR. WALSH: I suppose my learned friend wants to get down to what is the real contest in this trial. The real contest is that we say that under the provisions of this policy, Statutory Condition No. 5, we are relieved from liability, because the boy who was driving the car was not of an age permitted by law to drive the car.

Although counsel for the respondent agreed that the construction of statutory condition no. 5 was the chief point in controversy, he argued that the consent of Mrs. Swartz to her son driving her automobile could not be presumed from the judgment. The following shews the view taken by counsel:

HIS LORDSHIP: What is the real controversy now?

MR. GRANT: The construction of Section 5, my Lord.

MR. WALSH: That was my understanding, that it really got down to section 5.

HIS LORDSHIP: On what point?

MR. GRANT: As to whether this boy is one of the prohibited class.

HIS LORDSHIP: On the assumption that he was not driving with the consent of the mother.

MR. WALSH: * * * he could be driving with the consent of the mother, because my learned friend has taken judgment against the mother. * * *

The argument on behalf of the appellant was (*a*) that, under s. 44 of the *Highway Traffic Act*, the age limit fixed by law, for one who had not passed an examination and obtained a licence, was eighteen years, and that it was admitted that Alfred Schwartz at the time of the accident was only sixteen years of age and had no licence to drive an automobile, and (*b*) that the respondent was estopped from saying that the boy was not driving with the consent of his mother because the respondent had taken a judgment against the mother which she was only entitled, under the statute, to have if the boy was driving with his mother's consent.

In the view which I take of the second branch of this argument, it is not necessary in this appeal to determine "the age limit fixed by law," within the meaning of condition no. 5 (which question I leave open), for, assuming that the appellant's contention is right and that the age

1929

CONTINENTAL CASUALTY CO. v. YORKE.

Lamont J.

limit fixed by law is eighteen years, the appellant, to escape liability under the condition, must also shew that the boy was driving with the knowledge, consent or connivance of his mother. Of this there was absolutely no evidence.

The appellant's contention that, as against the respondent, such consent must be presumed, cannot, in my opinion, be supported. Sec. 42 (1)* provides that the owner of a motor vehicle shall be responsible for any violation of the Act unless, at the time of such violation, the motor vehicle was in the possession of some person other than the owner or his chauffeur without the owner's consent.

Sec. 43† reads as follows:

> 43. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.

If, therefore, Mrs. Schwartz, in the case of *Yorke* v. *Schwartz,* did not set up in her pleadings, and prove at the trial, that her son was, at the time of the accident, driving her automobile without her consent, judgment may have gone against her because she did not meet the onus cast upon her by s. 43, although, as a matter of fact, the son may have been driving the car not only without her consent but contrary to her instructions. Furthermore, I do not see anything in the Act that would prevent Mrs. Schwartz from being liable at common law for the damage caused by her son's negligence if it were shewn that he was in her employ and, at the time of the accident, in the course of his employment. It does not necessarily follow, therefore, that because judgment was given against her, Mrs. Schwartz had any knowledge that her son was driving her automobile, or that she consented thereto.

In the present action it was repeatedly stated by Mr. Grant at the trial, that, in the suit of *Yorke* v. *Schwartz,* the consent of Mrs. Schwartz was not a matter in issue, nor was any finding made thereon. The pleadings in that case were not put in evidence and they are not before us. The position taken by the parties appears clearly from the discussion before the trial judge. After Mr. Walsh had stated that the respondent was estopped from questioning

*S. 41 (1) of the *Highway Traffic Act,* R.S.O., 1927, c. 251. (Repealed and new section substituted by 19 Geo. V, c. 68, s. 9).

†Now s. 42 of R.S.O., 1927, c. 251.

the consent of Mrs. Schwartz to her son driving the car, the following discussion took place:—

Mr. GRANT: That was not the issue at all in the other action.

Mr. WALSH: I think it was.

Mr. GRANT: Well, look at the pleadings and you will see what was at issue.

Mr. WALSH: I was not at the trial of the other action.

Mr. GRANT: Well, I have the pleadings here, and you can see them if you want to.

HIS LORDSHIP: Well, do you want to offer any evidence?

Mr. WALSH: I would if there was any contest about that, my Lord.

HIS LORDSHIP: Mr. Grant is not admitting that the automobile was driven with the knowledge and consent of the insured. You are not admitting that?

Mr. GRANT: No, I am not admitting that; * * *

Mr. Walsh then informed the court that he had subpoenaed the boy's mother but that she had not yet arrived in court. The hearing was adjourned until she arrived. On her arrival the following took place:—

Mr. WALSH: My Lord, since the adjournment I have looked into this matter a little further; I do not think that I am called upon to call this witness.

HIS LORDSHIP: Well, don't argue it now, but make your own case in your own way, and then we will get to the argument.

Mr. WALSH: Well, I am going to say, my Lord, I am going to rely on Section 41 of the Act.

HIS LORDSHIP: Then you are closing your case?

Mr. WALSH: Yes, my Lord.

The appellant was clearly aware that the respondent was not admitting that the boy was driving the car with the consent of his mother. The onus was, therefore, upon the appellant to prove it. That it did not do. The defence, therefore, fails.

As to the amount which the respondent is entitled to recover against the appellant, I agree with the court below. The only item requiring consideration is the costs of the appeal by Mrs. Schwartz in the former action. That appeal, I think, was a reasonable one and would likely have been taken by the appellant had it defended the action.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Walsh & Mungovan.*

Solicitors for the respondent: *Johnson, Grant, Dods & MacDonald.*

1929
*Nov. 4.
1930
*Feb. 4.

EUGENE TAYLOR (PLAINTIFF).....APPELLANT;

AND

THE PEOPLE'S LOAN AND SAVINGS CORPORATION (DEFENDANT) ..... } RESPONDENT.

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

Negligence—Landlord and tenant—Claim for damages for personal injuries caused by fire in defendant's building while plaintiff attending meeting of society which was lessee of premises in the building—Absence of fire escapes—City by-laws—Factory, Shop and Office Building Act, R.S.O., 1914, c. 229—"Factory."

Defendant owned a four storey building, and leased premises on the top storey to a fraternal unincorporated society, of which plaintiff (subsequently to the lease) became a member. During a meeting of the society a fire occurred in the building and plaintiff, whose egress by the stairway was cut off by the fire, was injured. The building was not provided with fire escapes. Plaintiff sued defendant for damages.

Held: Plaintiff could not succeed. There was nothing to show that he was an invitee of defendant. Defendant's obligation was not higher or more extensive than that of lessor under the lease, and, assuming, the most advantageous position for plaintiff, that he and defendant stood in the relation of tenant and landlord under it, they were governed by the law as stated in *Lane* v. *Cox*, [1897] 1 Q.B. 415, *Cavalier* v. *Pope*, [1906] A.C. 428, *Fairman* v. *Perpetual Invt. Bldg. Soc.* [1923] A.C. 74, at pp. 95-96, *Scythes & Co. Ltd.* v. *Gibson's Ltd.*, [1927] S.C.R. 352, at p. 358; the landlord does not, in the absence of a provision to that effect, become liable to the tenant for defective construction or maintenance of the leased premises, or for damages resulting from any such cause. As to certain clauses of a city by-law, requiring fire escapes to be provided after notice by the building inspector, and requiring a building considered dangerous to be made safe, upon notice by the inspector, these had no application because (whatever the effect might otherwise have been) no such notice had been given as to the building in question. Whether or not a certain printing business carried on by a tenant in rooms on the lower two storeys of the building operated, as to such rooms, to create a "factory" within the *Factory, Shop and Office Building Act*, R.S.O., 1914, c. 229, it afforded no reason for regarding the fourth storey as a "factory," and therefore (apart from other considerations standing in plaintiff's way of recovery under that Act) the provisions of that Act invoked by plaintiff were inapplicable.

Judgment of the Appellate Division, Ont., 63 Ont. L.R. 202, in its result affirmed.

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

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which, reversing the judgment of Raney J. (2), held that the plaintiff was not entitled to recover from the defendant damages claimed for personal injuries to the plaintiff caused through a fire which occurred in the defendant's building, premises in the top storey of which had been leased by defendant to a fraternal unincorporated society, of which the plaintiff, at the time of the fire, was a member, and a meeting of which he was attending when the fire occurred. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

J. W. G. Winnett K.C. for the appellant.

I. F. Hellmuth K.C. and *T. N. Phelan K.C.* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—On the night of 22nd January, 1927, a building of four storeys, belonging to the defendant company, situate on Richmond street, London, Ontario, was destroyed, or seriously damaged, by fire. Parts of the building had been leased, and were in the possession of tenants. Among others, the space on the fourth floor, described as "the top flat of the building known as No. 426 Richmond street," was, by indenture of 1st April, 1923, in form and as thereby expressed, leased by the defendant company to "Court Eclipse, No. 1036, Canadian Order of Foresters of the said city of London," a fraternal, unincorporated society.

The lease was by indenture in duplicate, in pursuance of the *Act Respecting Short Forms of Leases;* it was executed, on behalf of the defendant company, by its President and Secretary-Treasurer, who affixed the company's corporate seal; and, on behalf of the Court Eclipse, by the Chief and Financial Secretary of the Court, who attached a seal. The lease was to run for one year from its date, and there is a memorandum endorsed of 26th April, 1924, extending the term for one year from the first of that month. It would

(1) (1928) 63 Ont. L.R. 202. (2) (1928) 62 Ont. L.R. 564.

1930

TAYLOR v. PEOPLE'S LOAN & SAVINGS CORP.

Newcombe J.

appear that the society continued to occupy the premises described down to the time of the fire, although there is no further written extension in evidence.

On the night of the fire, the members of the Court, or society, were entertaining themselves and their friends at a social assembly held in the flat, and the plaintiff, who had joined the society subsequently to the lease, was present. The party was broken up by the fire, which started on one of the lower floors while the festivities were in progress, and, most unfortunately, had, before it was discovered, gathered such headway that egress by the stairway was cut off for several of the members and their guests, including the plaintiff. The building was not provided with fire escapes, and so it was necessary for these unfortunate people to jump from the windows, in order to save themselves.

The plaintiff, who raised an alarm, and remained at a window until the firemen arrived, landed in one of the nets, and his hands proved to be so severely burned as permanently to destroy their usefulness. He claimed $15,000 damages, and that amount was found at the trial, and not questioned before us. The Appellate Division (1) reversed the trial judge, holding that there was no liability, and from that judgment the plaintiff appeals.

The learned trial judge (2) was of opinion that the defendant company was liable both at common law and by the legislation of Ontario. He held that, although there was no contract between the parties, the plaintiff was not a trespasser nor a mere licensee, but, in the language of the judgment, that he was

> an "invitee," just as much as he would have been if he had paid an admission fee to the defendant company.

I do not, however, find any material with which to construct an invitation by the defendant; its obligation cannot, in my view, be any higher, or more extensive, than that of lessor under the lease of 1st April, 1923; and, to assume the most advantageous position for the plaintiff, if he and the defendant stand in the relation of tenant and landlord under that instrument, they are governed by the

(1) (1928) 63 Ont. L.R. 202. (2) (1928) 62 Ont. L.R. 564.

law as stated in *Lane* v. *Cox* (1); *Cavalier* v. *Pope* (2); *Fairman* v. *Perpetual Investment Building Society* (3); *Scythes & Company Limited* v. *Gibson's Limited* (4). The landlord does not, in the absence of a provision to that effect, become liable to the tenant for defective construction or maintenance of the leased premises, or for damages resulting from any such cause.

There is a municipal by-law of the City of London, no. 5430, of 4th December, 1916, as amended, requiring, by clause 40, "the owner, lessee or agent of every building (except private dwellings) three storeys or more in height," to provide fire escapes within one month after notice by the Inspector of Buildings; but in this case there was no notice, and so the clause does not apply, whatever its effect might otherwise have been. For the like reason the provisions of clause 10 of the by-law do not apply; that clause requiring the owner or his agent, of a building which, in the opinion of the Inspector, is in a dangerous condition, to proceed at once, upon notice in writing of the Inspector, to make the building safe.

The judge expresses his view with regard to the legislation as follows:

> But did the failure of the building inspector to take his duties seriously absolve the defendant company from responsibility? I think not. Its officers certainly knew of the condition of the building and the absence of fire escapes, and their duty was to comply with the law irrespective of official notice or absence of official notice.

But I do not think that this is an admissible interpretation. There is no common law liability; and as to the by-law, to mention one reason only, the requisite of notice was not satisfied.

Chapter 229, R.S.O., 1914, *An Act for the Protection of Persons Employed in Factories, Shops and Office Buildings,* is also invoked on the plaintiff's behalf, and the trial judge considered that the plaintiff, as an invitee of the owner, was entitled to the benefit of s. 59, subs. 3, which provides that

> The owner of every factory, shop or office building over two storeys in height, and, where deemed necessary by the Inspector, the owner of every factory, shop or office building over one storey in height, shall provide one or more systems of fire escape, and shall keep the same in good repair and to the satisfaction of the Chief Inspector, as follows:

(1) [1897] 1 Q.B. 415.
(2) [1906] A.C. 428.
(3) [1923] A.C. 74, at pp. 95-96.
(4) [1927] S.C.R. 352, at p. 358.

1929

TAYLOR v. PEOPLE'S LOAN & SAVINGS CORP.

NewcombeJ.

and directions follow as to the structure, position and character of the stairways or ladders, shewing clearly enough, in addition to what may be inferred from the title of the statute, that it is for the protection of the employees that the fire escapes are required.

It appears that Langford and Company occupied rooms on the two lower flats for printing purposes, and it was for that reason that the learned judge considered that the building was a factory, and subject to factory regulations, even on the fourth floor, where the Court Eclipse was located. There seems to be some doubt as to whether the business of Langford and Company operated to create a factory within the meaning of the Act, even as to the space which they occupied; the learned judge suggests that the place was "barely within the statutory definition of the word." But, however that may be, and apart from other considerations which stand in the plaintiff's way of recovery under the *Factory, Shop and Office Building Act,* I see no reason why the fourth floor should be regarded as a factory, and I do not consider that this Act applies, any more than the other enactments which have been cited.

My conclusion is thus in conformity with that unanimously reached by the Appellate Division.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Winnett, Morehead & Co.*

Solicitors for the respondent: *Murphy, Gunn & Murphy.*

1930

*Feb. 12.

AMEDEE BARON .....APPELLANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

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

Criminal law—Practice and procedure—Jury trial—Charge of the trial judge—Misdirection—Sworn statement by stenographer conflicting with report of the judge—Section 1020 Cr. C.

The appellant, having been convicted of the crime of rape and condemned to fifteen years imprisonment and lashes, appealed to the court of appeal principally on the ground that the trial judge had erred in his

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

instructions given to the jury. In the record were the notes of the stenographer at the trial who certified, under oath, to the delivery of a charge by the trial judge which, as reported by him, contained a clear misdirection. The appellate court, having determined that, on the stenographic transcription, the appeal should be allowed, directed that a report be furnished by the trial judge in accordance with section 1020 Cr. C. The trial judge then prepared, two or three months after the trial, a certificate containing a number of statements made by him in answer to a corresponding number of objections to his charge which formed the grounds of appeal and stating, according to his recollection, that in fact his direction was precisely the contrary of that reported.

Held that such certificate of the trial judge was not a report within section 1020 Cr. C.: it did not contain the judge's "notes of the trial" nor was it a "report giving his opinion upon the case or upon any point arising in the case"; and, therefore, the court being left with nothing authentic and regularly before the court to establish that the charge was not as reported, the appellant was clearly entitled to a new trial. Section 1020 Cr. C. apparently contemplates that the judge or the magistrate should furnish "his notes of the trial" or his report immediately after the trial, or at least, so soon as an appeal is lodged; and it was never intended by this section to enable the trial judge, after an appeal had been argued, to put before the court of appeal, by way of certificate or otherwise, whether *proprio motu* or by direction of the court of appeal, his answer to the various points taken upon the appeal.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the conviction of the appellant for the crime of rape.

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

C. Bourgeois K.C. for the appellant.

P. Bigué K.C. and *Laetare Roy K.C.* for the respondent.

At the close of the arguments by counsel for the appellant and for the respondent, the judgment of the court was orally delivered by

ANGLIN C.J.C.—We regard this as a case of the utmost importance. A conviction for the crime of rape is always a serious matter. In the present case it is more than ordinarily so because the penalty imposed is fifteen years imprisonment and lashes.

(1) (1928) Q.R. 47 K.B. 371.

1930

BARON v. THE KING.

Anglin C.J.C.

It is the aim of this court, as of all courts of law, to do justice,—not abstract justice, but justice according to law. Elementary justice seems to require that a conviction for a serious crime should not stand if it may have been based on illegal evidence.

In criminal matters, under s. 1014 of the Code, the court of appeal may set aside a conviction, if of the opinion "that on any ground there was a miscarriage of justice." This power might well have been exercised here having regard to the charge as a whole. But, our jurisdiction is much more restricted. Under s. 1023 we can entertain an appeal only

against the affirmance of (*a*) conviction on any question of law on which there has been dissent in the Court of Appeal.

The present case has some most unpleasant aspects. A stenographer of repute has certified, under oath, to the delivery of a charge by the trial judge which, as reported by him, contains a clear misdirection. The learned trial judge, as reported, told the jury that a statement of the complainant to her aunt, which was admissible only to show the consistency of her conduct, in itself amounted to distinct evidence of the guilt of the accused.

On the other hand, we have also before us a statement or certificate, furnished by the trial judge under direction of the Court of King's Bench, in which he says his direction was not as so reported, but precisely the contrary. This is relied upon by the Crown as a report under s. 1020 of the Criminal Code, and it is contended that effect must be given to it and the stenographer's transcription ignored.

Were the certificate of the trial judge before us really a report made in conformity with s. 1020 of the Criminal Code, the case would present greater difficulty and it may be that effect would have to be given to it. But, as we read s. 1020, the certificate of the trial judge now before us, which consists in a number of statements made by him in answer to a corresponding number of objections to his charge, which formed the grounds of appeal, and was prepared by him some two or three months after the trial and after the argument of the appeal in the Court of King's Bench—indeed, counsel assure us, after that court had determined that, on the stenographic transcription, the appeal before it must be allowed,—is not such a report as

s. 1020 contemplates. It certainly does not contain the learned judge's "notes of the trial"; nor is it a "report giving his opinion upon the case or upon any point arising in the case."

S. 1020 provides that, as part of the material to be put before the court of appeal, the trial judge or magistrate shall furnish to the court "his notes of the trial" and shall also send "a report giving his opinion upon the case or upon any point arising in the case" and apparently contemplates this being done immediately after the trial, or at least, so soon as an appeal is lodged. It was never intended by this section to enable the trial judge, after an appeal had been argued, to put before the court of appeal by way of certificate or otherwise, whether *proprio motu* or by direction of the court of appeal, his answer to the various points taken upon the appeal. That, in substance, is what has been done in this case. We cannot regard such a certificate of the trial judge as having been properly given, nor as a report within s. 1020. That being so, we are left with nothing authentic and regularly before the court to establish that the charge was not what the stenographic transcription shews; and upon that, as already stated, the misdirection is so plain and so fatal in its consequences that a new trial is inevitable. Justice requires that a conviction where there is such grave uncertainty as to the propriety of the direction under which it was made should not be allowed to stand.

That such uncertainty exists in this case is obvious, since, against the accuracy of the note made at the moment of utterance by a careful, sworn stenographer, acting in the discharge of his usual functions, there is nothing but the recollection by a judge, however eminent and careful, of the precise language used by him some two or three months before.

This case is most exceptional. We trust such circumstances will not again arise; and the present decision can be relied upon only in a case which is on all fours with that before us.

The conviction will accordingly be set aside and a new trial had.

Appeal allowed.

1929
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1930
*Feb. 4.

DAME NOÉMIE LAMARCHE (PLAINTIFF), APPELLANT;

AND

ALBERT BLEAU AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Succession duties—Property transmitted in usufruct or with substitution—Usufructuary or institute bound to pay full duties to provincial collector, but liable only for his share in the estate—Balance of duties paid out of funds of proprietor or substitute—Succession duties Acts, (Q.) 4 Geo. V, c. 9, ss. 1375, 1380, 1381, 1382, 1385—(Q) 4 Geo. V, c. 11.

Under the Quebec *Succession Duties Act* (4 Geo. V, c. 9, 1914), neither the usufructuary, nor the institute in a substitution, is personally liable for the duties otherwise than in respect of his share in the succession, and for no more;

By force of the statute, the Collector must collect from the usufructuary or the institute the whole of the duties; but such duties, so far as they represent the share of the proprietor or the substitute, are payable out of the property or money in the possession of the usufructuary or the institute belonging or owing to the said proprietor or substitute;

A general usufructuary having paid out of his own money duties due in respect of the share of the proprietor is entitled to reimbursement thereof, without waiting until the expiration of the usufruct; but the reimbursement will be only of the sum so paid, without interest.

In such a case, the share of the general usufructuary in the duties payable is represented by (*a*) the loss of the interest, on the sum he has paid for the duties due, from the date of the payment so made, (*b*) the loss of revenue in the future, as a result of the diminution of the capital corresponding to the amount so reimbursed to him out of the property belonging or owing to the proprietor.

Judgment of the Court of King's Bench (Q.R. 46 K.B. 450) reversed.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, P. Demers J. and dismissing the appellant's action.

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

E. Lafleur K.C. and *A. Chase-Casgrain K.C.* for the appellant.

J. A. Kearney for the respondents.

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

(1) [1929] Q.R. 46 K.B. 450.

The judgment of the court was delivered by

RINFRET, J.—Eugène Bleau est mort *ab intestat* le 21 mai 1921.

L'appelante, son épouse, avait été instituée son usufruitière universelle par contrat de mariage en date du 26 mars 1884. Elle renonça à la succession de son mari, pour s'en tenir à cet usufruit. En leur qualité d'héritiers légaux, les enfants, qui sont les intimés, acceptèrent la succession.

L'appelante prit possession des biens et la conserva jusqu'au 30 janvier 1925, alors que, pour obéir à un jugement de la Cour Supérieure, elle les remit à La Société d'Administration Générale, qui en fut nommée séquestre.

Elle avait payé au gouvernement de la province de Québec les droits de succession s'élevant à $1,530.80. Dans son action elle allègue que le paiement de cette somme devait se faire à même le capital de la succession et elle en réclame le remboursement du séquestre et des héritiers. Ceux-ci prétendent, au contraire, que l'appelante, en payant les droits de succession, a acquitté sa propre dette et qu'elle n'a aucun recours contre eux.

La succession, nous l'avons vu, s'est ouverte le 21 mai 1921. La loi en vigueur à cette date était la *Loi de Québec relative aux droits sur les successions* (Statuts de Québec, 4 Georges V, chapitre 9 et ses amendements).

En vertu de cette loi,

Art. 1375. Tout bien mobilier ou immobilier, dont la propriété, l'usufruit ou la jouissance est transmis par décès, est frappé des droits suivants, sur la valeur du bien transmis, déduction faite des dettes et charges qui existent au moment du décès (suit une énumération des droits imposés).

1380. Tout héritier, légataire universel, légataire à titre universel ou légataire à titre particulier, ou donataire en vertu d'une donation à cause de mort (ou en vertu d'une disposition mentionnée dans l'article 1376 (*a*)) est personnellement responsable des droits dus pour sa part dans la succession et de rien de plus.

Dans le cas de transport de propriété avec usufruit ou substitution, les droits sont payables par l'usufruitier ou le grevé, et ne sont exigibles d'aucun autre bénéficiaire.

Aucun notaire, exécuteur, fidéicommissaire ou administrateur n'est personnellement responsable des droits imposés par la présente section. Cependant, l'exécuteur, le fidéicommissaire ou l'administrateur peut être appelé à payer ces droits à même les biens ou les deniers qu'il a en sa possession appartenant ou revenant aux bénéficiaires, et à défaut par lui de ce faire, il peut être poursuivi pour le montant de ces droits, mais seulement *ès qualité*, et tout jugement rendu contre lui en cette qualité, ne doit être exécuté que sur ces biens ou ces deniers.

1930

LAMARCHE v. BLEAU.

Rinfret J.

A cette fin,

tout héritier, légataire universel, légataire à titre universel ou légataire à titre particulier, donataire en vertu d'une disposition mentionnée dans l'article 1376 (*a*), exécuteur, fidéicommissaire ou administrateur, ou notaire qui a reçu un testament ou codicille, doit, dans les trente jours qui suivent le décès du testateur ou du *de cujus*, transmettre au percepteur du revenu de la province du district où le testateur est mort, ou dans lequel la succession est ouverte, une copie dudit testament ou codicille du testateur ou dudit acte de donation (art. 1381-1),

et chacun d'eux, sauf le notaire, doit, dans les trois mois qui suivent le décès, transmettre à ce percepteur une déclaration sous serment contenant diverses indications et, entre autres,

1381-2.

c. La description, la situation et la valeur réelle de tous les biens transmis par le défunt;

f. La nature et la valeur de la part du déclarant dans la succession, après déduction faite des dettes et charges par lui payables ou grevant les biens qui composent cette part et d'après la connaissance qu'il en a, la nature et la valeur des parts de chacun des autres bénéficiaires, après avoir fait une semblable déduction pour chacun d'eux.

Une déclaration dûment faite par l'une des personnes mentionnées dans le paragraphe 2 du présent article, si elle contient tous les renseignements nécessaires pour établir les montants de tous les droits payables au sujet de ce décès, libère toutes les autres de l'obligation de faire cette déclaration.

Or, voici maintenant la question qui est soumise. Elle est bien posée par M. le juge Tellier, dans son jugement en Cour du Banc du Roi:

Mais, quand les droits sont payables par l'usufruitier, est-il tenu de les payer à même ses propres biens, ou à même les biens de la succession dont il a l'usufruit? En d'autres termes, l'usufruitier qui paie, quand les droits sont exigibles de lui, acquitte-t-il sa propre dette, ou celle de la succession dont les biens sont sujets à son usufruit? Voilà la question débattue dans la présente cause.

La réponse n'est pas facile. Nous allons donner les raisons qui nous conduisent à la solution que nous adoptons.

Les droits de succession sont imposés uniquement par l'article 1375 du statut:

Tout bien mobilier ou immobilier, dont la propriété, l'usufruit ou la jouissance est transmis par décès, est frappé des droits suivants, sur la valeur du bien transmis, etc.

Il n'y a pas d'autre article qui impose la taxe.

Si l'on analyse cet article, on constate que la taxe est imposée sur les biens. En son essence, ce n'est pas une taxe personnelle. Les droits " frappent " les biens. Et ils les " frappent " sur la valeur du bien transmis. Cela veut dire: sur la valeur du bien lui-même et non sur la valeur

de la propriété, de l'usufruit ou de la jouissance de ce bien. C'est le bien qui, par le fait de sa transmission, est "frappé". La loi, pour imposer la taxe ou en déterminer le taux, ne s'occupe pas du caractère du droit (propriété, usufruit ou jouissance) de celui auquel le bien sera remis par suite de sa transmission.

Telle est, suivant nous, la nature de la taxe imposée par cette loi de Québec relative aux droits sur les successions (4 Geo. V, c. 9).

Il en résulte que c'est une taxe qui frappe le capital. Elle impose des droits qui doivent provenir du bien transmis.

Cela est confirmé par le fait qu'elle comporte sur ce bien un privilège, " prenant rang immédiatement après les frais de justice " (art. 1385 de 4 Geo. V) et encore par la définition du mot " bien " qui, pour les fins de cette loi, ne comprend que le " meuble ou immeuble réellement situé dans les limites de la province, etc.", que

la personne décédée ait ou n'ait pas son domicile dans * * * la province, ou que la transmission ait lieu dans la province ou hors de ses limites (art. 1376).

C'est le bien dans la province que l'on veut atteindre.

Si, maintenant, l'on passe aux articles 1380 et 1381, l'on s'aperçoit qu'ils n'imposent pas de taxe. Ils désignent " les personnes qui sont appelées à la payer " (comparer avec le préambule du chapitre 11 (onze) du statut 4 Geo. V, neuvième alinéa); et ils indiquent la procédure à suivre dans ce but.

Le testament et une déclaration doivent être transmis au percepteur du revenu par l'une de certaines personnes mentionnées. Notons, en passant, que l'usufruit ou le grevé de substitution ne figure pas nommément dans l'énumération de ces personnes. Ils sont englobés dans la désignation générale: héritier, légataire ou donataire.

Une seule déclaration dûment faite suffit et libère toutes les autres personnes de l'obligation de transmettre leur déclaration. Cette déclaration spécifie " la nature et la valeur de la part du déclarant dans la succession " et celles " des parts de chacun des autres bénéficiaires ".

Sur réception de ces documents, et après que les informations qu'ils contiennent ont été contrôlées (art. 1381-9 et amendements), le percepteur prépare un état des droits

1930
LAMARCHE
v.
BLEAU.
Rinfret J.

qui doivent être payés par chacun des bénéficiaires et adresse à chacun d'eux " l'état qui le concerne ". Sur défaut du paiement des droits dans les trente jours, il peut en poursuivre le recouvrement devant toute cour de juridiction compétente.

Et l'article 1380 spécifie les personnes à qui le percepteur du revenu doit s'adresser pour le paiement. Ce sont: l'héritier, le légataire universel, le légataire à titre universel, le légataire à titre particulier, le donataire en vertu d'une donation à cause de mort (ou en vertu d'une disposition mentionnée dans l'article 1376a).

Chacun d'eux est déclaré " personnellement responsable des droits dus ". Mais l'article ajoute: " pour sa part dans la succession et de rien de plus ".

On voit que, de nouveau, l'usufruitier et le grevé de substitution ne sont pas spécialement nommés dans l'énumération que nous venons de faire, en nous basant sur le premier paragraphe de l'art. 1380. Cette remarque n'est pas sans importance, parce que ce premier paragraphe est le seul qui édicte expressément une responsabilité personnelle. Sans doute, l'usufruitier ou le grevé de substitution tomberait dans la catégorie des légataires ou des donataires, mais à ce titre et comme tel, il ne serait personnellement responsable que " pour sa part dans la succession et de rien de plus ".

Cependant l'article poursuit:

> Dans le cas de transport de propriété avec usufruit ou substitution, les droits sont payables par l'usufruitier ou le grevé, et ne sont exigibles d'aucun autre bénéficiaire.

Ce deuxième paragraphe de l'article est ambigu. Il dit bien que le percepteur du revenu, " dans le cas de transport de propriété avec usufruit ou substitution " devra percevoir les droits de l'usufruitier ou du grevé (selon le cas) et qu'il ne pourra les exiger "d'aucun autre bénéficiaire". Mais il ne dit pas, comme dans le paragraphe précédent, que l'usufruitier ou le grevé en est personnellement responsable. Or, cette conséquence ne suit pas nécessairement de l'emploi du seul mot " payables " dans la phrase: " les droits sont payables par l'usufruitier ou le grevé ". La preuve en est dans le troisième paragraphe du même article 1380, en vertu duquel

l'exécuteur, le fidéicommissaire ou l'administrateur peut être appelé à payer ces droits,
mais il n'en est pas " personnellement responsable ".

D'autre part, le premier paragraphe de l'article énumère les personnes qui sont déclarées personnellement responsables et nous venons de voir que l'usufruitier et le grevé n'y sont pas nommément mentionnés.

De cette première analyse nous pouvons tirer les constatations suivantes:

1° Le législateur ne nomme pas l'usufruitier ou le grevé parmi les personnes qu'il rend personnellement responsables des droits sur les successions.

2° Il se peut que l'usufruitier et le grevé soient compris dans les termes généraux de légataire ou donataire, employés dans le premier paragraphe de l'article 1380, mais alors ils ne seraient, suivant les termes de cet article, personnellement responsables que chacun " pour sa part dans la succession et de rien de plus ".

3° Si, au contraire, le législateur n'a pas voulu inclure l'usufruitier ou le grevé dans les termes généraux de légataire ou de donataire, " dans le cas de transport de propriété avec usufruit ou substitution ", et s'il a entendu faire pour ce cas une règle à part, contenue uniquement dans le deuxième paragraphe de l'article 1380, il faudrait alors dire, d'après les règles ordinaires d'interprétation, que ni l'usufruitier, ni le grevé (dans le cas prévu par ce paragraphe) ne sont personnellement responsables des droits. En effet:

(*a*) Ils seraient exclus du paragraphe qui énumère les personnes personnellement responsables; et, en les mentionnant à part, dans un autre paragraphe qui vient immédiatement après, l'intention semblerait être de les mettre sur un pied différent.

(*b*) La présomption est que, si le législateur eût voulu les tenir personnellement responsables, il eût exprimé cette intention dans les mêmes termes qu'il venait d'employer à cette fin dans la clause précédente du même article.

Il existe toutefois une interprétation alternative. Ce serait que l'usufruitier ou le grevé fût " personnellement responsable ", à titre de légataire ou de donataire, " pour sa part dans la succession ", en vertu du paragraphe 1er de

1930

LAMARCHE v. BLEAU.

Rinfret J.

l'article 1380, et qu'il fût en outre tenu de payer la balance des droits " en qualité de représentant d'autres personnes à même les deniers leur appartenant " (suivant l'expression contenue dans le 10e alinéa du chapitre 11 du statut 4 Geo. V).

Nous ne voulons pas dire par là que les droits devraient être calculés en deux montants représentant respectivement la valeur de l'usufruit ou de la substitution d'une part et la valeur de la propriété d'autre part. Nous avons vu que l'article 1375 ne comporte pas cette interprétation. Les droits doivent être basés sur la valeur du bien qui a fait l'objet de la transmission. Mais, le montant des droits étant établi, l'usufruitier ou le grevé ne devrait personnellement que la partie de ce montant proportionnelle à " sa part dans la succession " (suivant le premier paragraphe de 1380), tout en étant obligé de payer la balance du montant global des droits (suivant le deuxième paragraphe de 1380) à même les deniers de la succession qu'il a en sa possession.

On peut concevoir que le législateur ait voulu ainsi éviter au percepteur du revenu les ennuis d'une collection de droits contre des nu-propriétaires ou des appelés nombreux, dispersés, et dont quelques-uns pouvaient n'être pas nés ou avoir seulement des intérêts éventuels. Il existait d'excellentes raisons pour que le parlement facilitât la tâche en ordonnant que, pour le paiement de la taxe, le percepteur ne serait tenu de s'adresser qu'à celui qui, au moment où cette taxe devenait due, se trouvait en possession des biens de la succession. (Nous renvoyons sur ce point au jugement de M. le juge de Lorimier dans la cause de *Blache* v. *Lévesque* (1), reproduit dans le rapport de l'arrêt de la Cour du Banc du Roi en cette cause).

Mais l'article 1380 contient un troisième paragraphe qui, nous l'avouons, affaiblit notre raisonnement. Il prévoit que l'exécuteur testamentaire, le fidéicommissaire ou l'administrateur peut être appelé à payer les droits de succession. Et il déclare expressément que, dans ce cas, il n'est pas personnellement responsable de ces droits, qu'il paiera seulement " à même les biens ou les deniers qu'il a en sa

(1) Q.R. 35 K.B. 30, at pp. 32, 33.

possession appartenant ou revenant aux bénéficiaires", qu'il peut être poursuivi seulement *ès-qualité* et que le "jugement rendu contre lui en cette qualité ne doit être exécuté que sur (les) biens ou (les) deniers" qu'il a ainsi en sa possession.

Si maintenant l'on a recours à la méthode d'interprétation déjà suivie pour les paragraphes 1 et 2, il est évident que la présence du paragraphe 3 y jette une certaine confusion. Il serait logique de se demander pourquoi un législateur, ayant l'intention (que nous avons présumée) de ne pas rendre l'usufruitier ou le grevé personnellement responsable au moins de la balance des droits en excès de "sa part dans la succession", n'aurait pas exprimé cette intention dans les termes si clairs qu'il emploie lorsqu'il s'agit de l'exécuteur, du fidéicommissaire ou de l'administrateur.

Il y a bien une explication.

La *Loi de Québec relative aux droits sur les successions* de 1914 a voulu remédier à la situation créée par l'arrêt du Conseil privé *re Cotton* v. *The King* (1) rendu le 11 novembre 1913 et déclarant la loi antérieure inconstitutionnelle parce qu'elle était supposée imposer une taxe indirecte, contrairement aux prescriptions de l'*Acte de l'Amérique britannique du Nord*. L'article 1380 est un des articles adoptés dans ce but. Le premier et le troisième paragraphes sont nouveaux; le deuxième ne l'est pas. Il remonte à la loi 55-56 Victoria, chapitre 17, sanctionnée en 1892, où il se trouvait à peu près dans les mêmes termes. Il fut conservé dans la loi 6 Edouard VII, chapitre 11; puis reproduit, comme article 1379, dans les Statuts Refondus de Québec de 1909. On le retrouve maintenant, légèrement modifié—mais ces modifications n'affectent pas le droit que nous discutons—et il est intercalé, en conservant textuellement sa partie essentielle, entre les paragraphes 1 et 3 de l'article 1380 de la loi de 1914.

Il ne faut donc pas perdre de vue que ce texte est antérieur au jugement dans *Cotton* v. *The King* (1) et date d'une époque où l'on n'était pas hanté par l'objection du Conseil privé. Pour cette raison, sans doute, ce texte ne cherche pas à éviter l'obstacle de la taxe indirecte avec une

(1) [1914] A.C. 176.

1930

LAMARCHE v. BLEAU.

Rinfret J.

précision dans les termes aussi minutieuse que celle que l'on trouve dans les paragraphes 1 et 3, qui sont nouveaux.

Mais ce qu'il est important de retenir, c'est que le deuxième paragraphe de l'article 1380 est un texte de loi antérieur au jugement rendu par le Comité judiciaire du Conseil privé *re Cotton* v. *The King* (1).

Or, le 19 février 1914, la législature de Québec a adopté une *Loi concernant certains droits imposés sur les successions* (Statuts de Québec, 4 Geo. V, chapitre 11). C'est une loi interprétative et déclaratoire. Le préambule réfère d'abord au jugement Cotton (1) et dit que, par suite de ce jugement,

des doutes se sont élevés sur la question de déterminer si les taxes imposées par la loi * * * 6 Edouard VII, chapitre II (alors les articles 1374 à 1387 des Statuts Refondus de 1909) étaient des taxes directes;

que ces doutes provenaient de ce que le Comité judiciaire aurait compris que la loi imposait la totalité des droits à percevoir sur certaines personnes dans l'expectative qu'elles recouvrent ensuite le montant ainsi payé de ceux qui étaient intéressés dans la succession; puis le préambule affirme: Aucune des lois antérieures ou postérieures à la loi 6 Edouard VII, chapitre 11, concernant les droits sur les successions, n'avait pour objet d'imposer ou n'a imposé des droits sur la personne faisant la déclaration, mais, au contraire, elles ont eu pour objet de taxer et ont taxé directement, et sans recours en faveur de qui que ce soit, tous les bénéficiaires de la succession.

Le préambule parle ensuite du passage suivant de la loi antérieure à 1914:

La déclaration dûment faite par une des personnes ci-dessus libère les autres en ce qui regarde cette déclaration,

lequel, rapproché des autres parties de la loi autorisant une demande de paiement au " déclarant ", semble avoir servi de base au jugement du Conseil privé. Mais il fait remarquer que ce membre de phrase n'était pas dans la loi originaire relative aux droits sur les successions et n'y a été inséré que par la section 2 de la loi 58 Victoria, chapitre 16. Avant cette dernière loi,

chacune des personnes intéressées dans une succession était tenue de faire la déclaration, et tenue seule de payer les taxes imposées sur sa part dans la succession, et * * * ces taxes étaient en conséquence des taxes directes.

(1) [1914] A.C. 176.

Et nous reproduisons textuellement les deux alinéas suivants du préambule parce qu'ils ont une importance spéciale:

Attendu que la section 2 de la loi 58 Victoria, chapitre 16, n'avait pas pour objet de changer et ne changeait pas la nature de la taxe ou les personnes appelées à la payer; son seul objet et son seul effet étant d'empêcher la production inutile de plusieurs documents contenant les mêmes renseignements;

Attendu que, même si un déclarant, faisant la déclaration dont il s'agit, pouvait être appelé à payer la totalité des taxes dues à l'occasion du décès, à même l'actif de la succession, ce paiement ne serait pas un paiement fait par une seule personne dans l'expectative de se faire indemniser par d'autres personnes, mais serait un paiement fait par une personne en qualité de représentant d'autres personnes à même les deniers leur appartenant;

Puis vient la loi proprement dite:

1. L'objet et le sens de toutes les lois de la Législature imposant des droits sur les successions, ont été et sont que toute personne à laquelle des biens ou quelque intérêt s'y rattachant, ont été transmis par décès, devait payer au gouvernement directement, et sans aucun recours contre qui que ce soit, une taxe calculée sur la valeur des biens ainsi transmis.

Nous avons donc là l'interprétation du Parlement lui-même sur les lois antérieures à 1914 et sur la *Loi de Québec relative aux droits sur les successions* (4 Geo. V, chapitre 9).

Leur objet est de

taxer * * * directement, et sans recours en faveur de qui que ce soit, *tous les bénéficiaires de la succession.*

Avant l'entrée en vigueur de la loi 58 Victoria, chapitre 16,

chacune des personnes intéressées dans une succession était * * * tenue seule de payer les taxes imposées sur sa part dans la succession.

La loi 58 Victoria

n'avait pas pour objet de changer et ne changeait pas la nature de la taxe ou les personnes appelées à la payer.

Même si un seul déclarant

pouvait être appelé à payer la totalité des taxes dues à l'occasion du décès, à même l'actif de la succession, ce paiement * * * serait un paiement fait par une personne en qualité de représentant d'autres personnes à même les deniers leur appartenant.

L'objet et le sens (de la loi est que) toute personne, à laquelle des biens ou quelque intérêt s'y rattachant ont été transmis par décès, devait payer au gouvernement directement * * * une taxe calculée sur la valeur des biens ainsi transmis.

Nous omettons à dessein, pour y revenir plus tard, la phrase: "et sans aucun recours contre qui que ce soit", qui n'est qu'une incidente.

1930

LAMARCHE v. BLEAU.

Rinfret J.

Il reste maintenant à tirer nos conclusions sur la loi telle que nous la trouvons en 1921, lors de l'ouverture de la succession de M. Bleau.

Les droits frappent les biens et non les personnes. Ils doivent être calculés sur la valeur du bien transmis, et l'intention du législateur est de les prélever de

> tous les bénéficiaires de la succession * * * de toute personne à laquelle des biens ont été transmis par décès.

Cette intention, manifestée clairement dans la loi interprétative (4 Geo. V, chapitre 11), trouve son expression dans le paragraphe 1 de l'article 1380 qui rend tout héritier, légataire ou donataire personnellement responsable des droits dus. L'usufruitier ou le grevé de substitution est un légataire ou un donataire et il tombe donc sous le coup du paragraphe 1. Quand il y a transmission par décès à la fois de la propriété et de l'usufruit, ou quand il y a substitution, rendre l'usufruitier ou le grevé seul débiteur de la taxe, serait libérer le nu-propriétaire ou l'appelé à la substitution et serait donc contraire à l'esprit de la loi qui veut que "tous les bénéficiaires de la succession" soient atteints. C'est pourquoi le paragraphe 2 de l'article 1380 est rédigé dans un langage différent du paragraphe 1. Ce langage est voulu et il exprime exactement le principe qui est à la base de toute la loi. Ce paragraphe 2 ne taxe pas l'usufruitier ou le grevé spécialement. Nulle part dans cette loi l'usufruitier ou le grevé ne sont taxés nommément comme tels. Leur responsabilité personnelle n'existe que de la même façon que les autres légataires ou donataires, en vertu du paragraphe 1 de l'article 1380, pour leur "part dans la succession" et "rien de plus". Cette interprétation s'impose *a fortiori* lorsque l'usufruit n'est transmis qu'à titre universel ou à titre particulier.

Les paragraphes 2 et 3 de l'article 1380 ne sont là que pour établir le mécanisme de la collection.

Dans le cas de transport de propriété avec usufruit ou substitution, le percepteur du revenu doit réclamer la totalité des droits de l'usufruitier ou du grevé, de même que, lorsqu'il y a un exécuteur testamentaire, un fidéicommissaire ou un administrateur, il peut la réclamer de l'un d'eux, suivant le cas. L'usufruitier ou le grevé, en acquittant la totalité des droits, en paie une partie dont il est responsable personnellement "pour sa part dans la succes-

sion" et il paie l'autre partie comme représentant le nu-propriétaire ou l'appelé à la substitution à même les deniers appartenant à ce dernier. L'exécuteur, le fidéicommissaire ou l'administrateur, appelé à solder les droits, les paie à même les biens ou les deniers qu'il a en sa possession appartenant ou revenant aux bénéficiaires.

L'usufruitier est relevé pour autant de son obligation de "conserver la substance" (art. 443 C.C.) de la propriété, le grevé de substitution est également relevé *pro tanto* de celle de "rendre" la chose (art. 944 C.C.) par la force même de cette loi, qui est pour chacun d'eux une justification suffisante à l'égard du nu-propriétaire ou de l'appelé à la substitution. On peut même dire que le *corpus* de la succession, qui fait l'objet de l'usufruit ou de la substitution, est définitivement constitué seulement après le paiement des droits de succession.

Il y a une difficulté: si l'usufruitier trouve dans la succession les deniers suffisants pour acquitter les droits comme représentant le nu-propriétaire, il n'a qu'à payer à même ces deniers. S'il ne les trouve pas, comme il n'a pas en vertu du Code le pouvoir d'aliéner les biens, il faudrait dire que la loi relative aux droits sur les successions lui confère ce pouvoir. Elle ne le fait pas en termes exprès. On ne peut supposer qu'elle ait voulu apporter au droit commun une modification aussi profonde sans le dire d'une façon explicite. Il resterait donc que, dans ce cas, pour la part du nu-propriétaire, l'usufruitier devrait se laisser poursuivre. Mais cela n'est pas un obstacle à notre interprétation, puisque alors l'usufruitier se trouvera dans la même position que l'exécuteur, le fidéicommissaire ou l'administrateur, qui ne trouverait pas dans la succession des deniers suffisants pour acquitter les droits et qui n'aurait pas le pouvoir de vendre pour se les procurer. La "dette privilégiée" de la Couronne, pour la somme ainsi due (art. 1385), serait alors recouvrée par voie de saisie-conservatoire sur les biens mobiliers ou par voie d'action hypothécaire contre les biens immobiliers frappés par les droits (art. 1375). Les articles 2059 et 2060 du Code civil pourvoient à cette dernière action; sauf que, pour ce cas particulier, l'action ne devrait être portée que contre l'usufruitier et serait seulement dénoncée au nu-propriétaire comme mis-en-cause.

1930

LAMARCHE v. BLEAU.

Rinfret J.

Nous sommes donc d'avis que l'appelante comme usufruitière n'était personnellement responsable que des droits dus " pour sa part dans la succession et de rien de plus ". Elle devait payer la totalité des droits pour se conformer au paragraphe 2 de l'article 1380, mais quant à la balance au delà de sa part il lui fallait payer seulement à même les deniers appartenant aux intimés nu-propriétaires. Elle a payé avec son propre argent et elle a le droit d'en être remboursée.

L'article 474 C.C. ne s'applique pas à ce cas parce qu'il ne s'agit pas d'une dette du *de cujus*; mais sa façon de fixer la contribution de chaque partie nous paraît indiquer la manière de procéder. Le principe que pose cet article est que le nu-propriétaire supporte la dette quant au capital, et l'usufruitier quant aux intérêts, pendant la durée de la jouissance. (Laurent, Droit civil, 3e éd. t. 7, n° 19).

Ainsi, dit M. Mignault (Droit civil canadien, vol. 2, page 618)), le legs de l'usufruit porte-t-il sur l'universabilité des biens: l'usufruitier, qui a tous les revenus actifs, supporte tous les revenus passifs de la succession, c'est-à-dire la totalité des *intérêts*, des dettes et des charges, lesquelles sont supportées *pour le capital* par les successeurs universels ou à titre universel de la nue propriété. Porte-t-il seulement sur une fraction, par exemple, sur un tiers ou sur un quart des biens: l'usufruitier supporte une fraction correspondante, un tiers ou un quart, des intérêts des dettes et des charges de la succession.

De cette façon, l'usufruitier perd alors la jouissance et le propriétaire la nue propriété des biens qui servent à acquitter les droits de succession; et chacun se trouve à y contribuer suivant l'esprit du droit commun dans la province de Québec. Ici, il n'y a lieu à aucune estimation entre l'appelante et les intimés, puisque la donation d'usufruit est universelle; l'usufruitière ayant tous les revenus actifs doit supporter l'intérêt des droits pour la totalité, puisqu'elle a l'entière jouissance des biens qui sont soumis à ces droits (Laurent, Droit civil, 3e éd., t. 7, n° 29; Mignault, Droit civil canadien, vol. 2, p. 619).

Nous atteindrons ce résultat en décidant que l'appelante a droit de se faire payer, à même les capitaux composant la succession de feu Eugène Bleau, la somme de $1,530.80 payée par elle pour droits sur la succession de son mari, et en ordonnant aux défendeurs de lui payer ce montant, mais sans intérêt.

Cette solution concilie la loi des droits de succession avec les principes du droit civil, en vertu duquel l'usufruitier n'est tenu que des charges ordinaires et des rentes ou contributions annuelles (art. 471 C.C.) et qui ne le fait contribuer aux dettes que dans la proportion de son intérêt (art. 474 C.C.). Le droit de mutation par décès dû à raison de la transmission de la propriété est une charge du capital. L'usufruitier qui l'a acquittée de ses propres deniers a le droit d'en demander le remboursement immédiat, sans attendre la fin de son usufruit. En lui reconnaissant ce droit, nous n'allons pas à l'encontre de la prescription: " et sans aucun recours contre qui que ce soit " contenue dans l'article 1 de la loi 4 Geo. V, chapitre 11. Cette phrase incidente a été évidemment insérée par surcroît de prudence, pour se prémunir contre le danger de la taxe indirecte; mais elle ne sert pas à définir la nature du droit imposé, non plus que l'objet et le sens de la loi. Elle est surabondante, puisque celui qui paie des droits de succession conformément à l'esprit de la loi, le fait de ses propres deniers lorsqu'il est personnellement responsable, ou des deniers de la succession lorsqu'il agit comme représentant de l'héritier, du légataire ou du donataire, que ce dernier soit propriétaire, nu-propriétaire ou appelé de substitution; dans l'une ou l'autre alternative, il ne saurait y avoir de " recours contre qui que ce soit " ni en fait, ni en droit.

L'appel est maintenu de la façon déjà indiquée avec dépens contre les intimés dans toutes les cours.

Appeal allowed with costs.

Solicitors for the appellant: *Casgrain, McDougall & Demers.*

Solicitors for the respondents: *Laflamme, Mitchell & Kearney.*

1929

*Oct. 7.
*Dec. 9.

DAVID M. WILSON (PLAINTIFF).....APPELLANT;

AND

MILTON H. WARD (DEFENDANT).....RESPONDENT.

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

Contract—Construction—Nature of transaction—Whether loan secured on land or agreement of sale of land with option of re-purchase—Admission of parol evidence—Findings on the evidence—Transaction in substance a loan on security—Stipulation for right of purchase in lender, void as repugnant to equitable right of redemption.

It was *held,* reversing judgment of the Appellate Division, Alta., 24 Alta. L.R. 48, and restoring judgment of Boyle J. at trial, that the agreement embodied in the document in question, between P. (appellant's assignor) and respondent, was, not for the sale of land from P. to respondent with an option of repurchase, but for a loan from respondent to P. on security of the land. The document, taken by itself, in certain respects favoured the latter construction. But, further, the parties' rights were not to be determined exclusively by examining the terms in the document; evidence was admissible, not only of the surrounding circumstances, but also of all the oral or written communications between the parties relating to the transaction, for the purpose of determining its true nature (*Lincoln* v. *Wright,* 4 De G. & J. 16, at p. 22; *Maung Kyin* v. *Ma Shwe La,* 45 Indian L.R. [Calcutta series], 320, at p. 332, and other cases cited). Even where the instrument professes fully and clearly to give the reasons and considerations on which it proceeds, collateral evidence is admissible to shew that the transaction is not thereby truly stated, although, in such cases, only the most cogent evidence avails to rebut the presumption to the contrary (*Barton* v. *Bank of N.S.W.,* 15 App. Cas. 379, at p. 381). In the present case, in view of the summary character of the document and the superficial incoherence of its terms, resort to parol evidence was peculiarly appropriate; and upon all the evidence (as viewed by this Court, and with the findings thereon by the trial judge) the substance of the transaction must be held to have been a loan on security. In such case the court will disregard, as repugnant to the equitable right of redemption, a stipulation professing to confer upon the lender the right of purchase, even if the parties, between themselves, had intended that it should be binding (*G. & C. Kleglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd.,* [1914] A.C. 25, at p. 52, and other cases, cited).

APPEAL by the plaintiff from the judgment of the Appellate Division of the Supreme Court of Alberta (1) which held, reversing the judgment of Boyle J. at trial, that the agreement set out in the document in question (quoted

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

(1) 24 Alta. L.R. 48; [1929] 2 W.W.R. 122.

in full in the judgment now reported), made between one Pellon (who later transferred to plaintiff his interest in the land in question and in said agreement) and the defendant, was an agreement of sale of land from Pellon to the defendant, and not, as contended by the plaintiff, in effect a mortgage to secure a loan from the defendant to Pellon.

By the judgment now reported the appeal was allowed, with costs in this Court and in the Appellate Division, and the judgment of the trial judge was restored.

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

E. Lafleur K.C. and *A. A. Ballachey K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—In May, 1927, A. L. Pellon was the registered owner of section 23 and of the south half and the north-east quarter of section 25, Township 20, Range 24, Alberta (1120 acres), subject to a lease in favour of the respondent for two years from the 1st of February, 1927, and to a charge securing a balance of purchase money owing to the Crown, and to certain executions. The beneficial owner of the lands in section 25 was the appellant, and for some years Pellon had farmed both parcels, for the appellant and himself as partners. Pellon had become involved in financial difficulties, judgments had been recovered against him, and executions thereunder had been filed against the appellant's land as well as his own.

In these circumstances Pellon applied for a loan on the 13th of May, 1927, to the respondent, who paid to Pellon, on the same day, $1,500 by cheque. The issue in the appeal is: What was the character of the transaction, between these parties, of that date?

The appellant, to whom, in April, 1928, Pellon transferred section 23, says that Pellon borrowed from the respondent $1,500, and that this sum, together with $300 borrowed in March of the same year, was made a charge upon section 23, the whole principal of $1,800, with interest from the dates of the respective loans, being repayable in ninety days. The respondent denies the loan and avers

1929

WILSON v. WARD.

Duff J.

that the agreement between him and Pellon was an agreement for the sale of section 23 on terms set forth in a document of that date.

The trial judge found that the agreement was in fact of the character contended for by the appellant, and his judgment was reversed by the Appellate Division (1), who held that the transaction was a sale.

The document is in these words:

This Agreement is made in duplicate this 13th day of May, 1927,

Between

Arthur L. Pellon, party of the first part,
and
Milton H. Ward, party of the second part.

Whereas the party of the first part is the owner of Section 23, Township 20, Range 24, West of the Fourth, and is desirous of obtaining a loan on the same for the sum of $1,800, and whereas the party of the second part is willing to advance the said amount on the following conditions:

Namely that in consideration of the said loan the party of the first part hereby agrees to sell the said lands to the party of the second part at or for the sum of $24,320. The sum of $1,800 being paid on the execution of this Agreement, receipt is hereby acknowledged, and the balance to be paid at the rate of $5,000 per year on December 1 of each year until paid, beginning with December 1, 1927.

Providing, nevertheless, that an option is hereby granted to the party of the first part to purchase back the said lands from the party of the second part herein within 90 days from the date hereof, at or for the sum of $1,840, said option to be exercised by him within 90 days from the date hereof.

In witness hereof both of the parties hereto have set their hands and seals this 13th day of May, 1927.

Arthur L. Pellon (Seal)
M. H. Ward (Seal)

The document is unusual in form, and upon the construction of it as it stands, there is room for divergent views. On the part of the respondent, it is contended that it embodies an agreement for sale and purchase of the lands mentioned for the sum of $24,320, of which $1,800 is acknowledged as paid on the execution of the agreement, and of which the residue is to be paid according to the terms stated; with a stipulation in favour of the vendor awarding him an option of re-purchase at the price of $1,840, to be exercised within ninety days of the date of the document, that is to say, on or before the 11th of August ensuing.

(1) 24 Alta. L.R. 48; [1929] 2 W.W.R. 122.

This view of the document was accepted by the Court of Appeal. It is a view, however, open to criticism. In the first paragraph, the parties declare that the appellant is desirous of obtaining a loan of $1,800, secured on the property in question, and that on the "following conditions" the respondent is willing to "advance the said amount." The "conditions" are then set forth. It is important, in considering the document, that while the subsequent paragraph contains the terms of an undertaking to sell on the part of Pellon, this undertaking is expressed to be in "consideration of the said loan"—that is to say, if the words are not to be emptied of all meaning, in consideration of a loan, by the respondent to Pellon, secured upon Pellon's property.

The view for which the respondent contends necessitates the rejection of this recital with which the document opens and which professes to declare its central purpose. By that I mean, that the application for the loan is affirmed, that the assent of the lender to grant the loan is affirmed; true, the assent is upon conditions, but when the conditions are stated, they are stated as conditions agreed to in consideration of the loan, which has been arranged between the parties. The basis of the transaction is a loan. All this, if we are to accept the respondent's construction, must be deleted as meaningless. A "loan" which does not involve an obligation of repayment is a contradiction in terms.

The appellant's construction is by no means free from difficulty, but in truth it involves no such radical operation as that required by the respondent's. Strictly, to establish the appellant's contention, it is necessary to ascribe to the recital its full effect and to read the proviso giving an option to Pellon to repurchase the land as a proviso for redemption on repayment of the loan with interest. That, of course, would be a departure from the literal meaning of the words, but in that manner of reading them one would be doing only what, in countless cases, the courts have done in similar circumstances.

Reading the document thus, it would present no difficulty from the legal point of view. The agreement for sale, on this hypothesis, is part of the security transaction, that is to say, it is one of the terms of the loan, and is a term which, on failure by the borrower to exercise the contractu-

1929
WILSON
v.
WARD.
Duff J.

al right of redemption, imposes a fetter upon the equitable right, or rather limits and circumscribes the equitable right in such a way as to entitle the lender to require the borrower to transfer the subject of the security to him on the payment of certain specified sums of money. To this subject it will be necessary to recur. For the present it is sufficient to say that such a term, where the transaction is primarily and substantively a loan on the security of the debtor's property, will be disregarded by the courts.

It is unnecessary to say more on the construction of this irregular document. In its terms it is not indubitably a contract of sale or a contract for security, and the rights of the parties are not to be determined exclusively by an examination of those terms. The learned trial judge rightly held that evidence was admissible, not only of the surrounding circumstances, but as well, of all the oral or written communications between the parties, relating to the transaction, for the purpose of determining whether they were truly effecting a sale of Pellon's property to Ward or a loan on the security of Pellon's land. The pertinent rule is founded upon principle, and the principle is thus stated by a great equity judge, Turner L.J., in *Lincoln* v. *Wright* (1):

> The principle of the Court is that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that as between plaintiff and Wright the transaction should be a mortgage transaction, it is, in the eye of this Court, fraud to insist on the conveyance as being absolute, and parol evidence must be admissible to prove the fraud.

This passage was approved and adopted by the Judicial Committee (the Board including Lord Dunedin, Lord Shaw and Lord Sumner) in *Maung Kyin* v. *Ma Shwe La* (2); and the rule is enunciated or exemplified in a great number of reported cases. *England* v. *Codrington* (3); *Vernon* v. *Bethell* (4); *Reeks* v. *Postlethwaite* (5); *Hodle* v. *Healey* (6); *Barton* v. *Bank of New South Wales* (7); *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* (8).

(1) (1859) 4 De Gex & Jones 16, at p. 22.
(2) (1917) 45 Indian Law Reports (Calcutta Series) 320, at p. 332.
(3) (1758) 1 Eden, 169.
(4) (1762) 2 Eden, 110.
(5) (1815) G. Coop., 161.
(6) (1813) 1 V. & B. 536.
(7) (1890) 15 App. Cas. 379.
(8) [1914] A.C. 25, at p. 47.

Even where the instrument in question professes fully and clearly to give the reasons and considerations on which it proceeds, collateral evidence is admissible to show that the transaction is not thereby truly stated, although in such cases, only the most cogent evidence avails to rebut the presumption to the contrary, *Barton* v. *Bank of N.S.W.* (1). In the case before us, in view of the summary character of the document and the superficial incoherence of its terms, resort to parol evidence is peculiarly appropriate.

Pellon gave a plain statement of his dealings with the respondent. He said that in March, 1927, he had borrowed $300 from the respondent, and that on the 13th of May, the date of the document, he requested a further loan on the security of lot 23. He suggested a mortgage; the respondent was doubtful about the suggestion, in view of the fact that there were judgments and executions against Pellon, and finally after interviewing his banker, he informed Pellon that the banker had made a suggestion which was this: that Pellon should give to the respondent an option on his property, which the respondent could use as security for a loan from the bank, which was necessary to enable the respondent to make the advance. To this Pellon assented, and they went together to a solicitor, who drew up up the document in question, which they executed. Some discussion arose as to the price to be named in the agreement, and Pellon, according to his story, said that, in the circumstances, the price was wholly immaterial, and the arbitrary figure of $38 an acre was inserted, on that footing. At first, Pellon desired credit for only fifteen days, and eventually ninety days was agreed to. In sum, Pellon's account is, that both the respondent and himself understood the transaction to be, as described in the recital, a loan upon security, and that the agreement was given the form in which we find it solely to conform to the requirements of the banker.

Pellon fully expected to repay the loan on the stipulated date, but finding that the source, from which he hoped to provide himself with the means of doing so, had failed him, he informed the respondent of this by telegram on the 20th of July, and requested him to make arrangements to bor-

(1) (1890) 15 App. Cas. 379, at p. 381.

1929
WILSON
v.
WARD.
Duff J.

row, on the security of Pellon's share of the crop, for the purpose of liquidating the debt. Receiving no answer to the telegram, he went to Arrowwood, travelling from Montana, only to find that the respondent was absent in Eastern Canada. Later, on his return home, he found a letter purporting to be signed by the respondent, in these terms:

Arrowwood, Alberta,
August 11, 1927.

Mr. Arthur L. Pellon,
Linton, Oregon, U.S.A.

Dear Sir:

Register and Return

Re All of Section Twenty-three (23) in Township Twenty (20), Range Twenty-four (24). West of the 4th Meridian, Province of Alberta.

In connection with our Agreement of Sale dated the 13th day of May, 1927, as you have not exercised your option to repurchase this land from me within the 90 days as set out therein, I am now presuming that the land is mine and that you have decided to carry out the Agreement according to the tenor thereof as I have not heard from you to date.

Yours very truly,
M. H. Ward.

Copy sent to the addressee at Linton, Oregon, U.S.A. and at Greybull, Wyoming, U.S.A., and at Northern Hotel, Billings, Montana, U.S.A.

On receiving this letter, Pellon wrote to the respondent as follows:

Greybull, Wyo. 8/21/27.

M. H. Ward, Esq.,
Arrowwood, Alta.

Dear Sir,—

Upon my return to Greybull after an absence since July 12, I find your letter of August 11, and am surprised at its contents.

I wired you from Twin Falls, Idaho, about July 20, about this loan and never received a reply and then I went to the expense of coming up to Canada to see you and arrange with you to get a loan on my share of the crop and reimburse yourself to the extent of $1,840, but you were absent in Eastern Canada so my trip was for nothing.

To make a long story short, I was called back here on a very important business matter and could not wait longer in Calgary—having been there over a week waiting for your return.

You are hereby authorized to secure the amount of loan $1,840 and use as security, my share of crop. This will take care of you if you can not carry the loan until you can sell sufficient wheat to do so.

Certainly you remember you said this agreement was only for the purpose of getting the money from banker, and for that purpose alone.

That land would cost you at least twice the price mentioned in agreement and after I personally explain the situation believe you will carry out our plan as originally agreed, and, as I believe, mutually understood.

Your letter smacks too much of Lyle-Hempleman procedure to come from one whom I have always considered a square-shooter and a friend. Better follow suggestion as above and let me hear from you again.

Yours very truly,

A. L. Pellon.

No reply to this letter was received or sent, and after a lapse of some days, Pellon again went to Arrowwood, and this time succeeded in interviewing the respondent. The respondent's testimony as to what occurred on that occasion will be noted in some detail; in the meantime it is sufficient to say that Pellon, according to his own account, having interrogated Ward as to the meaning of his letter of the 11th, was met by excuses. Ward said the letter was necessary for his own protection because of the seizure of the crop by Pellon's execution creditors, but that the matter would be cleared up satisfactorily when the crop was threshed. Pellon's words are:

Q. What conversation did you have with him?

A. Well, I said to him, "You surely didn't mean what you said in your letter that I received a few weeks ago, did you?

Q. Meaning the letter of August 11th?

A. Yes, and he said, "I had to do that to protect my own interests and to satisfy the banker. They have been hounding the life out of me every week about that."

Q. Yes.

A. And he went on to say that he had to do it, too, because these fellows had made a seizure of all the crop and that is about the gist of the conversation, there was not very much of anything said further than that, except as soon as he got threshed it would be all fixed up.

Q. As soon as you got threshed?

A. Yes.

Q. Was there a good crop on the land?

A. Yes.

Q. What did half the value of the crop amount to on this land in 1927?

A. Something a little over $5,000.

Q. Something over $5,000 from half the crop?

A. Yes.

Q. And one-half of that one-half of course had to be paid to the Dominion Government?

A. Yes.

Q. And the other half was yours?

A. Yes.

Ward believed, there can be no doubt, that in the document of the 13th of May, he was armed with an instrument that enabled him to maintain the rights of a purchaser, subject to an option of repurchase vested in Pellon, which at

1929

WILSON v. WARD.

Duff J.

this time had lapsed by reason of the expiry of the time limit. Nor is it, on the evidence, doubtful that the form of the transaction, whether suggested by the banker or not, was not in fact dictated by the necessity of conforming to the wishes of the banker, in order to enable Ward to obtain an advance from the bank, but was proposed by Ward for the purpose of enabling him to assert such rights, and in full confidence that Pellon would not exercise his option within the stipulated period.

If Pellon's evidence, therefore, is to be accepted, the conclusion of the learned trial judge appears to be unassailable. Ward permitted the appellant to believe that he was entering into a transaction, the essence of which was a loan upon security, while he himself was confident that the effect of it, in law, was to make him a purchaser, and from the beginning intended to take advantage of the transaction, in that sense, in asserting the rights of a purchaser. Beyond that, indeed, if Pellon's evidence is credible, Ward procured Pellon's assent to the transaction, in the form in which he proposed it, by misrepresenting material facts, as to the necessity, namely, of giving the agreement that particular form in order to enable him to make the advance to Pellon.

Assuming these facts, the legal result is not open to controversy. It is quite true that, *prima facie*, a sale, expressed in an instrument containing nothing to show the relation of debtor and creditor is to exist between the parties, does not cease to be a sale, and become a security for money, merely because the instrument contains a stipulation that the vendor shall have a right of repurchase. *Alderson* v. *White* (1); *Manchester, Sheffield & Lincolnshire Railway Co.* v. *North Central Wagon Co.* (2). But where the language of the instrument points to the existence of such a relation, the courts, as Lord Hardwicke said, have endeavoured to treat such instruments as securities. *Longuet* v. *Scawen* (3);. In *Douglas* v. *Culverwell* (4); Knight Bruce L.J., after stating that the plaintiff had executed the conveyance there in question with the inten-

(1) (1858) 2 De Gex & Jones 97, at p. 105.
(2) (1888) 13 App. Cas. 554, at p. 568.
(3) (1749) 1 Ves. Sen. 401, at p. 404.
(4) (1862) 4 De Gex F. & J. 20, at p. 23.

tion that it should take effect, not as an absolute conveyance, which it was in form, but as a security for money, proceeded thus:

> I am satisfied also that this understanding—this view of the matter—the plaintiff, before and on the occasion of his execution of the deed and before and when he received the money, was allowed, knowingly allowed, by the defendant to entertain. I am satisfied that the deed, at the time of its execution by the plaintiff, was accepted by the defendant with full knowledge that the plaintiff so understanding the matter so received the £101.

In these circumstances, the Lords Justices held that the instrument was to be treated as creating a security only. Here, according to the evidence of Pellon, not only did Ward fully know the state of Pellon's mind, the express arrangement was that the document was to be used as security.

Such being the substance of the transaction, the law, as already observed, would disregard the stipulations professing to confer upon the respondent the right of purchase, even if the parties, between themselves, had intended that these should be binding. Such stipulations are repugnant to the equitable right of redemption; they would have the effect of converting what was intended to be a security into something entirely different. It has long been settled that equity will not allow a mortgagee to enter into a contract with the mortgagor, at the time of the loan, for the absolute purchase of the subject of the mortgage for a specific sum in case of default in payment of the mortgage money at the appointed time. The rule had its origin in the Ecclesiastical Courts. In the Court of Chancery, it was a rule of policy based upon a recognition of the disposition of money lenders to use their power of dictating the form of a security transaction, in order to shape it in such a way as to make it possible to "wrest the estate out of the hands of the mortgagor." *Mellor* v. *Lees* (1); *Price* v. *Perrie* (2); *Willett* v. *Winnell* (3); *Bowen* v. *Edwards* (4); *Re Edwards* (5). And it applies, not only to mortgages, strictly so called, or to mortgages containing a contractual proviso for redemption, but, as well, to mortgages containing no such express proviso, and to agreements creating only an

(1) (1742) 2 Atk. 494, at p. 495.
(2) (1702) Freeman's Reports, 258.
(3) (1687) 1 Vern. 488.
(4) (13 Car. 2) 1 Rep. in Ch. 221.
(5) (1861) 11 Ir. Ch. R. 367.

1929

WILSON v. WARD.

Duff J.

equitable charge. If it is clear that the transaction is a transaction of loan, and that the interest in the property affected is vested in the lender by way of security only, then such stipulations are void as repugnant to the equitable right of redemption. As Lord Parker said in *G. & C. Kleglinger* v. *New Patagonia Meat and Cold Storage Company, Limited* (1), in such a case

> the right to redeem is from the very outset a right in equity only, and it is merely the right to have the property freed from the charge on payment of the moneys charged thereon. If the charge is for payment of a specified sum on a specified day, payment on that day will set the property free, and if the day passes without payment there will still be an equity to have the property so freed notwithstanding any provision in the nature of a penalty, such penal provision being a clog on the equity.

Here the learned trial judge held that the true nature of the transaction is disclosed by the recitals and the statement of the consideration. Although he has expressed his opinion that such is the effect of the document he had to consider, apart from the oral evidence as to what occurred between the parties, he has not limited himself to that; he has considered the evidence; assessed the relative weight of the testimony of the two principal witnesses, Pellon and the respondent; and stated his conclusions of fact. Among other things, he has held that Pellon's account of the transaction of May the 13th is true and should be accepted, and the cardinal question in the appeal is whether or not in this he is right, or rather, whether or not there are adequate grounds for holding he is wrong.

The learned trial judge, it may be said, in applying himself to the questions of fact, realized that he was confronted with a disagreeable duty of deciding for himself and expressing his decision, whether it was Pellon or the respondent who was endeavouring to mislead the court. And there was really no middle course open to him. If the respondent was honestly relating the facts as he recollected them, there could be no room for doubt that Pellon was dishonestly trying to escape from the bargain he had made; and it will also appear as I proceed, that if Pellon was telling the truth, it is impossible to reconcile that conclusion with the honesty of the respondent.

(1) [1914] App. Cas. 25, at p. 52.

I pass now to an examination of the respondent's account of these matters. He opens the story of his dealings with Pellon by a statement that during the negotiations for the lease executed in the autumn of 1926, Pellon said that he hoped the respondent would become the purchaser of sections 23 and 25. He says he lent Pellon at that time $1,000, Pellon promising to repay him when he sold his land, with a bonus of $4,000. Pellon says that the respondent paid him $1,000 at this time, but that this payment was a bonus on the lease, for which he had been offered, as bonus, still larger sums. The respondent admits that Pellon told him he had been offered a bonus of $1,500. The learned trial judge in delivering his judgment observed that he did not believe this story of the respondent, and counsel for the respondent intervened with the remark, "We withdrew that $1,000, my Lord, in our argument." Proceeding with the material incidents, in order of date, the respondent says, that in March, 1927, he paid Pellon $300. He says there were negotiations between him and Pellon for the purchase of Wilson's interest in section 25, and that, although these negotiations had not been concluded, this sum of $300 was paid to Pellon as an advance on account of the purchase money. On his examination for discovery, he persisted in declaring that this $300 formed no part of the sum of $1,800, the payment of which was acknowledged by the document of the 13th of May; that this latter sum was paid in two cheques, one for $1,750, and one for $50 on the last mentioned date. At the trial he abandoned this, admitting that only $1,500 had been advanced in May, that the sum of $1,800 acknowledged in the document comprised this advance together with the advance of $300 made in March.

His evidence, both on discovery, and in the early part of his examination at the trial, evinced a determination not to admit that any part of the sum of $1,800 had been advanced as a loan. Being obliged, at the trial, to admit that the $300, advanced in March, was included in it, he once more resorts to the position that the last mentioned advance was not a loan, but a payment on account of a prospective agreement of purchase. This, eventually, he is constrained to withdraw. The same anxiety is disclosed concerning the sum of $40, part of the $1,840 in the repayment or redemp-

1929

WILSON v. WARD.

Duff J.

tion clause. Pellon had explained that this sum was made up by calculating interest on the two loans of $300 and $1,500 (together comprising the $1,800), from their respective dates to the end of the ninety days period of credit, which, at 8% came to $39. The Appellate Division seems to accept this account of the matter. On his examination for discovery, the respondent denied, at the outset, in the most explicit way, that this sum represented interest; later he declared that it was added by Pellon as interest on two sums, one, the $300, already mentioned, and the other, a sum of $200, for which he had given a cheque, some time before March, 1927, both sums being on account of purchase money for lot 25. At the trial, in his examination in chief, he again, in the most definite way, denies that the $40 was added as interest, declaring it was offered by Pellon, as a "bonus" for what he, the respondent, "had done"; finally he admits it was interest calculated, as he had said on discovery, on these two sums of $300 and $200. On further cross-examination, after an adjournment, he withdraws his statement that he had given a cheque for $200 prior to May, 1927, declared he had made an advance, which might have been of any amount between $100 and $300, and that this advance was a loan. Why the amount of this loan was not included in the sum secured (or credited, as the respondent contends) by the document of May, no reason is suggested. Throughout, Ward persists in denying that any part of it represents interest on the $1,500 advanced in May. But, as an account of the fixing of the redemption price at $1,840, his story is, of course, valueless; and the learned trial judge naturally would have none of it.

I have mentioned more than once the respondent's statement that prior to the execution of the lease in the autumn of 1926, Pellon had initiated negotiations for the sale to him of both Pellon's and the appellant's property, and his affirmation, many times repeated, that the payment of $300 in March was made as part of the purchase money under a prospective agreement for the purchase of section 25. As a witness, Ward displayed some persistence in picturing Pellon as the eager vendor. This is part of his evidence:

A. About the time the lease was drawn Mr. Pellon made the suggestion he would sell the land or eventually he would sell both parcels of land to me.

Q. And when next was the matter discussed?

Q. Well it almost continued at that time, off and on until such time as the deal was closed.

Q. That is until you ultimately purchased?

A. Purchased.

Q. Well it continued with which parcel of land?

A. Well, 25 was under negotiations for an agreement for sale from that time on until it was purchased and Mr. Pellon offered Section 23 for sale in May, 1927.

In pursuance of these efforts he asserts that, on the 13th of May, Pellon "seemed anxious to sell his land." Eventually, confronted by his examination for discovery, and by Pellon's proposal, which he admits, of a credit of only fifteen days, he is obliged to concede that Pellon told him he wanted to keep his land. The learned trial judge, very justly as it seems to me, treated this story, in its various elements, as to Pellon's suggestion about the sale of section 23 at the time of the execution of the lease, as to the character of the advance of the $300 in March, and as to Pellon's anxiety to sell in May, as unworthy of credence.

Another feature of the respondent's testimony, concerning the occurrences of the 13th of May, deserves notice. The learned trial judge comments upon the manner in which the respondent meets Pellon's evidence giving an account of his excuse for insisting upon the agreement for sale as a necessary part of the document evidencing the loan.

He seems determined, as the learned trial judge says, to make it appear that Pellon's narrative is wholly baseless. In answer to questions as to what he had told Pellon about his visit to the bank, he insists and reiterates that he did not "have to borrow" from the bank; and, later, that he did not in fact borrow "for such a purpose." He is forced to admit that on that day he did borrow $1,500 from the bank, and that this same amount of money he paid to Pellon in two cheques; but he declares that the loan from the bank had nothing to do with his advance to Pellon. Contrast this with his evidence on discovery:

Q. Did you have to make any arrangement with your banker in order to loan it to him or give it to him or pay it to him?

A. Not necessarily.

1929

WILSON v. WARD.

Duff J.

Q. Did you, as a matter of fact, make any arrangements with your banker before you advanced this $1,800 to him?
A. I borrowed some money that day from the bank.
Q. For the purpose of making this advance to Pellon?
A. Yes.

This effort to discredit Pellon naturally affected the learned trial judge unfavourably. I will not multiply instances of such exploits of evasion. After carefully reading Ward's evidence, I am driven to the conclusion that the characterization of Ward by the trial judge, in the following passage, does him no injustice.

But I must say that in my opinion Ward was a very evasive and hedging kind of witness. It was very difficult indeed to get him to answer frankly the questions which were asked, he was anything but a frank witness. He was frank enough with respect to anything which was in his favour but he appeared to have a very keen sense of the situation and with respect to anything which was not in his favour it was extremely difficult to nail him down and get him to answer the questions directly which were asked him.

Ward's counsel emphasizes a letter written on November 15, 1927. Before examining this, one further passage in the evidence of Ward requires attention. I have already mentioned the interview between Ward and Pellon on the occasion of Pellon's visit to Arrowwood after his failure to get an answer to his letter of the 21st of August. Ward discusses the interview several times during his cross-examination. This is one passage in which he gives his account of it:

Q. So you say that all you can think of concerning the reason for Pellon's visit in August, 1927, was to see how the crop was getting along?
A. That is all.
Q. The crop on 25?
A. He just asked about his crop.
Q. His crop?
A. His crop.
Q. Did he mention 25?
A. He didn't mention any particular section.
Q. No, just his crop?
A. Just his crop.
Q. He didn't mention 25 or 23?
A. No, he didn't.
Q. Nothing said about that?
A. No.
Q. But he must have referred to 25, must he not?
A. He simply asked how his crop was, in that way, that is all.
Q. Do you know where he came from to see you at the end of August?
A. No, I don't exactly.
Q. Do you know he motored 800 miles to see you?

A. No, I don't.
Q. Did he tell you that?
A. He told me that. I don't know where he came from.
Q. To see how his one quarter of the crop on Wilson's land was getting along?
A. He came there and asked me about the crop.

In substance this account is repeated more than once. That Ward, having Pellon's letter of the 21st of August before him, could have doubted the object of Pellon's visit, is difficult to believe. That the interview could have been of the character described in this passage seems almost incredible, and the cross-examiner did succeed in dragging out of Ward the admission that Pellon begged him to say that he "didn't mean" the letter of the 15th. To this admission he afterwards adds that he told Pellon he must insist on carrying out the agreement. Here, as elsewhere, Ward's evidence is marked very conspicuously by lack of candour. Further discussion of this interview naturally falls into place with the consideration of the letter of November, to which I now come.

This is a letter written by Mr. Mavor, acting not for Pellon but for Wilson, and in order to appreciate the point made for the respondent, it is necessary to understand the circumstances in which it was prepared. The three quarter-sections of section 25, although owned by Wilson, were, as already stated, in Pellon's name, and executions had been filed against this property under judgments against Pellon. Wilson and Pellon together conceived the idea (Pellon being in debt to Wilson in about $25,000) of getting a settlement with Pellon's creditors at fifty cents in the dollar; and, in order to carry this plan into execution, they contemplated a sale to Ward of Wilson's interest in section 25, which Ward was most anxious to buy. Pellon was then to transfer section 23 to Wilson, and himself drop out. The letter in question was a letter addressed to Pellon's creditors generally, and it stated that Pellon had sold his interest in section 23 to Ward in May, and suggested the likelihood of Ward cancelling his agreement on the return of what he had paid. Pellon and Ward were both aware of the terms of this letter, and the fact that Pellon allowed the despatch of the letter, in these terms, without exception, is relied upon as an admission by him as to the nature of the transaction of May. Whether or not his conduct

1929

WILSON v. WARD.

Duff J.

constitutes an admission, depends entirely on the circumstances; because the statement itself could only be evidence against him as imparting significance to his conduct. It must be remembered that Pellon had, by his letter of the 21st of August, taken up his position. Ward had not answered the letter, and if Pellon's evidence is credible, he had, on the occasion of Pellon's visit to him, acted as if he accepted Pellon's view of the transaction of May. Pellon's evidence is explicit that there was an understanding, between him and Ward, that Ward would accept the redemption money of $1,840, while he, on his part, had promised to sell section 23 to Ward on terms to be arranged. Pellon says that Ward offered him $43 an acre; Ward admits that there was some such understanding, but treats the subject with his usual lack of candour. At one time he says he is unable to remember whether or not he offered Pellon $43 an acre, at another that he made such an offer, but that the offer was conditional. Again he admits that he knew Mr. Mavor and Pellon believed that he was going to assent to a fresh arrangement, but avers that he himself had no intention of doing so. Pellon's evidence as touching the letter is that when it was read to him, he raised, in Ward's presence, the question of the suitability of the expressions now relied upon on behalf of Ward, but that, in view of the understanding with Ward, the letter was not thought to be calculated to mislead the creditors to their prejudice. Pellon says that from time to time the subject of the arrangements about section 23 was opened up with Ward, but that Ward insisted on postponing it until the title to section 25 was settled.

In May, 1928, after the creditors had been paid, and the title to section 25 transferred to him, Ward, for the first time, since the letter of August 11, declared to Pellon that he was the owner of section 23. The view of the learned trial judge is expressed in these words:

> I am satisfied that the characteristic that distinguished Ward in the witness box is one of his natural characteristics and that he is not frank, and I am satisfied that he was not frank with Pellon. I accept Pellon's evidence, because, while it was not admitted by Ward, Ward finally, after being closely examined and being closely pressed by Counsel, finally admitted that he had some discussion with Pellon about a new agreement, but he was not prepared to admit that Pellon was right in saying that they were to agree to the terms upon which he would buy the land.

His statement was, that if he felt like it and if he was well off and felt himself well off, or something to that effect, he might, out of generosity, pay Pellon something. I am satisfied that Pellon is telling substantially the truth as to what took place and that Ward hedged and evaded Pellon until he had secured the title to 25 and that he was anxious to do that and that he paid the money voluntarily, his main motive was to get the title to 25 and after he had obtained the title to 25, then he was prepared to stand strictly upon what he considered to be his legal rights and he is standing on those legal rights to-day.

I see no reason to disagree with this, and in this view the letter of November, 1927, is of little importance. All this has a bearing upon another aspect, also, of the case, which has been emphasized by the defence. On the 6th of October, 1927, a receiver by way of equitable execution was appointed, under one of the judgments against Pellon, to receive " the rents, profits and moneys whether payable as rent or purchase price " in respect of sections 23 and 25. In November, Ward entered into an agreement with the appellant and Pellon for the purchase of the appellant's interest in section 25, at the price of $15,000, payable in cash, and $6,000 in promissory notes. The intention was to apply the proceeds of this sale in liquidating the debts of Pellon who was thereafter to convey section 23 to the plaintiff, which was done. Ward paid the whole of the sum of $15,000 to the receiver or to the appellant's solicitors acting as receivers, and it is alleged that he also paid certain additional sums, which it is now contended could only have been payable under the alleged agreement of May. As to this, it is to be observed that Ward, as lessee, was responsible for the payment to Pellon of one-half of the threshed crop on both properties in each year, and, as one-quarter of the crop was payable to the Indian Department, on account of the lessor, the net rental in kind receivable by Pellon under the lease was one-fourth of the crop of 1927, which it appears was not threshed until the summer of 1928. Ward, it should be observed, claimed that the effect of the document of May, 1927, was to put an end to the lease. Obviously, it had no such effect. Ward was not, on his own construction of it, entitled to a transfer of section 23 until the whole of the purchase money had been paid. Until then, he was entitled, under the agreement, neither to possession nor to the benefit of the rents or profits. In December, he estimated the value of the crop on section 23 as $12,000, out of which Pellon

1929

WILSON v. WARD.

Duff J.

would be entitled to $3,000 as his share after the payment of the share due to the Government; as to the value of the crop on section 25, we have no information.

Ward, it is to be observed in this connection, did not carry out the terms of the agreement of the 13th of May, even on his own construction of them. According to that construction, $5,000 was payable on the 1st of December. Ward paid $2,000 to the receiver by a cheque, expressed to be in payment of this sum of $5,000, after deducting $3,000, described as payable to the Indian Department as the Government's share of the crop. On Ward's own construction of the document, this sum of $3,000, which would be payable out of Pellon's share of the crop, was plainly not deductable from the instalment payable under the agreement. For this deduction of $3,000 there was no excuse; and on his own view of the transaction of May, Ward was in default after the 1st of December.

The defence as based upon the alleged overpayments could only be sustained on the ground that they were made in circumstances such as to establish a fresh agreement, on the part of Pellon or the appellant, to sell the equity of redemption in section 23 on the terms of the document of May, or an equitable estoppel precluding the appellant from denying the existence of such an agreement. In order to reach such a conclusion, one must find that Pellon's conduct amounted to an assent to such a fresh agreement, or that it was of such a character as to make it a fraud on his part to deny the existence of such an agreement. *Willmott* v. *Barber* (1).

In examining Pellon's and the appellant's conduct, it must not be forgotten that the respondent, as he admits, was aware that Pellon and the appellant believed that the respondent had agreed to accept the redemption price of section 23, on the understanding that there was to be a fresh agreement for sale, on terms to be agreed upon, while he, the respondent, had no intention of carrying out such an arrangement; and that, such being the state of mind of the parties, this matter of section 23 had, at the repeated suggestion of the respondent, been allowed to stand until the title to section 25 was cleared up. In light of this, and

(1) (1880) 15 Ch. D. 96.

1929
WILSON
v.
WARD.
Duff J.

of Ward's default in the payment due (as he alleges) on the 1st of December, and in view of the passage in the judgment of the trial judge just quoted, it would be impossible to hold that the respondent was misled by any conduct of Pellon or the appellant into thinking that they were assenting to a fresh agreement to deal with the equity of redemption in section 23 on the terms of the document of May. The truth obviously is, as the learned judge finds, that the respondent believed he had a binding agreement for sale under that document, which he intended to assert, and was not in any way influenced, in his course of conduct, by anything which either the appellant or Pellon did. I agree with the learned trial judge that the appellant's rights are not prejudiced by any of the transactions subsequent to May.

The appeal should be allowed with costs, both here and in the Appellate Division, and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Burns & Mavor.*

Solicitors for the respondent: *Ballachey, Burnet, Spankie & Heseltine.*

1929
*Nov. 20.
1930
*Feb. 4.

WALTER O'CONNOR (PLAINTIFF).....APPELLANT;

AND

WILLIAM WRAY (DEFENDANT).....RESPONDENT.

DAME GERTRUDE BOYD (PLAINTIFF)....APPELLANT;

AND

WILLIAM WRAY (DEFENDANT).....RESPONDENT.

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

Automobile—Negligence—Accident in Ontario.—Owner resident in Quebec —Action brought in Quebec—Liability of owner—Whether liable on both Ontario and Quebec Statutes—Highway Traffic Act (Ont.) 1923, c. 48, ss. 42, 43—Motor Vehicle Act, R.S.Q., 1925, c. 35.

The respondent, who was living and doing business in the city of Montreal, in the province of Quebec, loaned a motor car owned by him to his manager, one Cochrane, for the purpose of enabling the latter to

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

1930

O'CONNOR v. WRAY

BOYD v. WRAY.

visit his mother at Arnprior, in the province of Ontario. On July 11, 1926, the wife of the appellant O'Connor and the appellant Boyd, while walking on a highway called Montreal Road, near the city of Ottawa, in the province of Ontario, were both struck by the motor car driven by Cochrane in a reckless manner and at an excessive rate of speed. Mrs. O'Connor was instantly killed and the other appellant suffered permanent injuries. Actions in damages were brought against the respondent, owner of the car, in the Superior Court of the province of Quebec.

Held, that, in accordance with the provisions of the *Motor Vehicle Act* of Quebec as well as with the weight of judicial opinion in the courts of that province, the respondent cannot be held responsible for loss or damage sustained by the appellants by reason of his motor vehicle, negligence or improper conduct imputable to the respondent having been disproven. Anglin C.J.C. dissenting.

Per Newcombe, Rinfret, Lamont and Smith JJ.—Article 53 (1) of the Quebec *Motor Vehicle Act,* R.S.Q., 1925, c. 35, respecting the liability of the owner of a motor vehicle, now reads: "53 (1) The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle, or of any regulation made thereunder by the Lieutenant-Governor in Council." But a similar clause, when enacted by the Revised Statutes of Quebec, 1909, Art. 1406, contained at the end the following words "*and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square.*" These words disappeared when the article was replaced by the amending Act, chapter 19, of 1912. By the article as formerly enacted, the liability which is imposed to compensate for accidents or damages, as distinguished from that incurred for any violation of the statute or regulations, was founded upon the concluding sentence. Of these two clauses the first did not expressly, or with any degree of certainty, declare liability for damages; the second did. The charging clause having been repealed, there remains no provision upon which to hold that the owner is bound to compensate when he has committed no fault. Moreover, this interpretation is made conclusive by the implication of subsection 2 of article 53, which establishes the materiality of negligence or improper conduct by the owner. Anglin C.J.C. *contra.*

Quaere, per Newcombe, Rinfret, Lamont and Smith JJ., whether the respondent ever became subject to the *Highway Traffic Act* of Ontario.

Per Newcombe and Rinfret JJ.—Under the provisions of the *Highway Traffic Act of Ontario* (1923), the respondent would not have been liable, as the loss or damage claimed was sustained "by reason of a motor vehicle on a highway" and not "in case of a collision between motor vehicles." Section 42 of that statute does not apply; and the present cases fall within the purview of the special case described by section 43, which section must be considered as a modification of section 42.

Per Anglin C.J.C., Lamont and Smith JJ.—The respondent, had he been resident in the province of Ontario, would have been liable under the Ontario statute as it stood at the time the damages were sustained.

Per Anglin C.J.C. (dissenting).—The accident occurred because of Cochrane having driven at an excessive rate of speed and while under the influence of intoxication; and these were violations both of the On-

tario and Quebec statutes. The respondent, in lending his car to Cochrane with the intention that it should be used by him in Ontario, subjected himself to the *Highway Traffic Act* of that province and he was so subject when the accident occurred. That fact also establishes that the driving of the car by Cochrane was with the consent of the respondent within the meaning of the Ontario statute, and of the Quebec statute if, under that Act, consent be material. Under section 42 (1) of the Ontario statute of 1923, where any violation of the Act has been shown and an accident resulting in damage to another has ensued, unless the motor vehicle which caused the accident was at the time in the possession of some person, other than the owner or his chauffeur, without the owner's consent, the latter is "responsible" for the acts of the driver, just as he would have been had the car been driven by himself. The respondent must therefore be held liable under the Ontario law for the consequences of Cochrane's violations of the statute. Section 53 (1) of the *Motor Vehicle Act* of Quebec must receive the same construction as that already given to section 42 (1) of the Ontario statute of 1923 and it carries with it the civil responsibility which the latter has been held to impose. (*Curley* v. *Latreille* (60 Can. S.C.R. 131) discussed.) Therefore the respondent must be held to have incurred civil liability under the Ontario statute, and he would have incurred a like liability under the Quebec Act had the *situs* of the accident been in that province.

Per Anglin C.J.C. (dissenting).—As a matter of international law, in order to establish liability of the respondent, it would seem necessary that he be answerable under the law of Quebec, as well as under that of Ontario, because, while the *locus delicti commissi* was in Ontario, the actions were brought in Quebec. But it is not essential that the remedy for the tort in question should be identical in both provinces, i.e., that, in this case, it should be civilly actionable in each. It will suffice if the tort actually committed was actionable against the respondent, or if he was punishable therefore as a delict in Ontario, and if a like tort committed in Quebec would be civilly actionable there. *Canadian Pacific Ry. Co.* v. *Parent* ([1917] A.C. 195) discussed.

Judgment of the Court of King's Bench (Q.R. 46 K.B. 199) affirmed, Anglin C.J.C. dissenting.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1) affirming the judgment of the Superior Court, Boyer J. and dismissing appellants' actions in damages.

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

Eug. Lafleur K.C. for the appellant.

W. N. Tilley K.C. and *P. Brais K.C.* for the respondent.

(1) (1929) Q.R. 46 K.B. 199.

1930

O'CONNOR v. WRAY — BOYD v. WRAY.

ANGLIN C.J.C.—(dissenting) A motor car, owned by the respondent and used in his undertaker's business in Montreal, was loaned by him to his manager, one Cochrane, for the express purpose of enabling the latter to visit his mother at Arnprior, Ont. With one Tedley, likewise in the employ of the respondent, Cochrane took the car on this trip. Cochrane's wife also accompanied him. The car was in perfect order.

Cochrane, who was driving the car at the time of the accident, was reputed to be "a sober, industrious, careful and prudent man," and was familiar with motor cars and their mechanism; he held a driver's licence. The respondent has been acquitted of any fault in lending the car to Cochrane; and I accept the correctness of this finding.

The accident, out of which these actions arose, happened, however, because Cochrane was, on the occasion of it, neither sober, careful nor prudent; it occurred on July 11, 1926, in Ontario, near the city of Ottawa. Cochrane, as has been properly found, was intoxicated at the time and was driving in a reckless manner and at an excessive rate of speed, and it was through his negligence and violation of the provisions of *The Highway Traffic Act,* 1923 (O.) that the respondent's car struck and killed Margaret Butler, wife of the appellant, Walter O'Connor, and severely injured the other appellant, Gertrude Boyd.

Cochrane's personal liability for damages seems to be admitted; but he is in the penitentiary and appears to have little or no property. The respondent Wray, in lending the car to Cochrane with the intention that it should be used by him in Ontario, subjected himself to *The Highway Traffic Act,* 1923 (O.); and he was so subject when the accident occurred. The fact that the car was loaned by Wray to Cochrane for the purpose of the visit to his mother in Ontario, also establishes that the driving of the car, at the time of the accident, by Cochrane, was with the consent of Wray, the owner, within the meaning of s. 42 (1) of *The Highway Traffic Act,* 1923, (O), and also of s. 53 (1) of the *Motor Vehicle Act* R.S.Q., 1925, c. 35, if under the latter Act such consent be material.

The application of the original Acts, both of Ontario and Quebec, respectively, was restricted to motor vehicles "for which a permit is issued under the provisions of the

Act"; (6 Edw. VIII, (O.), c. 46, s. 13) and "for which a certificate is issued under this section," (art. 1406, s. XXI, R.S.Q., 1909). Both in Ontario and Quebec this restriction has been done away with and the Acts, as they now stand in both provinces, apply equally to all motor vehicles, wherever registered and wherever owned, while being driven upon the highways of the respective provinces, *Hess* v. *Pawlosk* (1); *Stapleton* v. *Independent Brewing Co.* (2); *Kane* v. *New Jersey* (3); *Pizzati* v. *Wuchter* (4).

As a matter of private international law, in order to establish liability of the respondent in these actions, it would seem necessary that he be answerable under the law of Quebec, as well as under that of Ontario, because, while the *locus delicti comissi* was in Ontario, the actions were brought in the Superior Court of Quebec, in which province the defendant resides: But it is not essential that the remedy for the tort in question should be identical in both provinces, i.e., that, in this case, it should be civilly actionable in each. It will suffice if the tort actually committed was actionable against the defendant, or if he was punishable therefore as a delict in Ontario, and if a tort committed in Quebec would be civilly actionable there. *Phillips* v. *Eyre* (5); *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.* v. *Henry Benham et al* (*The Hadley*) (6); *The Moxham* (7); *Livesley* v. *Horst Co.* (8); *Carr* v. *Fracis, Times & Co.* (9); *Isaacs & Sons, Ltd.* v. *Cook* (10).

If the implication in the language used at p. 205 of the judgment of the Privy Council, delivered by Haldane L.C., in *Canadian Pacific Ry. Co.* v. *Parent* (11), be that, because liability of the defendant in the jurisdiction where the wrong was committed is vicarious only (whether it arise, as in the case of master and servant, by an application of the common law maxim, *respondeat superior,* or, as in the case at bar, by virtue of a statutory provision, viz., s. 42 (1) of *The Highway Traffic Act,* 1923), the principles of private international law preclude its enforcement in the

(1) (1926) 274 U.S. 352.
(2) (1917) L.R.A. 916.
(3) (1916) 242 U.S. 160.
(4) (1926) 134 Atl. Rep. 727.
(5) L.R. 6 Q.B. 1, at pp. 28-30.
(6) (1868) L.R. 2 P.C. 193, at pp. 203-4.
(7) (1876) 1 P.D. 107, at p. 111.
(8) [1924] S.C.R. 605, at pp. 611-12.
(9) [1902] A.C. 176, at p. 182.
(10) [1925] 2 K.B. 391, at p. 400.
(11) [1917] A.C. 195.

1930

O'CONNOR v. WRAY — BOYD v. WRAY. — Anglin C.J.C.

courts of another country—I cannot accept that suggestion. But, on the other hand, if, as I think, all that was meant in *Canadian Pacific Ry. Co.* v. *Parent* (1) was that, in the absence of some statutory provision such as that found in ss. 3 of s. 53 of the Quebec *Motor Vehicle Act* (R.S.Q., 1925, c. 35), a purely vicarious, civil liability does not *per se* entail penal or criminal responsibility, there can be no doubt as to the accuracy of that statement. Nor do I know of any reason for thinking that the law enforced by the courts of Quebec in these matters differs from that which obtains where the English common law prevails. (*Canadian Pacific Ry. Co.* v. *Parent* (2). Of course, I agree with the contention of the respondent, that, "according to the general principles applicable under the title of private international law," liability imposed by the law of Ontario will be enforced in the province of Quebec only in so far as it may not conflict with the policy of the law as administered in that local forum.

By *The Highway Traffic Act,* 1923 (O.), which was in force in 1926, it was enacted that,

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

(2) If the employer of a chauffeur is present in the motor vehicle at the time of the committing of any offence against this Act, such employer as well as the driver, shall be liable to conviction for such offence.

These provisions are to be found in the R.S.O. (1927), c. 251, s. 41 (1) and (2). (S.v.n. 19 Geo. V. (1929) (0) c. 68, s. 8) (*a*).

Noteworthy features of s. 42 (1) are that it applies only to violations of the statute itself, or of any regulation prescribed by the Lieutenant-Governor in Council; but that,

(1) [1917] A.C. 195. (2) [1917] A.C. 195, at p. 205.

(*a*) Section 42 of the Highway Traffic Act (Ontario) of 1923 was re-enacted as section 41 in R.S.O., 1927, c. 251; and this last section was repealed by 19 Geo. V (1929) c. 68, s. 9, and the following substituted therefor:—

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

where any such violation has been shewn and an accident resulting in damage to another has ensued, unless the motor vehicle which caused the accident was at the time in the possession of some person, other than the owner or his chauffeur, without the owner's consent, the latter is "responsible" for the acts of the driver, just as he would have been had the car been driven by himself. That it was intended by this provision to create a new civil liability on the part of the owner in the interest of the victim of a violation of the statute by the driver or person in possession of the car, wherever such driver or person in possession was acting with the owner's consent, is, I think, manifest. The owner would be liable at common law had he, or his *praepositus,* been driving when the violation which caused the accident occurred. The provision of ss. 2 making the employer of a chauffeur, when present in the motor vehicle at the time of the committing of the offence, liable to conviction for such offence as well as the driver, in the opinion of Boyd C., and Latchford and Middleton JJ., and *Verral* v. *Dominion Automobile Co.* (1), made this certain. It is not improbable that in 1914 (c. 36, s. 3), 1917 (c. 49, s. 14) and 1918 (c. 37, s. 8), the legislature of Ontario, aware of the decision of a Divisional Court in 1911 (1), thought that, in most instances, civil responsibility of the driver alone would be illusory and that, in the public interest, it was essential that the owner of such a dangerous thing as an automobile should be made vicariously responsible for the civil consequences of any violation of the statute committed with his motor car, whenever possession of the car by the driver (not being the owner's chauffeur) was had with the owner's consent. *Hirshman* v. *Beal* (2); *Driscoll* v. *Colletti* (3); *Gray* v. *Peterborough Radial Ry. Co.* (4).

Under the Ontario law, therefore, there is, in my opinion, no room for doubt that the respondent became civilly liable for the consequences of Cochran's violations of *The Highway Traffic Act,* 1923, which resulted in the death of the plaintiff O'Connor's wife and in personal injury to the plaintiff Boyd. Indeed, it is not open in this court to

(1) (1911) 24 O.L.R. 551, at p. 553.
(2) (1916) 38 O.L.R. 40.
(3) (1926) 58 O.L.R. 444, at p. 448.
(4) (1920) 47 O.L.R. 541 at p. 546.

1930

O'CONNOR v. WRAY — BOYD v. WRAY. — Anglin C.J.C.

contend otherwise since the decision in *Hall* v. *Toronto, Guelph Express Co.* (1).

But it is said that while that may be so, a delict committed under like circumstances in Quebec, although it entails penal consequences for the owner, is not civilly actionable against him, and, in support of this position, reference is made to the construction to that effect, placed by the Quebec courts in several cases upon s. 53 (1) of the Quebec *Motor Vehicle Act* (R.S.Q., 1925, c. 35), which reads,

> The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle, or of any regulation made thereunder by the Lieutenant-Governor in Council.

The earlier part of s. 53 (3) contains a provision similar in import to s. 42 (2) of the Ontario Act above quoted.

Formerly, the provision, now set forth in s. 53 (1) was found in Section XXI, art. 1406, of the revision of 1909, and read as follows:

> The owner of a motor vehicle for which a certificate is issued under this section, shall be held responsible for any violation thereof or of any regulation provided thereunder by order of the Lieutenant-Governor in Council; and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square.

The latter words, "and shall be responsible, etc.," were struck out in 1912 (3 Geo. V. c. 19, s. 3). Under the former article (1406), while the liability imposed by the concluding part of it (now struck out) extended to all accidents or damages caused by motor vehicles on the highway, etc., whether they were or were not due to violations of the statute, "responsibility" under the earlier portion (which still remains) was confined (as it now is) to "violations of this section," i.e., of the statute as it then stood, or "of any regulation provided thereunder."

Although it may have been quite arguable, as the article formerly stood, that, because civil liability was completely covered by its concluding clause, the application of the earlier part of the article might be restricted to responsibility for penalties imposed by the statute itself, we have now to deal with a different situation; and, unless there be some inherent ambiguity in the language of s. 53 (1) as it now stands, we cannot look to the past history of that provision in order to determine its present scope and effect. Finding no ambiguity in the language of the

(1) [1929] Can. S.C.R. 92, at pp. 106-7.

subsection itself, the fact that the words, "and shall be responsible for all accidents, etc.," formerly appended to it, were struck out by the legislature, in 1912, may not be taken into account in construing it.

Such appears to be the result of the decision of the Privy Council in *Ouellette* v. *Canadian Pacific Ry. Co.* (1). Their Lordships intimated that a reference to previous legislation can properly be made only where it

* * * may be forced upon a court by reason of the ambiguity employed in the use of terms which the mind could not readily grasp without a previous preliminary interpretation.

It may well be that the change was made in 1912 because the Quebec legislature thought it desirable to restrict civil liability of the owner of a motor vehicle, not driven by himself or his *praepositus,* but by another person, to cases where damages had been caused by a violation of some provision of the statute itself. This would sufficiently account for the striking out of the concluding clause of the section as it formerly stood. It is also quite probable that the legislature knew of the construction that had already been placed by the courts upon the corresponding provision of the Ontario statute in 1906 (6 Edw. VII, c. 46, s. 13), later embodied in s. 42 (1) of *The Highway Traffic Act,* 1923, (O.), viz., that its terms imposed civil responsibility as well as subjecting the owner to the penalties provided by the statute (*Verral* v. *Dominion Automobile Co.* (2), and, therefore, regarded the concluding clause of article 1406 (s. XXI of the R.S.Q., 1909) as superfluous in cases of damages caused by violations of the statute.

Lord Shaw, writing on behalf of the Judicial Committee of the Privy Council in the *Ouellette case* (3), quotes with approval, at p. 575, the following observation of the late Mr. Justice Idington:

And, a remarkable feature of the contention is that the plain meaning of the words are to be given another meaning because some words used in an old Act were dropped out, when such changes as made were obviously part of a revision of the entire legislation * * * and intended to make clearer the law and improve in many respects by eliminating useless verbiage.

His Lordship proceeds to say:

* * * The danger of error would become acute if once presumption were to be made that because there was a difference of expression, therefore it must necessarily follow that there was meant to be a difference of

(1) [1925] A.C. 569, at p. 574. (2) (1911) 24 O.L.R. 551.
(3) [1925] A.C. 569.

1930

O'CONNOR v. WRAY

BOYD v. WRAY.

Anglin C.J.C.

the law. The words actually employed must stand for interpretation as they are found unaffected by any such presumption. In the present case their Lordships' reference to previous legislation was not required, there being no confusion or ambiguity to remove.

He had observed earlier:

It is important that the results of the labours in Canada of bringing the law compendiously up to date, whether these be characterized by the term "revision" or "codification," should be not impaired by the danger alluded to,

i.e., the danger of a reference to previous legislation. The following words of Malouin J., are also quoted approvingly, (p. 575),

Le législateur est présumé avoir voulu dire ce qu'il exprime et le juge ne peut chercher en dehors du texte de la loi son intention quand le texte est clair et ne prête à aucun doute.

The terms of s. 53 (1) of the R.S.Q., c. 35, are, I think, quite free from ambiguity. "Responsibility" *prima facie* includes civil liability as well as penal consequences. Notwithstanding the inclusion of s. 53 in a fasciculus headed, "Offences and Penalties" (compare the location in the revision of 1909 under the heading "Offences" of former art. 1406, which admittedly bore upon civil liability) and the absence from the present subsection (1) of any provision expressly restricting its application to cases where the motor vehicle causing damage was possessed and driven with the consent of the owner, such as has been in the present Ontario statute since 1917, I am unable to distinguish s. 53 (1) of the Quebec Act, in substance or in principle, from the early part of s. 42 (1) of *The Highway Traffic Act*, 1923, (O.), which comes down from the original enactment. Both must bear the same construction. Moreover, the presence in s. 53 of ss. 2, the application of which to civil liability is undoubted, *Marcus* v. *Browman* (1); *Robillard* v. *Bélanger* (2), in immediate collocation with ss. 1 and followed by ss. 3, which *ex facie* deals with penal consequences, affords practically conclusive proof that the "responsibility" dealt with in ss. 1 is civil as well as penal. Again, if penal responsibility alone is contemplated by s. 53 (1), s. 54 would seem to be impertinent.

Having regard to the decision of this court in *Curley* v. *Latreille* (3), and other Quebec cases, I think some restriction, such as that expressed in the latter part of s. 42

(1) (1921) 27 Rev. Leg. N.S. 256. (2) (1916) Q.R. 50 S.C. 260.
(3) (1919) 60 Can. S.C.R. 131.

(1) of the Ontario statute, must be implied, whether upon a proper construction s. 53 (1) extends to civil liability or merely covers penal responsibility, since otherwise the owner would be " responsible " for any violation of the Act, although his motor vehicle was being used by a stranger—even by a thief—entirely without his knowledge or consent. There can be no doubt that common law liability of the owner is restricted to cases where the motor vehicle is being driven by himself or by his préposé *" au cours de l'exécution des fonctions auxquelles ce dernier est employé."* An extension of such liability by the statute to cases where the motor vehicle was being used neither by the owner nor by his *préposé,* but, without his knowledge or consent, by some stranger, would appear to be so contrary to the principles of responsibility underlying the common law, on which exclusively *Curley* v. *Latreille* (1) was decided, that it may be presumed not to have been intended. In that case the motor car had been driven by the owner's chauffeur, but without his knowledge or consent. Hence the statute (3 Geo. V, c. 14, s. 3) was treated *en passant* as inapplicable (2). The liability asserted was based on art. 1054 C.C., the statute being invoked merely in aid thereof. On the other hand, where the owner consents to, or acquiesces in, the use of his automobile by a person to whom he lends it, it can at least be said that he had the option of granting or refusing such use, as well as the choice of the person to whom he entrusted the car; and it may well be that this would, in the view of the legislature, afford a sufficient basis for making him civilly responsible, not generally, but for violations of the statute itself—just as the master is civilly responsible for his servant's acts in the course of employment, even though done in violation of his master's orders, partly because he selected the servant. (Smith on Master and Servant, 7th ed. 208). Indeed, s. 11 imposes a similar vicarious civil liability on the owner of a registered car who has sold it, but has neglected to have the transfer recorded. The principle underlying the responsibility of the owner, as such, is the same in both cases. It depends on his own voluntary action or inaction. Vicarious liability of the owner of a car, *qua owner,* imposed by s.

(1) (1919) 60 Can. S.C.R. 131.

(2) 60 Can. S.C.R. 131, at pp. 133, 141.

1930

O'CONNOR v. WRAY — BOYD v. WRAY.

Anglin C.J.C.

53 (1) would not seem at all extraordinary to the legislature which had enacted a like liability by section 11.

Accordingly I think s. 53 (1) of the Quebec Act must receive the construction already given to s. 42 (1) of the Ontario statute and that it carries with it the civil responsibility which the latter has been held to impose. Indeed, its terms are not distinguishable from those of the original Ontario provision, 6 Edw. VII, c. 46, s. 13, except for the omission, above referred to, of the restriction to motor vehicles "for which a certificate is issued under this section."

The accident in question occurred because of Cochrane having driven at an excessive rate of speed and while under the influence of intoxication. No suggestion has been advanced that it happened through any other cause. These were both violations of the statute which, in my opinion, would have entailed civil responsibility of the owner, as well as of the driver, had the accident occurred in the province of Quebec. I am, therefore, of the view that civil liability was actually imposed on the respondent by the Ontario statute and that he would have incurred a like liability under the Quebec Act had the *situs* of the accident been in that province. Subject to the question of the sufficiency of the pleadings, now to be considered, this conclusion involves allowing this appeal.

The accident complained of in these actions happened on the 26th of July, 1926. The plaintiffs' original declarations were delivered on the 9th of November, 1926, i.e., within six months after the accident, and alleged, amongst other things, that Margaret Butler and Gertrude Boyd, had been, the former killed, and the latter injured, "by a motor car belonging to the defendant" (par. 3); that the driver, Cochrane, was in the employ of the defendant, (par 5); that the accident occurred in the province of Ontario near the city of Ottawa, (par. 4); that it was due to the fault of Cochrane who was driving at an excessive speed, and while intoxicated, and had lost control of his car, (pars. 7, 8, 12, 13); that the defendant is liable and responsible *as being the owner of the said car* and the registered owner of the licence issued for the said car, (par. 18). There is no allegation that Cochrane was driving for the defendant or in the course of his employment, and the

declarations would probably have been demurrable had vicarious liability of the defendant been rested solely on the common law either of Ontario or Quebec. Paragraph 14 of the original declaration in each action is as follows:

That the law of the province of Ontario is substantially the same as the law of the province of Quebec, regarding the manner of driving motor vehicles on the public roads, and that the car in question on the occasion in question was driven contrary to the laws and rules of the said provinces of Quebec and Ontario, to wit, in the manner above mentioned, and that moreover the maximum rate of speed allowed by the law of Ontario at the place in question was 25 miles per hour, with stipulation of lower speed when necessary to avoid accidents and according to circumstances, and that more particularly before reaching the place of the accident, the said car met with a curve in the road, which should have called the attention of the driver to reduce the speed of his car, instead of maintaining it or accelerating it, in such manner as to drive the said car over the edge of the ditch for a long distance as the said Cochrane did before the said car struck the two women (after which the said car was violently overturned).

I regard this paragraph, read with par. 18, as not intended to do aught else than to assert civil liability of the defendant under the statutory laws both of Ontario and Quebec.

By paragraph 22 of the defendant's amended plea in the O'Connor case (paragraph 24 in the Boyd case) to plaintiff's amended declaration, it is stated that Ronald Cochrane intending to visit his parents in Ontario,

borrowed the Cadillac car of the defendant and on the day in question left with his wife and friend on the projected visit.

By paragraph 2, in each case, of the answer to the amended plea of the defendant, the plaintiff

prays *acte* of the admission that the said Ronald Cochrane was using the car in question with the permission and consent of the defendant * * *.

On the 3rd of November, 1927, more than one year after the date of the accident, Mr. Justice Bruneau made an order allowing the plaintiffs to amend their declarations by adding to each the following paragraph, which appears as par 18a in the declaration in O'Connor v. Wray, and as par. 22 in that in Boyd v. Wray:

That the law of the province of Ontario which concerns the manner of driving motor vehicles on the public roads in the province of Ontario is *The Highway Traffic Act,* 13-14 Geo. V, 1923, c. 38, statutes of Ontario and more particularly sections 42 and 43 of the said Act, which have their application in the present case, read as follows: "Section 42. The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council unless at the time of such violation the motor vehicle was in the possession of some person other than the owner or his chauffeur, without the owner's consent, and the driver of a motor vehicle not being the owner shall also be responsible for any such violation. Sec. 43. When loss or

1930

O'CONNOR v. WRAY

BOYD v. WRAY.

Anglin C.J.C.

damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver;"

Section 54 of *The Highway Traffic Act,* 1923, (O.), requires that an action for the recovery of damages occasioned by a motor vehicle shall be brought within six months from the time the damage was sustained (in Quebec within one year under art. 2262 (2) C. C.) and section 6 of the *Fatal Accidents Act* (O.) requires that an action to recover damages where the death of a person has been caused by wrongful act, neglect or default of the defendant, shall be brought within one year of such death: (See art. 1056 C. C.). If, therefore, the amendment, made in November, 1927, (a year and a half after the accident occurred) should be regarded as asserting, for the first time, a cause of action under the Ontario statute, the allowance of such amendment would probably have been refused, as the statutory claim would then have been barred. (*Naud* v. *Marcotte* (1); *Croysdill* v. *Crescent Turkish Bath Co.* (2); *Weldon* v. *Neal* (3); *Hudson* v. *Fernyhough* (4); *Lancaster* v. *Moss et all* (5). But, having regard to the terms of paragraphs 14 and 18 in each of the declarations, I think the view must have been taken (and, in my opinion, properly taken) by the learned judge who allowed the amendments in the Practice Court, that they did not amount to the preferring of new causes of action, but were tantamount to the giving of particulars under ss. 14 and 18 of the original declarations, and that, so regarded, they might be allowed to be added thereto without in any way prejudicing the rights of the defendant. *Barone* v. *Grand Trunk Ry. Co.* (6). No appeal was taken from the allowance of these amendments and there is no adverse comment upon them in the judgment of the Court of King's Bench, such as would have been expected had they been open to exception. Under all the circumstances, therefore, I think the declarations should be regarded as having been originally (i.e. on the 9th of November, 1926, and, therefore, within the prescribed delay) based upon the statutory liability imposed by s. 42 (1) of the *Highway Traffic Act,* 1923, of Ontario.

(1) (1898) 1 Q.P.R. 196.
(2) (1910) Q.R. 38 S.C. 207.
(3) (1887) 19 Q.B.D. 394.
(4) (1889) 61 L.T.R. 722.
(5) (1899) 15 T.L.R. 476.
(6) (1920) Q.R. 22 P.R. 277.

I am accordingly of the opinion that these appeals should be allowed and that judgment should be entered declaring the defendant liable to the plaintiff in each action for the damages caused by his motor vehicle through the fault of the driver Cochrane. The appellant in each case is entitled to costs throughout to be paid by the respondent. As, however, the quanta of the damages have not been determined, the proper course would seem to be to remit the actions to the Superior Court—merely to have the damages assessed by that court in each case.

NEWCOMBE J.—The wife of the plaintiff, Walter O'Connor, and Mrs. Gertrude Boyd, the plaintiff of that name, were on Sunday afternoon, 11th July, 1926, walking together on the Montreal Road, in the province of Ontario, when they were both struck by an overtaking automobile, belonging to the defendant, and negligently driven by Ronald Cochrane. Mrs. O'Connor was instantly killed and Mrs. Boyd suffered painful and permanent injuries.

The defendant lives and carries on business at Montreal, in the province of Quebec; and, at the time of the accident, Cochrane, was and has been for about three years, in the defendant's employ in the capacity of manager. I extract the following from the defendant's evidence:

Q. As your manager, what kind of work was he called upon to perform?

A. Well, he had complete authority over everything and had all my interest to look after. When I was not there myself he acted just the same as I would myself if I was not there during my business time.

Cochrane had been granted a few holidays, and the use of one of the defendant's automobiles, in order to visit his mother who lived at Arnprior, in the province of Ontario; and, when the accident occurred, he was on his way thither, driving the car, and accompanied by his wife and one Tedley, an employee in the defendant's establishment, who had been permitted also to have leave of absence for the occasion. Both Cochrane and Tedley were qualified and experienced chauffeurs, though neither one of them, it appears, was employed exclusively in that capacity.

The actions were brought in the province of Quebec, not against Cochrane, who was at the time in charge of and driving the car, but against the defendant as the owner, though not in possession, who was alleged to be responsible for the damages by the law of Ontario.

1930

O'CONNOR v. WRAY

BOYD v. WRAY.

Newcombe J.

It was established by the proof, and found at the trial and upon appeal, that the defendant was not guilty of any negligence. The evidence in support of that seems to be perfectly clear, and the findings cannot, I think, be brought successfully into question. But the plaintiffs rely upon the *Highway Traffic Act*, 1923, of Ontario, chapter 48, and especially sections 42 and 43, which make the following provisions:

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

(2) If the employer of a chauffeur is present in the motor vehicle at the time of the committing of any offence against this Act, such employer as well as the driver shall be liable to conviction for such offence.

43. (1) When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver.

(2) This section shall not apply in case of a collision between motor vehicles on the highway.

Now it will be perceived that if it were intended that the owner, although not authorizing or participating in any violation of the Act, should, in cases to which section 43 applies, incur responsibility for damages caused by wilful or negligent conduct which constituted a violation, there would be no apparent reason for enacting, as it is enacted by section 43 for the cases to which it applies, that the onus of proof should be upon the owner to establish that the damage did not arise through his negligence or improper conduct. If it be meant that the owner, whether negligent or not, shall be responsible for the damages in all cases not within the exceptions, why should it be supposed that the legislature thought it worth while to make an utterly immaterial provision to affect the owner with relation to the burden of proof? Section 43 is evidently a modification of section 42 for the special case which section 43 describes, subject to the exception stated in the subsection. The cases now in question are within the purview of the latter section, and in my view it is difficult to find liability of the owner when it is realized that the loss or damage claimed was sustained by reason of a motor vehicle on a highway, and not "in case of a collision between motor vehicles," and when it is abundantly proved

that there was no negligence or improper conduct on the part of the owner.

Moreover I am not satisfied that the defendant ever became subject to the *Highway Traffic Act* of Ontario. According to the plaintiff's contention, that Act imposes upon the defendant a liability unknown to the common law of either province, although he was neither personally nor by his agent within the province of Ontario; and it is not easy to perceive that he had any point of contact with the Ontario law, unless it be by the lending of his car to Cochrane for a journey to Ontario; and, for myself, I confess it is difficult to understand why the defendant, by consenting to lend his motor vehicle to Cochrane for the latter's journey to Arnprior thereby became subject to the local legislation of Ontario, and personally responsible for the offences and faults of the borrower in Ontario. In this connection it may be useful to contrast the judgment of the House of Lords in the leading case of *Castrique* v. *Imrie* (1), as to the jurisdiction which a state may exercise over property within its lawful control, and Lord Selborne's judgment in the Privy Council in *Sirdar Gurdal Sing* v. *Rajah of Faridkote* (2), in which effect is given, as to personal actions, to the maxim *extra territoriam jus dicenti non paretur.* Professor Westlake says, in his book on Private International Law, 7th edition, page 281,

> The truth is that by entering a country or acting in it you submit yourself to its special laws only so far as legal science selects them as the rule of decision in each case. Or more truly still, you give to its special laws the opportunity of working on you to that extent. The operation of the law depends on the conditions, and where the conditions exist the law operates as well on its born subjects as on those who have brought themselves under it.

It is, I think, questionable that the conditions ever existed to bring the local law into operation with respect to the defendant; that question was not, however, fully discussed at the hearing, and I do not find it necessary to decide it.

But whatever be the interpretation of the *Highway Traffic Act* of Ontario, if it affects the case at all, it will not, according to the principles known as appertaining to private international law, be enforced by the courts of Que-

(1) (1869) 6 E. & I. Ap. 414. (2) [1894] A.C. 670.

1930

O'CONNOR v. WRAY — BOYD v. WRAY.

NewcombeJ.

bec, except in so far as it does not conflict with the policy of the local forum.

In the Liverpool Brazil and River Plate Steam Navigation Co. Ltd. v. *Henry Benham, et al. (The Halley)*, (1), Selwyn, L.J., pronouncing the judgment of the Judicial Committee of the Privy Council, said:

> It is true that in many cases the Courts of England inquire into and act upon the law of Foreign countries, as in the case of a contract entered into in a Foreign country, where, by express reference or by necessary implication, the Foreign law is incorporated with the contract, and proof and consideration of the Foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a Foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English Court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordships' opinion, alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.

See also the famous judgment of Willes, J., in *Phillips* v. *Eyre* (2); *The Moxham* (3), where, at page 111, Mellish, L.J., says:

> A great many cases were cited in the argument, but they almost all relate to actions respecting either wrongs to personal property or actual personal injuries. Now the law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled that no action can be maintained in the courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed and also wrongful by the law of this country. The cases of *The Halley* (4), and *Phillips* v. *Eyre* (5), together with the other cases in conformity with them, seem to be conclusive upon the subject.

Machado v. *Fontes* (6); *Carr* v. *Fracias, Times & Co.* (7); *Isaacs & Sons Ltd. v. Cook* (8); *Livesley v. Horst Co.* (9).

The law of England and of the Canadian provinces, where the common law of England prevails, is thus clearly

(1) (1868) L.R. 2 P.C. 193, at pp. 203, 204.
(2) L.R. 6 P.D. 1, at pp. 28-30.
(3) (1876) 1 P.D. 107.
(4) L.R. 2 P.C. 193.
(5) Q.R. 6 Q.B. 1.
(6) (1897) 2 Q.B.D. 231.
(7) [1902] A.C. 176.
(8) [1925] 2 K.B. 391, at p. 400.
(9) [1924] S.C.R. 605, at pp. 611, 612.

established, and rests upon the highest authority, and Willes J. made the remark in his judgment in *Phillips* v. *Eyre* (1), that

> Our courts are said to be more open to admit actions founded upon foreign transactions than those of any other European country.

No sufficient authority has been cited for the proposition that a more generous rule prevails in the province of Quebec than that sanctioned by the common law of England, and a decision that the courts of that province are to administer the *lex loci delicti commissi*, irrespective of the law of the forum, would introduce a distinction which might be attended with inconvenient results.

Upon the question as to whether the *lex fori* and *lex loci delicti commissi* must concur in order that an act or an omission may be deemed tortious, it is said in Westlake's Private International Law, 7th edition, at page 28.

> On the continent there is no general agreement. Savigny maintains the exclusive authority of the *lex fori* "both positively and negatively, that is, for and against the application of a law which recognizes an obligation arising out of a delit." His reason is that all laws relating to delits have such a close connection with public order as to be entitled to the benefit of what I have called the reservation in favour of a stringent domestic policy. Mr. Charles Brocher, on the contrary, maintains the authority of the *lex loci delicti commissi* in terms which would appear to be exclusive, were it not that he goes on to claim for the judge the right of taking considerations of public order into account; and the result at which he would practically arrive would probably not be very different from that which prevails in England.

The judgments below proceed upon a view from which it may be inferred that the Quebec rule and the English rule, as expounded above, are in accord, and this, I think, may be accepted as a reasonable and just conclusion.

Turning now to the Quebec legislation, it will be found, in the last revision, R.S.Q. 1925, c. 35, articles 53 and 54, which provide as follows:

> 53. 1. The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle, or of any regulation made thereunder by the Lieutenant-Governor in Council.
>
> 2. Whenever loss or damage is sustained by any person by reason of a motor vehicle on a public highway, the burden of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of such motor vehicle shall be upon such owner or driver.
>
> 3. If the employer of a person, driving a motor vehicle for hire, pay or gain, is present in the motor vehicle at the time of the commission of any offence against this Act or any regulation made thereunder, such em-

(1) Q.R. 6 Q.B. 28.

1930

O'CONNOR v. WRAY

BOYD v. WRAY.

Newcombe J.

ployer, as well as the operator or chauffeur, shall be liable to conviction for such offence, and it shall be in the discretion of the court to impose the penalty either upon the one or the other, or upon both, according to the circumstances of the case; but if the vehicle is being driven by the chauffeur, and not by the owner, at the time of the offence, then,—whether the owner be present in the vehicle or not at the time,—both the chauffeur and the owner shall be personally liable to conviction for the offence, and it shall be in the discretion of the court to impose the penalty either upon the one or the other or upon both, according to the circumstances of the case.

54. Nothing contained in this Act shall be interpreted as limiting or diminishing the right of any person to take civil proceedings for damages.

Now it is in accordance with the natural interpretation, as well as with the weight of judicial opinion in the local courts, that where there is no negligence or improper conduct imputable to the owner, he is not responsible for loss or damage sustained by any person by reason of his motor vehicle. This seems to be clearly the intention of the Legislature, having regard to the text and the history of the legislation. The respondent points out that formerly, by section XXI, article 1406, of the Revision of 1909, it was enacted, among the clauses regulating motor vehicles, that

The owner of a motor vehicle for which a certificate is issued under this section, shall be held responsible for any violation thereof or of any regulation provided thereunder by order of the Lieutenant-Governor in Council; *and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square.*

The last clause, which I have underlined above, disappeared when the article was replaced by the amending Act, chapter 19, of 1912. And, by the article as formerly enacted, it is clear that the liability which is imposed to compensate for accidents or damages, as distinguished from that incurred for any violation of the statute or regulations, was founded upon the concluding sentence, which was repealed by the Act of 1912, and not upon the earlier provision of the article, which still remains. Of these two clauses comprised in the article, the first did not expressly, or with any degree of certainty, declare liability for damages; the second did. The latter was therefore the effective provision for the purpose which it expressed, and this seems to result from the proper appreciation of the maxim *expressio unius est exclusio alterius*, or *expressum facit cessare tacitum*. And so, the charging clause having been repealed, there remains no provision upon which to base a reasonable pretension that the owner is bound to compensate when he has com-

mitted no fault; and, if any possible question could otherwise have been raised about it, that is concluded by the implication of subsection 2 of article 53, which establishes the materiality of negligence or improper conduct by the owner.

For these reasons I would dismiss the appeal with costs.

RINFRET J.—I concur with Mr. Justice Newcombe.

LAMONT, J.—I concur with Mr. Justice Smith.

SMITH J.— I agree with my brother Newcombe, for the reasons stated by him, that the respondent Wray was not liable for the damages sustained by the plaintiffs under the law of Quebec. The case of *Latreille* v. *Curley* (1), seems to me to be decisive on this point so far as this Court is concerned.

On this view it is not really necessary to determine whether or not the respondent would have been liable in an action in Ontario, but in view of the decisions, I am of opinion that, had he been resident in Ontario, he would have been liable under the Ontario statute as it stood at the time the damages were sustained.

The respondent was not, however, a resident of Ontario, and, with my brother Newcombe, I doubt if the Ontario legislation is effective to impose personal liability, under the circumstances, on the respondent, in view of the authorities cited in my brother Newcombe's reasons. This important point is raised in the respondent's factum, but my brother Newcombe says it was not fully argued before us, and therefore refrains from expressing a final opinion on it. There being no necessity for doing so, in view of the opinion expressed above as to the Quebec law, I also express no final opinion with regard to it, though, if well taken, this point sustains the judgment below.

I concur in dismissing these appeals with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Dorais & Dorais.*

Solicitors for the respondent: *Brais & Garneau.*

(1) 60 Can. S.C.R. 131.

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IN THE MATTER OF THE ESTATE OF ALEXANDER ZOTIQUE PETER PIGEON, DECEASED

MARIE FELICITE LEFEBVRE, JOSEPH LEFEBVRE AND ZOEL CYR, EXECUTORS AND EXECUTRIX OF AN ALLEGED WILL OF THE SAID DECEASED (PLAINTIFFS)..... APPELLANTS;

AND

HENRI MAJOR AND WILLIAM MAJOR, REPRESENTING THEMSELVES AND ALL OTHER NEPHEWS AND NIECES OF SAID DECEASED, AND MARIE FELICITE LEFEBVRE (DEFENDANTS)..... RESPONDENTS.

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

Will—Alleged will not forthcoming after death—Sufficiency of proof of execution and contents—Rebuttal of presumption of destruction animo revocandi—Destruction of one will on assumption of replacement by later will—Dependent relative revocation.

The judgment of the Appellate Division, Ont., 64 Ont. L.R. 43, holding that the alleged will in question should not be admitted to probate, was reversed.

There was evidence as to the making of a will by the alleged testator in November, 1923, and of its contents, and of correction of the testator's name as written therein, either by a new will or by correction and re-execution of the old one, in February, 1924, the contents, except for said correction, being unchanged. The alleged will was deposited in a bank in Vancouver, B.C., for safe keeping. Later the testator came to reside in Ontario. In May, 1925, in response to a letter from the testator, the bank in Vancouver sent the will to him and got his receipt for it. The testator died in May, 1928. Upon a search made after his death no will was found.

Held (1) As to execution of the will of 1923, while the evidence failed to shew fully observance of the statutory formalities, it was a reasonable assumption from the evidence that they had been duly observed, having regard to all the circumstances and especially to the fact that the will was prepared by a competent solicitor and executed in his office (*Harris* v. *Knight*, 15 P.D. 170, at pp. 179-180; *In re Thomas*, 1 Sw. & Tr. 255, cited); and its due execution should be held to have been established. As to the will of 1924, the question of its due execution was not very material, as, its contents being proved to be the same as those of the earlier will, it did not matter which document was admitted to probate. If its due execution

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

should be held to be established, the will of 1924 was the one to be admitted to probate; if not, the will of 1923 would remain effective, even though it had been physically destroyed on the assumption that it had been duly replaced by the later will; the doctrine of dependent relative revocation applied. The contents were clearly established.

(2) The presumption of destruction of the will by the testator *animo revocandi,* arising from its being traced to his possession and not being forthcoming after his death, must be held, on all the facts and circumstances, to have been rebutted, taking into consideration that the will as made was eminently reasonable in view of the testator's affectionate feelings towards the beneficiary (his only surviving sister), that there was no change in those feelings (as held established on the evidence), statements by the testator shortly before his death to independent and trustworthy witnesses (*Whitely* v. *King,* 17 C.B.N.S. 756), the simple character of the testator, the fact (to be inferred from the evidence) that he regarded his will as of the highest importance, and (there being no evidence of its deposit for safe keeping elsewhere) would likely have kept it near his person, and the fact that after his death certain of his clothing and bedding were burned without any search thereof and before any search for a will was made.

Sugden v. *Lord St. Leonards,* 1 P.D. 154, at pp. 217. 202-3; *Stewart* v. *Walker,* 6 Ont. L.R. 495, referred to. *Allan* v. *Morrison,* 17 N.Z.R. 678; [1900] A.C. 605, and *Eckersley* v. *Platt,* L.R. 1 P. & D. 281, distinguished on the facts.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Ontario (1) which held, reversing the judgment of His Honour, Judge O'Reilly, Judge of the Surrogate Court of the United Counties of Stormont, Dundas and Glengarry, that the alleged will in question of Alexander Zotique Peter Pigeon, deceased, should not be admitted to probate.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported, and are indicated in the above head-note. The appeal was allowed with costs.

O. Sauvé and *J. Sauvé* for the appellants.

H. H. Davis K.C. for the respondents.

The judgment of the court was delivered by

ANGLIN C.J.C.—This issue in this case is as to the admissibility to probate of an alleged will made by the late Alexander Zotique (Peter) Pigeon who died, at the town of Alexandria in the county of Glengarry, between the 15th

(1) (1929) 64 Ont. L.R. 43.

1930

LEFEBVRE v. MAJOR.

Anglin C.J.C.

and 29th of May, 1928. The facts as disclosed by the evidence are very fully stated in the judgment of Latchford C.J. in the Appellate Divisional Court (1). That court, by a majority of three to two, reversed the decision of the late Judge O'Reilly, Surrogate Judge of the United Counties of Stormont, Dundas and Glengarry (who admitted the will to probate), holding that the presumption of revocation, arising from the will having been traced to the testator's possession and not having been found amongst his papers after his death, had not been rebutted by the evidence adduced at the trial on behalf of the executors propounding it for probate.

Three questions are presented on the present appeal:

First—Was due execution of the alleged will established;

Second—Were its contents satisfactorily proved; and

Third—Does the evidence rebut the presumption of destruction by the testator *animo revocandi?*

The trial judge found that the evidence sufficiently established the due execution of the will; and upon this point the Appellate Division unanimously assumed the correctness of his conclusion, although the majority of the judges of that court did not pass upon it. At bar in this court, however, this was made a principal subject of contest.

The evidence established that the deceased, Alexander Zotique Pigeon, owned some property in British Columbia, which was acquired by the British Columbia Electric Company. Being desirous of investing the money derived from the property, he consulted a banker in Vancouver upon whose advice he invested most of it in Dominion bonds. This banker at the same time urged him to have a will made, and suggested that he should consult for that purpose, Messrs. Bourne & DesBrisay, a well-known and reputable firm of solicitors in Vancouver. Acting on this advice he called on Mr. Bourne and had a will drawn by him. He was accompanied at the banker's and at Mr. Bourne's by one Zoel Cyr, who appears to have been an intimate friend and who remained with him throughout the proceedings in the solicitor's office.

The will, having been drawn, was read to the testator in Cyr's presence and he tells us what its contents were.

(1) (1929) 64 Ont. L.R. 43, at p. 52.

Then, according to Cyr's evidence, Mr. DesBrisay, the partner of Mr. Bourne, was called in to act, with Mr. Cyr, as a witness to the will and, as Cyr says, Pigeon signed the will and he and DesBrisay witnessed it. He is not asked where Pigeon placed his signature on the paper, nor whether DesBrisay was present and saw him sign it as well as himself, nor whether he and DesBrisay actually signed the will as witnesses, nor whether, if they signed it, they did so in the presence of the testator. In ordinary parlance, however, a man who says he witnessed the execution of a document means that he attested such execution by his signature; and that, I think, is a fair inference from this evidence. As to the observance of the statutory formalities, to which Cyr's attention was not specifically called, it is, I think, a reasonable assumption that they were duly observed, having regard to all the circumstances and especially to the fact that the will was carefully prepared by a competent solicitor and was executed in his office. *Harris* v. *Knight* (1); *In re Thomas* (2). While neither Mr. Bourne nor Mr. DesBrisay had any recollection of the circumstances, a charge is made in the books of the solicitors for the drawing of a will of Mr. Pigeon on the 22nd of November, 1923. We have no hesitation in finding the due execution of the will of November 22, 1923, to have been established.

After this will was executed it was taken by Pigeon, accompanied by Cyr, to the banker's office and left with him for safekeeping. The banker corroborates Cyr's story both as to the sending of Pigeon to Bourne and DesBrisay and as to the return of the will to him for safekeeping.

It would appear that Pigeon advised his sister, resident in Williamstown, Glengarry county, Ontario, by letter of December, 1923, of the making of this will and that she then noticed that he had described himself as "Peter Pigeon," whereas his correct name was Alexander Zotique Pigeon, "Peter" being a nickname which he had acquired in the West. She replied informing him of this error. Having some doubt as to the sufficiency of the will containing this misnomer, it would seem (although there is no direct evidence to that effect) that Pigeon went back to

(1) (1890) 15 P.D. 170, at pp. 179-80.

(2) (1859) 1 Sw. & Tr. 255.

1930

LEFEBVRE v. MAJOR.

Anglin C.J.C.

the banker and withdrew the will temporarily for the purpose of having the correction made. At all events, as Cyr deposes, he attended for that purpose at the office of Mr. Bourne in the month of February; and in the latter's books there occurs an entry of February 21, 1924, where a charge is made for drawing (or re-drawing) the will of Pigeon. Whether the will was re-drawn on that date, or the existing will was merely corrected and the changes initialled and republication made in due form (*Hindmarsh Charlton* (1)) does not appear. Once more Mr. Bourne has no recollection of the circumstances except that derived from his books; nor is there any evidence given by Cyr as to what occurred on the occasion of the second visit except that it took place and that the contents of the will as "re-drawn" on that date were precisely the same as those of the earlier will, the name of the testator only being changed from "Peter Pigeon" to "Alexander Zotique Pigeon, better known as Peter Pigeon." The new will, or re-executed (?) will, was again taken and deposited in the bank for safekeeping. There is no evidence whatever as to who witnessed the new will or as to the formalities prescribed by the statute having been complied with.

Shortly afterwards, Cyr, by direction of the testator, who could not do more than write his name, wrote a letter to Mrs. Lefebvre, the testator's sister, informing her of the alteration of his name in the will and stating the substance of its contents and that he had re-deposited his will in the bank at Vancouver. Cyr says he wrote this letter exactly as dictated by Pigeon. The letter itself was produced and is in evidence.

While it would be more satisfactory had the circumstances of the making of the will of February 21, 1924, been adequately probed, it would seem to be not very material whether due execution of that will should or should not be regarded as having been established. Either it was or it was not duly executed. If it was, its contents, having been proved to be the same as those of the earlier will, are sufficiently established by proof of the contents of that will and the document to be admitted to probate would in that case be the will of February 21, 1924. If, on the other hand, the due execution and attestation of that

(1) (1861) 8 H.L.C. 160.

document should be held not to have been sufficiently established, the will of November 22, 1923, would remain effective, even though it had been physically destroyed on the assumption that it had been duly replaced by the later will. Under such circumstances the doctrine of dependent relative revocation applies. Jarman on Wills, 6th Ed., pp. 148 *et seq.*

It, therefore, seems to us not vital which document should be regarded as the last will of the testator. Either that of the 22nd of November, 1923, or that of the 21st of February, 1924, was a duly executed will; or perhaps both were so executed; and, the contents being identical except for the change in the testator's name, it does not seem to be very material which document should be admitted to probate.

As to the proof of contents, the evidence is absolutely clear and dependable. Not only are the contents stated by Zoel Cyr, who heard the will read, but they are also set forth in the testator's letter of the 2nd of March, 1924, to his sister; and this evidence is corroborated by the statements made by him to the witnesses Pelletier and Lalonde shortly before his death. *Barkwell* v. *Barkwell* (1).

There remains, therefore, only the difficulty presented by the presumption of revocation arising from the will, traced to the possession of the testator, not being forthcoming. *Welch* v. *Phillips* (2). This is said by Cockburn C.J., in *Sugden* v. *Lord St. Leonards* (3) to be "*presumptio juris*, but not *de jure*, more or less strong" according to circumstances such as the character of the testator and his relation to the beneficiaries, the contents of the instrument, and the possibility of its loss being accounted for otherwise than by intentional destruction on the part of the testator. The material circumstances on those points are the following:

The testator, a simple and uneducated man, left Vancouver and went to Williamstown to reside with his sister in the month of August, 1924. He remained with her until the following March, when he went to the hospital for some treatment, and after a few weeks' absence, returned to her house. About the end of April or beginning of May,

(1) (1928) P. 91. (2) (1836) 1 Moore P.C. 299.
(3) (1876) 1 P.D. 154, at p. 217.

1930

LEFEBVRE v. MAJOR.

Anglin C.J.C.

1925, having acquired a property in Alexandria, a nearby town, he went there to live. In November, 1925, his sister also moved to Alexandria with her family; and the evidence discloses an exchange of visits there, from time to time, between the testator and his sister. There is no suggestion whatever that the testator at any time ceased to entertain for his sister the same affectionate feelings which he appears to have had for her when making his will in Vancouver. On the contrary, the only evidence in the record is that he remained on good terms with her throughout.

Towards the end of April, 1928, about three or four weeks before his death, he had a conversation with an intimate friend named Lalonde, to whom he said that all his money had been willed to his sister; and, between the first and fifth of May following, probably about a fortnight before his death, he also had a conversation to the like effect with Louis Pelletier, a contractor, who resides in Ottawa and who knew Pigeon well. This contractor, having business in Alexandria, saw Pigeon there about the beginning of May at his (Pigeon's) house where he had called for a friendly chat and smoke. Pigeon then said to him, "I don't have to work any more. I have money to live on the interest." Upon Pelletier asking him, "What are you going to do with that money," he said, "I got my affairs fixed up when I die. I only have one sister living" * * * "he told, if he die, if anything happen to him all his papers was made," and again, "all my papers is fixed up so if anything happen to me, I have only one sister, everything goes to her." (*Whitely* v. *King et al* (1)). This was between the first and fifth of May, 1928, and that was the last this witness saw of the testator.

What is mainly relied upon as casting doubt upon the sufficiency of this evidence to rebut the presumption of revocation is a letter written by the testator from Alexandria to the bank manager at Vancouver, from which it is sought to draw the inference that there had been some friction between the testator and his sister, sufficient to afford a reason for his wishing to destroy the will in her favour. This letter bears date the 3rd of May, 1925, and was written immedi-

(1) (1864) 17 C.B. N.S. 756.

ately upon, or shortly after, his arrival at Alexandria. It is in the following terms:

ALEXANDRIA, ONT.,
May 3, 1925.

BANK OF MONTREAL,
Carrel Street,
Vancouver, B.C.

DEAR SIRS,—Any paper that comes to the name Mr. Lefebvre and Peter Pigeon don't give any money. Any paper that come to the Bank Except Peter Pigeon alone no other name is no good. Will you send my testament that is in your safe to Mr. Peter Pigeon,

Alexandria,
Ontario.

Acting upon this letter, the bank manager, on May 11, 1925, sent what had been deposited with the bank as the testator's will, to Alexandria, enclosed in the following letter:

May 11, 1925.

Registered.

PETER PIGEON, Esq.,
Alexandria, Ont.

DEAR SIR,—Referring to your letter of the 2nd inst., we beg to enclose herewith one sealed envelope said to contain your last will and testament and shall be obliged if you will kindly sign the enclosed receipt and return it at your earliest convenience.

Yours faithfully,
Manager.

The receipt is also produced, signed by Peter Pigeon as of the 21st of May.

There can be no question upon this evidence that the document deposited with the bank in Vancouver in February, 1924, was forwarded to and was received by Peter Pigeon at Alexandria in May, 1925. It is this fact, coupled with the other fact that the will was not found amongst his papers, that gives rise to the presumption of destruction by the testator *animo revocandi.*

Reverting for a moment to the letter of the 3rd of May, 1925, the prohibition which it contains to the banker to pay money upon any paper bearing the signature of Mr. Lefebvre as well as Mr. Pigeon, is relied upon as suggestive of unpleasantness having arisen between him and the Lefebvre family. Whether any such inference would be open upon the document if standing alone, or whether the proper view is that taken by the learned trial judge, viz., that the testator, an ignorant and unlearned man, feared that the fact that he had named Lefebvre as one of his

1930
LEFEBVRE
v.
MAJOR.
Anglin C.J.C.

executors might give that gentleman some present control of, or voice in, the disposition of moneys left by him with the bank and that he wished to guard against anything of the kind happening, is, perhaps, doubtful. But, however that may be, any inference that could otherwise be drawn adverse to Mrs. Lefebvre, the testator's sister, is entirely overcome by the direct evidence in the record that there was at no time any interruption whatever of the friendly and affectionate relations subsisting between her and the testator. Moreover, to infer from this letter that the testator had destroyed his will *animo revocandi* at any time after its receipt by him on the 21st of May, 1925, is so utterly inconsistent with his statements made in April and May of 1928 to the independent witnesses, Lalonde and Pelletier, that it may safely be disregarded.

While the view taken by the learned trial judge of the interpretation proper to be placed upon the testator's letter of the 3rd of May to the banker may not be entirely correct, having regard to all the evidence it is at least less improbable than that suggested on behalf of the respondents.

As already stated, the testator died somewhere between the 15th and the 29th of May. He was last seen alive by his sister on the 15th or 16th of May (she is not sure on which day), when he complained of not feeling well. No witness deposes to having seen him alive subsequently. His body was found in his residence on the 29th of May, 1928, by his nephew, Palma Lefebvre. Putrefaction had set in and the body was considerably decomposed, indicating that death had occurred some time before. He was lying upstairs in his bed.

No search for papers was made immediately; but, soon afterwards, by instructions of the undertaker, who had warned them to be very careful and to wear mittens for that purpose, a mattress, a feather bed and blankets, two coats, a pair of overalls, pants and socks, which had been in the testator's room, were thrown out and burned by his two nephews, Josephat and Alcide Lefebvre. No search had been made of the clothing or effects so burned, but, subsequently and for the first time, a search was made of the house by the nephew Palma Lefebvre, who found a

number of documents in different places, but did not find a will.

That the testator regarded his will as of the highest importance and, there being no evidence of its deposit for safekeeping in the bank, or with a solicitor, or trust company, that he would quite likely have kept it near his person, not improbably in the pocket of his coat, or in his bed, is a fair inference from the testimony of the witness Zoel Cyr, who deposes to the great care he took of it in carrying it from the office of the solicitor to that of the banker and adds, very significantly, that he (Pigeon) thought the will a very important document and that it was not likely that he would be careless with it when it came into his possession; that "he wanted the will to be in a safe place." It is obvious that the will may have been inadvertently burned when the testator's personal effects were destroyed after his death. Having regard to this circumstance, and also to the facts that the will, as made, was eminently reasonable in view of the testator's affectionate feelings towards his only surviving sister, that there was no change in those feelings, as the evidence establishes, that the testator's intention to benefit his sister subsisted until within a few weeks of his death, as he declared to two independent and trustworthy witnesses, and lastly, to the simple character of the man himself, it seems highly improbable that he intentionally destroyed his will *animo revocandi.*

The situation in *Allan* v. *Morrison* (1), was entirely different, the facts there affording reason to believe that the testator was dissatisfied with his will and meant to change it, and there being no circumstance, such as the burning of the personal effects of the testator in the present case, to account for a probable inadvertent destruction of the will. The affirmance of that decision in the Privy Council proceeded largely on the fact that the two courts below had concurred in their view of what was regarded as a question of fact (2). *Eckersley* v. *Platt* (3) is likewise clearly distinguishable on the facts and on the nature of the testimony there relied on to rebut the presumption of revocation. The case of *Stewart* v. *Walker* (4), where probate was granted, is much more closely in point.

(1) (1899) 17 N.Z.R. 678.
(2) [1900] A.C. 604, at p. 609.
(3) (1866) L.R. 1 P. & D. 281.
(4) (1903) 6 Ont. L.R. 495.

1930
LEFEBVRE v. MAJOR.
Anglin C.J.C.

On the whole case we are convinced that the presumption of destruction by the testator *animo revocandi* is sufficiently rebutted and that the trial judge reached the correct conclusion when he directed that probate should be granted in accordance with the prayer of the petition of the executors. The observations of Sir James Hannon in the *Sugden* case (1) are much in point.

For these reasons, which do not materially differ from those of Latchford C.J., and Orde J.A., in the Divisional Court, we would allow the appeal with costs in this Court and in the Appellate Division and would restore the judgment of the late learned judge of the Surrogate Court of the United Counties of Stormont, Dundas and Glengarry.

Appeal allowed with costs.

Solicitor for the appellants: *Osias Sauvé.*

Solicitors for the respondents: *Macdonell & Costello.*

1929
*May 21, 26.
*Sept. 26

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LIMITED (PLAINTIFF) ..... } APPELLANT;

AND

CANADA STEAMSHIP LINES, LIMITED (DEFENDANT) ..... } RESPONDENT.

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

Shipping—Loss of goods—Due diligence of ship owner—Latent defect—Burden of proof—Certificate of seaworthiness by government inspectors—Sections 6 and 7 of the Water Carriage of Goods Act, (1910) 9-10 Edw. VII, c. 61, now R.S.C., 1927, c. 207.

The appellant insurance company, having paid the sum of $17,141.80 to the owners of a cargo of wheat destroyed in transit from Port Colborne to Montreal on a vessel, the ss. *Hamilton,* owned by the respondent company, and having been subrogated to the rights of the owners, brought action and recovered judgment in the trial court against the respondent for that amount which represented the value of the cargo accepted by the respondent as a common carrier and

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

(1) (1876) 1 P.D. 154, at pp. 202-3.

which it failed to deliver to the owners. The accident to the *Hamilton* occurred in the St. Lawrence River, below Cornwall, Ontario, and was caused by the breaking of a threaded wrought iron bolt which entered a turnbuckle, the appliance being used to connect one of the chains of the steering apparatus to the port end of the quadrant attached to the rudder. According to the evidence, this bolt had been considerably bent at least for several months before it broke during the sixth trip of the season. The judgment of the trial judge in favour of the appellant was reversed by the appellate court, Tellier J. dissenting, on the ground that the respondent had established the statutory defences allowed it by sections 6 and 7 of the *Water Carriage of Goods Act*, R.S.C., 1927, c. 207.

Held that, upon the evidence, the appellate court was not justified in reversing the finding of the trial judge that the respondent has not established that it had "exercised due negligence to make the ship in all respects seaworthy and properly * * * equipped", and that the loss or damage was occasioned by a "latent defect" in the material of the bolt.

Per Anglin C.J.C. and Rinfret, Lamont and Smith JJ.—The burden of proving absence of fault or negligence, the cause of the damage or loss, and that that cause was a latent defect, is cast by the law upon the defendant as a common carrier seeking to avail itself of the protection of sections 6 and 7 of the *Water Carriage of Goods Act;* and, *per* Anglin C.J.C. and Rinfret and Lamont JJ., the respondent, by establishing that there was a latent defect in the material of the bolt and that it was a probable cause of its breaking, did not discharge that burden unless the evidence also excluded other possible causes.

Per Anglin C.J.C. and Rinfret, Lamont and Smith JJ.—The respondent company pleaded that it had "exercised due diligence * * *" and "alternatively, that the steering apparatus broke as a result of a latent defect in the material * * *," such plea apparently assuming that the respondent might escape liability by proving only one of the two allegations. If so, the plea is defective in that the statutory requirement is that both conditions, not one or the other, shall be established in order to make good the defence.

Per Anglin C.J.C. and Rinfret, Lamont and Smith JJ.—The certificates of seaworthiness given by two government officers are of no value as affording any proof of "due diligence" in inspection. One of them, whose duty it was to inspect boilers and machinery "including the steering apparatus" testified that it was none of his business to see to the condition of the steering chains and that his duties ended with the engines which operated them. The other inspector, whose duty it was to ascertain the condition of the ship's hull and equipment for seaworthiness testified to having seen the steering apparatus, but did not notice the turnbuckle bolt and did not know of its existence until he heard of it at the trial.

Per Anglin C.J.C. and Rinfret, Lamont and Smith JJ.—The terms "not apparent" and "latent" are not interchangeable; they are by no means equivalents, as some defects, although not apparent, cannot properly be said to be latent. Moreover, it cannot be assumed that if due diligence is exercised any defect not thereby discernible must be "latent," as the fact that the statute requires that after proof of

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

the exercise of due diligence the ship's owner must also establish, when he relies on that fact, that the defect which caused the damage was "latent," seems to indicate that such an assumption must be fallacious.

Newcombe J. upheld the finding of the trial judge that the owner failed in due diligence to have the ship seaworthy and properly equipped, and held that the respondent company did not therefore bring itself within the relief of the statute.

Judgment of the Court of King's Bench (Q.R. 46 K.B. 305) reversed.

APPEAL from the decision of the Court of King's Bench, Appeal Side, Province of Quebec (1) reversing the judgment of the Superior Court, de Lorimier J. (1) and dismissing the appellant's action.

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

Errol Languedoc K.C., for the appellant.

E. M. McDougall K.C., and *V. Lynch-Staunton* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Rinfret and Lamont JJ.) was delivered by

ANGLIN C.J.C.—The plaintiffs are an insurance company, which is subrogated to the rights of the owners of a cargo of wheat destroyed in transit from Port Colborne to Montreal on a vessel, the ss. *Hamilton*, owned by the defendant. The plaintiffs paid the sum of $17,141.80 to the owners of the cargo and they recovered judgment in this action for that amount against the defendant in the Superior Court. This judgment was, however, reversed by the Court of King's Bench (Tellier, J., diss.), on the ground that the defendant had established the statutory defences allowed it by ss. 6 and 7 of the *Water Carriage of Goods Act*, 1910, 9-10 Edw. 7, c. 61 (now c. 207 of R.S.C., 1927), which it invoked. Section 6 reads as follows:

6. If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.

(1) (1929) Q.R. 46 K.B. 305.

The accident to the *Hamilton* occurred in the St. Lawrence river, below Cornwall, Ont., on the night of the 26th of June, 1924, and was caused by the breaking of a threaded wrought iron bolt which entered a turnbuckle, the appliance being used to connect one of the chains of the steering apparatus to the port end of a quadrant attached to the rudder. This bolt had been considerably bent at least for several months before it broke during the sixth trip of the season.

The present action, in assertion of the owner's right, was brought to recover the value of the cargo accepted by the defendant as a common carrier which it failed to deliver to the owner. Recognizing that, if it would escape liability as a common carrier, it must assume the burden of establishing the facts necessary to make either s. 6 or s. 7 applicable, the defendant pleaded that it had

exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied;

that

the breaking of the steering apparatus occurred without (its) actual fault or privity or without the fault or neglect of (its) agents, servants or employees (s. 7)

and,

alternatively, that the said steering apparatus broke as a result of a latent defect in the material forming the screw in the turnbuckle used to operate the rudder of said vessel, which said latent defect was not and could not be known to the defendant or its employees notwithstanding due diligence to make the said vessel seaworthy in all respects and properly manned, equipped and supplied.

This plea apparently assumes that the defendant might succeed by proving either the exercise of "due diligence, etc." or that the defect which caused the break was "latent". That must be the meaning of pleading the latter fact "alternatively". If so, we think the plea defective in that the statutory requirement is that both conditions, not one or the other, shall be established in order to make good the defence, there being no suggestion in the present case that the loss or damage resulted from faults or errors in navigation or in the management of said vessel.

For the purpose of the present appeal, however, we shall treat the defence as properly pleaded and as sufficiently raising the statutory issue under s. 6.

At the trial the defendant called two expert witnesses, one, F. O. Farey, chief chemist and engineer in charge of physical testing at the R. W. Hunt Company's offices, who

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

Anglin C.J.C.

had high academic degrees and twenty years' experience, for the purpose of proving that upon chemical analysis a certain proportion of phosphorus was discovered in the wrought iron of which the bolt was made. The proportion established by the witness, .189, is not seriously controverted. He, however, admits that the amount of phosphorus found would not, *per se*, justify condemnation of the iron, nor establish a probable cause of the bolt breaking. The danger, the witness says, of the presence of phosphorus depends upon the extent to which it is segregated. The defendant's other expert witness, Professor Roast, who is in charge of metalography at McGill University and a distinguished chemist and metallurgist of long experience, deposed that, as a result of microscopic examination by him with the aid of microphotography, he found such a segregation of phosphorus in the samples submitted to him as would indicate its presence to be highly dangerous and a probable cause of the breaking of the bolt. He produced ten photographs, eight of them taken at 100 diameters and at least one of which, he says, covered an actual area of the size of pin prick; in fact it is not clear that each of the eight is not limited to the area of a pin hole. On the segregation of phosphorus shewn in such microscopic areas he largely bases his condemnation of the material in the bolt. He, however, was not able to say that this was in fact the cause of the bolt breaking. Indeed, he admits on cross-examination that the fact that a crack or defect occurred precisely at the point of indentation of the first thread affords an indication of some undue strain put upon it and a failure in resistance due to the presence of the threading—

> it might be so and it might not be so. It does not follow necessarily, but it might easily be.

On the other hand, the plaintiff called Professor Mailhiot, of the Montreal Polytechnic School, an eminent metallurgist and chemist, who deposed that the amount of phosphorus shewn by chemical analysis was negligible; that the mottled areas appearing on the micro-photographic plates indicated the segregation of some impurities, which might or might not be phosphides; that microscopic examination of the samples themselves disclosed no evidence of any dangerous segregation of phosphides; but, on the con-

trary, that the samples, when examined under the microscope, proved to be comparatively free from traces of phosphides and approximated closely to the superior quality of "engine bolt" iron, and that, in his opinion, the iron was not inherently defective and any segregation shown was too slight to condemn the metal from that point of view. He added that

there is certainly no latent defect in the bar.

Professor Mailhiot further deposed that, when a wrought iron bolt, such as that in question, is bent so as to produce a curve of 15 degrees, small fissures usually result, visible to the eye; that such a bending or curving of the bolt would cause it to lose about two-thirds of its resisting strength and that, in his opinion, this physical injury, perfectly visible, was the most probable cause of the breaking of the bolt, especially having regard to the point at which such break occurred. The point of fracture is established by Hamelin, the engineer of the defendant, and Bingley, a local mechanic called in by it to make repairs, both of whom saw the broken bolt shortly after the fracture occurred. Hamelin says the fracture was in the threaded part of the bolt immediately inside the point at which it entered the turnbuckle, into which it was inserted; Bingley, that the fracture was at such point of entry or in the first or second thread of the screw immediately outside the turnbuckle, his impression being rather that it was precisely at the point of entry. No other witness whose testimony is of value gave evidence on this point.

Professor Mailhiot's evidence was fully corroborated by A. G. Spencer, an American metallurgist of distinction and a graduate of McGill University in Applied Science, who was chief chemist and director of the testing department of the Canadian Inspection and Testing Laboratories for seven years, metallurgist for Peter Lyall & Sons, Ltd., from 1917 to the end of the war, and subsequently metallurgist for the Steel Company of Canada, at Montreal, until the present year. This witness made a microscopic examination of the metal in question. He says it was "a good grade of merchant bar iron"; that the presence of phosphorus and even of phosphides, to some extent segregated, is common to all wrought iron; and that a mottled structure may, or may not, indicate a segregation of phosphides; it may be

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

Anglin C.J.C.

wholly or partly due to other impurities. The photographs produced by Professor Roast, he adds, do not indicate the wrought iron to be defective. Speaking of the effect of threading a bolt and of a bend afterwards made in it while cold, he says:

> the tendency would be for an initial crack to develop which will gradually extend into the mass of the metal until a fracture occurs;

that the bolt will be weakened against a vertical strain owing to tension of the fibres on the convex side and compression of them on the concave side. The witness adds that when a bolt is bent in its threaded part it is a very dangerous practice to use it, especially if it is held firmly in the screw of a turnbuckle, the sharp threads being the initial starting point for cracks. He adds that, while phosphorus is a disadvantage, if present in an excessive amount, the chemical analysis in the present case does not shew such an excess. He also says that

> any bar of the same quality, or, in some cases which I have tested myself, material of better quality, will break under as nearly identical conditions as I could get.

Finally he says:

> I have come to a very definite, decided opinion that the cause of the breaking was not due to chemical defects, nor to a latent defect, but it was due to the rank physical abuse which the threaded bolt had received.

Another expert witness called by the plaintiff in rebuttal was James R. Donald, chemical engineer, a graduate of McGill University in Arts and Applied Science, who says:

> There was nothing in my examination which indicated anything in the metal which could cause it to break under normal stress or strain.

Speaking of the effect of the turnbuckle on a bolt, he says:

> The metal inside the nut is held firmly in the nut, and when the threaded portion outside the nut is bent, the fibres cannot stretch at the nut and therefore part developing the crack, and the fracture as seen at the top. On the other side the fibres come into compression resulting in more or less bursting apart of the metal.

The small cracks, which, when they first appear, are barely visible, he says are

> very dangerous because they may go deep, and because you have lost that much strength at the top of the bolt, and, if a further bending stress comes, you get the tearing effect * * *. It is very much like taking a pencil and bending it. If you bend that, it starts to break here (indicating). It takes very little to finish it. It gives way in tension.

He adds that a pull in the direction of the bend, if heavy enough

> will continue to bend (sic) (extend?) the crack until the bar gives way.

In his opinion, as the result of his investigations,

no piece of wrought iron threaded with bolt attached, and with a bend, can be expected to carry anything like a full load, that is the load it would normally carry if unbent.

He would consider it dangerous and unsafe with any appreciable load; and would regard the load which was put upon the bolt in question as appreciable. In his opinion any merchant bar iron would shew phosphide areas on microscopic examination to as great an extent as the bar in question. As to the manganese content, it was only $^{17}/_{100}$ths of 1%, whereas the specifications of the American Society for Testing Materials, places the maximum manganese content allowable at $^{30}/_{100}$ths. The mottled appearance in the photographs, he says, indicates

impurities in the metal which are always more or less segregated to a greater or less extent,

and which may or may not be phosphorus. Phosphorus in wrought iron is not a defect. You cannot get wrought iron without it. Provided the amount of phosphorus is great enough, segregation of it may be dangerous. In the present instance he agreed with Mr. Farey, whose analysis gives the proportion of phosphorus as ·189; but, he adds, he does not

think that amount of phosphorus segregated or unsegregated would seriously affect the metal.

Finally, he points out that the bolt could not originally have had any set or bend such as existed for some time prior to the breaking of it, because

you could not get the nut (turnbuckle) over the (bent) thread.

Mr. Robert Job, consulting chemist, of the city of Montreal, and a graduate of Harvard College, when asked whether the break in the bar could be caused by chemical or physical action, said,

Without any question it was caused by physical cause. Here is the evidence of it right in the piece;

repeated strainings in the same direction gradually extended the initial crack more and more until it finally broke. A force, applied longitudinally after bending it

would tend to tear (the metal) apart just as a piece of paper that had been nicked would tear apart * * *. No good mechanic would bring a strain to bear under those conditions, a transverse strain where there was a sharp angle such as caused by the threading. The bolt is certain to tear just the same as if a piece of paper was nicked and torn. It would be absolutely unsafe.

Of that there was

no question in (his) mind. On any vessel that (he) was ever connected with, or any place of that kind, (he) would never for a minute leave a

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

Anglin C.J.C.

bolt in an important position of that kind, when (he) knew that that bolt had been strained in that manner;

and it does not make any difference whether the bolt was bent by coming in contact with the bulkhead astern or whether it was bent by any other cause. He further adds:

I do know that gripping a bolt in a turnbuckle would hold it rigidly, pretty much the same way that that nut holds upon that bolt. Then, if a blow or pressure were applied, on some other point, the effect would be to localize the stresses at the point just outside of the turnbuckle and that would be the place at which the fracture or crack would naturally occur.

Captain Reitch, an English master mariner, and Commander of the *Canadian Victor*, of the Canadian Government Merchant Marine, said:

Any threaded bolt, in my opinion, is weakened by being bent cold,

and adds that he would not permit such a bolt set in a turnbuckle to be used in a steering gear. He further says that it would be hard to discover an initial crack in such a bolt, when caused by bending, *as it would be covered with oil or dirt* to some extent and would need to be taken out to be examined for flaws, but that, even though no flaw were so discovered, he would condemn it and require to have it straightened or replaced.

E. D. Walker, marine engineer, of Montreal, having seen the bolt in question, says,

If I had been responsible in authority and responsible for that steering gear, I should certainly have condemned it for the simple reason that the turnbuckle is for straight line adjustment. It is impossible for it to function with a bend. * * * When bent, the molecules at the concave side are in compression and the molecules at the convex side are in tension. They cannot be said to be in equilibrium. The only way to get it back into equilibrium is by taking it out, getting it hot, and letting it cool slowly. * * * If that is not done, it would eventually go to breaking point. * * * If would ultimately give way, especially if those bends are more or less continuous.

It practically amounts to the same thing whether the bolt is exposed to repeated blows or to a continued series of shocks in the same direction. Then, he adds,

the bend of the bolt * * * is what, I think, caused the accident.

H. M. McMaster, ship broker and sea captain, knows the *Hamilton*, having had her under his charge for about " ten or twelve years ", when he was marine superintendent for the Montreal Transportation Company and was also acting for the defendant company as an adviser. Asked whether as superintendent of shipping companies, if he had found the bolt of the turnbuckle, obviously meant to be

straight, in a bent condition, he would consider it good or not, he answers, after objection,

I would not like a vessel to go to sea with that * * * —go into operation anywhere.

William Harrison, a marine surveyor, condemned the arrangement of the turnbuckle and quadrant on the *Hamilton*.

G. L. Hayes, also a marine surveyor, who specially examined the steering gear of the *Hamilton* at Montreal after the accident, deposes that the bend was certainly caused by contact with the bulkhead. Having seen the pieces of the broken bolt, he says he certainly would not have kept it in service.

This is one of the most vital parts of the ship's equipment and to say that a bent screw can be just as efficient as if it is straight is ridiculous.

He adds that

when passing around the aft part of the boat, the thing would be quite obvious when the thing was hard over * * * you could not have failed to have seen it.

He draws the inference that the screw broke at the point of entry to the turnbuckle.

Captain Gray, who is the shipping master of the port of Montreal, and who examined the *Hamilton* while in Montreal and saw the pieces of broken bolt, when asked the conclusions to which he came after his examination of them, said that

the turnbuckle bolt had been bent by one of two reasons, firstly, by the possible striking of the bolt against the cast steel plate, secondly, by the extension of the turnbuckle screws allowing the head to protrude beyond the corner of the quadrant, being bent by the natural strain of steering the ship.

He then adds that the type of metal of which the bolt was made was usual and proceeds to say:

Q. Supposing you were in command of a vessel and you noticed that, either suddenly, or over a period of time, a turnbuckle of that kind, used as it was, had become bent as it was, what would you have done, if anything?

A. I would renew it at once.

Q. Why?

A. Because the thing is a source of danger in a bent condition.

* * * * *

Q. What would you say if that question were asked and not (so) answered in a Masters' and Mates' examination?

A. Well, if I were asking a question of that kind to a candidate who was sitting for his Master's certificate and he told me in describing the condition of the bolt that he would go ahead with it, I think there is only one thing left open for me, and that is to ask him to go back to sea for six months to learn better.

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

Anglin C.J.C.

He continues:

If a man told me that he would go to sea on a boat and depend on the steering with a buckle like that, I should say he is wrong—decidedly wrong.

On the other hand, John McLean, naval architect, of Montreal, who had some Scotch experience, says the steering apparatus of the *Hamilton* was "in accordance with good practice" and that the bend in the bolt would have no appreciable effect on its strength.

W. I. Hay, principal surveyor of the British Corporation for the survey and register of shipping in Canada and the American Bureau of Shipping, who was responsible for the reconstruction of the *Hamilton* in 1922, when

she was lengthened and transformed from a barge into a twin screw steamer,

and who reported on her when she got her certificate as a steamer, says the effect of the bend in the screw in the turnbuckle would be "negligible", although he admits that a

repeated impact on wrought iron in the shank of a bolt of that kind, a threaded shank * * * might have quite a lot of effect upon it.

Frank T. Norris, district superintendent of the defendant company and a certified Canadian engineer, thought the bend "insignificant". He did not think it would affect the strength of the metal sufficiently to warrant doing anything with it.

F. O. Farey, whose testimony has already been referred to, says that the break

was outside the maximum bend, and my observation indicated that it broke outside of any bend whatever, or any appreciable bend;

that the break

indicated * * * a flaw in the metal, or in other words, an inherent defect.

That the bolt which broke had been bent or curved 15 degrees for a considerable period—indeed for some time before the vessel began the voyage during which she met with disaster—is now common ground having been admitted by the witness Norris, district superintendent of the defendant company, and by Hamelin, the engineer of the *Hamilton*, who deposed that, noticing the bend in the spring of 1924, he took the turnbuckle off and "examined" the bolt and considered that it could safely be left to function. Hamelin apparently made this examina-

tion *without cleaning off the oil and dirt upon the bolt.* Had he done so he would certainly have mentioned that fact.

It is also common ground that efficiency in a ship's steering apparatus is of vital importance to its seaworthiness and safety and it must be the subject of careful and exhaustive inspection before such seaworthiness can be said to be established or should be certified. It is likewise clearly established that the bend or curve in the bolt would have been plainly visible to any person making a reasonable inspection of the steering gear. Yet of two Government officers, who gave certificates of such seaworthiness —much relied upon by the defendant—one, whose duty was to inspect boilers and machinery "including the steering apparatus," says that it was none of his business to see to the condition of the steering chains, that his duties ended with the engines which operated them. This witness also said that the bend was of no importance and that if he had seen it he would not have considered reporting it or ordering the replacement of the bolt; that it gave no warning of any danger. He guarded himself, however, by adding that he is not an expert in these matters. The other inspector, whose duty it was to ascertain the condition of the ship's hull and equipment for seaworthiness, saw the steering apparatus, and remarked that it was confined in too close quarters, though that was not, in his opinion, matter for objection; but he did not notice the turnbuckle bolt or the condition it was in at the time. He did not pay any particular attention to it when he inspected the vessel and did not see the bend. But, had he seen it as it appeared when shewn to him at the trial, he says he

> might have raised an objection * * * might have asked them why they did not straighten that out.

In his view whether this coupling came under the control of the engineer is a nice question—for him the straining point; but, although he said that the share in the inspection of the vessel taken by his fellow inspector, who worked together with him, was "everything that comes under the control of the engineer," he admits that he personally examined the steering gear, except the engine and its controls. He knew there was a turnbuckle only because he "heard (about) it in Court;" otherwise he "would not know it."

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

Anglin C.J.C.

It seems unnecessary to make further comment upon the value of the certificates issued by these two gentlemen, as affording any proof of "due diligence" in inspection.

The only other expert inspection of which we are told was made by Captain Foote, who is engaged in marine survey work and marine insurance and inspected the *Hamilton* for "classification" in the spring of 1924, when he had no criticism to make of the steering apparatus. This witness cannot remember whether or not there was an opening in the casing directly aft of, and in line with, the rudder post. He apparently did not notice the bent bolt. At all events he makes no allusion to it and was not asked as to the effect of its presence.

There is a considerable volume of evidence bearing on the question as to how the bend or curve came to be made in the bolt. Much of this evidence seems rather to indicate that it was due to the openings in the sides of the housing not being sufficient to permit clear play of the quadrant, with the result that whenever the rudder was put hard to starboard, the end of the quadrant being directed to port, the bolt or buckle came in contact with the steel housing and the bolt was thus bent. The mate, Dussault, admits that this actually occurred and that there had been for a long time a dent in the bulkhead at the point where the bolt or turnbuckle would hit it. But there is other evidence that the quadrant had sufficient clearance and that there was no such contact, and that the bending was caused by strain owing to the bolt protruding beyond the end of the quadrant and being bent around it as on a fulcrum by the pull of the chains. It is not necessary, however, to determine what was the actual cause of the bend. It suffices that the bolt in question, designed to be straight and, no doubt, straight when originally put in, had become considerably bent and was, in fact, so bent for some time prior to the commencement of the voyage on which the accident occurred, indicating the existence of a serious cause of trouble, which invited attention.

The trial judge found that the evidence as to the existence of the latent defect alleged by the defendant was contradictory. In his view the defendant had failed to establish either branch of its statutory defence. He proceeded, however, to find fault of the employees of the defendant

consisting in lack of foresight and failure to take precautions and want of diligence. But he appears to rest his judgment rather on the defendant's failure to establish its statutory defence.

In the Court of King's Bench only one of the five learned judges who sat (Cannon J.A.) held the existence of the latent defect assigned and that it had caused the damage to be facts established in the defendant's favour.

The *considérants* of the judgment of the Court of King's Bench were as follows:

Seeing ss. 6 and 7 of the statute 9-10 Edw. VII, c. 61:

(*a*) Considering that appellant exercised due diligence to make the vessel, ss. *Hamilton*, in all respects seaworthy and properly manned, equipped and supplied;

(*b*) Considering that the proof does not establish that the accident, with resulting damage, was due to the fault and negligence of appellant, its agents, servants and employees, who *had* knowledge that the steering gear was defective; (*sic*)

(*c*) Considering that it is not established that the fact that the bolt which failed was bent to the extent of fifteen degrees caused it to break and bring about the accident in question;

(*d*) Considering that, if the accident resulted from a defect in the equipment of the steering gear, that defect was not apparent, and exercise of due diligence by appellant, or its servants and employees, did not and could not discover the defect;

(*e*) Considering that appellant is entitled to the protection afforded by the sections 6 and 7 of the said statute;

It will be observed that in the *considérant* marked (*b*) the court deals with the case as if the burden were on the plaintiff to prove fault or negligence of the defendant or of its servants or agents. The burden to prove absence of such fault or negligence is cast by the law upon the defendant as a common carrier seeking to avail itself of the protection of s. 7 of the statute.

On *considérant* marked (*c*) a like observation may be made. The burden of proving what caused the damage or loss and that what caused it was a latent defect was on the defendant.

In *considérant* marked (*d*), the court seems to treat "not apparent" and "latent" as interchangeable terms. They are by no means equivalents. Some defects, although not apparent, cannot properly be said to be latent. Moreover, the court seems to assume that if due diligence was exercised any defect not thereby discoverable must be "latent". But the fact that the statute requires that after proof of the exercise of due diligence the ship's owner

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

Anglin C.J.C.

must also establish, when he relies on that fact, that the defect which caused the damage was "latent", seems to indicate that this assumption must be fallacious. If, as seems to us most probable, the breaking of the bolt was due to weakness developed in it as a result of its being bent as it was, that bend being readily visible to any person making an examination of that part of the steering gear and having been actually known to the ship's engineer, it would seem to be beyond question that there had not been anything approaching due diligence to make the ship seaworthy. The duty of remedying the bend would have been imperative. Yet Captain Legault says there was a daily inspection of the ship!

Mr. Justice Greenshields, one of the majority, and who wrote most comprehensive "notes", says:

> I am disposed to express the opinion, that appellant (defendant) has not satisfactorily proved that the actual breaking of this bolt was due to a latent defect in the material of which it was composed. I do not, in my view of the case, consider it necessary to decide that question, either in the affirmative or in the negative.

Mr. Justice Bernier, also one of the majority, merely finds that the defendant exercised due diligence to make the vessel seaworthy and that the breaking of the bolt in question was accidental, but that the cause of it was *some* latent defect. No such defect other than that in the chemical composition of the material of which the bolt was made is alleged or suggested by the defendant. As to the particular latent defect so alleged, viz., an undue segregation of phosphorus in the metal, there was, in his opinion, "*divergence entre les témoins*" and he adds: "*il me semble inutile d'analyser la preuve faite de part et d'autre sur ce point.*" Mr. Justice Hall, also of the majority, says:

> The burden of proof rests of course, upon the appellant (defendant) to establish the presumed (*sic*) latent defect, and, in view of the conflict of evidence it is impossible for this court to come to any other conclusion than that it has failed to discharge that burden.

That learned judge proceeds to discuss at length the probable cause of the bending of the bolt and concludes that a defect in the construction of the ship so that the bulkhead was set too close to the rudder head, contact of the quadrant therewith resulting, was not established. He concludes that "the appellant (defendant) did exercise due diligence to make this vessel sea-worthy" and, citing decisions upon the English Act, which differs materially from the Cana-

dian statute, holds, on that ground, that the defendant is not liable, without determining whether or not there was a latent defect which caused the damage. Mr. Justice Tellier, who dissented, finds that the defendant had established neither its claim to have exercised due diligence nor that the damage resulted from latent defect.

Mr. Justice Greenshields also said:

> If that bolt, in its bent condition, was a defect which interfered with the navigation of the vessel, it was not a defect apparent to those who examined the steering gear of the vessel. "Due diligence" does not exact the examination of every link making up the steering chain which controls the rudder. The strength of the chain, it is true, is that of its weakest link.

With respect, we find it difficult to reconcile this latter view of the learned judge, having regard to the admission that the steering gear is a vital part of a ship's machinery, with the proof that in determining seaworthiness an adequate inspection of that apparatus is imperative and with the admitted fact that Hamelin knew for at least two months before the bolt broke of the bent condition and should have realized the likelihood of its giving way as it did; indeed we find it difficult to believe that he did not sense this risk, although, perhaps, not as fully appreciative of its gravity as he should have been.

There is a mass of testimony not, it is true, uncontradicted, but in our view of great weight and cogency, that the presence of the bend or curve in the bolt afforded a distinct and obvious warning of its weakened condition, which should not have been neglected. We, therefore, find it impossible to assent to the conclusion that the defendant's employees "exercised due diligence" to make the *Hamilton* seaworthy. Either their inspection of the steering gear was of such a casual and perfunctory character that they failed to discover the bend or curve, or, having noticed it, they failed to discharge the plain duty of either replacing the defective bolt or of making it fit for use, if that were possible. That the bolt broke is only what must sooner or later have occurred, and what should have been expected. The power of resistance of the metal having been much reduced was eventually overcome, it may be by having some slight additional stress or strain put upon it. To speak of such a defect as "latent" seems to involve a misuse of that term. We do not find it necessary for the

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

Anglin C.J.C.

present further to define "latent defect". "Not discernible by adequate inspection" seems not an inapt paraphrase.

An exposé in further detail of the voluminous evidence which supports these conclusions would serve no good purpose. To be of any value it would have to be exhaustive and would necessarily be very lengthy.

Allusion was made in the course of the argument to s. 7 of the statute which relieves vessel owners from liability:

for loss arising without their actual fault or privity *or* without the fault or neglect of their agents, servants or employees. (The word "or" italicised should probably be read as "and.")

The burden of proof under this section is upon the defendant. There would not appear to have been any expert inspection of the ship, on behalf of the owners, prior to leaving Port Colborne, or during the spring of 1924. Captain Legault, master of the *Hamilton,* had no opportunity to inspect the steering gear before taking command of his ship in 1923. He apparently made no subsequent inspection of it. Hamelin, the ship's engineer, saw the bent bolt, superficially "examined" it, and took a chance with it. Dussault, the second officer, or mate, of the *Hamilton,* gave the following evidence:

Q. Quand aviez-vous examiné l'appareil pour gouverner le vaisseau avant l'accident?

R. A Port Colborne.

Q. C'était combien de temps avant l'accident?

R. Je ne peux pas dire, trois jours à peu près, deux jours et demi ou trois jours, je ne peux pas dire.

Q. Dans quel état l'aviez-vous trouvé?

R. Ce n'est pas moi-même qui l'ai inspecté, c'est l'homme de roue, celui qui a l'habitude d'y voir en chargeant. Il a fait le chargement en même temps il regarde tout partout, il ne m'a fait aucun rapport.

Q. Vous ne l'avez pas examiné vous-même?

R. Pas à Port Colborne. A Port Colborne, j'ai le chargement à faire, je m'occupe de charger.

The wheelsman, who made no report, was not called as a witness. Did he in fact inspect the steering gear and, if so, what did he find?

The weight of the testimony, especially of that given by the practical men called, who spoke from experience in the handling of ships, is in favour of the appellant. The defences afforded by secs. 6 and 7 of the *Water Carriage of Goods Act* being in derogation of the common law must be clearly made out. The burden of proof was upon the

respondent, both as to the "exercise of due diligence, etc.," and as to the fact alleged by it that the loss or damage was occasioned by "a latent defect in the material of the bolt" and also as to the loss having arisen without its actual fault *and* without the fault or neglect of its agents, servants or employees. To establish that there was such a latent defect (assuming for the moment the proof of its existence to be sufficient) and that it was a probable cause of the breaking of the bolt does not discharge this burden unless the evidence also excludes other possible causes. Especially is this so where, as here, there is cogent evidence pointing, with at least equal probability (we think with greater), to another cause obviously not latent. It is clear that if any substantial doubt remain, it must, in such a case, be resolved in favour of the appellant. The defendant has failed, in its effort to discharge the burden, which the statute imposes upon it, of establishing that essential element of its defence. As to the other elements its failure has not been less pronounced.

After a careful perusal of the whole record and an analytical study of the evidence, we find ourselves, both as to whether there was proof of an exercise of "due diligence" and as to whether the cause of the damage was shewn to have been a latent defect, in accord with Mr. Justice Tellier, who succinctly sums up his views in these terms:

> Je ne vois pas comment la défenderesse, dans ces circonstances, pourrait prétendre qu'elle a fait "due diligence" et que les dommages dont il s'agit sont le résultat d'un "défaut latent." La défenderesse a essayé de se justifier. Y a-t-elle réussi? Pas à mon avis.

It is satisfactory also to find that our conclusions of fact accord with those reached by the learned trial judge, who has had many years experience in deciding such questions and in appreciating the probative force of contradictory evidence.

We would, accordingly, allow this appeal with costs here and in the Court of King's Bench and would restore the judgment of the Superior Court.

NEWCOMBE J.—It is, in my view, sufficient for the disposition of this appeal to uphold the finding at the trial that the owner failed in the exercise of due diligence

> to make the ship in all respects seaworthy and properly * * * equipped.

I do not think we can justifiably reverse that finding, and

1929

SCOTTISH METROPOLITAN ASSURANCE CO. v. CANADA STEAMSHIP LINES.

the respondent company does not, therefore, bring itself within the relief of the statute.

I concur in the result.

SMITH J.—The burden of establishing that the bolt of the turnbuckle broke by reason of latent defect was, as pointed out in the reasons of the Chief Justice, upon the respondent. There was contradictory evidence upon this point, and a finding by the learned trial judge against the respondent, which finding, as the Chief Justice holds, should not be interfered with.

I just wish to say that, in my opinion, the evidence of latent defect offered by the respondent does not go far enough in itself to establish that this defect was the cause of the breaking of the bolt. Neither do I think that the evidence offered by the appellant establishes that the breaking was caused by the weakness in the bolt brought about by the slight bend. The maximum strain on this bolt in operating the rudder was, according to the evidence, 3·4 tons. The tensile strength of the rudder chains and this bolt was 20 tons, assuming that the iron of the bolt was of the ordinary quality in such iron. The safety margin was therefore about six. The respondent's witnesses did not expressly say that the defect that they referred to in the quality of the iron would reduce its tensile strength from 20 tons to 3·4 tons, nor did the witnesses for the appellant say that the bend would make that difference in the tensile strength of the bolt. They talk about the weakening effect, particularly on the outer side of the bend. It is clear that the greatest amount of weakening by reason of the bend would be at the point of maximum bend. The bolt did not break at that point, but at a point where there was no bend or, at least, practically none. One witness assumes that the bending process caused a crack to commence at the point where the break subsequently occurred. There is no evidence that any such crack was produced, and his evidence is mere theorizing as to what may have happened.

In my opinion the breakage occurred by reason of the conditions that originally brought about the bend, and that the mere existence of the bend in the bolt observed by the engineer was an indication that ought to have brought to

nis mind that some condition existed that ought not to exist, and which indicated danger. The evidence suggests two conditions, either one of which may have resulted in the bending of the bolt. One is that, with the turnbuckle screwed out to about its full extension, the "U" end of the bolt in question would project slightly beyond the outer point of the quadrant, so that the strain on this "U", instead of being in the direction of the axis of the bolt, would be at right angles or nearly at right angles to that axis, thus constituting the end of the quadrant a fulcrum on which the bolt would act as a lever, which would have a bending effect on the bolt and, of course, would subject it to a strain in a direction that it was not designed to take. If that condition existed, it would be evident to an intelligent engineer that it was a dangerous condition.

The other suggestion is that the bolt in operation came into collision with the iron housing, and there is evidence from which it might fairly be inferred that this condition at the time of the accident actually prevailed. The strain on the bolt, as I have said, was designed to be parallel to its axis, and if it had been subjected to that strain alone, it would have been impossible for the bolt to have taken a bend. On the contrary, the strain would have a tendency to straighten a bent bolt, rather than to bend a straight one. The engineer says that he did not put a new bolt in because he thought it would take the same bend. He is not asked, and he does not undertake to explain why he thought that a bolt which, working as the apparatus was designed to work, with a strain only in the direction of its axis, would tend to take a set or bend. If he really thought so, it must have been because he was aware of some condition existing that would have a tendency to make the bolt bend. As I have said, if such a condition did exist, it was a dangerous condition that he should have remedied.

I agree with the Chief Justice.

Appeal allowed with costs.

Solicitor for the appellant: *E. Languedoc.*

Solicitors for the respondent: *Casgrain, McDougall & Demers.*

1929
*Nov. 19.
1930
*Feb. 4.

MILN-BINGHAM PRINTING COMPANY LIMITED (DEFENDANT)..... } APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales tax—Exemption—"Magazine"—Special War Revenue Act, 1915 (as amended), s. 19BBB (4)—Construction of word in statute with reference to usage or definition in statute in pari materia.

It was *held*, reversing judgment of Audette J., [1929] Ex. C.R., 133, that the pamphlet in question, printed by defendant monthly for the Canadian Kodak Co. Ltd., and called "Kodakery", was a "magazine", and as such exempt from sales tax, under subs. 4 of s. 19BBB of the *Special War Revenue Act, 1915*, and amendments.

The word "magazine" in the exempting provision is used in its ordinary sense and must be construed and applied in that sense. Its meaning in ordinary usage discussed, with regard to its application to the pamphlet in question.

While, for the purpose of ascertaining the meaning of a word in a statute, its usage in other statutes may be looked at, especially if the other statutes are *in pari materia*, it is altogether a fallacy to suppose that because two statutes are *in pari materia* a definition clause in one can be bodily transferred to the other.

APPEAL by the defendant from the judgment of Audette J., of the Exchequer Court of Canada (1), holding that the plaintiff was entitled to recover from the defendant the sum of $2,426.42, claimed by the plaintiff for sales tax, under the *Special War Revenue Act, 1915*, and amendments, on sales of a pamphlet known as "Kodakery" and described on the cover as "a magazine for amateur photographers," and published monthly at the city of Toronto, Ontario. The defendant claimed that "Kodakery" was a magazine and exempted from the tax by subs. 4 of s. 19BBB of said Act.

The appeal was allowed with costs and judgment directed to be entered dismissing the action with costs.

W. N. Tilley K.C. and *J. F. Boland K.C.* for the appellant.

Geo. Wilkie K.C. and *J. Edward Hill* for the respondent.

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

(1) [1929] Ex. C.R. 133.

1930

MILN-BINGHAM PRINTING CO. LTD. v. THE KING.

Duff J.

The judgment of the court was delivered by

DUFF J.—The question on this appeal can be very briefly stated. The claim is made under subs. 4 of s. 19BBB of the *Special War Revenue Act, 1915,* and the amendments thereto. And the whole point for discussion is whether or not a certain booklet printed by the defendants for the Canadian Kodak Co. Ltd., having attached to it the name "Kodakery", falls within one of the exceptions to that subsection which is expressed in these words: "Newspapers and quarterly, monthly and semi-monthly magazines and weekly literary papers unbound."

One preliminary observation. No doubt, for the purpose of ascertaining the meaning of any given word in a statute, the usage of that word in other statutes may be looked at, especially if the other statutes happen to be *in pari materia,* but it is altogether a fallacy to suppose that because two statutes are *in pari materia,* a definition clause in one can be bodily transferred to the other.

The word "magazine" in the exception under consideration is used in its ordinary sense, and must be construed and applied in that sense. No doubt a publication, containing nothing but puffings and praising of the goods of the publishers, and invitations to purchase those goods, would not in accordance with ordinary usage come under the denomination "magazine." On the other hand, the fact that a magazine was published by a firm of publishers with the deliberate intention of encouraging an interest in literature and incidentally in books published by themselves, would not be a ground for saying that it was not a magazine according to ordinary parlance. Nor could I conceive, if a firm engaged in publishing and selling, as its sole business, books dealing with various subjects of applied science, were to publish a periodical devoted exclusively to such subjects, and very largely to the reviews of books upon them, that it could successfully be argued that such a periodical would not fall within the category of "magazine" according to the ordinary notions of men. The same may be said with regard to what are called "trade journals" which are media for information in relation to their respective trades.

"Kodakery" is stated in the evidence to be a journal, having for its subject matter technical information as re-

1930

MILN-BINGHAM PRINTING CO. LTD. v. THE KING.

Duff J.

gards photography; "how to make better pictures." One copy only is put in. The learned trial judge seemed to object to more than one copy being produced, which I think is rather unfortunate. However, I have looked through the copy produced and I have found it to be very far from a mere advertising production. I should hesitate to set limits to the skill or the subtlety of the commercial advertiser, and it may be that in this case he has succeeded in deluding me. But I think we must look at, for the purpose of this statute, which is a taxing statute, the thing we have to deal with as a thing in fact. If we attempt for the purpose of applying this Act to penetrate the designs of the writers, we shall set before ourselves a task, in which we are much more likely to be misled than if we are content not to be too perspicacious and to look at the real thing as it reveals itself. I think this booklet is just what Mr. Best describes it to be in his evidence; and I do not think a magazine ceases to be a magazine because the publisher, or somebody who pays the publisher, or some number of persons paying the publisher, is or are using it for the purpose of advertisement.

I think the appeal should be allowed with costs here and below.

Appeal allowed with costs.

Solicitors for the appellant: *Macdonell & Boland.*
Solicitors for the respondent: *Wilkie, Delamere & Hill.*

1929

*Oct. 21.

DAME MARY L. PRATT (PLAINTIFF PAR REPRISE D'INSTANCE)..... APPELLANT;

AND

EDGAR BEAMAN (DEFENDANT).....RESPONDENT.

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

Negligence—Accident—Damages—Loss of wages—Death of victim before trial—Taken into account in estimating damages—Arts. 1053, 1054, 1055 C.C.

In an action for damages for loss of wages resulting from an accident, events which happened between the date of the accident, such as the death of the victim. and the time of the trial must be taken into account in estimating such damages.

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

1929

PRATT v. BEAMAN.

The principle held by this court in *Findlay* v. *Howard* (58 Can. S.C.R. 516) is equally applicable whether the claim for damages is in tort, under articles 1053, 1054 and 1055 C.C., or is a claim for breach of contract.

Lemelin v. *Ladrie* (Q.R. 59 S.C. 456) discussed, and held to be an authority against allowing in an action commenced before the death of the victim any damages occasioned by such death.

Judgment of the Court of King's Bench (Q.R. 46 K.B. 401) affirmed.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), reversing the judgment of the Superior Court, Weir J. (1), and reducing the amount awarded to the appellant from $7,500 to $2,075.

An action in damages was instituted by one Frank Pratt against the respondent to recover damages resulting from a collision between respondent's motor car and a taxicab in which Pratt was a passenger. The trial took place in March, 1927; and judgment was rendered on the 1st of April, 1927, for $7,500, the full amount claimed and the costs. Frank Pratt died on the 23rd of May, 1927. The respondent had already appealed from the above judgment on the ground that the trial judge had refused to permit, either in cross-examination of appellant's medical witnesses or in examination-in-chief of the same witnesses who had been summoned as respondent's own witnesses, counsel for respondent to attempt to make evidence as to the probable number of years which these experts considered Pratt would live in order that the court might have before it some evidence to justify it in awarding an amount for future loss of wages and earnings commensurate with the probable expectancy of life of Pratt. The appeal was maintained and the record was sent back to the Superior Court in order to allow the respondent to make such evidence. The trial was therefore resumed before the same judge, Weir J., and judgment was rendered for the same amount, i.e., $7,500. The respondent again appealed from this judgment. The Appellate Court reversed it and reduced the amount of damages awarded; and, amongst the *considérants* of that judgment are the following:

" Considering that the Superior Court has based its estimate of $6,000 for loss of earnings of Pratt upon the assumption that he would live and continue to earn wages

(1) (1929) Q.R. 46 K.B. 401.

1929
PRATT
v.
BEAMAN.

for sixteen and a half years from the time of the accident, ignoring as irrelevant the fact, proven by the respondent herself (now appellant), that Pratt had died before the trial of the case was completed;

"Considering that, in estimating the damages claimed by the respondent (plaintiff *par reprise d'instance* now appellant) for loss of wages which the original plaintiff, Pratt, was prevented by his injuries from earning, the court must take into consideration not only relevant facts and circumstances existing before and at the time the action was instituted but also facts affecting the amount of such wages that occurred between that time and the trial of the case;

"Considering that the death of Pratt materially affected the amount of earnings lost by him by making definite what before had been uncertain namely, the length of time during which he was totally incapacitated by reason of the accident;

"Considering that Pratt lived approximately one year and nine months after the accident and so lost wages which he otherwise would probably have earned during that period amounting to * * *.

W. K. McKeown K.C. for the appellant.

Eug. Lafleur K.C. and *W. A. Merrill K.C.* for the respondent.

At the conclusion of the argument of counsel for the appellant and without calling on counsel for the respondent, the judgment of the court was delivered orally by

ANGLIN C.J.C.—Three distinct grounds of appeal have been pressed upon us. As to the first ground taken, the decision of this Court in *Finlay* v. *Howard* (1), is conclusive against the appellant. The principle of that decision is equally applicable whether the claim for damages is in tort, under articles 1053, 1054, 1055 C.C., or is a claim for breach of contract.

The case of *Lemelin* v. *Ladrie et Poulin* (2), cited by counsel for the appellant, far from being helpful to him, is a distinct authority against allowing in this action, commenced before the death of the victim, any damages

(1) (1919) 58 Can. S.C.R. 516. (2) (1921) Q.R. 59 S.C. 456.

occasioned by his death. Assuming that it could be shown that the death was caused by fault of the defendant and that an action for damages occasioned thereby was brought within a year, the present plaintiff might therein have a claim under article 1056 C.C., but that would be an "independent" action and could not be added by incidental demand to the present claim. The case cited is an authority for her right to continue, by revivor, the action already brought by her deceased husband.

The second ground of appeal is that the damages allowed for pain and suffering by the trial judge, $1,500, should not have been reduced, as they were on appeal, to $500. While, if we were the first appellate court, we might have been disposed not to interfere with the assessment of these damages by the Superior Court, it is the well established practice of this court not to interfere with an amount allowed for damages, such as these, by the court of last resort in a province. That court is, as a general rule, in a much better position than we can be to determine a proper allowance having regard to local environment. It is, of course, impossible to say that the Court of King's Bench erred in principle in reducing these damages.

The third ground of appeal is that the courts below, in dealing with the question of interest on compensation, appear to have followed the ordinary practice of not allowing interest on unliquidated damages prior to the ascertainment of their amount. We see nothing in this case to justify any departure from that wholesome practice.

It follows that the appeal fails and must be dismissed (Mr. Lafleur, do you ask for costs under the circumstances? Mr. Lafleur: Yes, we do.) with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *W. K. McKeown.*

Solicitors for the respondent: *Duff & Merrill.*

1929
*12 Sept.
*7 Oct.

IN THE MATTER OF ORDER OF THE BOARD OF RAILWAY COMMISSIONERS No. 448, REGARDING THE SUBJECT OF RAILWAY FREIGHT RATES IN CANADA.

ON APPEAL FROM THE BOARD OF RAILWAY COMMISSIONERS FOR CANADA

Appeal—Leave to appeal—Jurisdiction—Extension of time—Special circumstances—Order of the Board of Railway Commissioners—Freight rates—Railway Act, [1927] R.S.C., c. 170, s. 52, subs. 2 and 3; s. 325, subs. 5.

The action of the Canadian National Railways in obtaining from the Board of Railway Commissioners extensions of time covering a period of nearly two years within which to make application for leave to appeal from an order fixing freight rates from Armstrong to Quebec city and the applying for such leave only when a reduction of the rates fixed by the order was threatened and an application had been made to obtain a rate to maritime ports based on those rates, indicate that the Canadian National Railways had no *bona fide* intention of appealing against the order on account of any rates fixed therein; and, therefore, the obtaining of such extensions and the application now being made to the Board cannot be considered as "special circumstances" within the meaning of subsection 2 of section 52 of the *Railway Act*, under which "special circumstances" alone a judge of this court may grant extension of time for applying for leave to appeal.

Moreover, even if such extension of time had been given, leave to appeal should not be granted, as the intending appellant has not advanced any valid objection to the jurisdiction of the Board of Railway Commissioners. *Can. Nat. Rys.* v. *C.P.R. Co.* ([1929] S.C.R. 135). The Board did not misdirect itself by holding that it had jurisdiction to look at and use, as a basis for fixing the rates between Armstrong at the head of the lakes and Quebec City, the Crow's Nest Argeement from Calgary to Fort William and an agreement of July 29, 1903. Subsection 5 of section 325 of the *Railway Act* declares the powers of the Board under the Act to fix and determine just and reasonable rates shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, save and except as to rates on grain and flour from points west of Fort William to Fort William and Port Arthur. The wording of this subsection should not be construed as a restriction upon the powers of the Board to fix the rates set out in the Order now in question. On the contrary it seems from the language used that Parliament contemplated that the Board would look at and consider the statutes and agreements relating to rates which had been in force or agreed upon, and desired to make it clear that, with the exception of the Crow's Nest Agreement, the Board was not to be bound by any such statute and agreement. What weight these statutes and agreements shall

*LAMONT J. in chambers.

have is left to the discretion of the Board; and, subject to certain conditions, the obligation rests upon the Board of fixing rates which are "fair and reasonable." In this case, the own conduct of the Canadian National Railways since the Order in question was made has been such as to justify the inference that, in their judgment, the rates were not unfair or unreasonable.

APPLICATION for an Order extending the time for applying for leave to appeal, and for leave to appeal to this court under section 52 (2) of the *Railway Act* from an Order of the Board of Railway Commissioners No. 448, dated 26th August, 1927, regarding the subject of railway freight rates in Canada.

Alistair Fraser K.C., A. J. Thomson K.C. and *Geo. F. Macdonnell K.C.* for the Canadian National Railways.

J. R. L. Starr K.C. for the Attorney-General for Ontario.

F. H. Chrysler K.C. for the Attorney-General for Manitoba.

A. J. Fraser for the Attorney-General for Saskatchewan.

A. C. Boyce K.C. and *H. P. Duchemin* for the Attorney-General for Nova Scotia.

E. Thériault for the city of Quebec.

J. L. St. Laurent K.C. and *André Taschereau* for the Quebec Harbour Commission.

E. C. Phinney for the citizens of Halifax.

C. J. Burchell K.C. for the Halifax Harbour Commission.

J. Preud'homme K.C. for the city of Winnipeg.

Cuthbert Scott for the Canadian Pacific Ry. Co.

LAMONT J.—This is an application on behalf of the Canadian National Railways for an order extending the time for applying for leave to appeal, and for leave to appeal to this Court from the Order of the Board of Railway Commissioners for Canada, known as "General Order No. 448." The ground upon which the application is based is that the Board exceeded its jurisdiction in making the Order in that it proceeded upon a wrong principle by taking into consideration in fixing the rate: (1) The agreement of July 29, 1903, made between the Government of Canada and the Grand Trunk Railway Company, scheduled in the Dominion Statutes of that year, in the Confirmatory Act, and

1929

In re BOARD OF RAILWAY COMMISSIONERS ORDER No. 448 REGARDING RAILWAY FREIGHT RATES IN CANADA.

Lamont J.

(2) The Crow's Nest rate from Calgary to Fort William.

The application was opposed by (*inter alia*) the city of Quebec, the Quebec Harbour Commissioners, the province of Nova Scotia, the city of Halifax and the Halifax Harbour Commissioners.

The opposition to the application was based on two grounds,

(1) That the application was not made within one month from the making of the Order as required by s. 52, ss. 2, of the Railway Act, and that no special circumstances had been shewn which would justify the granting of an extension of time within which to apply for leave to appeal, and

(2) That in view of the action of the Canadian National Railways in putting into force and continuing for two years the rates fixed by the Order, it was not now fairly arguable that the rates fixed therein were unfair or unreasonable.

Section 52, subsecs. 2 and 3 of the *Railway Act* provide for an appeal from the Board to the Supreme Court of Canada (1) Upon a question of jurisdiction, if leave therefor is obtained from a judge of that court, and (2) Upon a question of law or jurisdiction or both, if leave therefor is obtained from the Board. The leave in either case is to be obtained within one month after the making of the Order sought to be appealed from, or, within such further time as the judge, under subsec. 2, or the Board, under subsec. 3, under special circumstances, shall allow.

The Order in respect of which leave to appeal is sought was made on August 26, 1927. No application to a judge of this Court for leave to appeal was made within a month of the date of the Order, nor, in fact, until September of this year, two years after the Order was made. It is, therefore, necessary for the Canadian National Railways to obtain an Order extending the time for applying for leave to appeal. This can only be granted by a judge "under special circumstances."

The special circumstances alleged to exist are as follows:

(1) That the railways had within the proper time applied to the Board for an extension of the time within which they could apply to the Board for leave to appeal to the Supreme Court of Canada; that the Board had granted

the application and had subsequently renewed the extension given from time to time until June, 1929, when an application was made to the Board for leave to appeal, but the same was refused.

(2) That the Canadian National Railways had, in May of this year, received a notice from the Board calling upon them to shew cause why an Order should not be made directing a reduction of the rates fixed by General Order No. 448, in conformity with the principles laid down in that order.

(3) That applications were now being made to the Board to fix a rate to Halifax and St. John based upon the rates fixed by the Order from Armstrong to Quebec.

On the argument before me counsel for the Canadian National Railways very frankly stated that had no steps been taken to bring about a further reduction of the rates fixed in the Order sought to be appealed from and no application had been made to have rates fixed to Maritime ports based upon those fixed to Quebec, the Canadian National Railways would have been content not to seek leave to appeal as there was not a great deal of grain being transported to Quebec, and they did not consider that the rates fixed would injure them very much.

In my opinion the action of the Canadian National Railways in obtaining from the Board extensions of time covering a period of nearly two years within which to make application for leave to appeal, and then appealing for such leave only when a reduction of the rates fixed by the Order was threatened and an application had been made to obtain a rate to Maritime ports based on those rates, points strongly to the conclusion that the Canadian National Railways had no *bona fide* intention of appealing against the Order on account of any rates fixed therein. What the Canadian National Railways were seeking to accomplish, by getting numerous extensions of time within which they might apply for leave to appeal, was to hold the threat of an appeal over the heads of those who might contemplate applying to the Board to fix a rate to Maritime ports based upon the rates to Quebec. Under these circumstances I am unable to hold that the obtaining of the extensions to which I have referred, or the applications now being made

1929

In re BOARD OF RAILWAY COMMISSIONERS ORDER No. 448 REGARDING RAILWAY FREIGHT RATES IN CANADA.

Lamont J.

to the Board, can be considered a special circumstance within the meaning of s. 52, ss. 2.

On the main ground upon which the application was based the Canadian National Railways, in my opinion, cannot succeed. As my brother Duff pointed out in *Canadian National Railways* v. *Canadian Pacific Railway Company* (1), it is the duty of a judge on an application for leave to appeal to consider whether the question which the applicants desire to raise is one in respect of which there can be said to be a fairly arguable controversy.

The Canadian National Railways desire to appeal from the Order fixing the rates from Armstrong to Quebec city. Their contention is that the Board misdirected itself by holding that it had jurisdiction to look at and use, as a basis for fixing the rates, the Crow's Nest agreement from Calgary to Fort William, and the agreement of July 29, 1903; and s. 325, ss. 5 of the *Railway Act* was cited in support thereof. That section declares that the powers of the Board under the Act to fix and determine just and reasonable rates shall not be limited or in any manner affected by the provisions of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, save and except as to rates on grain and flour from points west of Fort William to Fort William and Port Arthur. The wording of this subsection, on any fair reading of it, is not capable, in my opinion, of being construed as a restriction upon the powers of the Board to fix the rates set out in the Order. On the contrary it seems to me from the language used that Parliament contemplated that the Board would look at and consider the statutes and agreements relating to rates which had been in force or agreed upon, and desired to make it clear that, with the exception of the Crow's Nest agreement, the Board was not to be bound by any such statute or agreement. The Board was, therefore, entitled to take into consideration the agreements to which objection was taken. Taking them into consideration, however, does not mean, as I indicated above, that the Board is under any obligation to adopt the rates fixed or agreed to therein. What weight they shall have is, in my opinion, left to the discretion of the Board subject to this, that after it has given full consideration to these agree-

(1) [1929] Can. S.C.R. 135, at p. 139.

1929

In re BOARD OF RAILWAY COMMISSIONERS ORDER No. 448 REGARDING RAILWAY FREIGHT RATES IN CANADA.

Lamont J.

ments as well as to the other matter to which reference was made so often on the argument, namely, the expenditure of three hundred and thirty million dollars by the Parliament of Canada in constructing or aiding the lines now forming the Canadian National Railways, and the desire of the Government, as expressed in the Order in Council, to encourage the movement of traffic through Canadian ports, the obligation still rests upon the Board of fixing rates which are "fair and reasonable" from the standpoint not only of the producer but also from the point of view of the Railways.

Has it been made to appear on this application that it is fairly arguable that the rates fixed by Order No. 448 are unfair or unreasonable? I am very clearly of opinion that it has not. Not only have the Canadian National Railways failed to shew that the Board misdirected itself, but their own conduct since the Order was made has been such as to justify the inference that, in their judgment, the rates were not unfair or unreasonable.

The application will be dismissed with costs.

Application refused with costs.

HIS MAJESTY THE KING (RESPONDENT) . APPELLANT;

AND

ROGER MILLER & SONS LIMITED (CLAIMANT) ..... } RESPONDENT.

1929

*Nov. 15.

1930

*Feb. 4.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Contract—Interpretation—Construction of harbour works for the Crown —Dispute as to amount payable to contractor for rental of plant— Interest on delayed payments.

Respondent, under contract with the Crown, performed certain work in connection with harbour improvements. The contract provided for payment on a "cost plus" basis and also for rental, fixed at a percentage per annum on value of the plant (the units whereof, with value of each, were set out), to be paid to respondent "on plant used in the work * * * to be payable only when each individual piece of plant commences operation and to cease when determined by the Engineer." It was agreed that "no rental on any unit of plant shall exceed [said percentage] and rental charged for plant

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

1930

THE KING
v.
ROGER MILLER & SONS LTD.

used for a lesser time than the full rental season in any year shall be calculated in the proportion that the days the plant be retained or used bear to the full rental season of 150 days." At the commencement of a season's work the Crown's engineer would instruct respondent to put on the work the plant that he considered necessary, and that plant, with few exceptions, remained on the work and was employed constantly or intermittently throughout the season. The dispute was as to whether units which became unnecessary for substantial periods during the season should be struck off the rental sheet while idle.

Held: Having regard to the nature of the work and the nature of the plant required, the proper construction of the contract was that respondent was entitled to rental for all the plant while it remained on the work, notwithstanding idleness of some units as aforesaid, until the engineer determined that some unit or units were no longer required on the work and released them. (Judgment of Maclean J., [1929] Ex. C.R. 136, on this point affirmed.)

Held, also, that respondent was not entitled to interest on delayed payments (claimed on the ground that by reason of delay in payment respondent had to borrow at interest, and such interest should be included as part of the cost of the work); it was merely a case of moneys due respondent being withheld beyond due dates, in which case the Crown is not liable for interest except under special circumstances such as existence of statutory provision or contractual obligation. (Judgment of Maclean J., *supra,* in so far as he allowed interest, reversed.)

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada (1), upon a reference to that Court under s. 37 of the *Exchequer Court Act.*

The claimant (the present respondent) entered into a contract with His Majesty the King, represented by the Minister of Public Works of Canada, for the construction and completion of certain public works in the harbour at Toronto. The claimant was to furnish the labour, material, tools, machinery, equipment, facilities and supplies necessary for the completion of the work, and was to be paid the net cost plus 7½% thereof, and, in addition, a rental for machinery or plant described in the contract, at certain stipulated rates. The present appeal was taken against the allowance to the claimant, by the judgment of the Exchequer Court, of a sum of $47,298.21 for rental of plant in excess of what the Crown claimed to be the proper amount, and of a sum of $10,937.71 for interest on payments delayed, the claim to this interest being based upon

(1) [1929] Ex. C.R. 136.

the ground that the claimant, by reason of the delays in payment, had to borrow money at interest, and that such interest should be included as part of the cost of the work.

The appeal was dismissed as to the rental item of $47,298.21, but allowed as to the interest item of $10,937.71.

M. H. Ludwig K.C. for the appellant.

A. C. McMaster K.C. for the respondent.

The judgment of the court was delivered by

SMITH J.—The respondents entered into a contract with the Department of Public Works on the 10th of March, 1919, to do certain work in connection with Toronto Harbour improvements, and to furnish the labour, materials, machinery, equipment facilities and supplies necessary for the completion of the work, for which they were to be paid the net cost plus 7½%, in addition to a rental for machinery or plant described in the contract, at the rates therein stipulated.

The respondents proceeded with the work in 1919 under the directions of the Department Engineer, pursuant to the contract, but at the beginning of the following season the Department commenced negotiations to secure better terms of contract with the respondents, and in the meantime suspended operations. These negotiations resulted in a new contract, dated 12th August, 1920, under which the work proceeded, and which provided that respondents were to be paid as therein provided, both for the work already done and for the work to be done, so that the terms of the original contract are not material to the matters in question here.

The main dispute is as to an item of $47,298.21 allowed the respondents by the learned trial judge for rental of plant in excess of what the appellant claims to be the proper amount. The agreement of 12th August, 1920, has the following provisions in reference to rental of plant:

(c) Rental, to be paid to the Contractor on plant used in the work as hereinafter provided; said rental to be payable only when each individual piece of plant commences operation and to cease when determined by the Engineer on the following basis, namely:—

Twenty per cent. per annum on the value of the plant as set forth in the schedule attached hereto and forming part of this contract in respect of all work performed in the year 1919, and 15 per cent. per annum on said

1930

THE KING
v.
ROGER MILLER & SONS LTD.

Smith J

valuation after necessary additions, deductions or other amendments in respect of all work performed thereafter under this contract.

* * * * *

The payment for rental of plant shall be calculated on the basis of 150 days of elapsed time in each calendar year.

No rental on any unit of plant shall exceed 20% of the value for 1919, or 15% for the years or portions of years following, and rental charged for plant used for a lesser time than the full rental season in any year shall be calculated in the proportion that the days the plant be retained or used bear to the full rental season of 150 days.

F. Hands, the Department engineer in charge of the work, says that his practice was at the commencement of the season's work to instruct the contractors to put on the work the plant that he considered necessary for the operations, and that plant remained on the work, with few exceptions, continuously throughout the working season. This plant, he says, would all be employed constantly or intermittently throughout the season, and when a unit was put to work and then ceased to work for a month or so and then was put to work again, he did not strike it off the rental sheet, but when a unit became unnecessary for a substantial period during the season, he struck it off the rental sheet while idle. The amount of rental that the Department claims to be the correct amount is arrived at on this basis.

The respondents claim that they are entitled to rental for the full season for all the plant while it remained on the work until the engineer determined that some unit or units were no longer required on the work, and released them, so that respondents would be entitled to take them away and employ them elsewhere, and that until the engineer so determined, the plant was "retained" by the Department within the meaning of the terms of the contract quoted above.

Having regard to the nature of the work to be done and its requirements as to plant described in the contract, the respondents' interpretation of the meaning of the language used in the clauses quoted above seems to be correct.

Units of the plant described, such as dredges with their attendant tugs and scows, derrick scows with air compressor and electric plant, diving scow with air compressor equipment and electric light plant, concrete mixer with boiler, sand and gravel bins, travelling derricks, pile drivers, etc., could not with any degree of practicability be

moved about for short periods from this particular work to some other similar work and then brought back again when required. The words of the contract, "cease when determined by the Engineer on the following basis, namely," and "the plant be retained or used," employed in connection with such an undertaking and the plant to be used in carrying it out are significant of what was intended. The plant that remained on the work throughout was kept there because it was required for the undertaking, and was therefore "retained," and the engineer accordingly did not "determine" that it should be released so that rental should cease. A time did arrive when certain small units, such as motor boats, were not further required, and the engineer as to these did "determine" that rental as to them should cease, and released them, so that they were no longer "retained or used," and rental for them ceased.

Nothing seems to turn on the fact that the part of the plant closed in by the coffer-dam was idle during the first part of the season of 1920. This plant was placed there in 1919, and worked there in that season under the contract. The Department chose to suspend work while negotiating for better terms, but did not "abandon the work and cancel the contract," as provided by one of its terms. The respondents were not at liberty to remove their plant, because they were under contract to supply this plant, and they might have been required at any moment to proceed with the work.

As to the determination of the contract, dated 10th March, 1919, authorized by the Order in Council of 17th February, 1919, there need be no misunderstanding. The Government, by the provisions of the 12th clause, reserved the right, if deemed advisable or necessary, to "abandon the work and terminate the contract." There is an Order in Council of 18th March, 1920, which provides,

> That the contract with Messrs. Roger Miller and Sons, Limited, for the execution of works in the Harbour of Toronto, as authorized by Order in Council of February 17, 1919, be cancelled.

And, in the appellant's factum, it is stated that, "By Order in Council dated 18 March, 1920, the said contract with the respondents was cancelled" (meaning thereby the contract of 10th March 1919). This Order in Council, however, so far from providing for the abandonment of the

1930

THE KING
v.
ROGER MILLER & SONS LTD.

Smith J.

work, expressly provides for its continuance, under a new contract to be made with the respondents, which was accordingly entered into on the 12th day of August, 1920.

In the new contract it is recited:

> It has been found expedient and has been mutually agreed by and between the respective parties hereto that the said contract shall be cancelled and superseded by a new contract in relation to the said works.

and this recital is followed by a mutual release and discharge of the contract; but it is, however, provided, at the foot of the 8th clause, that

> The release clause of this contract shall not operate to release the party hereto of the second part from payment of any sum or sums of money due under the contract for partial performance of the same computed under the terms and conditions of the released contract and modified by this agreement.

By the statement of defence,

> The respondent says that by *the said contract, dated the twelfth day of August, 1920,* the said contract, dated the tenth day of March, 1919, was cancelled.

At the opening of the case, however, we were informed by the appellant's counsel that the *contract had not been cancelled.* It seems clear that the Order in Council of 18th March, 1920, could not effectively cancel the existing contract, as clause 12 authorizes such cancellation only on the abandonment of the work, whereas the Order in Council expressly provides for continuance of the work by the respondents. Moreover, there is no evidence that the respondents had any notice of this Order in Council prior to the execution of the new contract. The appellant cannot therefore base any claim for reduction of rental on the alleged cancellation of the contract.

The contention of the appellant as to the basis on which rental of the plant is to be calculated is not therefore well founded, because there was no "determination" by the engineer that rental claimed should cease, and because the plant for which the rental is claimed was "retained." It is conceded that in the event of the contract being construed as indicated above, the item of $47,298.21 was correctly allowed. The appeal as to this is therefore dismissed.

The only other amount in question here is the item of $10,937.71 allowed by the learned trial judge to the respondents for interest on moneys not paid to the respondents at the times stipulated in the contract. The total sum claimed by the respondents for interest was $28,700.16,

1930

THE KING v. ROGER MILLER & SONS LTD.

Smith J

of which $17,762.45 was allowed and paid by the appellant, voluntarily as appellant claims.

It was argued that the interest claimed should be treated as part of the cost of the work, and therefore is payable under the terms of the contract, but this argument seems quite unsound. It is a mere case of moneys becoming due to respondents at certain times and being withheld beyond the due dates, in which case the Crown is not liable to pay interest during default except under special circumstances such as the existence of statutory provision or contractual obligation.

The appeal therefore as to this item is allowed.

The appellant, having been obliged to appeal in order to get relief from the judgment for the latter item, would ordinarily be entitled to the costs of the appeal. Of the two items involved in the appeal, the one for $47,298.21 was much the larger and as to this, the appellant fails. A considerable portion of the costs is attributable to that item, and there will therefore be no costs of the appeal.

Appeal allowed in part.

Solicitors for the appellant: *Ludwig, Shuyler & Fisher.*

Solicitors for the respondent: *McMaster, Montgomery, Fleury & Company.*

1929

*Oct. 1, 2.
*Nov. 4.

DONALD H. BAIN LIMITED (DEFENDANT) ..... } APPELLANT;

AND

H. W. J. MADDISON (PLAINTIFF) ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Breach—Sale of goods—Pleading—Breach of duty to employer—Evidence of plaintiff's contract of hiring with employer—Admissibility—Fraud.

In an action for breach of a written contract the defence was raised that the respondent was guilty of a breach of duty towards his employer in entering into the contract, but as no fraud was alleged in this regard, the paragraph was struck out with leave to amend. The amend-

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

1929

BAIN
v.
MADDISON.

ed paragraph alleged that the contract was made by the appellant's agent without authority and contrary to instructions and that the agent and the respondent fraudulently conspired together to bring about the contract, that the contract was procured by fraud and the respondent fraudulently obtained from the agent a price lower than the market price of the goods. The trial judge refused to admit evidence of the respondent's contract of hiring with his employer on the ground that a defence of illegal contract had not been raised on the pleadings; and the jury found in favour of the respondent. It was argued by the appellant before this court that the price named in the contract being less than the market price, a profit would have accrued to the respondent if the contract had been carried out and that such concession to the respondent had been given by the appellant's agent, and accepted by the respondent, as a bribe to induce him to advance the interests of the appellant in the dealings of the respondent's employer with it through the respondent; and it was further argued by the appellant that the facts already disclosed by the evidence point to the existence of such a conspiracy or illegal agreement and that, notwithstanding the insufficiency of the pleadings, it was the duty of the trial judge to investigate the facts and for that purpose to receive further evidence supporting the appellant's argument above stated.

Held that the trial judge was right in rejecting the evidence offered by the appellant. If such an agreement, affecting the contract sued upon, had been embodied in a document put in evidence by the respondent, and the character of it had been thereby plainly disclosed, or if the nature of it plainly appeared from other evidence adduced by the respondent, then, if the court was satisfied it has before it all the facts, the respondent would have necessarily failed; and, in such circumstances, it was immaterial whether or not the agreement had been pleaded in defence. It is otherwise, however, where the appellant, in order to shew that the contract sued upon was unenforceable, was obliged to adduce evidence of the corrupt inducement. The appellant was not entitled to present such evidence unless the respondent has had notice, through the pleadings, of the nature of the defence. *North Western Salt Co.* v. *Electrolytic Alkali Co.* ([1914] A.C. 461) followed.

Judgment of the Court of Appeal (40 B.C. Rep. 499) affirmed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), affirming the judgment of the trial judge, Macdonald J., with a jury and maintaining the respondent's action, awarding damages for breach of a contract for the sale of goods.

By contract in writing of the 2nd of September, 1926, the respondent purchased from the appellant 1,000 cases (55 pounds each) of Manchurian shelled walnuts at 24 cents per pound, shipment to be made from the Orient in December, 1926, to be delivered in Vancouver. The ap-

(1) (1929) 40 B.C. Rep. 499; [1929] 1 W.W.R. 437.

pellant failed to deliver the goods and the respondent claimed $5,500 being the difference between the contract price of 24 cents per pound and 34 cents per pound the market price at the time of the breach. At the time the contract was made, the respondent was manager of the wholesale grocery department of the Hudson's Bay Company in Vancouver, his duties including the purchase of walnuts for his employer and one Mason was the appellant's agent in Vancouver with whom the respondent made the contract in question. The appellant alleged that the respondent and Mason in breach of their respective duties fraudulently conspired together to enter into the contract for the sale of walnuts at a price less than the market price at which the appellant was selling walnuts to their other customers.

Glyn Osler K.C. for the appellant.

W. F. Chipman K.C. for the respondent.

The judgment of the court was delivered by

DUFF J.—This is an appeal from a judgment of the Court of Appeal of British Columbia (1), pronounced on the 8th of January, 1929, dismissing an appeal from the judgment of Mr. Justice W. A. McDonald, awarding the respondent $4,000 damages for breach of a contract for the sale and delivery to him by the appellant company, of 1,000 cases of Manchurian shelled walnuts. The issues raised by the pleadings were submitted to the jury by the learned trial judge, in a charge which the majority of the Court of Appeal, with whose view we agree, held to be free from objection, and these issues, by the general verdict of the jury, were disposed of in plaintiff's favour.

At the trial evidence was offered in support of a defence which in its most advantageous form, and substantially as put by Mr. Osler, may be stated thus: The respondent was the manager of the wholesale grocery department of the Hudson's Bay Company at Vancouver. As such, he acted for his employers in their dealings with the appellant company, in the purchase, that is to say, of various kinds of commodities, including shelled Manchurian walnuts.

(1) 40 B.C. Rep. 499; [1929] 1 W.W.R. 437.

1929

BAIN v. MADDISON.

Duff J.

The price named in the contract sued upon, it is said, was considerably less than the market price, and by reason of this, a profit of several hundred dollars would have accrued to the respondent if the contract had been carried out; and this concession to the respondent was, it is alleged, given by the agents of the appellant company, and accepted by the respondent, as a bribe to induce him to advance the interests of the appellant company in the dealings of the Hudson's Bay Company with them through the respondent. These allegations, if established, would no doubt have constituted a defence (*Harrington* v. *The Victoria Graving Dock Co.* (1); but the learned trial judge rejected the evidence offered in support of them on the ground that the defence had not been pleaded.

It is quite clear that no such defence is set up in the pleadings; but it was argued by Mr. Osler, on behalf of the appellant company, that the facts disclosed by the evidence point to the existence of such a conspiracy, and that, notwithstanding the state of the pleadings, it was the duty of the learned trial judge to investigate the facts, and for that purpose, to receive the evidence tendered.

The pertinent rule is not open to doubt. If such an agreement, affecting the contract sued upon, is embodied in a document put in evidence by the plaintiff, and the character of it is thereby plainly disclosed, or if the nature of it plainly appears from other evidence adduced by the plaintiff, then if the Court is satisfied it has before it all the facts, the plaintiff must necessarily fail; and, in such circumstances, it is immaterial whether or not the agreement has been pleaded in defence. It is otherwise, however, where the defendant, in order to shew that the contract sued upon is unenforceable, must adduce evidence of the corrupt inducement. The defendant is not entitled to present such evidence unless the plaintiff has had notice, through the pleadings, of the nature of the defence. Lord Moulton said, in *North Western Salt Co.* v. *Electrolytic Alkali Co.* (2):

> At the trial before Scruton J. the plaintiffs put their manager into the witness box to give evidence on some issue of fact raised in the pleadings. In commencing his cross-examination of this witness counsel for the defendants put a question to him admittedly not relevant to any matter

(1) (1878) 3 Q.B.D. 549.

(2) [1914] A.C. 461, at p. 474.

pleaded, but directed solely to shew that the contract was, in fact, a contract in restraint of trade, and thus void or unenforceable. Objection was taken to the question on the ground that if the defendants intended to raise such a defence they ought to have pleaded it. The objection was sustained by the judge. He could scarcely have done otherwise in face of the specific provision in the Rules that the defendant must raise by his pleading all matters which shew the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, as, for instance, fraud, facts shewing illegality either by common or statute law. The defendants thereupon asked leave to amend their pleading so as to raise the defence of illegality, but the judge refused such leave, on the ground that it would be unfair to the plaintiffs to allow such an amendment to be made when the trial had already commenced.

The reasonableness of this refusal is not now in question. No appeal was brought against it, and the defendants have at no stage of the case renewed their application. It is evident, and, indeed, it is not denied. that the point was before the minds of their counsel from the first, and that it was not by inadvertence, but by choice, that it was not pleaded originally, or that leave to add such a plea was not applied for during the period of more than eighteen months that elapsed between the delivery of the points of defence and the trial.

In the result the judge found in favour of the plaintiffs for £1,055 4s. 10d. damages. The defendants appealed, and on the hearing of the appeal their counsel raised the contention that the contract sued on, when considered with the facts of the case as shewn by the evidence, was in restraint of trade, and was a contract having for its purpose and effect the maintenance of an illegal monopoly injurious to the public; that the Court was entitled, and, indeed, bound, to take cognizance of this contention; and that accordingly it ought to allow the appeal and dismiss the action, regardless of the fact that the issue of illegality was not raised in the pleadings. The Court of Appeal by a majority accepted this view of the case, and allowed the appeal on that ground. Questions as to the proper measure and amount of damages, therefore, became irrelevant, and the Court of Appeal has neither considered nor pronounced upon these matters.

The present appeal is from this decision of the Court of Appeal, and the discussion before this House has related solely to the question whether the Court was justified in dismissing the action on the ground that the contract was illegal and unenforceable. The argument on behalf of the defendants is a very specious one. It is conceded that if a written contract is *ex facie* in restraint of trade so as to be against public policy, the judge is entitled, and, indeed, bound, to take the point, and the decision is for him, and not for the jury. The same must be true when the question is whether a contract, when taken in connection with the surrounding circumstances, is in like manner against public policy. This must be so because the question is one of law, and therefore is for the Court and not for the jury; although it is needless to say that if there be a dispute as to the facts, that dispute has to be settled by the tribunal which has the duty of deciding as to fact before the judge can exercise his function. If, therefore, say the defendants, the Court, taking the contract in connection with the facts appearing in the plaintiff's case or otherwise legitim-

1929

BAIN v. MADDISON.

Duff J.

ately brought before the Court at the trial, comes to the conclusion that is against public policy, it is entitled and bound to dismiss the action.

This reasoning would be sound in the case of a properly constituted action, where the defence of illegality is duly raised on the pleadings. The Court would then be entitled to assume that it had before it, in evidence, all the relevant surrounding circumstances. If any be missing it is the plaintiff's own fault, and he must take the consequences. In such a case the legal motto, *de non apparentibus et de non existentibus eadem est ratio,* is rightly applied. But it is not so where the issue is not raised on the pleadings. The plaintiffs have received no notice that the point will be raised, and are presumably not prepared with the necessary evidence. Even if they are in a position to call the evidence, they are not at liberty to do so, because they are only entitled to call evidence on the issues raised by the pleadings. The facts before the Court at the end of the case are therefore only casual selection from the surrounding circumstances, and the Court has no longer the right to treat them as properly and fully representing those surrounding circumstances so as to justify its pronouncing on their true effect upon the contract. It may be shortly put as follows: if the contract and its setting be fully before the Court it must pronounce on the legality of the transaction. But it may not do so if the contract be not *ex facie* illegal, and it has before it only a part of the setting, which it is not entitled to take, as against the plaintiffs, as fairly representing the whole setting.

Lurking beneath the argument for the defendants was the idea that the public good is a matter of such supreme importance that the Courts should not require proof in due form and in accordance with the recognized requirements of our legal procedure of any charge of illegality or offence against the rules of public policy. But our judicial procedure is based on the principle that in fairness a litigant should have due notice of the issues that are to be raised in order that he may prepare himself with the evidence necessary to present his case fittingly to the Court, and it would indeed be strange to hold that this wholesome rule should be relaxed when he is charged with something so grave as acting against the common weal. Such a proposition partakes of the absurdity of the rule in criminal proceedings that prevailed in England centuries ago, namely, that, because felony was so very wicked, persons accused of it should not be allowed the assistance of counsel. Happily we have shaken ourselves free from all such notions, and the principle that in all cases fair notice should be given to the plaintiff of all the defences that are to be raised is now so fully recognized in our procedure that it is formulated in the rule above quoted, in language which permits no misunderstanding as to the general rule, and which, in particular, specifically includes such a case as the present.

With these observations of Lord Moulton, Lord Haldane and Lord Parker in substance agree. They apply to the present case.

Nor, in view of the course of the litigation, is it possible to give the appellant company a further opportunity of establishing this defence. For the purpose of raising it, the appellant company was given an opportunity, by order of the Court of Appeal, of amending its defence (*Maddi-*

1929

BAIN v. MADDISON.

Duff J.

son v. *Bain* (1)), but deliberately elected to proceed to trial without doing so. At the trial, the trial judge having ruled that, on the state of the pleadings, the defence was not open, no application was made for leave to amend, nor does the appellant company appear to have asked for such leave in the Court of Appeal. Such being the history of the proceedings, the appeal and the litigation must now be determined upon the pleadings as they stand.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *St. John, Dixon & Turner.*
Solicitor for the respondent: *Knox Walkem.*

1929

*Dec. 17.

ALPHONSE NOEL (PLAINTIFF).....APPELLANT;

AND

LA COUR DES SESSIONS DE LA PAIX AND LE COLLEGE DES MEDECINS ET CHIRURGIENS DE LA PROVINCE DE QUEBEC (DEFENDANTS). } RESPONDENTS.

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

Appeal—Special leave to appeal—Proviso to s. 41, Supreme Court Act—Jurisdiction—Writ of prohibition

The proviso to section 41 of the *Supreme Court Act* (which gives jurisdiction to this court to grant special leave to appeal), notwithstanding the wide terms in which it is couched, is necessarily restricted in its application to cases within section 41 itself, i.e., to cases in which the appellate court had jurisdiction, if so advised, to grant special leave to appeal to this court under that section.

APPLICATION by the intending appellant for an extension of time to permit of his asking for special leave to appeal.

The intending appellant moved before Anglin C.J.C. in chambers for an extension of time to permit of his asking for special leave to appeal, under the proviso to section 41 of the *Supreme Court Act,* such leave having been refused by the Court of King's Bench.

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*PRESENT:—Anglin C.J.C. in Chambers.

(1) (1928) 39 B.C. Rep. 460.

1929

NOËL v. LA COUR DES SESSIONS DE LA PAIX.

The proposed appeal is from a judgment of the Court of King's Bench, confirming the decision by the Superior Court, refusing a writ of prohibition to the Court of Sessions of the Peace. The appellant had been convicted by that court of practising medicine illegally and contrary to c. 213, R.S.Q., 1925. For this offence he had been condemned to pay a fine of $50, or, in default, to suffer sixty days imprisonment. By the present action, it was sought to prevent the enforcement of this punishment.

P. Dubois for the motion.

P. St. Germain K.C. contra.

ANGLIN C.J.C.—The proviso to s. 41, notwithstanding the wide terms in which it is couched, is necessarily restricted in its application to cases within s. 41 itself, i.e., to cases in which the appellate court had jurisdiction, if so advised, to grant special leave to appeal to this court under s. 41.

The proviso is based upon a refusal of such leave by the appellate court. It therefore presupposes the right or power in that court to grant such leave and that it has refused to exercise that right or power. But, under the terms of s. 41, such power only exists in cases within s. 36, and the granting or refusal of prohibition in a criminal case is expressly excluded from our jurisdiction by that section, which defines the subjects of appeal to this court. This court is purely statutory in its origin and in its jurisdiction. There would be no object, therefore, in extending the time to enable the appellant to apply for special leave to appeal under the proviso to s. 41 since that leave must necessarily be refused for want of jurisdiction to grant it.

Application dismissed.

ROBERT CREAN AND COMPANY, LIMITED (OBJECTING PARTY) ..... APPELLANT; *Nov. 18, 19. 1929

AND

DOBBS AND COMPANY (PETITIONER) ... RESPONDENT. *Feb. 4. 1930

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-mark—Trade-Mark and Design Act, R.S.C., 1927, c. 201—"Person aggrieved" by registration of mark (s. 45)—Resemblance of registered mark to mark in prior use—Expunging—Application for registration of mark in Canada—Misrepresentation in use of mark, acquiesced in by owner—Mark used on goods manufactured and sold by person not owner of the mark—Inability of applicant truthfully to make declaration required by s. 13—Essentials for right of registration in Canada—Use of, and "property" in, trade-mark.

In 1908 the members of C. & K. Co., a Connecticut company, hat manufacturers, along with one Dobbs who took a qualifying share, formed the respondent company, of New York, with Dobbs as president. Respondent sold hats in stores in New York city, adopting a trade-mark of which the prominent feature was the word "Dobbs." It also contained the words "Fifth Avenue, New York," and other features. The hats were manufactured by C. & K. Co., which also placed the trade-mark on all hats which it manufactured and sold to its various representatives or agencies. From 1913, C. & K. Co. sold hats, manufactured by it and bearing the "Dobbs" trade-mark, to representatives in Canada. In 1923 respondent procured registration of its trade-mark in the United States. By an agreement in 1924, respondent, in consideration of royalties to be paid to it, granted to C. & K. Co. the exclusive licence to sell hats bearing as a trade-mark the word "Dobbs," either alone or with other words, to customers outside of New York city. In 1922 or early in 1923, appellant, a hat manufacturer in Toronto, Canada, adopted a trade-mark having as a prominent feature the words "Dan Dobbs" (a name not borne by any member of the company) and in 1923 procured registration of its trade-mark in Canada; and it did a considerable business in Canada under it. In 1925 respondent applied to have the word "Dobbs" registered in Canada as a specific trade-mark. This was refused because of appellant's registered mark. On petition by respondent in the Exchequer Court, Audette J. ([1929] Ex. C.R. 164) ordered that appellant's mark be expunged, and that respondent be at liberty to renew or proceed with its application for registration. On appeal:

Held (1) Respondent was a "person aggrieved," within s. 45 of the *Trade-Mark and Design Act*, R.S.C., 1927, c. 201, by registration of appellant's mark, and entitled to sue for its expunging ("person aggrieved" discussed; reference to 27 Halsbury, p. 714; *In re "Vulcan" Trade-Mark*, 51 Can. S.C.R. 411, at p. 413, and other cases).

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

1930

ROBERT CREAN & CO., LTD. v. DOBBS & CO.

(2) Appellant's mark was improperly placed on the register and should be expunged; its resemblance to respondent's mark, under which hats had been sold in Canada for years before appellant's mark was adopted, was such as to confuse and deceive the public.

(3) Respondent should not be allowed to proceed with its application for registration. The hats sold in Canada bearing its mark were manufactured, owned and sold by C. & K. Co. It never was intended that C. & K. Co. should sell anywhere products of respondent; on the contrary, the principal object of the founders of respondent company in its formation was the acquisition of a business on Fifth Ave., New York, under the mark of which they could represent to the public, in cities and towns outside of New York, that the hats manufactured by C. & K. Co. were the product of Fifth Ave., New York; in that scheme of misrepresentation respondent acquiesced. To sell an article stamped with a false label is *pro tanto* an imposition on the public, and acquiescence by the owner of the stamp leaves representor and owner *in pari delicto* (see *Leather Cloth Co.* v. *American Leather Cloth Co.*, 4 DeG. J. & S., 137; 11 H.L.C., 523). On this ground alone registration should be refused (*Bowden Wire Ltd.* v. *Bowden Brake Co. Ltd.*, 30 R.P.C., 580, at p. 590). There were other grounds for refusal: Respondent could not truthfully make the declaration, required by s. 13 of the Act, that the mark was not in use to its knowledge by any other person than itself at the time of its adoption (i.e., adoption in Canada) thereof; there was no adoption of it as a trade-mark in Canada by respondent; it did no business in hats in Canada and it knew that, from 1913 to 1924, the mark was being used in Canada in connection with the sale of hats by C. & K. Co. An applicant for registration of a trade-mark in Canada must shew that he is the proprietor thereof. Respondent had not acquired in Canada any property in the mark. There can be no property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good-will against the sale of another's products as his (*Hanover Star Milling Co.* v. *Metcalfe*, 240 U.S. Rep. 403, at p. 412; *Bayer Co.* v. *American Druggists Syndicate*, [1924] Can. S.C.R. 558, at p. 569). The right to registration in Canada of a trade-mark belongs to him who first uses it there to designate as his the goods to which it is attached; and respondent did not come within this condition.

Judgment of Audette J. (*supra*) varied.

APPEAL from the judgment of Audette J., of the Exchequer Court of Canada (1), ordering that the appellant's trade-mark registered in the Register of Trade-Marks of the Dominion of Canada be expunged, and that the respondent be at liberty to renew or proceed with its application for registration of its own trade-mark.

(1) [1929] Ex. C.R. 164.

The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed as to the expunging from the register of the appellant's trade-mark. The appeal was allowed as to the leave given to the respondent to continue its application for the registration of its trade-mark. Success being about evenly divided, no costs were given on the appeal.

A. W. Anglin K.C. and *C. A. Thompson* for the appellant.

Harold G. Fox for the respondent.

The judgment of the court was delivered by

LAMONT J.—The short history of this case appears to be as follows: Prior to 1908 the Crofut & Knapp Company, a corporation organized under the laws of the State of Connecticut, and having its head office and factory in that state, was manufacturing, in a large way, hats and caps for both men and women. These it sold at wholesale throughout the United States and other parts of the world. The policy of the company was to sell to one agent or representative only, in each city or town. In 1908 the company, being desirous of putting on the market in cities and towns other than New York, an agency hat bearing a Fifth Avenue, New York, label, and being desirous also of selling its goods by retail in the city of New York, obtained the services of a Mr. Dobbs, the manager of an exclusive hat store on Fifth Avenue, and, with him as president, organized, under the laws of the State of New York, a new company called Dobbs & Co. All the stock of the new corporation was owned by the members of the Crofut & Knapp Company, except the qualifying share of Mr. Dobbs. Dobbs & Co. opened a retail store on Fifth Avenue, selling hats and caps for men. In connection with these articles that company adopted as a trade-mark the word "Dobbs" in large type, and the words "Fifth Avenue, New York" in smaller type, but, apart from the trade-mark, no claim was made to the words "Fifth Avenue New York." There were also the words "The Knapp-Felt Shops" in small type, together with a coat of arms. Of this mark the really prominent feature—the thing which would catch the eye—was the word "Dobbs." This mark was affixed to

1930

ROBERT CREAN & CO., LTD. v. DOBBS & CO.

Lamont J.

the silk lining which covered the crown of the hat on the inside and, in addition, the word "Dobbs" was stamped on the leather sweat band. Not only was this trade-mark placed on all hats and caps sold by Dobbs & Co., but it was placed by the Crofut & Knapp Company on all hats and caps manufactured by them and sold to their various representatives or agencies, including Dobbs & Co. Both companies have continued to use the mark since 1908. Dobbs & Co. has never manufactured any hats or caps, nor has it ever sold any, except by retail in the city of New York and, for a short period, at Palm Beach, Florida, and at Southampton, Long Island. All the "Dobbs" hats and caps sold by it were manufactured by the Crofut & Knapp Company. Dobbs & Co. has not now, and never had, any place of business in Canada, nor has it sold any hats or caps in this country. This was made clear in the cross-examination of Mr. Wilmot, vice-president and secretary of both companies. Mr. Wilmot at first testified that the hats sold in Canada bearing the "Dobbs" trade-mark were the hats of Dobbs & Co., but subsequently explained his statement by saying that the two companies were owned by the same people. As to the actual ownership of the hats, he testified as follows:—

Q. And I say Dobbs & Company have never sold a hat in Canada?
A. Dobbs & Company's selling agents have, yes.

HIS LORDSHIP: Make it clear, ask him, did Dobbs & Company sell themselves, direct, a hat in Canada?

The WITNESS: No.

HIS LORDSHIP: Then you contend that they have sold in Canada, you mean they have sold through agents or licensees. Is that what you mean?

A. Yes, my lord.

Mr. THOMPSON: Whose goods have Dobbs & Company sold in Canada through agents, who manufactured the goods?

A. Made by Crofut & Knapp Company.

Q. The goods were manufactured by Crofut & Knapp?

A. Right.

Q. Were sold by Crofut & Knapp?

A. Sold through Crofut & Knapp, I would not say they were sold by Crofut & Knapp.

HIS LORDSHIP: Has the petitioner a factory besides the factory of Crofut & Knapp?

A. No.

Mr. THOMPSON: As a matter of fact Dobbs & Co. do not manufacture men's hats at all do they?

A. No.

Q. They sell in the retail stores in New York hats manufactured by Crofut & Knapp?

A. True.

Q. And Crofut & Knapp sell in Canada hats manufactured by themselves under the Dobbs name?

A. Under a licence agreement.

Q. So that Dobbs & Co., neither manufacture nor sell any hats that are sold in Canada or the United States, except the ones in the retail stores?

A. True.

* * * * *

Q. And since Dobbs & Company has been incorporated the only actual business that Dobbs & Company has done has been a retail business in two or three retail stores in the United States?

A. Five.

Q. But that is all the business that Dobbs & Co. has actually done?

A. As the Dobbs Corporation, yes.

Q. Of course Dobbs & Co. has never done any wholesale business?

A. Not Dobbs & Co., actually itself.

HIS LORDSHIP: Dobbs & Co. were selling locally as retailers?

A. Retailers.

From 1913 to the present time the Crofut & Knapp Company has, every year, sold hats and caps, of its own manufacture but bearing the "Dobbs" trade-mark, to Max Beauvais, Limited, Montreal, Canada. These annual sales have increased from 25 dozen in 1913 to 60 dozen in 1928. Sales were also made to other representatives in Canada: some were made to Richardson & Potts, Vancouver, but, apparently, not since 1921; one or two small orders were sold, some ten years ago, to Holt, Renfrew & Co., also one order to a firm in Edmonton, and a few shipments were made to Eaton & Co., Winnipeg. Within the last two or three years sales have been made to Eaton & Co., Toronto. All these hats shipped to Canada bore the mark of Dobbs & Co., and were manufactured by the Crofut & Knapp Company at their factory in Connecticut, and sold by their own salesmen. In February, 1923, Dobbs & Co. applied to have their trade-mark registered in the United States to be used in connection with sales of hats and caps and other wearing apparel for men, women and children, and it was registered there on October 23, 1923. On or about November 1, 1924, the Crofut & Knapp Company and Dobbs & Co. entered into an agreement in writing whereby, in consideration of certain royalties to be paid to it, Dobbs & Co. granted to the Crofut & Knapp Company the exclusive licence and right to sell hats, caps and wearing apparel for

1930

ROBERT CREAN & CO., LTD. v. DOBBS & CO.

Lamont J.

men, women and children, bearing as a trade-mark the word "Dobbs", used either alone or with other words, to customers for resale at retail at their places of business for the sale of such merchandise, outside of the city of New York.

In the latter part of 1922 or early in 1923, Robert Crean & Company, Limited, who had for many years been manufacturing hats and caps in Toronto, in the province of Ontario, adopted as its trade-mark the words "Dan Dobbs" with a triangle above containing the words "Deerskin Finish" and one below containing the words "Character Hats." In April, 1923, Crean & Company applied to have their trade-mark registered in Canada, to be used in connection with the sale of men's felt and straw hats, and the same was registered on May 1, 1923. After its registration the company did a considerable business in Canada under its trade-mark.

In June, 1925, Dobbs & Co. applied to have the word "Dobbs" registered in Canada as a specific trade-mark in connection with the sale of hats and caps. The application was refused by reason of the existence on the register of the prior registration of the words "Dan Dobbs" in favour of Robert Crean & Company. Dobbs & Co. then filed a petition in the Exchequer Court praying for an order: (1) directing that the registered trade-mark "Dan Dobbs" be expunged from the register, and (2) directing that the petitioner's trade-mark consisting of the word "Dobbs" might be registered as a specific trade-mark to be used in connection with the manufacture and sale of hat and caps. The petition was objected to by Robert Crean & Company. The learned judge of the Exchequer Court, before whom the petition came for adjudication, held that "Dan Dobbs" and "Dobbs" were words which, as applied to articles of the same kind, might readily be confused and which would tend to deceive the ordinary purchaser; and that hats bearing the word "Dobbs" had been on sale in Canada prior to the registration of the trade-mark "Dan Dobbs." He also held that in the light of the evidence it was impossible to credit the statements of the objecting party's manager who had invented the trade-mark "Dan Dobbs" that he was unaware of the existence on the Canadian market of hats bearing the mark

"Dobbs", and that he was not influenced, in adopting his trade-mark, by a desire to benefit by the reputation which the petitioner's hats had acquired in the trade. He therefore ordered that the entry of the objecting party's specific trade-mark in the Canada Trade-Mark Register (No. 147, fol. 33279) be expunged therefrom. He further declared that the petitioner be at liberty to renew or proceed with the application for the registration of his own trade-mark. From that order Crean & Co. now appeal to this court.

Section 45 of the *Act respecting Trade-Marks and Industrial Designs* (R.S.C., 1927, c. 201) reads as follows:—

45. The Exchequer Court of Canada may, on the information of the Attorney-General, or at the suit of any person aggrieved by any omission, without sufficient cause, to make any entry in the register of trade-marks or in the register of industrial designs, or by any entry made without sufficient cause in any such register, make such order for making, expunging or varying any entry in any such register as the Court thinks fit; or the Court may refuse the application.

The first question therefore is, can it properly be said that the respondent is "a person aggrieved" by the registration of the appellant's trade-mark "Dan Dobbs"?

The construction placed upon the words "any person aggrieved" by the decisions under the English Act, and by those under our Act, is the same. Under the English decisions the words are construed to mean, as set out in 27 Halsbury, 714:—

Any person who is in any way hampered in his trade by the presence of the marks or who can shew any real interest in having them removed. *In Re Rivière's Trade-Mark* (1); *In Re Apolonaris Company's Trade-Marks* (2); *Powell* v. *Birmingham Vinegar Brewery Company* (3).

In *In re "Vulcan" Trade-Mark* (4), Davies J. construed "any person aggrieved," under our Act, to include,

any one who may possibly be injured by the continuance of the mark on the register in the form and to the extent it is so registered.

See also *Crothers Co.* v. *Williamson Candy Co.* (5).

As long as the appellant's registered mark remains on the register the appellant would have the right to prevent the respondent or its licensee from registering the "Dobbs" trade-mark in Canada or from continuing to carry on in Canada the sale of hats and caps under the "Dobbs" mark.

(1) (1884) 26 Ch. D. 48.
(2) [1891] 2 Ch. 186.
(3) [1894] A.C. 8, at p. 10.
(4) (1915) 51 Can. S.C.R. 411, at p. 413.
(5) [1925] Can. S.C.R. 377.

1930

ROBERT CREAN & CO., LTD. v. DOBBS & CO.

Lamont J.

If the right were exercised, it would injure the respondent in respect of the royalties to be paid on sales made in this country. The respondent, therefore, in my opinion, is a "person aggrieved" within the meaning of the statute.

Then is the appellant's mark calculated to deceive the unwary or to cause those not skilled in the hat business to think they are purchasing a "Dobbs" hat when they buy one having the appellant's mark thereon? The general principle adopted by the court is to consider the impression produced by the mark as a whole. A new mark is calculated to deceive if it suggests the article known by the old mark, or if, in its essential particulars, it resembles those of the old. Although the two marks in question are different in certain respects the prominent feature of each is the name. The respondent's hat was known as the "Dobbs" hat, and the evidence shews that customers would ask for it by that name. The word "Dobbs" along with the words "Fifth Avenue, New York" indicates primarily the origin or ownership of the hat to which the mark is applied. A customer desiring to purchase a "Dobbs" hat, and not having the respondent's mark before him, might very easily, it seems to me, be confused. No one has a right to use a mark by which another's goods are known for the purpose of passing off his goods as the goods of the other and, even when he is innocent of that purpose, he must not use it in any way calculated to deceive, or aid in deceiving, the public. The evidence, in my opinion, fully supports the finding of the trial judge that purchasers of hats would likely be misled and deceived by the general resemblance of the two marks in question. The name "Dobbs" the trial judge found was adopted in good faith by the respondent company because it was the surname of its president. The appellant admits that no member of its organization bears the name Dobbs. The name "Dan Dobbs" as a mark for hats and caps was evolved by the appellant's manager in Montreal during a conversation between him and one Harry Samuels, one of the appellant's Montreal customers who had just organized a company to sell hats and caps at wholesale. On cross-examination, the appellant's manager was asked:—

Q. What led you to adopt the word "Dobbs"?

A. I cannot tell you, it came from the blue sky.

In *Burgess* v. *Burgess* (1), Lord Justice Turner said:—

> Where a person is selling goods under a particular name, and another person, not having that name, is using it, it may be presumed that he so uses it to represent the goods sold by himself as the goods of the person whose name he uses.

In view of all the facts and circumstances of this case: the reputation which the "Dobbs" hat had acquired in the United States as a high class hat of superior quality; the sale of these hats in Montreal and the considerable advertising of them there for ten years by Max Beauvais, Limited; the extensive advertising of them in the United States in publications which found their way across the border, and the inability of the appellant to give any reasonable explanation of how it came to adopt the mark, the fair inference to be drawn, in my opinion, is that the appellant's mark was designed with the object of approaching as closely to the respondent's mark as the designer thought he could with safety, in order to obtain a trade benefit from the reputation of the respondent's hats. The appellant's mark being only a colourable variation of the mark under which hats had been sold in Canada for years, I agree with the learned trial judge that such mark was improperly placed upon the register and should be expunged therefrom.

The learned trial judge not only expunged the appellant's trade-mark from the register but also directed that the respondent be at liberty to proceed with its application for the registration of its own trade-mark. It is with this part of the judgment of the learned judge that I find myself not in accord. His conclusion was based upon the following findings:—

> It has been abundantly established, by conclusive evidence, that the petitioner, as far back as 1913, to the present day, sold and is selling in Montreal, Canada, his hats with his trade-mark thereon and he further sold them in Vancouver, B.C., in 1917 and during some time subsequent thereto.
>
> * * * * *
>
> These goods have been sold in Canada under the Licence (filed as exhibit No. 13) and were so sold under that name as per such licence. *Qui facit per alium facit per se.*

From these quotations I take it that the learned judge was of opinion that the hats sold in Canada from the year 1913 to the present day were the hats of Dobbs & Co., sold by it through its licensee the Crofut & Knapp Company.

(1) (1853) 3 DeG., M. & G., 896, at p. 905.

1930

ROBERT CREAN & CO., LTD. v. DOBBS & CO.

Lamont J.

I do not so read the evidence. It is true that all hats sold in Canada by the Crofut & Knapp Company bore the respondent's mark, but that did not make them the respondent's hats. They were the property of the Crofut & Knapp Company and were sold as such. The fact that the respondent was a subsidiary company organized and owned by the Crofut & Knapp Company does not make the two companies identical. In law each company is a separate and distinct entity, and the rights of each are separate and distinct. It was stated by Mr. Wilmot that the Crofut & Knapp Company sold hats in Canada bearing the respondent's mark, under licence from the respondent. That is true since November, 1924, only. There is no evidence of any licence having been granted before that date. As the Crofut & Knapp people owned practically all the stock of the respondent company, it could, without doubt, have obtained a licence at any time, but there is no evidence that it did so. Neither is there any evidence that from 1908 until 1924 there was any actual agreement between the two companies that the Crofut & Knapp Company could use the respondent's trade-mark. Such an agreement was doubtless considered unnecessary since both companies were owned by the same group of shareholders. The evidence, however, establishes clearly that when hats were sold in Canada bearing the "Dobbs" mark, they were hats manufactured and sold by the Crofut & Knapp Company and not by the respondent. They were not the respondent's hats sold by the respondent's agents or licensees. It never was the intention of anyone, from 1908 to the present time, that the Crofut & Knapp Company should put on the market, either in Canada or elsewhere, the products of the respondent. On the contrary, the principal object which the founders of the respondent company had in view in its formation, according to the evidence of Mr. Wilmot, was the acquisition of a business on Fifth Avenue, under the mark of which they could represent to the public, in cities and towns outside of New York, that their own Connecticut manufactured hats were the product of Fifth Avenue, New York. In that scheme of misrepresentation the respondent, with full knowledge thereof, acquiesced. To sell an article stamped with a false statement is *pro tanto* an imposition on the public, and an acquiescence

therein by the owner of the stamp, in my opinion leaves representor and owner *in pari delicto*. See *The Leather Cloth Co.* v. *The American Leather Cloth Co.* (1). On this ground alone the registration of the respondent's mark should be refused, for, as Vaughan-Williams L.J., said in *Bowden Wire, Limited* v. *Bowden Brake Co., Limited* (2):

> The whole object (of the Trade-Mark Act) is that by registering a trade-mark you should be able to represent to the public: "You may rely upon it that all goods which bear this registered trade-mark are the goods manufactured or sold by me, the registered proprietor of the mark."
>
> * * * * *
>
> The moment that you show that there is a plain case of an arrangement in respect of a trade-mark which is calculated to mislead in the sense that it will cause goods which had not been manufactured by the proprietor of the registered trade-mark to look as if they were so manufactured, that will cause people or customers to be deceived.

There is, however, another consideration which, in my opinion, must be equally fatal to the respondent's application.

To be entitled to register a trade-mark the applicant must be the proprietor thereof (s. 9), and he must make a declaration that the mark was not in use to his knowledge by any other person than himself at the time of his adoption thereof (s. 13). If the Minister is not satisfied that the applicant is undoubtedly entitled to the exclusive use of the mark, he may refuse to register it (s. 11a). Once it is registered, however, the proprietor has, under the Act, the exclusive right to use the trade-mark to designate articles manufactured or sold by him (s. 13 (2)).

The right to registration in Canada of a trade-mark belongs to him who first uses it there to designate as his the goods to which it is attached. Before an applicant can have a mark registered he must establish that he is the proprietor thereof—that he has a property in the mark. There is, however, no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his good-will against the sale of another's products as his. *Hanover Star Milling Co.* v. *Metcalfe* (1).

(1) (1863) 4 DeG. J. & S. 137; 11 H.L.C. 523.

(2) (1913) 30 R.P.C. 580, at p. 590.

1930

ROBERT CREAN & CO., LTD. v. DOBBS & CO.

Lamont J.

In *The Bayer Co.* v. *American Druggists Syndicate* (2), my brother Duff said:—

> It is sufficiently clear that a trade-mark, in order to be registrable under the Act, must be something which the applicant is entitled to adopt as distinguishing the articles to which it is applied as his own;
>
> * * * * *
>
> Adoption by the applicant for the purpose of distinguishing his goods is the ruling condition. There must, moreover, be adoption for use as a distinguishing mark implying a present *bona fide* intention to use the mark for such purposes; and indeed the affidavit in the form prescribed by the rules could hardly be made by an applicant who has not, in however limited a degree, actually made use of the mark in respect of which the application is made.

The business in Canada since 1913 in connection with which the mark has been employed has been the business of the Crofut & Knapp Company, which business, until 1924, was carried on, so far as the evidence discloses, without any relation to the business of the respondent beyond the acquiescence of the latter in the use by the former of the trade-mark. Mere acquiescence by the owner of a foreign trade-mark to its use in Canada by another, does not give property in the trade-mark in Canada to the foreign owner thereof, unless the goods in connection with which it is used in Canada are put on the market as the goods of the owner of the foreign trade-mark, or sold under his name. *Re Elaine Inescourt Trade-Mark* (3).

It is difficult, therefore, to see how the respondent could have acquired in Canada any property in the trade-mark. Furthermore, to be entitled to registration in Canada the respondent must be able truthfully to make the declaration required by s. 13. In its application to the Minister for registration the respondent declared as follows:—

> We hereby declare that the said Specific Trade-Mark was not, to our knowledge, in use by any person other than ourselves at the time of our adoption thereof.

"Adoption" here means adoption in Canada. There was no adoption of it as a trade-mark in Canada by the respondent. The respondent did no business in hats in Canada and it knew that, from 1913 to 1924, the mark was being used in Canada in connection with the sale of hats by the Crofut & Knapp Company. It could not, therefore,

(1) (1916) 240 U.S. Rep. 403, at p. 412.

(2) [1924] Can. S.C.R. 558, at p. 569.

(3) (1928) 46 R.P.C. 13.

1930

ROBERT CREAN & CO., LTD. v. DOBBS & CO.

Lamont J.

in my opinion, truthfully make the declaration required by the statute. Its application for registration should, on this ground also, be refused.

The appeal, therefore, will be dismissed as to the expunging from the register of the appellant's trade-mark, and allowed as to the leave given to the respondent to continue its application for the registration of its mark. As success has been about equally divided, there will be no costs.

Appeal allowed in part.

Solicitors for the appellant: *Aylesworth, Thompson, Garden & Stuart.*

Solicitors for the respondent: *Fetherstonhaugh & Fox.*

1929

*Oct. 16.
*Dec. 9.

HERBERT MILLAR ELLARD (DEFENDANT) ..... } APPELLANT;

AND

DAME ELLEN MILLAR (PLAINTIFF) ..... RESPONDENT.

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

Practice and procedure—Pleadings—Res judicata—Dispositif—Object of the judgment—Necessary consequence of the judgment—Action to account—Promise of sale—Arts. 1241, 1478, 1536, 1537, 1907 C.C.—Arts. 215, 571 C.C.P.

As a rule, under Quebec law, the authority of *res judicata* applies only to the *dispositif* or, in the language of the code (art. 1241 C.C.), "to that which has been the object of the judgment"; but it will also result from the implied decision which is the necessary consequence of the express *dispositif* in the judgment. In this case, upon an action previously brought, a final judgment between the same parties had annulled two deeds for the reason that the annuity thereby provided should have been $2,000, instead of $800. Although the *dispositif* of the judgment stated that the action was maintained "so far as the annulment of the deeds was prayed for," that involved a determination of the true amount of the annuity as being $2,000, which was the same question as that sought to be controverted in the present case; and such question was concluded as between the parties by the judgment in the first case.

Where sums pertaining to the administration by one party of the business and affairs of the other party have, through the course of dealing between the two, become bound up with items of debit or credit derived from other sources, such as annuities, salary, farm produces, etc., so that, during the period of administration, charges offset ad-

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

1929

ELLARD v. MILLAR.

vances or payments of money and so on: it is not open to either of the parties to sue on a single transaction or for a specific sum of money. The recourse is by action to account. The account must be discussed as a whole, a balance must be struck and such balance alone may be awarded to the party entitled to receive it.

Art. 1536 C.C. which provides that "the seller of an immoveable cannot demand the dissolution of the sale by reason of the failure of the buyer to pay the price, unless there is a special stipulation to that effect" applies in the case of a promise of sale accompanied by tradition and actual possession (Art. 1478 C.C.)

APPEAL and cross-appeal from the decision of the Court of King's Bench, appeal side, province of Quebec, varying the judgment of the Superior Court, Martineau J., (who had awarded the respondent the sum of $12,400), and maintaining the respondent's action for $10,000, for annuities.

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

J. W. Ste-Marie K.C. for the appellant.

H. Aylen K.C. and *J. A. Aylen* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The appeal is from the judgment of the Court of King's Bench (appeal side) of the province of Quebec modifying the judgment of the Superior Court sitting in the district of Hull from which both parties had appealed to the Court of King's Bench. The respondent has also given notice of cross-appeal to this court.

The respondent is the widow of the late Joshua Ellard, in his lifetime merchant of the township of Wright, who died on March 24, 1916. Under the last will and testament of her husband, she was made his universal and residuary legatee. After his death she continued to carry on his business as a general merchant and is still carrying it on.

The appellant is the son of the respondent and of the late Joshua Ellard. Before the death of his father, he was already managing the business and continued so to do until the month of March, 1919, when he requested his mother to accept his resignation.

Matters however got to be unsatisfactory and the appellant was induced to assume once more the management of his mother's interests. The agreement arrived at was reduced to writing at Gracefield on July 4, 1919.

It begins by stating that the respondent

> requires the assistance, advice and services of the said Herbert Millar Ellard in the administration of the said estate * * * and also in the administration of her personal affairs

and Herbert Ellard agrees to give them on the following terms: (1) He is to have "full control, care and management of the property, business and affairs" of Mrs. Ellard during her lifetime; (2) he is to have a power of attorney, irrevocable for five years, but subject to renewal at his own option, with "the most ample powers"; (3) Mrs. Ellard agrees to pay him $100 per month as salary for his services; (4) Mrs. Ellard agrees to convey to Herbert Ellard, on or before the 1st October, 1919, the properties known as the Victoria and Pickanock farms, save and except certain pieces of land therein described and also save and except the homestead with two acres of land adjoining, the store, hotel and mill properties

> together with such areas of land in connection with each of the said properties as will best serve the requirements of each of the said properties from the point of view of ultimate sale, rental, or other disposal thereof

and Herbert Ellard is to cause a proper survey to be made thereof. (5) Then comes paragraph 6 of the agreement which should be recited verbatim, as it affords the main ground for this litigation:

> 6. In consideration of the agreement by the said Ellen Millar to convey to the said Herbert Millar Ellard the properties hereinabove mentioned, the said Herbert Millar Ellard agrees to pay to the said Ellen Millar, during her lifetime, an annuity of $2,000, whereof $800 per annum shall constitute a first charge upon the aforesaid properties and $1,200 thereof to constitute a first charge upon trading and other operations hereby placed under the control, care and management of the said Herbert Ellard, it being understood that all profits derived from the said trading or other operations, in excess of the $1,200 will belong absolutely to the said Ellen Millar.

(6) Herbert Ellard agrees to render annually, on the first day of August, a statement, duly audited and certified by a chartered accountant, of his management of Mrs. Ellard's affairs.

(7) Finally, it is stated that the agreement cancels a donation made by Mrs. Ellard to Herbert Ellard in 1917.

In order to carry out this agreement, so far as concerned the demarcation of the properties conveyed, the appellant

1929

ELLARD v. MILLAR.

Rinfret J.

caused a deed to be prepared, which the respondent signed on the 23rd June, 1920; but, as the lots in the said deed were not described by their official cadastral numbers, a further deed to cover this insufficiency in the description was signed by the respondent on the 14th March, 1921.

In both of these deeds the consideration provided for in the agreement of 4th July, 1919, was fixed at an annuity of $800.

On the 27th September, 1923, the respondent revoked the power of attorney she had given to the appellant.

On the 22nd January, 1924, the respondent brought an action against the appellant praying that the agreement of 4th July, 1919, and the deeds of 23rd June, 1920, and 14th March, 1921, be set aside on the ground of fraud in securing the same.

The Superior Court maintained the action *in toto*, but the Court of King's Bench found that

ledit acte du 4 juillet 1919 n'est annulable pour aucune des causes ou raisons invoquées par la demanderesse; que cette dernière ne montre pas qu'elle a valable raison de s'en plaindre; et qu'il s'en suit que, quant à cet acte-là, sa demande aurait dû être rejetée.

The agreement made in Gracefield on the 4th July, 1919, was therefore upheld by the appellate court. A further appeal to this court by Mrs. Ellard against the validity of the agreement proved unsuccessful.

With respect to the two deeds however, the judgment of the Superior Court was confirmed by the Court of King's Bench and the decision of that court was not appealed from.

The result was that Herbert Ellard still required a deed from his mother to obtain proper conveyance of the properties mentioned in the Gracefield agreement. On the other hand, he had yet to account for the management of his mother's property, business and affairs. (See judgment of this court in the first case between the same parties) (1).

The parties unfortunately were unable to come to an understanding and Mrs. Ellard brought this second action asking that, unless Herbert Ellard accepted the descriptions set out in a deed, which she tendered and which she declared her readiness to sign, the respective parts of the

(1) [1927] 2 D.L.R. 102 at p. 112.

lots which she was entitled to retain and the parts her son was entitled to receive be defined by the court. The action also claimed $15,500 for annuities then due as the consideration of the conveyance and asked that, in case Herbert Ellard failed to pay this or such other sums as may be awarded, the agreement of 4th July, 1919, be set aside and Mrs. Ellard be relieved from all obligation to convey; and that, in that case, Herbert Ellard be ordered to deliver to Mrs. Ellard the properties of which he had taken possession and to pay $15,500 for the enjoyment thereof as well as for the value of pulpwood by him cut and removed therefrom.

Herbert Ellard pleaded in substance that on the 18th October, 1919, in accordance with the Gracefield agreement, he had caused a survey to be made of the parcels or tracts of land Mrs. Ellard had agreed to convey to him. A description of the lots in conformity with the survey was inserted in the deeds of 23rd June, 1920, and 14th March, 1921, but these had been set aside by the courts, for reasons having nothing to do with the survey itself. He thought this survey correctly defined the lots and was always willing to sign a deed accordingly, but Mrs. Ellard refused to accept it. He was still ready to do so, but would not sign the deed tendered by Mrs. Ellard, because the description of the lots widely departed from the agreement. Herbert Ellard further pleaded that until he secured a proper deed from Mrs. Ellard, he could not be called upon to pay her the annuities which, at all events, since she had revoked his power of attorney in September, 1923, amounted only to $800 and not to $2,000 per year; that immediately after the revocation of the power of attorney he had paid Mrs. Ellard $1,733.35, in full of all that was then due to her and she had accepted the amount; that from then on, he had regularly tendered to her payments on the basis of $800 a year, which she had refused. He denied Mrs. Ellard's right in any event to the cancellation of the agreement of the 4th July, 1919, because of the absence in it of any resolutory clause.

The trial judge found that Mrs. Ellard was not entitled to the parcels of land claimed by her, and he proceeded to

> fix and determine * * * the parts of said lots that (she) was entitled to receive and the parts thereof that (Herbert Ellard) was entitled to retain

1929

ELLARD v. MILLAR.

Rinfret J.

under the agreement. He also found that the true amount of the annuity was $2,000, to be paid to Mrs. Ellard during her lifetime, and not $800 as was contended by Herbert Ellard. He accordingly gave judgment on that basis for seven annual payments, less however a sum of $1,600 which he held to have been paid by the son in the interval. He dismissed all the subsidiary conclusions of the action. A deed embodying these findings was drafted by the judge himself and annexed to his judgment as representing the conveyance which Mrs. Ellard ought to sign.

The litigation in appeal centres around the correctness of the deed so drafted by the Superior Court.

The boundaries of the parcels of land to which each party is entitled are no longer in dispute. They were confirmed by the Court of King's Bench and they are now accepted by both the appellant and the respondent. But the parties still persist in every one of the other contentions they put forward at the trial.

The Court of King's Bench was divided on what has now become the main question in the case: the total amount which the appellant must pay to the respondent. Three of the judges of appeal, forming the majority, were of opinion that the annuity was correctly fixed by the trial judge at $2,000, but they thought the respondent was barred from recovering the whole of the arrears of her rent because of the prescription of five years which, they held, applied in this case under arts. 2188, 2250 and 2267 of the Civil Code. For that reason, they reduced the amount of the recovery to $10,000, although they disallowed the credit of $1,600 accepted by the trial judge.

Of the two remaining judges, one (Hall J.) would have declared that the stipulated annuity was only $800 and that the yearly balance of $1,200 was to be paid Mrs. Ellard out of the profits of the store, which Herbert Ellard guaranteed to the extent of that sum. He discussed at length the accounts between the parties, including the item of $1,600 allowed by the trial judge, and came to the conclusion that the real balance due by the appellant up to the day of the institution of the action was $4,400.20. Yet another calculation was made by the fifth judge (Cannon J.), who thought that the payment of $1,733.35 made by Herbert Ellard to his mother, after the revocation of the

power of attorney, should be regarded as final up to that date and who would therefore have computed the arrears of annuity as of that date (September, 1923), with the result that, according to him, the total amount due was $9,066.87, including that sum of $1,733.35.

All the judges of appeal agreed that Mrs. Ellard's grievances against the deed drafted by the trial judge were not to be entertained and they concurred with him in dismissing all the subsidiary conclusions of the action. In fact, the practical result of the appeal, on both sides, to the Court of King's Bench was a reduction of $2,400 from the amount awarded to Mrs. Ellard.

The same questions, except that concerning the demarcation of the lots, were again raised before this court.

On the first question, i.e., the annuity payable by Herbert Ellard, we think, like the respondent, that there exists *res judicata* and that the whole discussion is concluded by the judgment of the Court of King's Bench in the first case between the same parties.

In that case, as already stated, Mrs. Ellard sought the annulment of the agreement of 4th July, 1919, and of the two deeds respectively dated the 23rd June, 1920, and the 14th March, 1921, executed for the purpose of carrying out the agreement. The *dispositif* of the judgment annulling the two deeds merely stated that the action was maintained

pour ce qui concerne les dits actes de vente du 23 juin 1920 et du 14 mars 1921

but one of the points discussed was that Herbert Ellard,

depuis qu'il a obtenu de (Mrs. Ellard) ledite acte de vente du 14 mars 1921, ne se prétend plus tenu envers elle qu'à une rente viagère de $800 par année.

The consideration stipulated in the deeds was $800 instead of $2,000 per year and they were annulled for that reason as appears by the following *motif* of the judgment:

Considérant que la cause ou considération de la vente telle qu'exprimée dans ces deux actes de vente, n'est pas celle dont les parties étaient convenues; que par l'acte du 4 juillet 1919, la demanderesse avait stipulé du défendeur, comme considération de la vente qu'elle s'engageait à lui faire, une rente viagère de $2,000 par année; qu'au lieu de cette rente, ce n'est plus qu'une rente de $800 par année qui figure, comme considération de la vente, dans lesdits actes de vente; que ce changement a été fait sans le consentement de la demanderesse et hors sa connaissance; que la demanderesse n'a pas lu ces actes et n'en a pas eu lecture avant de les signer; * * * qu'elle aurait sûrement refusé de signer, si elle eût su que lesdits actes de vente ne faisaient mention que d'une rente de $800 au lieu de celle de $2,000 qu'elle avait stipulée; * * * et que, pour

1929

ELLARD v. MILLAR.

Rinfret J.

cette raison, la demanderesse a le droit d'être relevée du consentement et de la signature qu'elle a donnée.

As a rule, under Quebec law, the authority of *res judicata* applies only to the *dispositif* (3 Garsonnet, Procédure, p. 239, no. 465 and note 13; 7 Larombière, ed. 1885, no. 18; 20 Laurent, no. 29; 8 Aubry & Rau, p. 369) or, in the language of the code (art. 1241 C.C.), "to that which has been the object of the judgment." In this case, the object of the judgment was no doubt the annulment of the two deeds. But the judgment "involved a determination of the same question as that sought to be controverted" in the present litigation (Spencer Bower on Res Judicata, p. 9), viz.: the amount of the annuity. The reason for the annulment of the deeds was that the consideration of $800 per year there expressed was not in conformity with that of $2,000 per year stipulated in the agreement. Clearly that implied a decision that the true amount of the annuity was $2,000.

Res judicata will result from the implied decision which is the necessary consequence of the express *dispositif* in the judgment (Cass. 22 March, 1882; S. 83, 1, 175: Cass. S. 1907, 1, 397; S. 1910, 1, 135).

Lacoste, a foremost authority on the subject, lays down the following rules:

La règle d'après laquelle l'autorité de la chose jugée ne s'attache pas aux motifs doit être écartée lorsque les motifs font corps avec le dispositif, lorsque, selon l'expression de la Cour de cassation, ils sont nécessaires pour soutenir le dispositif.

Souvent, en effet, le dispositif ne contient qu'une partie de ce que le juge a décidé, et l'autre partie se trouve dans les motifs. C'est ce qui se produit à chaque instant lorsque le juge doit statuer successivement sur deux points et que la solution donnée pour le second est la conséquence nécessaire de celle qui est donnée pour le premier; le juge met la première solution dans les motifs sous forme de considérant, et le dispositif ne renferme que la seconde. Ainsi le demandeur se prétend le fils de telle personne décédée et réclame à ce titre la succession; plus d'une fois le tribunal ne constatera la filiation contestée que dans les motifs, et le dispositif contiendra simplement l'attribution de l'hérédité. Il est manifeste que, dans les cas de ce genre, l'autorité de la chose jugée ne doit pas s'attacher uniquement au dispositif; le jugement contient, en réalité, deux décisions, l'une renfermée dans le dispositif, l'autre insérée dans les motifs.

(Lacoste, De la chose Jugée 3e éd., pp. 92 & 93, & 226-227, et nombreuses autorités en notes.)

Posons donc en principe, que si un droit a été affirmé ou nié dans un procès, il y aura identité d'objet si dans un nouveau procès on remet en question le même droit, alors même que ce serait pour en tirer une autre conséquence qui n'a pas été déduite dans le procès originaire." (Lacoste, p. 103, no. 252.)

La règle à suivre est celle-ci: (says Baudry-Lacantinerie (3e éd. vol. 15, no. 2677, p. 357), la seconde demande devra être rejetée toutes les fois qu'elle tend par son objet à mettre le juge dans l'alternative, ou de se contredire, ou de confirmer purement et simplement la sentence qu'il a déjà rendue.

A similar view of the law is expressed in Juris-Classeur Civil (vo. Contrats—Obligations en général—Div. 155, art. 1351, nos. 57 et 107):

57.—A. Identité d'objet.—L'objet de la demande est le bénéfice juridique immédiat que l'on se propose d'obtenir en la formant.—Pour qu'il y ait identité d'objet, il faut donc que les deux instances portent sur le même droit, ou que l'une d'elles porte sur un droit qui fait essentiellement partie intégrante de celui au sujet duquel le tribunal s'est déjà prononcé de manière définitive. Dans ces cas, en effet (et c'est le critérium de l'identité d'objet), le juge serait mis, par le nouvelle demande, dans l'objection ou de confirmer ou de contredire la première.

107.—Mais il ne faut pas confondre l'omission avec la décision implicite (V. supra, n. 47). La première laisse non résolu le point omis qui peut donc faire l'objet d'une nouvelle demande; la seconde, qui découle nécessairement de la solution exprimée, participe logiquement de son autorité, puisqu'elle ne pourrait être remise en question sans remettre également en question la décision qui l'impliquait.

Reference might also be made to the judgment of Lamothe C.J., then Chief Justice of the province of Quebec, in *Ville de St. Jean* v. *Quinlan & Robertson* (1), and to the decision of the Quebec Court of Queen's Bench in *Stevenson & The City of Montreal & White* (2), confirmed by this court (3).

We must therefore hold that the judgment delivered on the 23rd February, 1926, by the Court of King's Bench of Quebec constitutes *res judicata* as to the amount of the annuity payable by the appellant to the respondent.

Of course the appellant argues that the revocation of his power of attorney had the effect of reducing the annuity. This was a new contention not apparently raised in the first trial and, at all events, not decided in the judgment just referred to. The power of attorney was revoked in September, 1923. The first action was brought only after that date, but the fact of the revocation could not be urged in support of the two deeds executed long before the revocation. The appellant is right in saying that there is not *res judicata* as to this point, but he cannot derive any benefit from that fact. He acquiesced in his dismissal as

(1) (1920) Q.R. 30 K.B. 189, at p. 191.

(2) (1896) Q.R. 6 Q.B. 107.

(3) (1897) 27 Can. S.C.R. 593.

1929

ELLARD v. MILLAR.

Rinfret J.

manager of the business and affairs of Mrs. Ellard. Whether he could have made the dismissal a ground for repudiating the whole agreement is not in issue. He elected to proceed with the balance of the agreement as it now stands and to remain in possession of the farms and other properties acquired under the agreement. He must pay the price stipulated therefor. That he should remain manager of the business was no part of the consideration of the conveyance, nor was it made by him a condition for his agreeing to pay the annuity of $2,000.

This disposes of the appellant's objections against the deed drafted by the trial judge. Those put forward by the respondent will be discussed when we come to consider the cross-appeal.

There remains to establish the amount due by the appellant when the action was brought and which gave rise to such a diversity of opinion in the courts below.

For this, it is necessary to refer to the course of dealing between the parties.

When Herbert Ellard undertook the management of Mrs. Ellard's "property, business and affairs," he was to receive a salary of $1,200 a year for his services. On the other hand, for the conveyance of the farms, etc., he agreed to pay "an annuity of $2,000." Under the agreement, his salary was payable at the rate of $100 per month. No mention was made of a date when the annuity was to be paid and, therefore, the first instalment became due on the 4th of July, 1920, being one year after the date of the agreement. It may be pointed out that, unless Herbert Ellard received his salary during the year, compensation between it and the annuity took place *pro tanto* at the expiration of each year and the only sum then due by him to his mother would be the balance of $800.

The evidence shews that Mrs. Ellard did not make to Herbert Ellard monthly payments of his salary and that Herbert Ellard did not pay the annuity all at once and in a lump sum at the end of each year, while his management lasted. Instead of so doing, they

> opened up an account in the ledger for (Mrs. Ellard) as she got monies and charged it to her, and (Herbert Ellard) had (his) own personal account in the ledger and he charged (himself) up with the $800 per year and credited (himself) with his salary.

He did not receive his salary. It would only "be credited into the account * * * and the credit was left lying

there." In the same way he credited his farm produce delivered to Mrs. Ellard's store or hotel. He would take money from time to time and have it charged to the account. So would Mrs. Ellard ask and receive odd sums of money and have it charged in the same way. These accounts were kept by different bookkeepers in the employ of the estate, outside of Herbert Ellard, and most of the entries were made by them. This method of dealing went on from the moment that Herbert Ellard took charge of Mrs. Ellard's affairs until the revocation of his power of attorney, or from the 4th July, 1919, until the 27th September, 1923. It was to the knowledge and with the consent of both parties.

The accounts were in the books of the estate and copies thereof were filed in the case. They shew that, in the fall of 1923, when Herbert abandoned the management, there was a balance of $1,733.35 due Mrs. Ellard. The appellant "squared up his account and went down to her and delivered her a cheque" for that amount, for which she gave him a receipt. The appellant accordingly claimed to have paid his mother up to the time of the revocation. The cheque of $1733.35 was only tendered back by Mrs. Ellard with the return of the writ of summons on or about the 2nd May, 1927, or more than four years later.

On this state of facts, it will be apparent that the payment of the salary or of the annuity and the several items pertaining to the administration by Herbert Ellard of the business and affairs of Mrs. Ellard were so bound up together that it would be unfair, not to say impossible, to deal with one without dealing with the other. Charges for farm produce or for salary offset advances of money or payments of annuity and so on. They were made part of one and the same account. As a consequence, it became no longer open to either of the parties to sue on a single transaction or for a specific sum of money, such as for the salary or for the annuity, for the period extending up to the revocation, but the recourse was necessarily by action to account. (*Reid* v. *Brack* (1); *Stephens* v. *Gillespie* (2); *Duhamel* v. *Dunne* and *La Banque Royale* (3).) Chief Justice Lamothe, in the latter case, said (p. 188):

(1) 5 R. de J. 100.
(2) M.L.R. 7 Q.B. 289.
(3) Q.R. 31 K.B. 185.

1929

ELLARD v. MILLAR.

Rinfret J.

"Qui doit compte ne doit rien," dit une maxime souvent citée, ce qui veut dire que celui qui a droit de demander un compte n'a pas de créance liquide et exigible à ce moment-là, sa créance dépendant du reliquat qui sera établi sur la reddition de compte, si ce reliquat est en sa faveur, ce qui veut dire, de plus, que le rendant compte n'est, à ce moment, débiteur d'aucune dette connue et exigible.

Les principes que j'énonce ci-dessus sont élémentaires à mes yeux.

The trial judge picked out a single item of the accounts representing a sum of $1,600, and gave credit for it to the appellant. No doubt the evidence, clear and uncontradicted, amply justified the finding so made but, in the matter of accounting, individual items may not thus be singled out; the account must be discussed as a whole, a balance must be struck and such balance alone may be awarded to the party entitled to receive it.

The judgments of the Superior Court and the majority of the Court of King's Bench fail to follow this principle. For this reason, we think the amount awarded by these judgments is wrong. Having regard to the method adopted by the parties, the whole period covered by the management of Herbert Ellard is one for accounting. Without an account properly rendered and discussed, it is not possible to decide whether there is any sum due and by whom. Provision was made in the agreement for the rendering of an account. The respondent may yet avail herself of the stipulation. She may also make use of the accounts filed in the record by the appellant and bring an *action en réformation de compte.* It is to be hoped that this will not be necessary and that, the parties having now become better informed of their respective rights, will be able to come to terms.

We see no harm however, in adjudicating at once that the appellant must pay the sum of $1,733.35 acknowledged by him to be due to the respondent at the end of his administration. (Art. 571 C.C.P.) Upon payment thereof, he will be entitled to withdraw from the record the cheque he gave for that amount on the 24th September, 1923. Due credit of course would then have to be given to the appellant, in discussing the accounts, for the sum thus paid.

Having now disposed, at least so far as concerns this case, of the period during which the appellant was managing the affairs of the respondent, it becomes an easy matter to fix the amount owed by the appellant, independently of that period, up to the time of the institution of the action.

From September 24, 1923, to 4th July, 1924, the annuity represented an amount of $1,548. Further annuities of $2,000 each came due on the 4th July of the years 1925 and 1926, viz.: $4,000. In 1927, when the action was brought the annuity for that year was not yet due. We cannot in this action make any award in respect of it, nor of any other annuity accruing in the subsequent years, in the absence of an incidental demand on the part of the respondent. (Art. 215 C.C.P.)

The total amount due for annuities when the action was brought was therefore $5,548 to which, for reasons already stated, should be added $1,733.35, making a total sum of $7,281.35. As for interest, the courts below decided that it should run " from the date of service of the action " and no complaint was made by either party in that respect. In the above view of the case, the question of prescription, on which the majority of the Court of King's Bench based its judgment, does not arise and does not require to be discussed.

This disposes of all the points raised in the main appeal, and we may now turn to those submitted by the respondent on the cross-appeal.

The draft deed prepared by the trial judge contains the following stipulation:

> The above conveyed properties to the purchaser together with all buildings and real improvements thereon will be hypothecated in favour of the plaintiff for the payment of her annuity, but to the extent only of $800 per year.

This was approved by the Court of King's Bench.

The respondent contends that she never renounced any part of the privilege which would ordinarily secure the payment of her annuity and that the judgments below are wrong in requiring her to sign a deed whereby her privilege or hypothec over the properties would be limited to $800 a year.

Clause 6 of the agreement of 4th July, 1919 (already cited) provides in part as follows:

> In consideration of the agreement by the said Ellen Millar to convey to the said Herbert Millar Ellard, the properties hereinabove mentioned, the said Herbert Millar Ellard agrees to pay to the said Ellen Millar, during her lifetime, an annuity of $2,000, whereof $800 per annum shall constitute a first charge upon the aforesaid properties and $1,200 thereof, to constitute a first charge upon trading and other operations, etc.

We agree with the Superior Court and with the Court of King's Bench that this was a clear renunciation of part of

1929

ELLARD v. MILLAR.

Rinfret J.

the privilege given by law (Compare *Lower St. Lawrence Power Co.* v. *L'Immeuble Landry Limitée* (1). No other purpose could be ascribed to the stipulation. In fact, unless it means a reduction of the privilege, it would lend colour to the contention of the appellant that the annuity was only $800 and that the balance of $1,200 was to be paid out of the earnings of the "trading and other operations."

The respondent further asked that in case the appellant should fail to pay the annuities that would be awarded, the agreement of 4th July, 1919, be set aside by reason of such default. The courts below have refused to grant such conclusions and the respondent complains of that part of the judgment.

The answer lies in article 1536 C.C. which provides:

> The seller of an immovable cannot demand the dissolution of the sale by reason of the failure of the buyer to pay the price, unless there is a special stipulation to that effect.

The agreement, it is true, is only a promise of sale, but the appellant took possession at once of all the properties defined in the judgment and has occupied them ever since. "A promise of sale with tradition and actual possession is equivalent to a sale" (Art. 1478 C.C.). Article 1536 C.C. applies to a case of this kind and, in the absence of any stipulation to that effect, the agreement cannot be set aside by reason of the failure of the appellant to pay the price. If it were not so the respondent would yet be precluded from securing the remedy she claims by force of art. 1907 of the Civil Code:

> Non-payment of arrears of a life-rent is not a cause for recovering back the money or other consideration given for its constitution.

On both these questions, therefore, we find ourselves in accord with the courts below.

Moreover, the draft deed for which we are now providing must be that which, according to the agreement, should have been passed on or before the first day of October, 1919. On that day the respondent obliged herself to supplement the agreement by a proper conveyance, but there was no corresponding and simultaneous obligation on the part of the purchaser to pay any part of the price. There was no cash payment to be made, the first payment of annuity would not be due until the 4th July, 1920. Even although, by force of circumstances, the deed will finally

(1) [1926] S.C.R. 655, at pp. 663 and 664.

be executed only after the date agreed upon, there exists no reason why it should, on that account, be different now from what it should have been then. We see no necessity for making in the deed any reference to a cash payment. All requirements will be met by modifying the draft deed so as to state the consideration as follows:

an annuity of two thousand dollars ($2,000) per year from and after the fourth day of July nineteen hundred and nineteen, payable by the purchaser to the vendor during her lifetime.

It follows that, saving the modification just mentioned, and consequential changes hereinafter indicated, the draft deed annexed to the judgment of the Superior Court should be approved.

The cross-appeal must accordingly be dismissed with costs.

On the main appeal, the judgment should be modified as indicated and the amount of the condemnation reduced to $7,281.35 with costs to the appellant here and in the Court of King's Bench.

In the draft deed annexed to the judgment of the Superior Court, we would strike out the clause reading as follows:

The present transfer and conveyance is so made by the vendor to the purchaser for and in consideration of an annuity of two thousand dollars ($2,000) per year from and after the fourth day of July nineteen hundred and nineteen, payable by the purchaser to the vendor during her lifetime, the vendor acknowledging to have received at the passing of the presents the sum of twelve thousand four hundred dollars ($12,400), being in full of said annuity to the 4th July, 1926;

and the following clause should be substituted for it:

The present transfer and conveyance is so made by the vendor to the purchaser for and in consideration of an annuity of two thousand dollars ($2,000) per year from and after the fourth day of July nineteen hundred and nineteen, payable by the purchaser to the vendor during her lifetime.

This however will not remove all difficulties in the path of the parties. The deed drafted by the Superior Court defines the lots which each party is entitled to receive and contains other stipulations in conformity with the agreement of 4th July, 1919; but it can take effect only if and when received before a notary after having been signed by both the appellant and the respondent. We should help the parties to work this out, and provide machinery, so far as we have the right to do it. (*Grondin* v. *Cliche* (1).)

(1) [1929] S.C.R. 390.

1929

ELLARD v. MILLAR.

Rinfret J.

The party most interested in securing the deed is the appellant. He needs it for purposes of registration. The respondent did not require it to sue for the annuities. If it were otherwise, she could not recover under the present action. It devolves primarily upon the appellant to ensure the execution of the deed.

Unless this be done by mutual agreement and the deed be properly completed within one month from the present judgment, the appellant is authorized to cause to be prepared by a notary a deed similar to that drafted by the Superior Court, as amended by this court, and to sign it. He may then put the respondent *en demeure* to affix her own signature to the said deed; and, in default of her so doing within fifteen days after the *mise en demeure,* the appellant may again come before this court to apply for an order to the effect that the judgment be registered to all intents and purposes in lieu of and to take the place of a deed between the parties. In the meantime, the case will stand adjourned until the 2nd day of February, 1930, or such other day as may be fixed upon application by either of the parties.

Appeal allowed with costs.
Cross-appeal dismissed with costs.

Solicitors for the appellant: *Ste. Marie & Ste. Marie.*

Solicitors for the respondent: *Aylen & Aylen.*

1929

*Oct. 4.

SIMONITE *v.* MOXAM

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Agency—Real estate agent—Right to commission—Intervention of another agent—Whether chain of causation broken—Estoppel.

APPEAL from the decision of the Court of Appeal for Manitoba (1), reversing the judgment of Galt J. at the trial (2) and dismissing the appellant's action.

The appellant is a real estate agent in Winnipeg and the respondent is a builder in the same city. The appellant

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

(1) (1929) 38 Man. R. 113; [1929] 1 W.W.R. 513. (2) 38 Man. R. 114.

1929

SIMONITE v. MOXAM.

claims that the respondent employed him to find a purchaser for an apartment block known as the "Blackstone" in St. Boniface and at the same time named the sum of $100,000 as the price he was willing to accept for the premises. The appellant further says that he then introduced to the respondent one F., the manager of a trust company; and as a result of the appellant's efforts, this company purchased the apartment block for $100,000. The appellant claims by his action $3,060 representing his commission. The respondent denies most of the material allegations in the statement of claim and alleges that he sold the property through the agency of a different real estate agent.

The question at issue in the case was whether, upon the facts, the appellant was entitled to his commission. The trial judge, Galt J., decided in the affirmative; and the majority of the Court of Appeal, Dennistoun, Prendergast and Trueman JJ. reversed this judgment, Perdue C.J.M. and Fullerton J.A. dissenting.

At the conclusion of the argument of counsel for the appellant before this court, and without calling on counsel for the respondent, the court orally delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

J. C. Collinson for the appellant.

W. F. Hull K.C. for the respondent.

CHERTKOW *v.* FEINSTEIN

1929

*Oct. 3.

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

Marriage—Annulment—Capacity to contract—Alleged unsound mind at date of marriage—Evidence—Sufficiency

APPEAL by the plaintiff from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J. (2), and dismissing the appellant's action in annulment of marriage.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) (1929) 24 Alta. L.R. 188; [1929] 2 W.W.R. 257.

(2) [1929] 1 W.W.R. 467.

1929

CHERTKOW v. FEINSTEIN.

The issue to be determined in the case was whether the respondent at the time of the marriage was of sound mind so as to be able to enter into the contract of matrimony.

At the conclusion of the argument of counsel for the appellant, and without calling on counsel for the respondent, the court orally delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

J. B. Barron for the appellant.

J. J. Frawley and *H. G. Nolan* for the respondent.

1929

*Oct. 14.

HENRY K. WAMPOLE & CO. *v.* HERVAY CHEMICAL CO. OF CANADA

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Trade-marks—Infringement—Packings common to the trade—Form, size or colour—"Get-up"

APPEAL from the judgment of the Exchequer Court of Canada, Audette J. (1), dismissing with costs the appellant's action to restrain the respondent from infringing its trade-marks.

For some years previous to the date of appellant's registration of its trade-marks in question in this case, it had been common to the trade, including the respondent, to market cod liver oil in pink or red packings, similar to the appellant's. The respondent's package complained of however bore his name prominently at the top. This was so also of the label on the bottle itself inside. Appellant's outside package also bore the name "Wampole" in large letters at top. This being the essential characteristic of the two trade-marks.

The trial judge (1) held that the two trade marks were perfectly distinct and not liable to create deception.

At the conclusion of the argument of counsel for the appellant before this court, and without calling on counsel for the respondent, the court orally delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

O. M. Biggar K.C. and *H. A. O'Donnell* for the appellant.

J. L. Perron K.C. for the respondent.

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

(1) [1929] Ex. C.R. 78.

1929

*Oct. 4.

ROOT *v.* McKINNEY

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

Automobile—Accident—Negligence—Pedestrian run into by car coming from behind—Whether pedestrian negligent

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), affirming on equal division of the court the judgment of the trial judge, Boyle J. (2) and maintaining the respondent's action.

The respondent was walking at night along the centre of the graded portion of an unpaved street. There was no sidewalk but at one side was a path. It was raining slightly and the street was muddy. The annual fair was in progress in the city and the street in question was adjacent to the fair grounds. The respondent saw the light of an approaching motor car and started to move over to the right side of the street. While doing so he noticed that the ground was lighted by the lights from a car coming from behind. He did not stop or look back and was struck by the latter car (the appellant's) before he reached the ditch.

The trial judge (2) awarded respondent damages. The appellate court (1), affirming this judgment, held that the respondent took reasonable precautions to avoid being struck and was not negligent and that the appellant had not satisfied the onus on him of proving that the damage did not arise through his negligence.

At the conclusion of the argument of counsel for the appellant before the court, and without calling on counsel for the respondent, the court orally delivered judgment dismissing the appeal with costs.

Appeal dismissed with costs.

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

Eug. Lafleur K.C. for the respondent.

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

(1) (1929) 24 Alta. L.R. 181; [1929] 2 W.W.R. 340. (2) [1929] 1 W.W.R. 884.

1929
*Oct. 1.
1930
*Feb. 4.

CANADA MORNING NEWS COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

W. G. B. THOMPSON AND F. E. BINNINGTON, LOW YEE QUAN AND WAI HON (DEFENDANTS)..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Landlord and tenant—Lease by unincorporated society—Distress—Right to levy—Action for illegal distress—Relationship by estoppel.

The members of the Chinese National League of Canada, scattered throughout the Dominion (hereinafter called the League) subscribed money for the purchase of a site and the erection of a building in Vancouver for "headquarters" purposes. As the League was an unincorporated and unregistered society, the conveyance of the property was taken in the name of a branch of the League, called "The Chinese Nationalist League," which was incorporated under the *Benevolent Societies Act,* with headquarters at Victoria. After the erection of the building the then president and secretary of the League leased a portion of the premises to the appellant company, first in July, 1922, under a verbal arrangement and later in September, 1924, under the same arrangement put in writing. The appellant paid rents to the League for some time but falling in arrears, in April, 1927, the then president and secretary of the League, the respondents Low and Wai, issued a distress warrant, and the respondents Thompson and Binnington, bailiffs, distained the goods, chattels and fixtures of the appellant. In an action for illegal distress, the appellant recovered $500 damages; but that judgment was reversed in the appellate court.

Held that, upon the evidence, the relationship of landlord and tenant never existed between the appellant company and the League, on whose behalf the distress was made; therefore the distress was illegal and the appellant was entitled to recover the damages awarded by the trial judge.

Held, also, that an unincorporated society such as the League (although not within the prohibition of section 8 of the *Companies Act,* R.S.B.C. 1924, c. 38, inasmuch as it has not "for its object the acquisition of gain") is incapable of making a lease. *Jarrott* v. *Ackerley* (85 L.J. Ch. 135) and *Henderson* v. *Toronto General Trusts Corporation* (62 O.L.R. 303) followed.

Held, further, that the appellate court erred in holding that the appellant was estopped from setting up incapacity of the alleged landlords on the ground that to do so would be tantamount to impeaching the title to the premises of the persons by whom it was let into possession of them as tenant. To extend the estoppel, which exists where

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

the relationship of landlord and tenant is admitted or established and which prevents the tenant questioning the landlord's title, so as to make it apply to a case in which the real question is as to the existence of that relationship, seems to be wrong in principle and is quite unwarranted by the authorities. *Rennie* v. *Robinson* (1 Bing. 147) and *Morton* v. *Woods* (L.R. 4 Q.B. 293) discussed. The courts, at the instance of a person claimed to be a tenant, ought to determine the status of an alleged landlord for the purpose of ascertaining whether or not the relationship of landlord and tenant exists between them, and the consequent legality of a distress. *Farwell & Glendon* v. *Jameson* (26 Can. S.C.R. 588) followed.

Judgment of the Court of Appeal (41 B.C. Rep. 230) reversed.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Murphy J. (2), and dismissing the appellant company's action in damages for illegal distress.

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

G. R. Nicholson for the appellant.

Glyn Osler K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The record discloses the following material and relevant facts necessary to be considered on the present appeal.

The action is for damages for illegal distress. The learned trial judge held the distress to be illegal and awarded $500 as damages. The Court of Appeal, reversing, upheld the legality of the distress and dismissed the action. The present appeal is by the plaintiff, the Canada Morning News Company Limited, a company incorporated under the laws of British Columbia in October, 1924.

The defendants are W. G. B. Thompson and Francis Edward Binnington, carrying on business as bailiffs, who effected the distress in question, and Low Yee Quan and Wai Hon, who signed the distress warrant. The actual form of the signature is as follows:—

The Chinese Nationalist League,
(Per Low Yee Quan, Pres.)
(Per Wai Hon, Secy.)

(1) (1929) 41 B.C. Rep. 24; [1929] 1 W.W.R. 548.
(2) (1928) 40 B.C. Rep. 230; [1928] 3 W.W.R. 35.

1930

CANADA MORNING NEWS CO. v. THOMPSON.

Anglin C.J.C.

Although the status of the signatories as such officers has been challenged, for the purpose of the disposition of this appeal it may be assumed to be established.

It is clear law that in order to justify a distress for rent the relationship of landlord and tenant must subsist between the person on whose behalf it is made and the person against whom it is directed. It is also certain that this relationship can only arise out of contract, express or implied.

The learned trial judge took the view that no tenancy existed in this case because the Chinese Nationalist League of Canada (hereinafter called "The League"), which purported to be the landlord, was an unincorporated and unregistered society and, as such, an entity unknown to the law, and, therefore, incapable of making a lease. He further held that there was no evidence to support the contention that a lease existed between the plaintiff company and some member or members of the "headquarters" of The League, inasmuch as there was nothing to show who those individuals were, or that the distress warrant was issued on their behalf, or had since been ratified by them, although there is abundant evidence of such attempted ratification by the "headquarters" itself.

The Court of Appeal, on the other hand, relying on such authorities as *Rennie* v. *Robinson* (1), and *Morton* v. *Woods* (2), held the plaintiff estopped from setting up incapacity of the alleged landlord or landlords on the ground that to do so would be tantamount to impeaching the title to the premises of the persons by whom it was let into possession of them as tenant, or of their assignees or representatives.

To what has already been said, it may be added that the evidence is entirely silent as to whether the membership of The League is to-day the same as it was when the alleged lease was made. Indeed, the fact is, no doubt otherwise.

Originally, the publishers of the Canada Morning News then unincorporated, were given possession of the premises in question under a verbal arrangement made with persons who were then officers of The League. This occurred

(1) (1823) 1 Bing. 147. (2) (1869) L.R. 4 Q.B. 293.

about 1922. In September, 1924, about a month before the plaintiff company was incorporated, at the request of one of its officers, the arrangement between these parties was put in writing. This document, in the nature of a lease, purports to be made by Louis Man Har and Mah Kaing Chee, as lessors; whereas the distress warrant is signed by Low Yee Quan and Wai Hon. The evidence shows that Louis Man Har had been both President of The League and editor of the Canada Morning News up to some time in 1924. It also appears from the evidence that the property in question was acquired about 1920 for the "headquarters" purposes of The League and was paid for by subscriptions of its members scattered throughout Canada. The agreement for its purchase was made in the name of two of such members; and the deed was originally drawn in favour of The Chinese Nationalist League of Canada, the unincorporated body in question. Difficulty having arisen as to registration of the title, however, it was decided to take the deed in the name of an incorporated branch of The League, viz., "The Chinese Nationalist League" (of Victoria, B.C.). This body had been incorporated under the *Benevolent Societies Act* of British Columbia in 1916. The legal title, thus vested in the incorporated branch, may have been held by it in trust for those members of The League who had contributed to the purchase of the property. The precise situation in this respect is not very clear in the record, but there probably arose a resulting trust in favour of such members of The League. If the distress had been made on behalf of these *cestui que trustent,* an interesting question might have arisen on such authorities as *Vallance* v. *Savage* (1); but it was not so made. Nor is there evidence of authority having been given by such members to the men who purport to be the lessors to enter into a lease binding upon them. On the whole evidence, it is impossible to say that the members of The League intended to become lessors and if the lease should be regarded as having been made personally by the individuals who purported to make it on behalf of The League, it is equally impossible to hold

(1) (1831) 7 Bing. 595.

1930

CANADA MORNING NEWS CO. v. THOMPSON.

Anglin C.J.C.

that the two gentlemen who signed the distress warrant in any wise represented them.

To extend the estoppel, which exists where the relationship of landlord and tenant is admitted or established and which prevents the tenant questioning the landlord's title, so as to make it apply to a case in which the real question is as to the existence of that relationship, seems to be wrong in principle and, with respect, is quite unwarranted by the authorities.

That an unincorporated society such as the League (although not within the prohibition of section 8 of the *Companies Act,* R.S.B.C., 1924, c. 38, inasmuch as it has not "for its object the acquisition of gain") cannot become a lessee is established by several judgments, of which it is only necessary to refer to two,—*Jarrott* v. *Ackerley* (1), and *Henderson* v. *Toronto General Trusts Corporation* (2). These decisions rest upon the incapacity of an unincorporated and unregistered society to assert any position which is maintainable in law only by a legal entity. In principle, therefore, they are equally applicable whether the position so asserted be that of landlord or tenant.

That the courts will, at the instance of a person claimed to be a tenant, determine the status of the alleged landlord for the purpose of ascertaining whether or not the relationship of landlord and tenant exists between them, and the consequent legality of a distress, seems to be settled by the decision of this court in *Farwell & Glendon* v. *Jameson* (3). Indeed, the very cases cited by the learned judges of the Court of Appeal proceed on this footing, because in both of them the court first determined that the relationship of landlord and tenant existed. Thus, in the *Rennie* case (4), the question was whether the admitted rights of the original lessor extended to his assignee of the reversion, i.e., whether the latter might be regarded as landlord of the tenant let in by the former and, as such, entitled to distrain. It was so held upon the express ground that "Rennie (the assignee) only stands in the shoes of Williams" (the lessor);

as the defendant was not competent to impeach the title of Williams, neither is he competent to impeach that of Rennie.

(1) (1915) 85 L.J. Ch. 135.
(2) 62 O.L.R. 303.
(3) (1896) 26 Can. S.C.R. 588.
(4) 1 Bing. 147.

In *Morton* v. *Woods* (1), the court, having stated (p. 303) that the second objection went to the existence of the relationship of landlord and tenant between the parties, said of it:—

> These objections are all of a technical nature; but we are bound to give effect to them if they turn out to be sustained in point of law;

and the decision proceeded upon the ground that the objections were not sustainable in fact, and that, therefore, the relationship of landlord and tenant subsisted between the parties. See too *Baldwin* v. *Burd* (2).

The evidence entirely supports the findings of the learned trial judge that the alleged lease purported to be made on behalf of the unincorporated body, The League; that "The Chinese Nationalist League" (of Victoria) had no connection with it at any time prior to the distress; and that any ratification of the acts of the defendants, Low Yee Quan and Wai Hon, by the Victoria society was impossible and wholly ineffective, inasmuch as the acts of these defendants did not purport in any way to be done on behalf of that society (Bowstead on Agency, 7th ed., p. 49), but, on the contrary, *ex facie* of the distress warrant itself and according to all the evidence, had been done on behalf of The League. That the alleged lease purported to be made on behalf of The League is also clear *ex facie* of the document of September, 1924, " the makers " thereof appearing to be Louie Man Har, President, and Mah Kaing Chee, Secretary of the Chinese Nationalist League Headquarters of Canada.
This alleged lease is also signed by " Wong Ko, Treasurer of The Chinese Nationalist League " (of Canada) and, " Wong Kong Doo, Director of Canada Morning News."

The evidence clearly discloses payment of rent as such by the Canada Morning News Company Limited, both before and after its incorporation, to the alleged landlord, in cash and by way of set off of amounts due for rent against amounts due to the Canada Morning News Company for printing. If the alleged landlord, The League, had been an entity capable of granting a lease, there might well be enough in these payments to found an estoppel against the alleged tenant denying that the relationship of landlord and tenant subsisted between it and the alleged landlord. But, in order that there should be such an

(1) L.R. 4 Q.B. 293. (2) (1861) 10 U.C.C.P. 511.

1930

CANADA MORNING NEWS CO. v. THOMPSON.

Anglin C.J.C.

estoppel, the body invoking it must itself be an entity known to the law,—in other words, must be capable of assuming the position of landlord. Estoppels in pais are mutual.

On the short ground, therefore, that the relationship of landlord and tenant never existed between the appellant and the Chinese Nationalist League of Canada, on whose behalf the distress in question was made, that distress in our opinion was illegal. The appeal must, accordingly, be allowed with costs here and in the Court of Appeal and the judgment of the trial judge restored.

Appeal allowed with costs.

Solicitors for the appellant: *Russell, Nicholson & Co.*

Solicitor for the respondents: *W. F. Brougham.*

1929

*Oct. 10.

1930

*April 10.

C. K. McLELLAN, EXECUTOR OF THE LAST WILL AND TESTAMENT OF ELIZA PATRIQUIN, DECEASED ..... } APPLICANT;

AND

R. B. FRASER AND OTHERS, TRUSTEES OF THE PRESBYTERIAN CHURCH AT TATAMAGOUCHE, IN CONNECTION WITH THE UNITED CHURCH OF CANADA..... } APPELLANTS;

AND

GORDON FRASER AND OTHERS, TRUSTEES OF SEDGEWICK MEMORIAL CHURCH ..... } CROSS-APPELLANTS:

AND

EDWIN C. McLELLAN, APPOINTED BY ORDER OF THE SUPREME COURT OF NOVA SCOTIA IN BANCO TO REPRESENT THE CLASS COMPRISED OF THE NEXT OF KIN OF ELIZA PATRIQUIN..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Will—Church congregations—Bequest for "Tatamagouche Presbyterian Church"—Congregation becoming, after date of will and before testatrix' death, part of the United Church of Canada.

By her will, made January 5, 1924, P. bequeathed $100 "to the Trustees of the Tatamagouche Presbyterian Church," and a residue "to Tatamagouche Presbyterian Church." She was then a member of that

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

church. She died May 2, 1926. On January 12, 1925, a vote was taken in the congregation, pursuant to c. 100, statutes of Canada, 1924, when a majority voted for union, and, as a result, the congregation, on June 10, 1925, became a part of the United Church of Canada.

Held, that the congregation could not take under said bequests; by becoming a congregation of the United Church of Canada at Tatamagouche, it had become something so different from the congregation for whose benefit the bequests were made, that it did not now come within the description in the will; the present congregation was not the same entity as the congregation which P. contemplated as her beneficiary. (*In re Donald,* [1909] 2 Ch., 410, and *In re Magrath,* [1913] 2 Ch., 331, distinguished). As to the bequest to "the Trustees of the Tatamagouche Presbyterian Church," it was to a corporation which, even if it continued to exist, was not now one for carrying into effect the testatrix' object, and the same principle applied as in the case of the other bequest.

The fact that, about the time the congregation became part of the United Church of Canada, P.'s name was, at her request, removed from its roll and she became a member of Sedgewick Memorial Church, a continuing Presbyterian Church formed at Tatamagouche by those of the original congregation opposed to the union, was not admissible as a guide to interpretation of the will. The question in issue must be decided without regard to whether P. remained in the United Church congregation or left it.

Judgment of the Supreme Court of Nova Scotia *in banco* (60 N.S. Rep., 343), which held that there was an intestacy as to said bequests, affirmed in the result.

APPEAL (by leave granted by the Supreme Court of Nova Scotia) from the judgment of the Supreme Court of Nova Scotia *in banco* (1) which varied the decision of Chisholm J. (2).

The proceedings were commenced by originating summons in the Supreme Court of Nova Scotia, at the instance of the executor of the will of Eliza Patriquin, late of Tatamagouche, Nova Scotia, deceased, to construe the said will and determine to what body or persons bequests left under certain clauses of the will should be paid.

Chisholm J. (2) held that the present appellants were entitled as beneficiaries to the legacies bequeathed under the clauses in question. The Supreme Court of Nova Scotia *in banco* (1) held that the property in dispute should be dealt with as if undisposed of by the will, and it was de-

(1) (1929) 60 N.S. Rep. 343.

(2) (1928) 60 N.S. Rep. 343 (at p. 344).

1930

In re ESTATE OF ELIZA PATRIQUIN, DECEASED.

FRASER v. MCLELLAN.

clared that the next of kin or persons entitled by law, had the deceased died intestate, were entitled to the legacies provided for by the said clauses.

The cross-appellants, the Trustees of Sedgewick Memorial Church, filed a notice discontinuing their appeal.

The clauses in question of the will, and the material facts of the case, are stated in the judgment now reported. The appeal was dismissed with costs.

Donald McInnes for the appellants.

No one *contra.*

The judgment of the court was delivered by

SMITH J.—Eliza Patriquin made her last will, dated the 5th day of January, 1924, and died on the 2nd day of May, 1926. The clauses of the will that give rise to the questions here involved read as follows:

> 7. I bequeath to the Trustees of the Tatamagouche Presbyterian Church, One Hundred Dollars.
> 10. If there is any balance remaining I bequeath such balance to Tatamagouche Presbyterian Church.

At the date of the execution of the will, the testatrix was a member of the Tatamagouche Presbyterian Church.

On the 12th day of January, 1925, a vote was taken in Tatamagouche Presbyterian Church congregation, pursuant to the provisions of Chapter 100, Statutes of Canada, 1924, when a majority of the members of the congregation voted for union, and, as a result, the congregation became a part of the United Church of Canada on the 10th of June, 1925.

The bequests under clauses 7 and 10 of the will quoted above are claimed by this congregation of the United Church of Canada at Tatamagouche. The respondent, Edwin C. McLellan, was, by order, appointed to represent the class comprising the next of kin of Eliza Patriquin. The cross-appellants, the Trustees of Sedgewick Memorial Church, have filed a notice discontinuing their appeal and disclaiming any interest in the bequests referred to.

It appears in the record that about the time the congregation became part of the United Church of Canada the name of the testatrix was, at her request, removed from the roll of that congregation and that she became a mem-

ber of Sedgewick Memorial Church, a continuing Presbyterian Church formed at Tatamagouche by those of the original congregation opposed to the Union. Some argument was based on this incident. It, however, appears clear that evidence of what the testatrix did after the making of the will is no more admissible as a guide to its interpretation than evidence as to what she may have said would have been. We must decide the question presented without regard to whether the testatrix remained in the United Church congregation or left it.

There can be no doubt that at the time the will was executed the testatrix intended these two bequests for the benefit of the congregation to which she then belonged, and the sole question for determination is whether or not that congregation, under the circumstances that have since arisen, comes now within the description in the will or has become something so different that it does not now answer to the description.

On the return of the original summons before Mr. Justice Chisholm it was held that these bequests go to the congregation at Tatamagouche that became a congregation of the United Church of Canada (1). This decision was unanimously reversed by the Supreme Court of Nova Scotia *in banco* (2), where it was held that, as to these bequests, there was an intestacy.

The first question is whether or not the bequest under clause 10, of any balance remaining, to "Tatamagouche Presbyterian Church," is effective as a bequest to the congregation which has now become a congregation of the United Church of Canada at Tatamagouche.

Not much help is to be obtained from the cases cited in the appellant's factum.

In *In re Whorwood* (3), the bequest was to Lord Sherborne. He died before the testator, and it was held that the successor in title was not entitled to the bequest, for the reason that he was manifestly not the identical person described by the testator.

The case of *In re Magrath* (4), seems to have no bearing. On October 31, 1909, "Queen's College, Belfast" was

(1) (1928) 60 N.S. Rep. 343 (at p. 344).
(2) (1929) 60 N.S. Rep. 343.
(3) (1887) 34 Ch. D., 446.
(4) [1913] 2 Ch. 331.

1930

In re ESTATE OF ELIZA PATRIQUIN, DECEASED.

FRASER *v.* MCLELLAN.

Smith J

dissolved under the provisions of the *Irish Universities Act,* 1908, and by the same Act, "Queen's University of Belfast" was incorporated. The testatrix, by her will dated February 16, 1910, made a bequest to "Queen's College, Belfast." It was held that "Queen's University of Belfast" was sufficiently referred to by the words of the will, and that the legacy took effect in its favour, the words in the will being treated as a mere misdescription of the legatee. It will be seen that the principle applied there has no relation to the present case. Had the will in that case been dated prior to the dissolution of "Queen's College, Belfast," it would have more nearly resembled the present case, but the decision would in that case probably have been different, because in that event the bequest would have exactly described an institution then in existence, and subsequently dissolved. The contention here is that the legatee ceased to exist by becoming merged in a new corporation subsequently created.

The case of *In re Donald* (1), is more nearly in point, but is nevertheless capable of being distinguished. The bequests were for the benefit of certain military units. By the *Territorial Reserve Forces Act,* these units were transferred to the Territorial Forces under new names. Warrington J., in this case says:

> In my opinion the effect of the Territorial and Reserve Forces Act, 1907, and of the Order in Council of March 19, 1908, made under it, is not to destroy these units, but to reorganize them, and they are treated both in the Act and in the Order in Council as existing entities which are transferred to, and from henceforth become units of, the Territorial Force, and are called by different names; but, so far as the Act and the Order in Council are concerned, they continue to exist as institutions under those names.

These units were all, both before and after the change, part of His Majesty's military forces, and the units, being simply transferred and given new names, did not, in the learned judge's opinion, cease to exist.

The situation to be dealt with here is not altogether similar. These was, at the date of the will of the testatrix, a religious body named the Presbyterian Church in Canada, having a congregation of that church at Tatamagouche, to which the testatrix belonged. That congregation, or at least the majority of those who composed it, have now become

(1) [1909] 2 Ch. 410.

a congregation of the United Church of Canada, an incorporated body that came into existence, as stated, subsequently to the date of the will. I think that the Supreme Court *in banco* has correctly held that the present congregation of the United Church of Canada at Tatamagouche is not the same entity as "The Tatamagouche Presbyterian Church" to which the testatrix made this bequest, and therefore cannot take it. We have, incorporated by the Act, an entirely new and distinct legal entity, and what we have to consider is whether or not that entity is the same organization as that which she had in contemplation as her beneficiary. There can be no doubt that it was not present to her mind that there was to be any such change as subsequently took place, and it seems clear that the beneficiary that she had in mind was "The Tatamagouche Presbyterian Church", as a congregation of the Presbyterian Church as it then existed, and it cannot be said that a congregation of the United Church of Canada at Tatamagouche is the same religious organization as was within the contemplation of the testatrix in making this bequest to the Tatamagouche Presbyterian Church.

The bequest of $100 is to "The Trustees of the Tatamagouche Presbyterian Church."

By 10 Vic., c. 37, The Presbyterian Congregation at Tatamagouche was empowered to appoint three trustees to take charge of the House of Worship and of the adjoining cemetery, called the Tatamagouche Burial Ground, whose name of office shall be "The Trustees of the Presbyterian Church at Tatamagouche." There is power to fill vacancies caused by death, resignation or otherwise, and to remove trustees and appoint others, and the power and authority of the former trustees is to vest in their successors for all purposes intended by the Act. The trustees are authorized, in the name of their office, to sue and be sued.

Under the authorities it seems clear that these trustees became a corporation by implication. *The Conservators of the River Tone* v. *Ash, et al* (1); *Re Wansley and Brown* (2); *Beaty* v. *Gregory* (3).

(1) (1829) 10 Barnwell & Cresswell's Repts., 349.
(2) (1891) 21 Ont. R., 34.
(3) (1897) 24 Ont. App. R., 325.

1930

In re ESTATE OF ELIZA PATRIQUIN, DECEASED.

FRASER *v.* MCLELLAN.

Smith J

The statute 10 Vic., c. 37, does not provide for the vesting of any property in the trustees, and the only power given them is as to care and management of property already held. There are later statutes, authorizing the trustees to sell parts of the property and give title thereto, but there is nothing in the record that indicates that any property was vested in these trustees, and therefore sec. 20 of *The United Church of Canada Act,* N.S., 14-15 Geo. V, ch. 122, would seem not to apply to these trustees. If it does apply, subs. (b) expressly provides for their continuance as a body corporate.

The bequest of $100, therefore, is to a corporation which, perhaps, continues to exist, but it is nevertheless necessary to consider, even if that be so, whether or not it is a corporation for carrying into effect the object that the testatrix had in view, namely, to hold or expend the bequest for the benefit of the "Presbyterian Church at Tatamagouche". It would seem that the same principle should be applied as in the case of the other bequest.

It follows, therefore, that the Trustees of the Presbyterian Church at Tatamagouche, if still a corporation, would take the bequest upon a trust different from that in the contemplation of the testatrix at the time of making her will, and that this bequest also lapses.

The appeal therefore must be dismissed, with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the cross-appellants: *T. R. Robertson.*

JAMES P. STEEDMAN (DEFENDANT).....APPELLANT;

AND

WILLIAM SPARKS AND WILLIAM A. McKAY, CARRYING ON BUSINESS AS BUILDING CONTRACTORS UNDER THE NAME, STYLE AND FIRM OF "SPARKS & McKAY (PLAINTIFFS)..... } RESPONDENTS;

AND

WILLIAM J. LORD, AND OTHERS.....(DEFENDANTS)

1929
*Nov. 5.
1930
*Feb. 26.

JAMES P. STEEDMAN (DEFENDANT).....APPELLANT;

AND

DOMINION LUMBER AND COAL COMPANY LIMITED (PLAINTIFF).. } RESPONDENT;

AND

WILLIAM J. LORD, AND OTHERS.....(DEFENDANTS)

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

Mechanics' liens—Mortgages—Priorities—Lien for erection of building—Land against which lien to be registered—Land "occupied thereby or enjoyed therewith"—Severance of land—Mechanics' Lien Act, R.S.O., 1927, c. 173, ss. 5, 7 (3)—Sale of land under power of sale in mortgage—Effect on lienholders' rights—Title of purchaser.

The *Mechanics' Lien Act*, R.S.O., 1927, c. 173, s. 5, gives to one who erects a building a lien on the owner's estate or interest in the "building and appurtenances and the land occupied thereby or enjoyed therewith." It is a question of fact in each case what land this includes, to be determined from all the circumstances. The fact that an owner has acquired land in one connected parcel by a single conveyance and has included it all in one or more mortgages does not necessarily imply that those entitled to liens in connection with a building erected on a part of it are entitled to place their liens on the whole parcel. In the case in question it was held that the land to be enjoyed with the building erected for the owner had been severed from the rest of the property by the owner and leased, to be occupied and enjoyed by the lessee, separate from the rest of the owner's property, and this leased land (and including, with regard to the lien, one half of the wall of an adjoining building, which wall was used as a wall

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

1930

STEEDMAN v. SPARKS & MCKAY

STEEDMAN v. DOMINION LUMBER & COAL CO. LTD.

of the new building) was the only land upon which the lien was acquired, and therefore the claim of lien, which was filed against it only, was properly so confined, the contention of appellant, second mortgagee of all the land and purchaser thereof at a sale made under power of sale in the first mortgage, that the lien should have been filed against all the land, being rejected.

It was further held that the judgment at trial sustaining another claim of lien, which had been filed against the whole property, but which was for materials furnished for construction on some part of the land other than where the building above mentioned was erected, should be set aside and that it should be referred back to the trial judge to ascertain the particular part or parts of the property upon which this claimant was entitled to a lien.

It was further held that the appellant, who, subsequent to registration of claims of lien and with notice thereof, purchased the land at a sale by the first mortgagee (whose mortgage was registered long prior to when the liens arose) under the power of sale in the mortgage, did not thereby acquire a title free from the liens.

APPEAL by the defendant Steedman from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing his appeal from the judgment of His Honour Judge Brandon, Deputy Judge of the County Court of Wentworth, in favour of the respondents Sparks & McKay, as lienholders, in one action, and in favour of the respondent Dominion Lumber & Coal Co. Ltd., as lienholder, in the other action. The two actions were mechanics' lien actions and were tried together.

The defendant Lord had owned certain land on the southwest corner of Barton and Ottawa streets in the city of Hamilton, Ontario. It was subject to three mortgages: (1) To the Canada Permanent Mortgage Corporation, dated August 10, 1925, for $80,000; (2) To one Richardson, trustee, dated August 18, 1925, for $30,000; (3) To one Mills, dated September 19, 1925, for $10,000.

By deed, not registered, dated May 6, 1926, Lord conveyed the land to the defendant the East End Markets, Ltd., subject to the mortgages.

The northerly part of the frontage on Ottawa street, which runs north and south, was occupied by a market building. To the south of this was a store, and to the south of the store some land upon which there was no building, but some excavation and foundations.

(1) (1929) 63 Ont. L.R. 393.

On August 19, 1927, the East End Markets, Ltd., leased to the F. W. Woolworth Co., Ltd., the northerly part of the said vacant land (immediately south of the store) and agreed to erect, for the use of the lessee, a building upon the land leased. The East End Markets, Ltd., then contracted with the plaintiffs (respondents), Sparks & McKay, for the latter to erect the building.

Sparks & McKay commenced work early in October, 1927, and on December 12, 1927, registered a claim of lien against the land on which the new building was constructed, including the southerly half of the south wall of the building immediately to the north thereof, which wall, so far as it extended, was used to provide the northerly wall of the new building, the joists of the new building being inserted six inches into the southerly wall of the old building. (The land against which Sparks & McKay registered their lien is hereinafter referred to as the "Woolworth lot").

The second and third mortgages had been assigned to defendant (appellant) Steedman on March 25, 1927. The Canada Permanent Mortgage Corporation, the first mortgagee, had taken proceedings under the power of sale in its mortgage, offering the land for the first time in April, 1927, and the sale being postponed from time to time. On December 15, 1927, Steedman bought the land at the mortgage sale for $125,000.

The trial judge held that the lien of the respondents Sparks & McKay had been validly registered and ordered a sale. He found that when their lien arose the actual value of the Woolworth lot was $7,900. He therefore held that, under s. 7 (3) of the *Mechanics' Lien Act,* R.S.O., 1927, c. 173, the first mortgage had priority to the extent of $7,900, and that Sparks & McKay ranked next for the amount of their lien.

The appellant, Steedman, contended that the lien of the respondents, Sparks & McKay, was not validly registered against the Woolworth lot, and should have been registered against the whole of the land. This contention was rejected by the Appellate Division (1). He also contended that the lien had been extinguished by the sale

(1) (1929) 63 Ont. L.R. 393.

1930

STEEDMAN v. SPARKS & McKAY

STEEDMAN v. DOMINION LUMBER & COAL CO. LTD.

under its power of sale by the first mortgagee, and that the lien claimants were relegated to the purchase money on that sale, in lieu of the land, and, since the purchase money was not sufficient to satisfy the claims of the first mortgagee and of the appellant, there was nothing to which the lien claimants could resort. This contention also was rejected by the Appellate Division (1) on grounds (adopted by reference by this Court in the judgment now reported) which were stated as follows:

> It is argued that the sale by the Canada Permanent under the mortgage has had the effect of preventing a sale of the property in these proceedings. I am unable to follow this contention. Of course, if such is the law, we should have the anomaly of a statutory lien wiped out by acts over which the lienor has no control. If such a sale could under any circumstances have any effect, it certainly could not in a case in which, as here, the purchaser bought with full statutory notice of the liens encumbering the property.

The respondent, Dominion Lumber & Coal Co. Ltd., on January 13, 1927, filed a claim of lien against the whole land, for $367.46, the price of materials used for some part or parts of the northerly buildings on the land, but none of which, of course, went into the Woolworth building, which was erected later. The trial judge fixed the value of all the said land when this lien arose at $160,000, directed a sale, and found that the claims of the Canada Permanent Mortgage Corporation and Steedman, as mortgagees, amounted to $92,796.50 and $37,583.40 respectively, and that they should rank in priority to the lien (of the Dominion Lumber & Coal Co. Ltd.) in respect of $84,796.50 and $35,329 respectively, and that, subject to said priorities, the lien should rank in priority to any other claims of the said mortgagees.

The appellant contended, similarly as in the other action, that the effect of the sale under the power of sale in the first mortgage was to defeat the lien and to relegate the lien claimant to the purchase money, and since this was insufficient to satisfy the mortgagees' prior claims (which, he contended, should have been allowed at larger sums) and since the trial judge had found the value of the mortgaged lands to be $160,000 at the time when the first lien arose, the lien claimant was entitled to no relief as against the mortgagees.

(1) (1929) 63 Ont. L.R. 393, at p. 397.

There were also certain questions in regard to the amounts and priorities allowed to the mortgagees, as follows:

The appellant alleged error in the trial judge's finding as to the time of advancement of an amount of $8,000 by the first mortgagee, and that the allowance of the latter's priority over the lien should have been larger.

The trial judge found that the second mortgagee, Richardson, was a trustee for certain creditors of Lord; that, although the face value of the mortgage was $30,000, it was only security for $28,183.59; that the appellant, on the assignment of the mortgage to him, paid only 70% of this latter amount, the creditors receiving only 70% of their respective claims; and he held that the appellant was only entitled to be credited to the extent of the amount actually advanced, viz., 70% of $28,183.59, plus interest. The appellant contended that he was entitled to hold the second mortgage for the full amount for which the mortgage was originally security.

The trial judge found that the third mortgage, which represented only an actual advance of $8,000, was assigned to the appellant for its full face value, without knowledge by the appellant that less than $10,000 had been advanced on it. He held, however, that the third mortgagee had only priority for $8,000, the amount advanced, and, as the assignment to appellant was after the registration of the Dominion Lumber & Coal Co.'s lien, the appellant could be in no higher position in regard to that lien. The appellant claimed that he was entitled to priority, in respect of the third mortgage, to the full sum of $10,000 and interest.

G. Lynch-Staunton K.C. and *H. A. F. Boyde* for the appellant.

C. C. Robinson K.C. and *E. G. Binkley* for the respondents Sparks & McKay.

H. E. B. Coyne for the respondent Dominion Lumber & Coal Co. Ltd.

The judgment of the court was delivered by

SMITH J.—The defendant Lord was the owner of a property in the city of Hamilton, bounded on the north by Barton street and on the east by Ottawa street. The northerly

1930

STEEDMAN v. SPARKS & MCKAY

STEEDMAN v. DOMINION LUMBER & COAL CO. LTD.

Smith J

part of the frontage on Ottawa street was occupied by the Market Building, to the south of which was a store, and to the south of that store there was no building, but some excavation and foundations.

There were three mortgages on the property prior to the registration of any lien, namely:

(1) To Canada Permanent Mortgage Corporation, dated 10th August, 1925, for $80,000;

(2) to Sinclair G. Richardson, dated 18th August, 1925, for $30,000;

(3) to William R. Mills, dated 19th September, 1925, for $10,000.

Lord conveyed these lands, subject to the mortgages, to the East End Markets Limited, but the conveyance has not been registered. On the 19th of August, 1927, the East End Markets Limited leased to the F. W. Woolworth Co. Ltd., for ten years, the northerly 32 feet of the vacant portion of their lands referred to, lying immediately south of the line of the southerly wall of the store building mentioned, and, by the terms of the lease, agreed to erect a building upon the land so leased, for the use of the lessee, and entered into a contract with the plaintiffs Sparks & McKay for the erection of such building, pursuant to the terms of the lease.

The plaintiffs Sparks & McKay registered a lien on this 32 feet for the amount owing to them in connection with the construction of this building, in pursuance of their contract.

The building occupied the full width of the 32 feet except six inches south of the southerly wall. The pre-existing store was made use of to provide the northerly wall of the new building, as far as it extended, the joists of the new building being inserted six inches into the southerly wall of the old building. The new building on this 32 feet extended westerly beyond the older store to the north of it, but not all the way to the alleyway at the west, which is the westerly boundary of the lands described.

The appellant attacked the validity of this lien of the plaintiffs Sparks & McKay, on the ground that it should have been registered against the whole mortgaged prop-

erty, whereas it is limited to the 32 feet on which the building was erected.

The learned deputy judge seems to have thought that these plaintiffs acquired a lien on the whole mortgaged property, but held that they had the right to sever the 32 feet from the whole and register their lien against that part only. In the Appellate Division the opinion is expressed that,

> the lien attaches in whole and in part to all parts of the property liable to it so that every cent is a lien on every inch; and that he may abandon his lien on any part without interfering with his right in respect of the rest or any part of it.

It is, however, immediately pointed out that it is unnecessary to decide that point. I agree that there is no such necessity, and refrain from expressing an opinion in reference to it. It is manifest, however, that grave complications as to the rights, not only of the owner but of encumbrancers and other lienholders, might arise in connection with enforcement of liens by sale of the property if the opinion alluded to is correct. Such complications would arise, for example, in a supposed extreme case where an owner, having mortgaged his building lot with a view to erecting a dwelling house on it, finds at the completion of the building that a number of liens have been registered against the whole lot and some against only a part of the lot, including only part of the house.

The statute gives a lien on the estate of the owner, in the building and appurtenances and the land occupied thereby or enjoyed therewith, and it is a question of fact in each case what land this includes, to be determined from all the circumstances. The fact that an owner has acquired land in one connected parcel by a single conveyance and has included it all in one or more mortgages does not necessarily imply that those entitled to liens in connection with a building erected on a part of it are entitled to place their liens on the whole parcel. Here, as pointed out in the reasons of the Appellate Division, the land to be enjoyed with the building that was erected had been severed from the rest of the property by the owner and leased to the F. W. Woolworth Co. Ltd., to be occupied and enjoyed by them, separate from the rest of the owner's property, and was, in my opinion, the only land upon which

1930

STEEDMAN v. SPARKS & McKAY

STEEDMAN v. DOMINION LUMBER & COAL CO. LTD.

Smith J.

these plaintiffs and others having claims in connection with the erection of the building acquired liens.

The appellant, however, further contends that by his purchase subsequent to the registration of the liens at the mortgage sale under the first mortgage, he acquired a title free from these liens. This contention also fails, upon the grounds set out in the reasons for judgment in the Appellate Division (1).

The deputy judge therefore proceeded properly in ascertaining and fixing the value of the land described in the lien of the plaintiffs Sparks & McKay at the time the first lien arose. Having fixed this value at $7,900, he has properly held that to that extent the mortgages have priority over the liens, and that the lienholders have priority over the mortgagees as to the surplus that may be realized from the sale of that land with the building; and has properly ordered such sale in default of payment into court of the amount found owing. The only lien found under this judgment is that of Sparks & McKay; but by the judgment in the other case he finds the plaintiff in that action also entitled to a lien on this property.

The Dominion Lumber & Coal Co., Ltd., registered a lien against the whole mortgaged property and brought a separate action to enforce the same. The formal judgment in that action declares that this plaintiff company is entitled to a lien on this whole property for the sum of $450.83, and finds that The Canada Permanent Mortgage Corporation ranks in priority to this lienholder in respect of the sum of $84,796.50, and that the appellant Steedman ranks in priority to the lienholder in respect of the sum of $35,329, and that the lienholders have priority over the mortgages as to the balance of purchase money to be realized.

We have, then, as a result of the two judgments, a direction for the sale of the Woolworth lot and building and a direction to apply the whole proceeds on the mortgages and on Sparks & McKay's lien, according to the priorities already referred to, and without reference to any lien of the Dominion Lumber & Coal Co. Ltd.; and then we have, in the other action, a judgment for sale of this same land as

(1) (1929) 63 Ont. L.R. 393.

part of the whole, and a direction that the whole amount of the purchase money be paid to the mortgagees and to the Dominion Lumber & Coal Co. Ltd., without any reference to the lien of Sparks & McKay. It is evident that both of these judgments cannot be carried out, and it seems equally evident that the Dominion Lumber & Coal Co., Ltd., was never entitled to any lien on the Woolworth lot and building, because the evidence establishes that no part of the material in that company's account went into the construction of that building. The judgment therefore, in the action in which the Dominion Lumber & Coal Co., Ltd., is plaintiff, must be set aside, and it must be referred back to the deputy judge to ascertain the particular part or parts of the mortgaged property upon which the plaintiff in that action is entitled to a lien.

According to the evidence of Lord, these materials went into the East End Market building. If that is so, as indicated above, the lien should be confined to the estate of the owner in that building and appurtenances and the land occupied thereby or enjoyed therewith; and it will be for the deputy judge to ascertain what that includes. Having decided that question, he should ascertain, as in the other case, the value of the portion of the property to which he finds the lien attaches at the time the lien arose, and fix the priorities on the same principle as in the other case. One would think, however, that the plaintiff would regard it as rather a hopeless task to establish that the sale value of this market building and the lands enjoyed with it was much increased by the $367 worth of lumber that went into it, probably for repairs. Apparently this plaintiff's hope was to share in the increased value that arose from the Woolworth building, to which he had contributed nothing.

The deputy judge, it seems, made a mistake in holding that $8,000 of the Canada Permanent Mortgage Corporation mortgage moneys was not advanced till after the registration of the liens, and will make the necessary correction accordingly.

There is no evidence on which the finding of the deputy judge that the appellant is entitled under the second mortgage only to the amount he paid for it, can be disturbed. In the evidence it is sometimes stated that the mortgage

1930

STEEDMAN v. SPARKS & McKAY

STEEDMAN v. DOMINION LUMBER & COAL CO. LTD.

Smith J.

was given to secure creditors and in other places that it was for subscriptions. Whether the appellant was buying the full rights of the creditors or subscribers from the trustee and settling with them at a discount where he could, or the creditors were reducing their claims and thus reducing the mortgage, so that the appellant was buying the mortgage thus reduced, does not appear. The mortgage on its face was for $30,000, but the appellant knew that this was more than the real amount.

Mills took the third mortgage on the property for $10,000, but advanced only $8,000, and, after the registration of the liens, assigned it to the appellant for the full face amount. The appellant had no notice that the full amount had not been advanced, and acted in good faith. The answer to the question raised as to the respective rights of the mortgagees and lienholders under these circumstances is that the mortgage has priority over the liens only on the basis of the amount advanced prior to the first lien, but that, subject to this, the appellant is entitled to the full amount against the mortgagor and the land.

Both cases are referred back to the deputy judge, to be proceeded with as indicated above.

The appellant will pay the costs of this appeal of the respondents Sparks & McKay in the action brought by them.

In the other case, the plaintiffs claimed a lien on the whole property, and the judgment is set aside because the lien does not extend to the whole property. The appellant, however, contended here that this plaintiff had properly registered its lien on the whole property, and attacked it on the ground that he had, by his purchase under the first mortgage, acquired title free of all liens, and that in any case he had priority for the full amount of the mortgages; and moreover, that in any event there was no power to order a sale of the property. He has failed on all these contentions, but has succeeded on his contention that there cannot be two sales under separate judgments of the same property.

1930

STEEDMAN v. SPARKS & MCKAY

STEEDMAN v. DOMINION LUMBER & COAL CO. LTD.

Smith J.

There should therefore be no costs of either appeal in the action of the Dominion Lumber & Coal Co. Ltd.

Steedman v. Sparks et al.: Appeal dismissed with costs.

Steedman v. Dominion Lumber & Coal Co. Ltd.: Appeal allowed; judgment at trial set aside, and matter referred back to trial judge to proceed as directed herein.

Solicitors for the appellant: *Bruce, Counsell & Boyde.*

Solicitors for the respondents, Sparks & McKay: *Langs, Binkley & Morwick.*

Solicitors for the respondent, Dominion Lumber & Coal Co. Ltd.: *Gibson, Levy, Inch & Coyne.*

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... APPELLANT;

AND

THE CARLING EXPORT BREWING AND MALTING COMPANY, LIMITED (DEFENDANT) ..... RESPONDENT.

1929

*Dec. 12, 13, 16, 17, 18.

1930

*Feb. 4.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Gallonage and sales taxes—Special War Revenue Act, 1915 (as amended), ss. 19B (1), 19BBB (1)—Exemption in case of export—Requisites for operation of the exempting provisoes—Onus as to proof of export—Export of beer into a country in violation of its laws—Sales tax on sales made in Ontario in violation of Ontario Temperance Act—Right of Crown to interest and penalties.

The Crown claimed against the defendant, under the *Special War Revenue Act, 1915* (as amended), for sales tax in respect of beer sold, and for gallonage tax in respect of beer manufactured and sold, between April 1, 1924, and May 1, 1927. Defendant claimed that the beer was manufactured for export and was exported, and that, therefore, the taxes were not payable.

Held (1) Export, in order to attract the exemption from gallonage tax, must be under government regulation, and in the absence of regulations the exempting proviso in s. 19B (1) of the Act can have no operation.

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*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

1930

THE KING
v.
CARLING
EXPORT
BREWING
& MALTING
CO. LTD.

(2) The proviso in s. 19BBB (1) that the sales tax "shall not be payable on goods exported" exempts only in cases in which the goods are exported by the vendor in execution of the contract of sale. If the contract for sale is completed by delivery in Canada the liability for sales tax attaches, notwithstanding that export is contemplated and that the purchaser agrees with the vendor that the goods shall be exported. Subsequent export does not effect a defeasance of the obligation to pay the tax. The remedy in such case would be by way of the procedure (for refund) laid down in subs. 10 of s. 19BBB.

It was further held that, even assuming that subsequent export could have brought defendant within the benefit of the proviso, export had not been sufficiently established to effect this. The Crown having proved the sales, the defendant, to escape taxation in respect of any shipment, must shew it was in fact exported (meaning of "export" discussed); and, upon the facts and circumstances in evidence, while no doubt beer was exported in large quantities, it was impossible to say judicially with regard to any particular shipment that it was in fact exported.

Quaere whether "export," in the sense of the statutory exemption, should not be taken to exclude export which involved the violation of the laws of the United States by the introduction and sale there of goods which could not there be lawfully introduced or sold or (except in circumstances not here relevant) be the subject of property or juridical possession.

(3) As to certain sporadic cash sales in Ontario, these were "sales" within the meaning of said Act, and subject to the tax, notwithstanding that the *Ontario Temperance Act,* in force during the period in question, made such sales unlawful and deprived them of legal effect (*Minister of Finance* v. *Smith,* [1927] A.C. 193, applied).

(4) The Crown was entitled to the penalties provided by s. 19CC (3) (as enacted by c. 69 of 1926-27, amending the *Special War Revenue Act*) not only in respect of sales made after its passing, but also, from the date of its passing, in respect of sales made prior thereto; and, up to the date of said enactment, to interest at 5% per annum from the dates when the taxes became due (*Toronto Ry. Co.* v. *Toronto,* [1906] A.C. 117).

Judgment of Audette J., of the Exchequer Court of Canada, [1929] Ex. C.R. 130, varied in favour of the Crown.

APPEAL by the Crown (plaintiff) from the judgment of Audette J., of the Exchequer Court of Canada (1), in so far as he refused to allow the Crown's claim. The defendant cross-appealed against the allowances made in the said judgment in favour of the Crown.

The Crown's claim was for $163,828.07 for sales tax, under s. 19 BBB of the *Special War Revenue Act, 1915* (as amended), in respect of alleged sales of beer by the defendant on and after April 1, 1924, and prior to May 1, 1927, and for $260,662.21 for gallonage tax, under s. 19 B of

(1) [1929] Ex. C.R. 130.

said Act (as amended) in respect of beer alleged to have been manufactured and sold by the defendant on and after April 1, 1924, and prior to May 1, 1927; and for interest at 5% per annum from the dates when the taxes became due to June 1, 1927, and thereafter at the rate of $\frac{2}{3}$ of 1% per month as provided by s. 19 CC of said Act, as enacted by 17 Geo. V, c. 69, s. 4.

The defendant denied the Crown's allegations and alleged that the beer in respect of which sales taxes were sought to be recovered was exported and not subject to the tax, but, on the contrary, was exempted under the provisions of s. 19 BBB; and that the beer manufactured by it was manufactured for export and was exported within the meaning of s. 19 B, and the defendant was not liable to pay the gallonage tax.

By the formal judgment in the Exchequer Court of Canada, it was adjudged (*inter alia*) that the plaintiff should recover $1,590 for sales tax on certain sales of strong beer entered in the defendant's books as cash sales, upon which sales tax had not been paid; that the plaintiff should recover sales tax and gallonage tax on all strong beer sold by defendant to one Bannon and resold by him in Canada; that the plaintiff should recover sales tax on all other sales of strong beer upon which sales tax had not been paid and in respect of which Customs export entry forms commonly known as B. 13's were not produced and put in as exhibits at the trial [export entries produced covered about 83% of the total sales]; that the defendant was liable to pay to the plaintiff interest at the rate of 5% per annum upon such gallonage and sales tax in respect of all transactions prior to April 14, 1927 [the date of the passing of said 17 Geo. V, c. 69] from the due date thereof until paid, and interest at the rate of $\frac{2}{3}$ of 1% per month upon such gallonage and sales tax in respect of all transactions subsequent to April 14, 1927, from the due date thereof until paid. A reference was directed to ascertain and determine the amount payable by defendant under the judgment.

The Crown's appeal to this Court was allowed with costs. By the formal judgment of this Court, it was adjudged:

* * * that the appellant is entitled to recover from the respondent sales tax on all sales in respect of which sales tax is claimed in this action

1930

THE KING
v.
CARLING EXPORT BREWING & MALTING CO. LTD.

and gallonage tax on all sales in respect of which gallonage tax is claimed in this action as to which the said Exchequer Court held no liability rested on the respondent.

* * * that the appellant is entitled to recover from the respondent interest upon such sales tax and gallonage tax in respect of all sales prior to the fourteenth day of April, A.D. 1927, from the due date thereof until the said fourteenth day of April, A.D. 1927, at the rate of five per centum per annum and a penalty thereafter until paid at the rate of two-thirds of one per centum per month; and a penalty upon such sales tax and gallonage tax in respect of all sales subsequent to the said fourteenth day of April, A.D. 1927, from the due date thereof, until paid at the rate of two-thirds of one per centum per month.

* * * that this action be remitted to the Exchequer Court of Canada which shall determine the amount payable by the respondent under the judgment of the Exchequer Court of Canada as varied by this Court and all subsequent costs, and, except as herein varied, the said judgment of the Exchequer Court of Canada be affirmed.

N. W. Rowell, K.C., G. A. Urquhart, K.C., and *G. Lindsay* for the appellant.

W. N. Tilley, K.C., and *C. F. H. Carson* for the respondent.

The judgment of the court was delivered by

DUFF, J.—In the action out of which the appeal arises the Crown claims $163,828.07 sales tax in respect of beer sold between the 1st of April, 1924, and the 1st of May, 1927; and the sum of $260,662.21 gallonage tax in respect of beer manufactured and sold during the same period; and interest on these sums up to the 1st of June, 1927, at the rate of 5% per annum, and thereafter at the rate of two-thirds of 1% per month. The ground of defence was that all this beer was manufactured for export and exported in fact, and that consequently under the provisions of the Revenue Act upon which the Crown's claim is based, there is no liability.

The learned trial judge held that in respect of certain cash sales in London and the vicinity of London, the respondents are liable to sales tax, and in respect of certain sales by one Bannon, in Windsor, to both sales and gallonage taxes. These items constituted a comparatively trifling element in the Crown's claim, and in respect of the claim as a whole the learned trial judge drew a distinction between shipments of beer sold by the respondents for which export entries were produced, and those for which evidence of such entries was not forthcoming. He accepted

the export entry as evidence of export and held that in respect of sales of goods, of which export was thus proved, no liability rested on the respondents for either sales or gallonage tax. Export was in this manner established in respect of about 83% in value of the goods sold. As to interest and penalties, the learned trial judge allowed the Crown's claim for interest, but disallowed the claim for penalties under the statute of 1927 in respect of taxes payable upon transactions prior to the date of the statute.

It will be convenient first to consider the learned trial judge's view as to the Crown's claim for gallonage tax. The statute is section 19 B 1 (b) of *The Special War Revenue Act, 1915*, as amended by 12-13 Geo. V, c. 47, s. 14:

19B. 1. (*b*). There shall be imposed, levied and collected upon all goods enumerated in Schedule II to this Part, when such goods are imported into Canada or taken out of warehouse or when any such goods are manufactured or produced in Canada and sold on and after the twenty-fourth day of May, one thousand nine hundred and twenty-two, in addition to any duty or tax that may be payable under this Act, or any other statute or law, the rate of excise tax set opposite to each item in said Schedule II.

(*c*) Where the goods are imported such excise tax shall be paid by the importer and where the goods are manufactured or produced and sold in Canada such excise tax shall be paid by the manufacturer or producer; provided that if an automobile is, on the twenty-fourth day of May, one thousand nine hundred and twenty-two in the hands of a dealer and not sold to a *bona fide* user the tax shall be paid by such dealer when such automobile is sold.

(*d*) The Minister may require every manufacturer or producer to take out an annual licence for the purposes aforesaid, and may prescribe a fee therefor, not exceeding two dollars, and the penalty for neglect or refusal shall be a sum not exceeding one thousand dollars.

Provided that such excise tax shall not be payable when such goods are manufactured for export, under regulations prescribed by the Minister of Customs and Excise.

Schedule II. Ale, beer, porter and stout, per gallon, twelve and one-half cents.

The respondents base their defence upon the proviso which takes effect when the goods are manufactured for export "under regulations prescribed by the Minister of Customs and Excise." The construction advanced on behalf of the respondents turns upon the effect of the word "under". "Under regulations prescribed by the Minister" means, it is argued, "in compliance with such regulations, if any." That does not appear to be a natural reading of the words. Obviously an exemption on the ground that the goods affected are manufactured for export

1930

THE KING v. CARLING EXPORT BREWING & MALTING CO. LTD.

Duff J.

could not be generally allowed to take effect upon the unsupported representations of the manufacturer without grave risk of fraud upon the revenue, and it is this consideration, no doubt, which accounts for the requirement that export in order to attract the exemption must be under government regulation; in the absence of regulations the proviso can have no operation. Counsel for the Crown called attention to the distinction in the statute between cases in which export is made *simpliciter* the condition of exemption, and cases where the condition is manufacture for export. In the last mentioned cases (the proviso to s. 19 B and the proviso to s. 16 A) regulations, and export under them, are required. In other cases, as for example, sections 19 BB 1 (b), 19 BB 1 (e), 19 BBB 1, regulations are not required; proof of export is enough. Mr. Tilley argues that the present case is distinguishable from the case of the excise taxes which were in question in *Dominion Press Ltd.* v. *Minister of Customs and Excise* (1), and there are no doubt distinctions, but the reasoning in the Lord Chancellor's judgment in that case seems to extend in substance to this case. "The proviso," his Lordship said, "is an exempting proviso, and, in order to obtain its protection, the tax-payer must bring himself within its language." That you cannot do unless there are regulations. This claim for exemption seems to be unfounded.

I shall next mention the sporadic cash sales in London and Windsor. The contention in respect to these is that they are not subject to the tax because they are not sales. The *Ontario Temperance Act,* which was in force during this period, unquestionably did mark down as unlawful (indeed "criminal" if we adopt the recently sanctioned terminology) sales of liquor, except sales of specified categories to which those in question do not belong. Furthermore, by force of the statute, such transactions had no legal effect except for the protection of *bona fide* purchasers for value, and no moneys or other consideration, received for liquor sold, became the property of the receiver as against the payer, who could recover it back. The effect of the Act was undoubtedly to deprive such transactions of the character of sales in contemplation of law, except for a

(1) [1928] A.C. 340.

limited purpose, that is to say, for the purpose of protecting a *bona fide* purchaser for value. The point made is that they are consequently not sales within the meaning of the statute the Crown is seeking to enforce.

The answer to the contention appears to be this. The Ontario Act did not apply to all sales within Ontario. Sales made in course of interprovincial or foreign trade, and sales made to the Ontario government were not affected. Where transactions have taken place which contain all the elements of a sale according to the ordinary language of business, which, but for such a prohibiting statute as the *Ontario Temperance Act,* would have legal effect as sales, and the parties have treated them as such, the purchaser receiving the goods as purchaser, and the vendor receiving the purchase price as vendor, then, the vendor having received the price, which has passed into and become a part of his assets, the court will not for fiscal purposes inquire into the application or effect of a statute such as the *Ontario Temperance Act.*

The case is not precisely the same as, but is not easily distinguishable from, the decision of the Privy Council in *Minister of Finance* v. *Smith* (1). Smith was an Ontario bootlegger and he was assessed for income derived from his bootlegging business. This Court held (2) that he was not assessable in respect thereof because by the provisions of the *Ontario Temperance Act,* above adverted to, every transaction in which he engaged in that business was an offence against the *Ontario Temperance Act* and punishable by imprisonment, and that no moneys received by him from such transactions, and consequently no apparent profits, made in the course of his business, were his property; and that it must be assumed that the *Income War Tax Act* was not intended to apply to incomes made up of the aggregate of apparent profits of such transactions. That judgment was reversed (1) on grounds which were stated in the following passage of Lord Haldane's judgment:

> Construing the Dominion Act literally, the profits in question, although by the law of the particular Province they are illicit, come within the words employed. Their Lordships can find no valid reason for holding that the words used by the Dominion Parliament were intended to

(1) [1927] A.C. 193. (2) [1925] Can. S.C.R. 405.

1930

THE KING
v.
CARLING EXPORT BREWING & MALTING CO. LTD.

Duff J.

exclude these people, particularly as to do so would be to increase the burden on those throughout Canada whose businesses were lawful. Moreover, it is natural that the intention was to tax on the same principle throughout the whole of Canada, rather than to make the incidence of taxation depend on the varying and divergent laws of the particular provinces. Nor does it seem to their Lordships a natural construction of the Act to read it as permitting persons who come within its terms to defeat taxation by setting up their own wrong. There is nothing in the Act which points to any intention to curtail the statutory definition of income, and it does not appear appropriate under the circumstances to impart any assumed moral or ethical standard as controlling in a case such as this the literal interpretation of the language employed. There being power in the Dominion Parliament to levy the tax if they thought fit, their Lordships are therefore of opinion that it has levied income tax without reference to the question of Provincial wrongdoing.

I see no substantial ground for holding these considerations (held decisive in the circumstances of *Smith's* case) to be without application here.

I now come to the critical question in the case, the question, namely, of the liability of the respondents in respect of sales tax. The statute is section 19 BBB (1) of *The Special War Revenue Act, 1915*, as amended by 13-14 Geo. V, c. 70, s. 6, and 14-15 Geo. V, c. 68, s. 1 (1):

19 BBB. 1. In addition to any duty or tax that may be payable under this Part, or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of five per cent. on the sale price of all goods produced or manufactured in Canada, including the amount of excise duties when the goods are sold in bond, which tax shall be payable by the producer or manufacturer at the time of the sale thereof by him; and in the case of imported goods the like tax upon the duty paid value of the goods imported payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption.

For the purpose of calculating the amount of the consumption or sales tax, "sale price" shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto.

Provided that the consumption or sales tax specified in this section shall not be payable on goods exported; * * *

It was urged by Mr. Rowell that the phrase "consumption or sales tax" should be read distributively, the designation "sales tax" being applicable only to the tax payable in respect of "sales" under the first limb of the subsection. I doubt if a strict analysis of the language would justify this; the phrase "consumption or sales tax" seems rather to be a designation of the tax levied in respect of sales of good produced or manufactured in Canada, as well as of that which affects the case of imported goods only. In my view of the section, I cannot convince myself that the

point is of any importance. The statute, for the purpose of this particular head of taxation, classifies goods as those produced or manufactured in Canada, and those imported. It is only with the first of these categories that we are concerned, and as to goods coming within it, there is "imposed, levied and collected" a "tax of 5% on the sale price" of all such goods. This tax, it is declared, is to be payable by the producer or manufacturer at the time of the sale of the goods by him. The tax is described as "a consumption or sales tax" or according to the view suggested by the Crown a "sales tax". It does not seem to me to matter in the least whether you think of this tax as a tax upon a sale, or upon goods sold, or upon the price of goods sold. The rubric is "sales tax"; and any such compendious label might serve if it be distinctly understood that it is only a summary way of indicating the tax, which becomes exigible, according to the terms, and under the conditions, laid down in this sub-section. The statute seems clearly enough to assume that the liability to pay is completely ascertainable, as well as completely constituted, at the time of the sale. And this seems to be the cardinal thing, for the purpose in hand. In terms, the taxes are payable in respect of all sales of goods produced or manufactured in Canada, and the phrase "tax * * * on the sale price" is employed by the principal clause. The proviso employs a different turn of expression and seems to treat the impost as a tax "payable on goods"; and declares that it shall not be payable upon a designated class of goods, namely, "goods exported," but there is absolutely nothing in the proviso to indicate any qualification of the enactment in the principal clause that the tax is payable at the time of sale. On the contrary, the proviso explicitly and exclusively legislates for "the tax specified in this section". What it seems to effect is a qualification of the general terms of the principal clause, which literally embraces all sales of goods produced or manufactured in Canada (or all such goods when sold), and it does so by excluding from that comprehensive category "goods exported"; that is to say, the seller, by force of it, is not to come under the liability declared by the principal clause if he sells, not goods manufactured or produced in Canada simply, but such goods "exported." In other words, the

1930

THE KING v. CARLING EXPORT BREWING & MALTING CO. LTD.

Duff J.

proviso seems to exempt from the operation of the tax cases in which the goods are exported by the vendor in execution of the contract of sale. That seems to be the fair and reasonable meaning of the language, and there is no context by which the natural construction of the language is controlled.

This exposition of the statute is criticized on two distinct grounds. First, it is said that the principal clause in itself, read apart from the proviso, would only apply to sales complete in Canada and that on this reading the proviso is merely pleonastic. Such inelegancies are not uncommon in statutes; and the criticism, if well founded, would not appear to be a satisfactory reason for departing from what appears rather plainly to be the effect of the language the legislature has seen fit to employ.

The alternative construction was not very precisely formulated in argument; but those suggested seemed to be open to the practicable objection that the exigibility of the tax would under them remain indeterminate for a more or less indefinite period after the completion of the sale. The second objection is that this construction would be productive of great inconvenience in practice. The purpose of the exemption being, it is said, to reinforce Canadian producers in their competition in foreign markets, it could not have been intended to restrict the scope of it so narrowly as to make it non-available in, for example, such frequently occurring transactions as sales through a foreign agent stationed here. But the ingenuity of commerce can hardly be supposed to be so limited in range as to justify a doubt that such transactions would quite legitimately assume a form within the proviso. It is difficult to suppose that any considerable inconvenience would arise in such cases from putting the transaction in some such form. In any case, provision is made by sub-section 10 for a refund of the tax where domestic goods are exported under regulations prescribed by the Minister of Customs and Excise. Further, there is a general provision by which the Government has authority to remit taxes and other claims where justice requires it. The argument *ab inconvenienti* has little cogency.

The Crown contends that, on this construction of the statute, the liability of the respondents to sales tax is indis-

putable, and that contention seems to be unanswerable. It is not seriously open to dispute, in view of the repeated admissions of Low, that the sales proved were sales completed in Canada; nor indeed was this denied on the argument. Neither is it possible to argue, assuming there was export in fact, that such export was effected by the respondents in execution of the contract of sale. The contention of the respondents was that the sales proved were sales to individual purchasers, first to one, Grandi, and afterwards to one, Savard, and that it was part of the arrangement with them that the beer delivered to them should be exported to the United States; that the sales were export sales in the sense that the beer was under the control of the respondents until it was placed in a boat (always an undecked boat) and entered for export, and that these boats cleared for the United States under the eyes of the respondents' agents. Shipment, in these craft, it is said, took place under the superintendence of Low acting for the respondents, for whom it was vital in a business sense that the goods should reach the United States.

Assuming for the moment the point of fact in favour of the respondents, they do not bring themselves within the proviso. The contract for sale was completed by delivery in Ontario. The export, on any assumption, was a subsequent fact, in respect of which the respondents assumed no responsibility. In the view above stated as to the effect of the statute, the liability thereupon attached, and there is nothing in the statute to indicate that export effected a defeasance of the obligation to pay the duty. The remedy of the respondents in such circumstances would be by way of the procedure laid down in sub-sec. 10.

Turning to another branch of the argument, let it be allowed that export, in the circumstances indicated, if proved in fact, would be sufficient to bring the respondents within the benefit of the proviso. The onus is, of course, upon them, to establish export in fact, and one observation is necessary as to what that means. The claim of the Crown is a claim for taxes payable in respect of sales of beer during the period mentioned. It was incumbent upon the Crown to prove such sales, and that has been done. The respondents, if they are to escape taxation in respect of any shipment, must shew it was in fact exported. Gen-

1930

THE KING v. CARLING EXPORT BREWING & MALTING CO. LTD.

Duff J.

erally speaking, export, no doubt, involves the idea of a severance of goods from the mass of things belonging to this country with the intention of uniting them with the mass of things belonging to some foreign country. It also involves the idea of transporting the thing exported beyond the boundaries of this country with the intention of effecting that. The concrete question here is, have the respondents shewn that these goods passed beyond the boundaries of Canada in course of transport to the United States, and that they did not return to this country. I assume that goods passing within American territory and there seized by American customs officials, were exported within the meaning of the proviso. As I shall point out, there are difficulties in reconciling with the ordinary notion of export, as commonly understood in commerce, and as contemplated by this statute, the kind of operation in which the respondents were engaged. But putting this aside for the moment, the respondents must face the question whether export in fact, in the sense just indicated, has been proved.

The case they put is this. They were engaged, they say, in exporting beer to the United States. The beer that they manufactured was a beer which found its principal market there, and their aim throughout was to secure and maintain that market. The persons to whom they sold beer were engaged in the business of selling in the United States, and large quantities of their beer were sold in Detroit and the vicinity. And they go so far as to argue that the onus is on the Crown to shew that the goods did not reach their intended destination.

It is first necessary to remember that the learned trial judge has found virtually that 17% of the beer with which we are concerned was not exported. The learned trial judge was evidently satisfied that the export entries produced were all that could be produced; and I think it is right to say that, considering the opportunities the respondents have had of searching for export entries, and considering the fact that such export entries were in their own possession, it must be found against them, that of the beer in question, not more was entered for export than that covered by the export entries proved. This of course is a very important fact. It is inconsistent entirely with the theory that the respondents were exclusively engaged in

carrying on an export trade, and it is also irreconcilable with any assumption that they have laid before the court an accurate account of the disposition of their beer. There is, moreover, another state of facts of decisive import. The persons concerned in the export of these goods were engaged in a trade which involved the introduction into the United States, and the sale there, of things which could neither be lawfully introduced nor sold there, nor, except in circumstances not here at all relevant, could be the subject of property or juridical possession there. The boundary waters were patrolled by police whose duty it was to prevent the entry of such goods into the United States and to capture and confiscate craft endeavouring to effect such entry. The evidence abounds in indications that this is by no means a theoretical consideration. One witness, Dunford, says that in one month six craft owned by him personally, were captured and confiscated. It is also clear from the evidence that there was an extensive trade carried on in Ontario in beer of all kinds. In view of the non-production of the export entries, in relation to 17% of the goods in question, I do not think we can accept the suggestion that there was no market for lager beer in Ontario. The learned trial judge dwells upon the fact that rice beer is peculiarly an American taste, and infers that it is not sold in Ontario. The evidence in support of this does not proceed from disinterested sources and I wonder whether the boundary line so sharply affects the taste in illicit liquor. In truth, it is stated by Low that it was not until some time in 1926 that the respondents began the manufacture of rice beer, and we are not told at what date, if ever, in their brewery, rice beer wholly superseded malt beer. My conclusion is that, while there is some evidence of export, while no doubt beer was exported in large quantities, it is impossible to say judicially with regard to any particular shipment that that shipment reached the United States side and was landed there, or that it was captured by the United States preventive officers, or that it was returned to the Canadian side and sold there. I may add, that, I hope, as a judge of fact, I shall not be supposed to have divested myself of all knowledge of human habits and modes of thinking.

1930

THE KING v. CARLING EXPORT BREWING & MALTING CO. LTD.

Duff J.

The Crown argues that as the export alleged in this case involves, as already indicated, a deliberate violation of the United States laws to the extent pointed out, it cannot be treated as "export" within the meaning of the statute. I think there is a great deal to be said in favour of the view that "export" in the sense of the statute may be limited in such a way as to exclude export so entirely beyond the ordinary course of commerce. The considerations in favour of this view are so numerous and so obvious that they need not be dwelt upon. As against this contention, however, one must not overlook the point, very moderately put by Mr. Tilley, that the Crown is proposing that we overlook the criminal law from one point of view, while giving decisive effect to it, from another. Personally, I do not think this last contention, although far from being without force, is conclusive. It may well be that here, not for the first time in the history of human affairs, the way of the transgressor is hard. In my view, it is hardly conceivable that Parliament should contemplate such transport beyond the country as is now relied upon as constituting a ground of exemption. But after all we are only concerned with the meaning of the words used. It is risky to speculate upon Parliamentary motives, and I prefer not to express any opinion upon this point.

The only remaining point concerns interest and penalties. As for interest, we are governed by Lord Macnaghten's judgment in *Toronto Ry. Co.* v. *Toronto* (1). As to the other point, I think we are bound to give effect to the precise words of the statute.

The appeal should therefore be allowed and the case remitted to the Court of Exchequer to be dealt with in accordance with the views herein expressed. The respondents must pay the costs of the appeal.

Appeal allowed with costs.

Solicitor for the appellant: *W. Stuart Edwards.*

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

(1) [1906] A.C. 117.

FROWDE LIMITED (DEFENDANT).... APPELLANT; 1929

AND *Dec. 10, 11, 12.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... RESPONDENT. 1930 *Feb. 4.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Sales Tax—Special War Revenue Act, 1915 (as amended), s. 19BBB (1)—Whether goods "exported" within the exempting proviso.

The judgment of Maclean J., President of the Exchequer Court of Canada, [1929] Ex. C.R. 119, holding that the Crown was entitled, under the *Special War Revenue Act, 1915*, and amendments, to recover the amount claimed for sales tax in respect of the sales of spirits in question, was affirmed; the reasons in *The King* v. *Carling Export Brewing & Malting Co. Ltd., ante*, p. 361, being held applicable.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the Crown was entitled to recover from the defendant the sum of $101,641.06, with interest, for sales tax in respect of sales of spirits, under the provisions of the *Special War Revenue Act, 1915*, and amendments thereto. The defence was that the spirits sold were exported out of Canada, and that under the proviso contained in s. 19 BBB (1) of said Act the sales tax was not payable.

W. N. Tilley, K.C., and *Waldon Lawr* for the appellant.

N. W. Rowell, K.C., and *G. Lindsay* for the respondent.

The judgment of the court was delivered by

SMITH, J.—This is an appeal by the defendant from the judgment of the Exchequer Court (1), holding the appellant liable to pay the Crown, under the Special War Revenue Act, 1915, and amendments, $101,641.06 and interest. The reasons for judgment in the case of *The King* v. *Carling Export Brewing and Malting Company* (2) apply also to this case, and the appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *Waldon Lawr.*

Solicitor for the respondent: *W. Stuart Edwards.*

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

(1) [1929] Ex. C.R. 119. (2) *Ante*, p. 361.

1930

*Mar. 11, 12.

YORK v. KRAUSE

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

Sale of land—Default by purchaser—Suit by vendor for cancellation of agreement—Forfeiture of payments—Construction of agreement—Recovery by purchaser of moneys paid.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario, which allowed the plaintiff's appeal, and dismissed the defendant's cross-appeal, from the judgment of McEvoy J.

The plaintiff and defendant entered into a written agreement, dated June 26, 1925, for the sale by the plaintiff to the defendant of certain land in Kingsville, Ontario. The purchase price was $13,500, payable "$2,700 in cash on the date hereof and the balance as follows: in four equal annual consecutive payments on the 26th days of June in each year hereafter of $2,700 each together with interest thereon at 7% per annum payable on the amounts of principal from time to time due on the same dates as the said instalments".

The defendant had previously paid a deposit of $200, and at the time of execution and delivery of the agreement he paid the sum of $2,500, making up the cash payment of $2,700 under the agreement. In July, 1926, he paid another sum of $2,700.

The defendant complained that the terms of payment were not expressed in the agreement according to the understanding of the parties on previous negotiations, and that the annual payments of $2,700 should have been blended payments of principal and interest. As to this point the trial judge held that, on the evidence, the defendant should be held to the terms expressed in the agreement.

The agreement contained a provision that unless the payments were punctually made "these presents shall be null and void and of no effect and vendor shall be at liberty to re-sell the said lands and all payments heretofore made are to be forfeited to the vendor as liquidated damages".

In May, 1927, the plaintiff sued, alleging default by defendant in payment of interest and taxes, and claimed

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

recovery of possession of the land and cancellation of the agreement. In August, 1927, the plaintiff entered into an agreement to sell the land to other parties.

The defendant delivered his defence in October, 1927, and counterclaimed for repayment to him of all amounts paid on account of the alleged contract together with interest thereon.

McEvoy J., in his judgment, said that he was satisfied that the property was one of highly speculative value, and that the peculiar wording of the forfeiture clause was made for the purpose of providing what the parties considered would be a fair amount to be forfeited if the defendant should fail to carry out the agreement; and refused to relieve the defendant from the forfeiture of the cash payment of $2,700, in the circumstances revealed in the evidence. He gave judgment for the plaintiff for possession of the land and for a declaration that under the terms of the agreement the same had become null and void and of no effect. He held that the defendant was entitled to recover all amounts paid by him in excess of the sum of $2,700 together with interest thereon at 5% per annum from the date of the sale by the plaintiff to the other parties above referred to. He refused to make any allowance to the defendant for alleged improvements to the property, but did not charge him with any occupation rent.

The plaintiff appealed to the Appellate Division against the judgment of McEvoy J., in so far as he held defendant entitled to recover any sum from the plaintiff. The defendant cross-appealed, asking that the amount awarded him by the judgment be increased to the whole amount paid by him with interest.

The Appellate Division, without written reasons, allowed the plaintiff's appeal, and dismissed the defendant's cross-appeal. The defendant appealed to this Court.

On conclusion of the argument, the judgment of the Court was orally delivered by the Chief Justice, allowing the appeal to the extent of restoring the judgment of the trial judge. The Court was unable to construe the word "heretofore" in the agreement as meaning "theretofore" as had been suggested. As to the construction to be put upon the words "payments heretofore made," the Court

1930
YORK
v.
KRAUSE.

was of opinion, in view of all that took place, that they should be taken to include the $200 deposit and the $2,500 paid at the time of the execution of the agreement, making $2,700 in all, but nothing more.

Appeal allowed in part, with costs.

S. L. Springsteen for the appellant.

J. H. Rodd K.C. for the respondent.

1930
*March 4.
*April 10.

THE LONDON LOAN AND SAVINGS COMPANY OF CANADA (DEFENDANT) ..... APPELLANT;

AND

ROBERT K. MEAGHER, LIQUIDATOR OF THE ESTATE AND EFFECTS OF TRANS-CANADA THEATRES LIMITED (PLAINTIFF) ..... RESPONDENT.

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

Mortgage—Agreed bonus to mortgagee—Right to bonus—Interest Act, R.S.C., 1927, c. 102, ss. 6 to 9.

Appellant agreed to loan to T. Co., on mortgage of real estate, $30,000, at 7½% interest, but stipulated that, in consideration of making the loan, it should receive a bonus of $3,000, to which T. Co. agreed. The mortgage on its face was one for $30,000, bearing interest half-yearly at 7½% per annum, and containing no reference to the bonus. Appellant issued its cheque to T. Co. for $28,505.55, being the $30,000 less deductions for taxes, insurance premiums and solicitors' costs, and took a cheque from T. Co. for the $3,000 bonus. Some payments were made, but T. Co. became insolvent, and, the mortgage being in arrear, appellant advertised the property for sale, and the liquidator paid off the amount owing, on the basis of the full face amount of the mortgage, without knowledge of the bonus. He sued to recover the $3,000, with interest paid thereon, invoking ss. 6 to 9 of the *Interest Act*, R.S.C., 1927, c. 102.

Held, that he could not recover. The agreement for the bonus was legal and enforceable. The $3,000 bonus could have been recovered by appellant as a debt, not under the mortgage, but under the agreement for the loan, and the full $30,000 was advanced, whether the bonus be taken as paid by the mortgagor's cheque or by retention

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

from the loan, unless the *Interest Act* applies (*G. & C. Kreglinger* v. *New Patagonia Meat & Cold Storage Co. Ltd.*, [1914] A.C. 25, *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307, *Mainland* v. *Upjohn*, L.R. 41 Ch. D., 126, referred to). The Act does not apply; in view of the effect of the legislation in question, its application should be confined to mortgages coming clearly within its description; and, taking the precise language of s. 6, it applies only to mortgages which on their face come within the description in that section. In this case there is nothing in the mortgage itself that brings it within such description. Moreover, there was no offence against the spirit of the Act; the mortgage did not fail to disclose to an ordinary borrower what he was to pay for the loan; and the aim of the Act is, not to limit the rate of interest or recompense that lenders may exact, but to prevent the collection of interest provided for in the mortgage by plans which do not disclose to the ordinary borrower the real rate of interest being exacted by such plans.

The far-reaching consequences involved, if the legislation in question were held applicable against a transaction such as that in question, also form a reason for confining its application to mortgages coming strictly within the description in s. 6.

Singer v. *Goldhar*, 55 Ont. L.R., 267, and *Re Brown*, 61 Ont. L.R., 602, discussed; and the passage in the former case, at p. 271, where *Canadian Mortgage Invt. Co.* v. *Cameron*, 55 Can. S.C.R., 409, and *Standard Reliance Mortgage Corp.* v. *Stubbs*, 55 Can. S.C.R., 422, are cited, commented on.

Judgment of the Appellate Division, Ont., 64 Ont. L.R. 600 (affirming judgment of Wright J., *ibid*, p. 221) reversed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1), affirming the judgment of Wright J. (2), holding that the plaintiff, liquidator of the estate and effects of Trans-Canada Theatres Ltd., was entitled to recover from the defendant the sum of $3,000 and interest thereon, the said $3,000 being the amount of a bonus paid to the defendant by the said Trans-Canada Theatres Ltd. on the making of a loan by the defendant to the said company secured by a mortgage on certain theatre premises in London, Ontario. The plaintiff relied on ss. 6 to 9 of the *Interest Act*, R.S.C., 1927, c. 102. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was allowed and the action dismissed with costs throughout.

W. N. Tilley K.C. and *Hamilton Cassels* for the appellant.

R. V. Sinclair K.C. for the respondent.

(1) (1929) 64 Ont. L.R. 600. (2) (1929) 64 Ont. L.R. 221.

1930

LONDON LOAN & SAVINGS CO. OF CANADA v. MEAGHER.

The judgment of the court was delivered by

SMITH J.—The respondent (plaintiff) is the liquidator of the estate of Trans-Canada Theatres Limited, which company, in March, 1922, applied to the appellant (defendant) for a mortgage loan of $30,000. The appellant agreed to make the loan, at 7½ per cent. payable half yearly, but stipulated that, in consideration of making the loan, it should receive from the mortgagor a bonus of $3,000, which the mortgagor agreed to pay.

The mortgage is dated the 15th day of March, 1922, and on its face is a mortgage for $30,000, bearing interest half yearly at 7½ per cent., and containing no reference to the bonus.

The appellant issued its cheque to the mortgagor for $28,505.55, being the $30,000 less some deductions for taxes, insurance premiums and solicitors' costs, and took a cheque from the mortgagor for the $3,000 bonus. Some payments were made, but the mortgagor became insolvent, and, the mortgage being in arrear, the mortgagee advertised the property for sale, and the liquidator, about the 12th March, 1925, paid off the amount owing, on the basis of the full face amount of the mortgage, without knowledge of the bonus having been paid.

In this action, the liquidator sues to recover the $3,000 with interest paid thereon up to 12th March, 1925, claiming to be entitled to such relief by virtue of the *Interest Act*, R.S.C., 1927, ch. 102.

The trial judge (1) gave judgment in favour of the liquidator for the amount claimed, and this judgment was sustained in the Second Appellate Division of the Supreme Court of Ontario (2), the five judges being unanimous.

The portion of the *Interest Act* referred to, relating to the questions involved, reads as follows:

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

(1) (1929) 64 Ont. L.R. 221. (2) (1929) 64 Ont. L.R. 600.

7. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in such statement.

8. No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage of real estate, which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrear.

2. Nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear.

9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under the three sections last preceding, such sum may be recovered back, or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

I am of opinion that the payment of the full amount of $30,000 by the mortgagee and payment of the bonus by the mortgagor's cheque, as arranged, had no different legal effect from payment of that bonus by simply deducting and retaining it from the loan. *Mainland* v. *Upjohn* (1).

If, as argued, the bonus became a debt owing by the mortgagor to the mortgagee as consideration for the loan outside of the mortgage, the liability would have been satisfied by retention of the amount from the mortgage moneys, just as any other debt that might have been owing by the mortgagor to the mortgagee might have been paid effectually in that way.

It was an unsettled question for a considerable period as to whether or not, in connection with a mortgage loan, there could be any other transaction between the mortgagor and the mortgagee that might secure any possible advantage to the mortgagee. The question is discussed at length in *Mainland* v. *Upjohn* (cited above) (2); *Biggs* v. *Hoddinott* (3), and *G. & C. Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* (4). The latter case, in the House of Lords, settles the question in the following paragraph, commencing at the bottom of p. 60 of the Report:

My Lords, after the most careful consideration of the authorities I think it is open to this House to hold, and I invite your Lordships to hold, that there is now no rule in equity which precludes a mortgagee, whether

(1) (1889) L.R. 41 Ch. D., 126, at pp. 143, 144.
(2) (1889) L.R. 41 Ch. D., 126.
(3) [1898] 2 Ch., 307.
(4) [1914] A.C., 25.

1930

LONDON LOAN & SAVINGS CO. OF CANADA v. MEAGHER.

Smith J.

the mortgage be made upon the occasion of a loan or otherwise, from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem.

It is clear, therefore, that the stipulation for the $3,000 bonus in this case was legal and capable of being enforced, unless the *Interest Act* is a bar.

As to all mortgages that fall within the description set out in section 6, the Act takes away from the mortgagee part of what the mortgagor has agreed to pay, and would be obliged to pay, were it not for the Act. This results, quite irrespective of whether or not the terms are fair under the circumstances and have been agreed to by the mortgagor with full knowledge and appreciation of their meaning and effect, and irrespective also of whether or not the mortgagor would be entitled to relief under the ordinary rules of law. The application of the Act therefore must be confined to mortgages that come clearly within the description set out in the Act itself.

In this case the mortgage is not by its terms made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, nor on any plan which involves an allowance of interest on stipulated repayments, and does on its face contain a statement showing the amount of principal money and the rate of interest chargeable thereon calculated half yearly, not in advance. There is therefore nothing in the mortgage itself that brings it within the description set out in section 6. The argument is that, by evidence outside the provisions of the mortgage, it is established that it was agreed that the mortgagor should pay for the use of the money $3,000 in advance, in addition to the 7½ per cent. half yearly mentioned in the mortgage, so that the real terms of the loan were an advance of only $27,000, for which the mortgagor was to pay, as interest, $3,000 in advance, together with 7½ per cent. half yearly on $30,000, and thus the $3,000 of interest became blended with the $27,000 of principal under the covenant to pay $30,000. This, however, is begging the question, because it is only if the Act applies that the result follows. As already pointed out, the $3,000 that the mortgagor agreed to pay as consideration for the loan,

whether regarded as interest or as something differing from interest, could have been recovered as a debt, not under the mortgage, but under the agreement for the loan, and the full $30,000 was advanced, whether the bonus is taken as paid by the mortgagor's cheque or by retention from the loan, unless the Act applies. To hold, therefore, that only $27,000 was advanced, it must first be determined that the Act does apply, and that any right to the $3,000 bonus was by its provisions prevented from arising.

The argument, if acceded to, involves very far-reaching consequences. An innocent third party purchasing such a mortgage as the one in question at its face value without notice would be entitled to collect on it only the actual amount advanced ($27,000 on this mortgage) and no interest. A very usual commercial transaction is, as pointed out on argument, a mortgage by a corporation on its assets, including real estate, made to a trustee to secure a bond issue, the bonds being sold to the public at a discount. The mortgagor in such a case receives only the face amount of the mortgage less the discount, and probably less also the charges and expenses of the trustee (mortgagee). It would be difficult to distinguish in principle such a mortgage from the one in question here. It might even be argued that the principle would extend to the common transaction of the retention by the mortgagee of the amount of his solicitor's bill for examining title and putting through the loan.

These considerations form an additional reason for confining the application of the Act to mortgages coming strictly within the description in section 6. Taking the precise language of this section, it is only where any principal money or interest is, by the mortgage itself, made payable on any of the plans mentioned, that the section applies, the words being "is, *by the same,* made payable on the sinking fund plan," etc., and it is only to mortgages described in the preceding part of the section that the final provision and sec. 9 apply. The proper conclusion seems to be that the provisions of the statute apply only to mortgages which on their face come within the description set out in section 6.

If it be thought that this leaves open the door for making agreements similar in practical effect to the mortgages de-

1930

LONDON LOAN & SAVINGS CO. OF CANADA v. MEAGHER.

Smith J.

scribed in section 6 but not covered by it, Parliament can enlarge the scope of the Act, at the same time providing, as it may see fit, against any undesirable results such as I have indicated.

The Act, however, as it stands does not aim at controlling or limiting the rate of interest or recompense that lenders may exact for loans, and has no such effect if the last part of section 6 is complied with, except that no greater rate can be exacted than the rate mentioned in the statement thereby called for. The aim is to prevent the collection of interest provided for in the mortgage by plans described in section 6, which do not disclose to the ordinary borrower the real rate of interest being exacted by such plans. So far, however, as this Act is concerned, any rate of interest may be provided for by such plans, and enforced, if that rate is disclosed by a statement in the mortgage of the principal money and of the rate of interest, as provided in the latter part of section 6.

There is, therefore, in the mortgage in question, no offence against the spirit of the Act, because it does not fail to disclose to an ordinary borrower what he is to pay for the loan, though he might not realize what rate per cent. the $3,000 cash in advance, added to the 7½ per cent., would amount to. The $3,000 cash payment might, however, give him a clearer idea of what the loan was costing him than if provided for in terms of an added rate of interest.

There were previous decisions of the Appellate Divisions, which the learned trial judge and the Appellate Division thought were binding on them in this case, but one of the learned judges of the Appellate Division suggests a doubt as to their correctness. The first of these is *Singer* v. *Goldhar* (1). There the mortgage was for $4,700, to be repaid in eleven monthly instalments of $100 each, the balance to be paid at the end of twelve months. There was no provision for the payment of interest, but there was a provision that the mortgage, when executed and registered, should not bind the mortgagee to advance the money or, "having advanced a part, to advance the balance." The action was for foreclosure. There was no oral evidence, but it was admitted, for the purposes of the trial, that only

(1) (1924) 55 Ont. L.R. 267.

$3,500 was advanced and that the mortgagor had paid back $3,800, and it was held that the mortgage was satisfied. This result does not conflict with what I have indicated above to be the proper construction to place upon the Act.

There is, however, some conflict in the reasons given, and as two cases in this court are cited in support of these reasons, I deem it well to call attention to the particular passage where this appears. It is at page 271, and is as follows:

> But the essential thing is that the statute requires that the mortgagor shall be informed on the face of the mortgage not merely of the amount which he is to pay, but also of the *rate* of interest which he is to pay on the money lent, and this was not done: *Canadian Mortgage Investment Co.* v. *Cameron* (1); and *Standard Reliance Mortgage Corporation* v. *Stubbs* (2).

In these cases this court was dealing with mortgages which on their face had plans of repayment coming within the description in the first portion of section 6, and the question in dispute was whether or not the mortgage contained a statement in compliance with the provision of the latter part of that section. I have already pointed out that this latter part of the section applies only to mortgages that come within the description in the previous part of the section. The passage quoted above is dealing, as will be seen, with a mortgage which had no provision for repayment on any of the plans described in section 6. The two cases cited are authority for the proposition laid down only when it is limited to mortgages described in section 6.

Another case referred to is *Re Brown* (3). The terms of the mortgage are not set out, but in the reasons for judgment it is stated that there is a provision in the mortgage which "involves an allowance of interest on stipulated repayments." This brings the mortgage within the description in the first part of section 6, and this case, therefore, does not seem to be in conflict with the construction which I have placed upon the statute.

The appeal must be allowed and the action dismissed with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Cassels, Brock & Kelley.*

Solicitors for the respondent: *McMaster, Montgomery, Fleury & Co.*

(1) (1917) 55 Can. S.C.R. 409. (2) (1917) 55 Can. S.C.R. 422.
(3) (1927) 61 Ont. L.R. 602.

1929

*Oct. 14.
*Dec. 9.

BONENFANT v. THE CANADIAN BANK OF COMMERCE

Banking—Bills and notes—Collateral security—Pledging—Bills of Exchange Act, R.S.C., 1927, c. 16

APPEAL from the decision of the Court of King's Bench, appeal side, Province of Quebec (1), reversing the judgment of the Superior Court, Trahan J. (1) and reducing the amount awarded to the respondent from $6,584.98 to $2,579.05.

The respondent bank sued the appellant as endorser of certain promissory notes, which, with others, had before maturity been transferred to the bank by one Dussault, as collateral security for moneys owing or to become owing to the bank by Dussault. The appellant, by his defence, denied in general terms that the bank was holder in due course of the notes. The Court of King's Bench unanimously concurred with the view of the trial judge that the bank was entitled to enforce payment of the notes up to the amount chargeable against them by the bank as pledgee; and the Supreme Court of Canada affirmed that decision.

But the respondent bank cross-appealed on two grounds: first, that it was entitled to judgment against the appellant for the full amount of the notes and interest, and secondly, that it should be reimbursed the amount of certain costs paid to the appellant as the costs of a successful appeal made by the latter in respect of some promissory notes of which due notice of dishonour had not been proved; and the bank relied upon the terms of Dussault's letter of hypothecation, which authorized it to charge as pledgee " toutes les dépenses encourues et les déboursés faits par la banque à ce sujet."

As to the first ground, the Supreme Court of Canada agreed with the view of the majority of the judges of the Court of King's Bench that, on the whole evidence, the respondent bank's claim was not valid, in so far as it rested upon the existence of a liability on the part of the appellant to Dussault. And on the second point, the Supreme Court of

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

(1) (1929) Q.R. 46 K.B. 219.

1929

BONENFANT v. THE CANADIAN BANK OF COMMERCE.

Canada affirmed the judgment of the court appealed from rejecting that claim, on the ground that, *prima facie*, the bank's liability for these costs resulted directly from its own fault and nothing in the letter of credit authorized it to put upon its customer the burden of a disbursement exacted from it under such circumstances.

Appeal and cross-appeal dismissed with costs.

Louis A. Pouliot K.C. for the appellant.
Chas. Mignault for the respondent.

1930

*March 13.
*April 10.

IN RE THE WALLACE REALTY COMPANY LIMITED

THE WALLACE REALTY COMPANY LIMITED ..... } APPELLANT;

AND

THE CORPORATION OF THE CITY OF OTTAWA ..... } RESPONDENT.

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

Income assessment (municipal)—Assessment Act, R.S.O., 1927, c. 238—Ascertainment of "income" (as defined in s. 1 (e))—Allowance of deduction, from company's gross revenue, of sum paid for interest on moneys borrowed for investment—Exemption claimed for dividends received on shares in another company whose revenue derived from real estate rentals—Deduction for overhead expenses; proportionate allowance, having regard to amount of non-taxable income.

The appellant company's business, carried on in Ottawa, Ontario, included the leasing and managing of real estate owned by it in Ottawa, and the buying and selling on its own account of stocks, bonds, etc. In the year in question it derived a gross revenue of $12,288 from rents (exempt from assessment for income tax), and a gross revenue of $27,091 from dividends and interest upon stocks, bonds, etc. From the latter sum it claimed, in respect of income assessment, deductions or exemptions as follows: (1) $8,004.83, being interest paid to a bank for money borrowed to pay off a balance of stock and bond purchase price and to buy certain bonds; (2) $6,622, being dividends on shares held by it in another company, whose revenues were derived

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

1930

WALLACE REALTY CO. LTD. v. CITY OF OTTAWA.

exclusively from real estate rentals; and (3) in respect of salaries and general expenses. The County Court Judge disallowed deduction or exemption of items (1) and (2). As to certain "overhead expenses" (item (3)) he allowed a deduction, in fixing which he adopted as a guide the proportion which appellant's revenue from rentals bore to its total revenue. His judgment was affirmed by the Appellate Division, Ont., 64 Ont. L.R. 265.

Held, that the judgment below (*supra*) should be affirmed as to items (2) and (3), but reversed as to item (1); the appellant being entitled to the deduction of $8,004.83.

"Income," as defined in s. 1 of the *Assessment Act,* R.S.O., 1927, c. 238, discussed. A year's income from a business cannot be properly determined without deducting from the gross receipts of that business for that year expenditures legitimately incurred during that year in the business for the purpose of earning such receipts as a whole; such expenditures to include those made in the hope of earning receipts for the business, although such hope has been disappointed. The $8,004.83 in question was expended, by way of interest to the bank which advanced the money required by the appellant, to enable it to obtain an investment within its powers and earn from it any receipts that might be had therefrom.

Mersey Docks v. *Lucas,* 8 App. Cas., 891; *Gresham Life Assur. Soc.* v. *Styles,* [1892] A. C., 309; *Russell* v. *Town & County Bank,* 13 App. Cas., 418; *City of Kingston* v. *Can. Life Assur. Co.,* 19 Ont. R., 453, at p. 458; *Lawless* v. *Sullivan,* 6 App. Cas., 373; *Farmer* v. *Scottish North American Trust Ltd,* [1912] A.C. 118, and (judgment below) 1909-10 Sess. Cas., 966; *Bryon* v. *Metropolitan Saloon Omnibus Co. Ltd.,* 3 DeG. & J., 123, and other cases, referred to.

APPEAL by the Wallace Realty Co. Ltd. from the judgment of the Appellate Division of the Supreme Court of Ontario (1) on an appeal by the said company in the form of a special case, under s. 84 of the *Assessment Act,* R.S.O., 1927, c. 238, from the decision of His Honour Judge O'Brian, a judge of the County Court of the County of Carleton, upon an appeal by the said company from a decision of the Court of Revision for the City of Ottawa, confirming the assessment of the appellant for income on the assessment roll of Wellington Ward in the City of Ottawa in the year 1926, for the purpose of taxation in the year 1927. (In the city of Ottawa the assessment is made in the year preceding the year in which the tax is imposed, under the provisions of what is now s. 60 of the *Assessment Act.*)

The appellant is a company incorporated under the Ontario *Companies Act,* having its chief place of business at

(1) (1929) 64 Ont. L.R. 265.

the city of Ottawa. Its business consists in part, in leasing, administering and managing certain real estate owned by it in the city of Ottawa, and in part, in buying and selling on its own account stocks, bonds and other securities.

In 1925 the company derived a gross revenue of $12,288 from its real estate business. This amount represented rent received from real estate exclusively, and consequently was exempt from income assessment. The company also received in the same year a gross revenue of $27,091, by way of dividends and interest upon stocks, bonds and other securities owned by it, including an item of $6,622, being dividends or interest upon certain securities held by the appellant in another company known as the Ottawa Building Co. Ltd., carrying on a real estate business in the city of Ottawa, and the appellant company claimed exemption from assessment for this item. In his stated case the County Court Judge assumed, for the purpose of the appeal, that the business carried on by the Ottawa Building Co. Ltd. was a real estate business exclusively, and that its revenues were derived from the rental of real estate exclusively.

The appellant company also claimed exemption by way of deduction from its gross revenue derived from stocks and bonds, an item of $8,004.83, which might be described as a "carrying charge." The item was set out in the company's return to the Assessment Commissioner as follows:

> Interest paid Bank of Montreal for money borrowed to pay off $120,000 of T. Ahearn unpaid balance of stock and bond purchase price and to buy $290,000 bonds of The Auditorium Ltd., interest on which bonds not being paid to us until 1st June, 1926.....$8,004.83

The company also claimed deductions in respect of salaries and general expenses, hereinafter referred to as "overhead expenses."

The County Court Judge held that the "carrying charge" of $8,004.83 could not be deducted, and that exemption could not be claimed for the income derived from the Ottawa Building Co. Ltd., but in respect of certain "overhead expenses" he allowed a deduction, in fixing which he adopted as a guide the proportion which the company's revenue from rentals bore to its total revenue.

He submitted the following questions for the opinion of the Appellate Division:

1930

WALLACE REALTY CO. LTD. v. CITY OF OTTAWA.

"Question 1. Was I right in holding that no part of the sum of $8,004.83, in respect of the interest paid by them to the Bank of Montreal (and which I have designated as the "carrying charge"), should be deducted from the gross receipts of $27,091?

"Question 2. Was I right in over-ruling the appellant company's claim to deduct the revenue derived by them from the Ottawa Building Company Limited, amounting to $6,622?

"Question 3. Was I right in holding that the amount of the allowance for so-called overhead expenses, should be fixed and determined in the proportion which the amount of their non-taxable [taxable?] income bore to their total gross income?

"Question 4. If question 3 is answered in the negative, what amount if any, should have been deducted for overhead expenses, so-called?"

The Appellate Division (1) answered questions 1, 2 and 3, each in the affirmative (Orde J.A. dissenting as to the first question), and dismissed the company's appeal with costs.

Leave to appeal to the Supreme Court of Canada was granted by the Appellate Division.

By the judgment of this Court now reported, the appeal was allowed as to question No. 1, which this Court held must be answered in the negative, the appellant being entitled to the deduction of $8,004.83 from its gross receipts of $27,091 for assessment purposes. The appeal was dismissed as to the other questions.

Redmond Quain for the appellant.

F. B. Proctor K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—This is an appeal by the Wallace Realty Company, Limited, against the judgment of the Second Appellate Divisional Court (1), answering in the affirmative certain questions submitted to them by a County Court Judge under s. 84 of the *Assessment Act* (R.S.O., 1927, c. 238). Mr. Justice Orde dissented as to the first question only.

(1) (1929) 64 Ont. L.R. 265.

The questions submitted by the learned County Court Judge are as follows:

(1) Was I right in holding that no part of the sum of $8,004.83, in respect of the interest paid by them to the Bank of Montreal, (and which I have designated as the "carrying charge") should be deducted from the gross receipts of $27,091?

(2) Was I right in over-ruling the appellant company's claim to deduct the revenue derived by them from the Ottawa Building Company, Limited, amounting to $6,622?

(3) Was I right in holding that the amount of the allowance for so-called overhead expenses, should be fixed and determined in the proportion which the amount of their non-taxable income bore to their total gross income?

(4) If Question 3 is answered in the negative, what amount, if any, should have been deducted for overhead expenses, so-called?

With regard to questions 2, 3 and 4, as was intimated to counsel in the course of the argument, the Court entirely agreed with the conclusions reached below for, substantially, the reasons on which those conclusions were based. Judgment was reserved, however, on the first question; and upon it we are unable to accept the view that prevailed in the Appellate Division.

In our opinion, the determination of this question rests entirely on the proper view to be taken of the definition of the word "income" in s. 1 of the *Assessment Act*, which reads as follows:

(*e*) "Income" shall mean the profit or gain or gratuity, wages, salary, bonus or commission, or other fixed amount, or fees or emoluments, or profits from a trade or commercial or financial or other business or calling directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source.

We are, with great respect, unable to understand how

the profit or gain . . . from a trade or commercial or financial or other business or calling,

for "the year ending on the 31st of December then last past," (s. 10 (2)) can be arrived at without deducting from the gross receipts of such trade, business or calling, during that year, expenditures legitimately incurred during the same year in the business for the purpose of earning such receipts as a whole.

(1) (1929) 64 Ont. L.R. 265.

1930

WALLACE REALTY CO. LTD. v. CITY OF OTTAWA.

Anglin C.J.C.

Mersey Docks v. *Lucas*, in the House of Lords (1), is authority for the general principle that in ascertaining the "profits and gains" of any trade, manufacture, adventure or concern for the purpose of the Income Tax Acts, the taxpayer is entitled to deduct from the gross profits of his trade or business the expenses necessary to earn them.

Gresham Life Assurance Soc. v. *Styles* (2), another decision of the House of Lords, established that, in Income Tax Acts, the words "profits or gains" are, where the context does not otherwise require, to be construed in their ordinary signification.

"Profits" generally mean the gain which is made upon any business or investment when both receipts and payments are taken into the account. *The People* v. *The Supervisors of Niagara* (3).

In the *Gresham* case (*ubi supra*) (2) the company was held entitled to deduct the amount paid out by it for annuities in ascertaining its profits or gains for income tax purposes. Lord Herschell said, at p. 323,

Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise.

Lord Fitzgerald said in *Russell* v. *Town and County Bank* (4),

"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.

In *City of Kingston* v. *Canada Life Assurance Company* (5), Boyd C., delivering the judgment of a Divisional Court, said,

"income", as commercially used, means the balance of gain over loss in the fiscal year or other period of computation.

The Privy Council, in *Lawless* v. *Sullivan* (6), dealing with a taxing Act of the Province of New Brunswick (31 V, c. 36), held that

The tax imposed by s. 4 (of the statute) upon "income" is leviable in respect of the balance of gain over loss made in the fiscal year, and where no such balance of gain has been made there is no income or fund which is capable of being assessed. There is nothing in the said section or in the context which should induce a construction of the word "in-

(1) (1883) 8 App. Cas. 891.
(2) [1892] A.C. 309.
(3) (1842) IV Hill, 20, at p. 23.
(4) (1888) 13 App. Cas. 418, at p. 429.
(5) (1890) 19 Ont. R. 453, at p. 458.
(6) (1881) 6 App. Cas., 373.

come," when applied to the income of a commercial business for a year, otherwise than its natural and commonly-accepted sense, as the balance of gain over loss.

There was no definition of the word "income" in the Act.

Sir Montague Smith, in delivering the judgment of the Court, said, that the Chief Justice of Canada had erred in treating

every particular earning as irrevocably subject to taxation, so soon as it is received, though the period of assessment is postponed to the end of the fiscal year. But the Act does not impose a tax on each individual earning or gain, but on the income of the year, which can only be ascertained on taking an account for the whole year. (P. 379.)

and he added,

Again, suppose a bank, in order to increase its resources for lending and discounting, takes up money, say at 4 per cent., and, owing to a fall in the rate of interest, can only employ it at 3 per cent., is the amount which the bank receives for interest and on discounts at 3 per cent. to be treated as taxable income, without reference to the loss it has sustained by borrowing at the higher rate? Their Lordships cannot think that, on a reasonable construction of the Act, these questions ought to be answered in the affirmative (pp. 379-80).

and,

So, a trader who keeps a general store may gain on some of the articles in which he deals and incur losses on others. In these cases, though the losses balanced or exceeded the gains, and consequently no income was or could be received from the business of the year, it would follow from the construction contended for by the Respondents that the gain on the particular sales which yielded a profit would still be subject to taxation. Such a construction implies, as already observed, that the tax would attach on each sale producing profit, which is not the ordinary or fair meaning of a tax upon the income of the fiscal year (p. 380).

In *Farmer* v. *Scottish North American Trust, Ltd* (1), the House of Lords confirmed the decision of the Court of Sessions (2). The Courts were there called upon to deal with the right of a tax-paying investment company to deduct from its gross receipts interest paid to a bank on loans made by the bank to the company to enable it to buy certain securities which it was part of the company's business to deal in. Under the Income Tax Acts this interest was deductible if it was

money wholly or exclusively laid out or expended for the purpose of such trade.

At p. 127 of [1912] A.C., Lord Atkinson, delivering the unanimous judgment of the House of Lords, says,

(1) [1912] A.C. 118.
(2) 1909-10 Sess. Cas. 966. (Reported also as to both decisions in 5 Tax Cas., 693).

1930

WALLACE REALTY CO. LTD. v. CITY OF OTTAWA.

Anglin C.J.C.

The interest is, in truth, money paid for the use or hire of an instrument of their trade, as much as is the rent paid for their office or the hire paid for a typewriting machine. It is an outgoing by means of which the company procures the use of the thing by which it makes a profit, and, like any similar outgoing, should be deducted from the receipts to ascertain the taxable profits and gains which the company earns. Were it otherwise they might be taxed on assumed profits when, in fact, they made a loss.

Bryon v. *Metropolitan Saloon Omnibus Co., Ltd.* (1), cited in *General Auction Estate & Monetary Co.* v. *Smith* (2), is, as Stirling J. points out, at p. 441 of the latter case, direct authority that the borrowing of money, as was done in the case at bar, is not in any sense an increase of capital.

At p. 970 of the report of *Scottish North American Trust, Ltd.* v. *Inland Revenue* (3), Lord Salvesen, presiding at the Court of Session, said,

> If the question had arisen for the first time for decision it would appear to me to present no difficulty whatever. From an ordinary business point of view it seems preposterous to suggest that the money which a trader pays to a bank upon overdraft or on a secured loan forms part of the profits or gains of his business. Money which he receives by way of interest will no doubt, in the ordinary case, go to swell his profits; but how payments which in fact diminished his receipts should be regarded as in any sense part of his income it is at first sight very difficult to understand. * * * The interest which a trader pays to a bank with which he deals for financial accommodation is not in any sense payable out of profits. It is an ordinary claim of debt with which the whole assets of the company or trader are chargeable.

At p. 971, His Lordship quotes from the decision of the Lord President of the Court of Sessions in *Inland Revenue* v. *Stewart & Lloyds* (4), as follows:

> * * * it all depended on whether this expenditure was really an outlay to earn profit or was an application of profit earned.

Lord Salvesen goes on to say that

> Assuming that to be the test, it would certainly be a strange abuse of language to say that interest which a trader has had to pay on money borrowed for the purposes of his business is an application of the profits earned, when it may be that the interest exceeds the total amount of the profits.

As Lord Halsbury said in the *Gresham* case (5),

> The thing to be taxed is the amount of profits and gains. The word "profits" I think is to be understood in its natural and proper sense—in a sense which no commercial man would misunderstand. * * * The tax is payable upon the profits realized, and the meaning to my mind is rendered plain by the words "payable *out of* profits."

and at p. 316,

(1) (1858) 3 De G. & J. 123.
(2) [1891] 3 Ch. 432.
(3) 1909-10 Sess. Cas., 966.
(4) (1906) 8F. 1129.
(5) [1892] A.C. 309, at p. 315.

Profits and gains must be ascertained on ordinary principles of commercial trading, and I cannot think that the framers of the Act could be guilty of such confusion of thought as to assume that the cost of the article sold to the trader which he in turn makes his profit by selling, was not to be taken into account before you arrived at what was intended to be the taxable profit.

Of course, in construing English Income Tax decisions, one must always bear in mind that they depend largely upon the phraseology of the statutes under consideration; but I find it impossible to understand how, where the word "income" is defined, as it is here, to be "profit or gain," not from any particular transaction, but from the whole business of an entire year carried on by the "person" upon whom the tax, in respect to it, is to be imposed, such "income" can be arrived at otherwise than by taking account of the receipts for the year and deducting therefrom at least all expenditure made in, and properly attributable to, the earning of such receipts as a whole, including therein expenditure made in the hope of earning receipts for the business or undertaking, although such hope has been disappointed.

Upon the evidence before us, it seems perfectly clear that, whether or not any receipts were actually had from the particular investment in question, there was expended, during the year in question, in respect of that investment, and for the purpose of enabling the company to earn from it any receipts that might be had therefrom, by way of interest paid to the bank which advanced the money required by the company to enable it to secure the investment, the sum of $8,004.83. This sum was not paid out of profits, because, until it was paid and deducted, the profits of the business could not be known. On the other hand, it was paid to enable the company to obtain an investment within its powers, from which, in the ordinary course, some return might be expected. In order to arrive at the "profit or gain" from the undertaking, or business of the appellant company for the year in question, it is certainly necessary to deduct from the receipts which it had from all sources, among other items, this sum of $8,004.83. As Lord Herschell said in the *Gresham* case (*ubi supra*) (1),

(1) [1892] A.C. 309, at p. 323.

1930

WALLACE REALTY CO. LTD. v. CITY OF OTTAWA.

Anglin C.J.C.

Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise.

and, in the *Russell* case (1),

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. That seems to me to be the meaning of the word "profits" in relation to any trade or business. Unless and until you have ascertained that there is such a balance, nothing exists to which the name "profits" can properly be applied.

We are for these reasons of the opinion that the appeal must be allowed with respect to Question number One.

Since the appellant should have limited its appeal to the particular question in respect of which it has succeeded, as provided by s. 64 (2) of the *Supreme Court Act*, it should have only the costs of the appeal to this Court incurred in connection with that question, against which should be set off any costs incurred by the respondent in regard to the three questions upon which the appellant has failed. The appellant is entitled to its costs in the Appellate Division and before the County Court Judge.

Appeal allowed in part.

Solicitors for the appellant: *Quain & Wilson.*
Solicitor for the respondent: *F. B. Proctor.*

1930

*Mar. 14.
*Apr. 10.

EUGENE VIGEANT..... APPELLANT;

AND

HIS MAJESTY THE KING..... RESPONDENT

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

Criminal law—Conspiracy—Witness—Accomplice—Charge—Misdirection—New trial—Police spy or informer—Need of corroboration—Practice when dissenting opinion in appellate court—Cr. C., s. 573, s. 1013, ss. 5.

The appellant, with two other men, was convicted of conspiring to commit an indictable offence. On appeal to the appellate court and to this court, the appellant's main ground was that one Boulanger, the chief witness for the crown, was in fact an accomplice; that the direction given by the trial judge was bad in law, as he had omitted to instruct the jury on what is an accomplice in law, and to warn them of the danger of convicting on the uncorroborated testimony of an accomplice.

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

(1) (1888) 13 App. Cas. 418, at p. 424.

Held that, after consideration of the charge as a whole and reading it in the light of the evidence, there had been misdirection by the trial judge and that the appellant was entitled to a new trial. There was in the record of the trial some evidence upon which the jury might have found that Boulanger had been, at some stage of the affair, an accomplice in the conspiracy charged against the three accused; and it appears by his charge that the trial judge thought this was a question of fact that should be submitted for the determination of the jury. Therefore it was the first duty of the trial judge to have instructed the jury as to what in law would constitute a man an accomplice; he should then have proceeded to direct their attention particularly to any facts in evidence which would serve to indicate Boulanger's complicity in the conspiracy at any stage thereof, and to submit to them the issue as to whether what he was proved to have done made him, having regard to the direction in law already given, an accomplice; he should then have instructed the jury that, if they concluded that the witness was, at any stage of the proceedings, an accomplice in the crime charged against the accused, there would be danger in convicting them of that crime upon his evidence standing alone and uncorroborated, although the law did not preclude their doing so.

The formal judgment of the appellate court directed that "separate judgments should be pronounced" by the two dissenting judges of the court; and there was no direction that any other judgment be pronounced except that to be delivered by Cannon J., who was said to have been "designated by the Chief Justice to pronounce judgment." But opinions, practically the same as that of Cannon J., were also delivered by the two remaining judges.

Held that such a practice is contrary to the imperative prohibition of ss. 5 of s. 1013 Cr. C., its impropriety having already been asserted by this court in *Davis* v. *The King*, [1924] Can. S.C.R. 522. *Gouin* v. *The King*, [1926] Can. S.C.R. 539; *De Bortoli* v. *The King*, [1927] Can. S.C.R. 455, also ref.

Observations, in view of its regrettable results, as to misdirection by a trial judge which necessitates a new trial, especially where the misdirection is due to inattention to matters of substance.

Comments made upon a passage of Phipson on Evidence, 3rd Ed., at page 456, corrected in the 6th Ed., at page 486. The statement that "the rule requiring the corroboration of accomplice does not apply to * * * police spy" means that the informer must have been connected with the matter from the first only as a police spy and not merely have "continued" as such.

APPEAL from a decision of the Court of King's Bench, appeal side, Province of Quebec, affirming the judgment of the Court of King's Bench, criminal side, and sustaining the conviction of the appellant upon an indictment of having conspired to commit an indictable offence.

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

1930

VIGEANT v. THE KING.

Francois Lajoie K.C. and *Leopold Pinsonnault* for the appellant.

Valmore Bienvenue K.C. for the respondent.

The judgment of the court was delivered by

ANGLIN C.J.C.—The appellant (Vigeant), with two other men, Edgar Gariépy and Armand Tremblay, was convicted at the assizes at Three Rivers, Que., before the Honourable Mr. Justice Marchand, of conspiring to commit an indictable offence (Cr. C., s. 573). On appeal to the Court of King's Bench (Appeal Side) by all three from this conviction, several grounds were taken; but only the two following, as given in the judgment of Cannon J., were thought to require consideration by the court:

(*f*) Le témoignage de Boulanger est dans l'espèce un témoignage de complice avant le fait, son témoignage doit être considéré comme tel, et Boulanger seul incrimine Vigeant dans l'offense reprochée, soit de la conspiration.

(*g*) La direction donnée par le président du tribunal aux jurés est fausse en droit, alors que le juge n'a pas mentionné ce fait, le juge a omis de renseigner les jurés sur ce qui peut être un complice en droit et que c'est une question de fait que les jurés ont à décider.

In the appellant's factum in this court these two grounds are treated as one and stated as follows:

The witness Boulanger was in fact an accomplice and the direction given by the president of the assizes was bad in law, and the learned judge having omitted to instruct the jury on what is an accomplice in law, and to warn them of the danger to convict on the uncorroborated testimony of an accomplice.

This was the ground of dissent by Lafontaine C.J.Q. and Létourneau, J. in the Court of King's Bench.

The formal judgment of that court

directs that it is convenient that separate judgments should be pronounced by Chief Justice Lafontaine and Mr. Justice Létourneau, two of the members of the court who dissent from the judgment of the majority for the reasons stated in their respective judgments.

There is no direction that any other judgment be pronounced except that to be delivered by Mr. Justice Cannon, who is said to have been

designated by the Chief Justice to pronounce judgment.

Yet, notwithstanding the imperative prohibition of s.s. 5 of s. 1013 of the Criminal Code that

no judgment with respect to the determination of any question shall be separately pronounced by any other member of the court,

save that which has been so directed to be pronounced, the record now before us contains opinions by two of the learned

judges of the Court of King's Bench, whose views, speaking generally, coincide with those of Mr. Justice Cannon. We had occasion to remark on the impropriety of a similar practice in *Davis* v. *The King* (1). See also *Gouin* v. *The King* (2); *De Bortoli* v. *The King* (3).

After fully considering the record of the trial, which occupied three days, we are of opinion that there was some evidence upon which the jury might (of course we do not at all mean that they should) have found that Boulanger, the chief witness for the Crown, had been, at some stage of the affair, an accomplice in the conspiracy charged against the three defendants. That the trial judge thought this was a question of fact that should be submitted for the determination of the jury is manifest from the following passage in his charge:

> Vous aurez à juger la conduite de Boulanger. Dès le premier ou deux d'août, il a averti le gérant de la banque, que l'on tramait quelque chose contre lui. Dès le quatre août il a rencontré le détective Jargaille, à tous les jours après ça, à chaque fois qu'il voit les accusés, qu'il avait connaissance de ce qu'ils faisaient, il venait le dire au détective Jargaille. Il était en communication constante avec lui. Je ne crois pas que c'est la conduite d'un homme qui est complice dans la préparation d'un crime. Je vous laisse à décider si la conduite de Boulanger, est la conduite de quelqu'un qui avait préparé un complot.

It was suggested in the course of argument by counsel for the Crown that the complicity on the part of Boulanger referred to in the above passage was not complicity in the conspiracy charged against the defendants but in some other crime, which, it was said, the evidence disclosed was in the contemplation of Boulanger and the defendants. After careful consideration of the charge as a whole and reading it in the light of the evidence it seems to us impossible to put that construction upon the language used; on the contrary, it seems clear that what the learned judge intended to leave to the jury by this passage in his charge was the question of Boulanger's complicity in the very conspiracy which was the subject of investigation.

Under such circumstances, the first duty of the trial judge was, in our opinion, to have instructed the jury as to what, in law, would constitute a man an accomplice. He should then have proceeded to direct their attention par-

(1) [1924] Can. S.C.R. 522, at p. 525.
(2) [1926] Can. S.C.R. 539.
(3) [1927] Can. S.C.R. 455.

1930

VIGEANT v. THE KING.

Anglin C.J.C.

ticularly to any facts in evidence which would serve to indicate Boulanger's complicity in the conspiracy at any stage thereof; and to submit to them the issue as to whether what he was proved to have done made him, having regard to the direction in law, already given, an accomplice. Nothing of this kind appears to have been done by the learned trial judge in this instance.

He should then proceed to instruct the jury that, if they concluded that the witness was, at any stage of the proceedings, an accomplice in the crime charged against the defendants, there would be danger in convicting them of that crime upon his evidence standing alone and uncorroborated; that the law does not preclude their doing so—indeed, they are at liberty to do so—but that there is danger in basing a conviction on such uncorroborated evidence. If, after this warning, the jury had faith enough in the evidence given by the accomplice to convict, their verdict will not be set aside. The jury should not be told to acquit the prisoner; but they should be warned of the danger of convicting. *Rex* v. *Royal* (1). Where there has been failure so to charge a jury with regard to the uncorroborated evidence of an accomplice the conviction must be quashed. *Gouin* v. *The King* (2); *Brunet* v. *The King* (3).

A passage from the 3rd edition of Phipson on Evidence (1902), at p. 456, cited by Mr. Justice Cannon, which, at first blush, lends colour to the view taken by that learned judge, that the rule as to corroboration does not apply

> to the case of persons who have * * * continued in a conspiracy as agents of the police,

in our opinion does not correctly state the law. Indeed, this misleading statement will be found to have been corrected in a later edition of Mr. Phipson's work, viz., the 6th edition of 1921, at p. 486, where it is said that

> the rule requiring the corroboration of accomplices does not apply to * * * persons who have joined in or even provoked the crime as police spies.

The latter passage makes it clear that the informer must have been connected with the matter from the first only as a police spy and not merely have "continued" as such. This distinction underlies the observation made in Roscoe's Criminal Evidence (15th Ed.) at p. 156. Here, as already

(1) Q.R. 31 K.B. 391. (2) [1926] Can. S.C.R. 539.
(3) [1928] Can. S.C.R. 375.

stated, there was some evidence on which it was open to the jury to determine, if they were so advised, that, from the 22nd of July and up to the 2nd or 4th of August, the witness Boulanger was connected with the conspiracy charged against the defendants as a principal therein and not merely as *agent provocateur*, police spy or informer.

On the whole case, for the foregoing reasons and for those very clearly and succinctly stated by the learned Chief Justice of Quebec in his dissenting judgment, we are of the opinion that the conviction of the appellant Vigeant must be set aside and a new trial as against him ordered.

This conclusion is the more satisfactory, because, while not open for consideration in this court, owing to its not having been made a ground of dissent in the court below, we are disposed to think that a new trial might well have been ordered as to the present appellant by that court on the ground, there taken at bar, but not given effect to, that the learned trial judge had, contrary to the prohibition of subs. 5 of s. 4 of the *Canada Evidence Act*, R.S.C., c. 59, alluded, in the course of his charge, to the fact that the present appellant had not given evidence in his own behalf, when he said,

> Deux des accusés ont été entendus et *le troisième ne l'a pas été; c'était son droit. Ce sera à vous d'agir en conséquence. Bigaouette* v. *The King* (1).

It is always very unfortunate that a new trial should become necessary because of some misdirection by a trial judge. It is especially so where such misdirection is due to inattention to matters of substance. It is sometimes not as fully realized as it should be that such errors on the part of those charged with the conduct of criminal trials not only put the country to very considerable expense but also lead to delays and uncertainties in the administration of justice which are deeply regrettable.

Appeal allowed.

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(1) [1927] Can. S.C.R. 112.

1929
*Dec. 9.
1930
*April 10.

IN THE MATTER OF THE INCOME WAR TAX ACT 1917

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

AND

THE SASKATCHEWAN CO-OPERATIVE WHEAT PRODUCERS LTD.. RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Income tax—Income War Tax Act, R.S.C., 1927, c. 97—"Income"—"Profit or gain" from a trade or business—Assessability for income tax of "Saskatchewan Wheat Pool" in respect of sums retained for "commercial reserve" and "elevator reserve."

The respondent, commonly known as the "Saskatchewan Wheat Pool," was incorporated under the Saskatchewan *Companies Act*, and its incorporation was confirmed by c. 66 of 1924 (Sask.). Its primary object was to enable its members, who were Saskatchewan grain growers, to market their grain co-operatively. It was assessed for income under the *Income War Tax Act* (now R.S.C., 1927, c. 97) in respect of certain sums which it retained, from the gross returns of sale of grain, as a "commercial reserve" and as an "elevator reserve." It objected to the assessment on the ground that the sums so retained did not constitute income within the *Income War Tax Act*.

Held, that it was not assessable in respect of the said sums. Having regard to the provisions of its memorandum and articles of association, of its confirming Act, and of its agreement with the grain growers (its shareholders), its employment of the reserves, and provisions made for return to the growers, it could not be said that the reserves assessed constituted taxable income of respondent within the meaning of the *Income War Tax Act*. The basis of chargeability to income tax is the operation of a trade or business giving rise to a profit. The respondent in respect of said reserves was merely machinery for collecting contributions from the growers, not as its shareholders but as subscribers to the fund, and for using those moneys for the growers' benefit and handing them back in some form or other when no longer required; and hence the reserves could not be said to be "profits or gains" of respondent.

New York Life Ins. Co. v. *Styles*, 14 App. Cas., 481; *Jones* v. *S. W. Lancashire Coal Owners' Assn., Ltd.*, 42 T.L.R. 401, and other cases, referred to and discussed. *Last* v. *London Assur. Corp.*, 10 App. Cas. 438; *Commissioners of Inland Revenue* v. *Sparkford Vale Co-operative Soc. Ltd.*, 133 L.T., 231; *Fraser Valley Milk Producers' Assn.* v. *Minister of National Revenue*, [1929] Can. S.C.R. 435; *Liverpool Corn Trade Assn. Ltd.* v. *Monks*, [1926] 2 K.B. 110, and *Cornish Mutual Assur. Co. Ltd.* v. *Commissioner of Inland Revenue*, [1926] A.C., 281, discussed and distinguished.

Judgment of the Exchequer Court of Canada (Audette J.), [1929] Ex. C.R., 180, affirmed.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

1930

MINISTER OF NATIONAL REVENUE v. SASK. CO-OPERATIVE WHEAT PRODUCERS LTD.

APPEAL by the Minister of National Revenue from the judgment of the Exchequer Court of Canada (Audette J.) (1), allowing the appeal of the present respondent from assessments made against it for the years 1925 and 1926, under the *Income War Tax Act*, now R.S.C., 1927, c. 97. By the judgment of the Exchequer Court the assessments were declared to have been erroneously made and were set aside.

The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

C. F. Elliott K.C. for the appellant.

O. M. Biggar K.C. and *R. H. Milliken K.C.* for the respondent.

The judgment of the court was delivered by

LAMONT J.—This is an appeal by the Minister of National Revenue from the judgment of Mr. Justice Audette (1), in which he held that the respondent corporation was not liable to pay a tax, under the *Income War Tax Act* (now R.S.C., 1927, c. 97), in respect of the sums of money assessed against it as income. Section 9 of the Act provides that,

> Save as herein otherwise provided, corporations and joint stock companies, no matter how created or organized, shall pay a tax, at the rate applicable thereto set forth in the First Schedule of this Act, upon income exceeding two thousand dollars

The whole question here is, were the moneys, in respect of which the respondent was assessed for each of the years 1925 and 1926, part of its income for the year in question?

The respondent (commonly known as the "Saskatchewan Wheat Pool") is a body corporate, having been incorporated under the *Companies Act* of Saskatchewan on August 25, 1923, which incorporation was confirmed by statute (c. 66 of 1924). The primary object of its incorporation was to enable its members, who were Saskatchewan grain growers, to market their grain co-operatively. Its authorized capital is $100,000 divided into 100,000 shares of one dollar each. Shares in the corporation can be issued only to Saskatchewan grain growers, and of those, only to such as

(1) [1929] Ex. C.R. 180.

1930

MINISTER OF NATIONAL REVENUE v. SASK. CO-OPERATIVE WHEAT PRODUCERS LTD.

Lamont J.

enter into an agreement with the company for the marketing of grain in the form required by the company.

In this agreement the grower applies for one share of the corporation's capital stock and the corporation agrees to issue it to him. Each shareholder has only one vote and voting by proxy is prohibited. The governing body consists of sixteen directors, one from each of sixteen districts into which, for the purposes of the corporation, the province is divided. The shareholders in each district, from among themselves, elect ten delegates, and these delegates elect a director to the Board of Directors. The 160 delegates constitute the voting body at the annual meeting. Both the memorandum of association, and the statute confirming the same, contain the following provision:—

> No dividend shall be declared or paid to the shareholders of the company on the shares held by them in the company.

By its memorandum of association the objects of the respondent corporation are, *inter alia,* declared to be:—

1. To carry on the business of buying, selling, marketing and exporting of grain either as principal or agent.

2. To enter into any contract whatsoever for or incidental to the co-operative marketing of grain.

3. To act as agent or broker for its shareholders.

4. To operate a pool for grain received or handled by the corporation.

5. To make advances and payments from time to time on all grain delivered.

6. To enter into and carry into effect all and every agreement for the co-operative marketing of grain and, particularly, agreements with growers of grain in the province of Saskatchewan, a copy of which agreement is attached to the memorandum of association.

7. To distribute or pay to any person or persons who have held a contract or contracts with the company on the basis, so far as practicable, of their contributions, the moneys deducted or withheld from the proceeds of all or any commodity handled for such contract holder.

Of the articles of association reference need be made to one only, which provides that the business of the company is to be conducted in such a manner that, so far as possible, no profits will be taken from any member of the company on the marketing of his grain.

In the Marketing Agreement the respondent is referred to as the "Association" and, for convenience, I shall continue that designation.

By clause 8 of the agreement the grower appoints the Association his sole and exclusive agent, factor and mercantile agent within the meaning of "The Factors Act" of Saskatchewan and also his attorney in fact with full power and authority in its name, in the name of the grower, or otherwise,

(*a*) to receive, transport and market the wheat delivered to it by the grower;

(*c*) to borrow on its own account on the security of the grain delivered and to exercise all rights of ownership without limitation in respect of such grain;

(*d*) to retain and deduct from the gross returns from the sale of the wheat delivered to it by the growers, the amount necessary to cover all operating costs and expenses, and all other proper charges, and,

in addition, the Association may deduct such percentage, not exceeding 1% of the gross selling price of the wheat as it shall deem desirable as a commercial reserve to be used for any of the purposes or activities of the Association;

(*f*) to deduct from the gross returns from the sale of all wheat handled by the Association for growers * * * a sum out of each grower's proper proportion thereof, not exceeding two cents per bushel and to invest the same for and on behalf of the Association in acquiring either by construction, purchase, lease or otherwise such facilities for handling grain as the directors of the Association may deem advisable or in the capital stock or shares of any company or association formed or to be formed for the purpose of so erecting, constructing or acquiring such facilities and to sell or otherwise dispose of any such investment and re-invest the proceeds thereof in like manner.

This latter deduction is commonly known as the "Elevator Reserve."

Clause 9 reads as follows:—

9. Any unused balance of reserves and surpluses shall stand in the name of the Association and be owned by the members and shall, when in the opinion of the directors a distribution should be made or upon a dissolution of this Association, be divided in the same proportions in which it was contributed by the members.

Clause 16 provides for an advance to be made to the grower on delivery of his grain and for payment of the proceeds thereof to him when sold, less advances already made, deductions retained as provided for in the contract, and marketing expenses. It also provides that the grower's

1930

MINISTER OF NATIONAL REVENUE v. SASK. CO-OPERATIVE WHEAT PRODUCERS LTD.

Lamont J.

whole right to the proceeds of the grain "shall be to receive the initial advance and his due proportionate share of the moneys realized from the operation of the pool, less the deductions herein provided for."

By clause 26 the grower admits that the marketing agreement is a contract of agency coupled with a financial interest, and, by clause 27, any loss which the Association may suffer on account of inferior grade, quantity, quality or standard or condition at delivery, shall be charged against the grower and deducted from his net returns.

It is only the sums retained by the Association as a Commercial Reserve and as an Elevator Reserve that we are concerned with in this appeal.

Out of the proceeds of the grower's wheat the Association made the following deductions, at uniform rates pursuant to clause 8 (*d*) and 8 (*f*):

1925 (wheat operations)	
Commercial Reserve	$ 756,462 65
Elevator Reserve	958,238 32
	$1,714,700 97
1926 (wheat operations)	
Commercial Reserve	907,113 90
Elevator Reserve	2,594,267 53
	$3,501,381 43

In addition to the deductions made in 1926 in respect of wheat operations, there were certain sums retained by the Association out of the proceeds of the sale of coarse grain. Some 30,000 out of 80,000 growers, who held agreements for the marketing of wheat, also held agreements relating to the marketing of coarse grains. These latter agreements authorized the Association to sell the coarse grains delivered to it by the growers and to retain out of the proceeds a portion thereof, not exceeding certain specified percentages, as a commercial reserve, and as an elevator reserve. The amounts deducted in 1926, under the coarse grains agreements, were as follows:—

Commercial Reserve	$ 76,670 28
Elevator Reserve	157,498 35

For these sums retained by the Association in the years 1925 and 1926, it was assessed, and a tax, at the rate prescribed in the schedule, was levied thereon.

The Association refused to pay the taxes levied, on the ground that the sums deducted as reserves did not constitute income within the meaning of the *Income War Tax Act*.

Before inquiring into the question as to whether or not these reserves constitute taxable income, it may be useful to ascertain how they were employed by the Association, and what provision, if any, was made for their return to the growers from the proceeds of whose grain they were taken.

Dealing first with the elevator reserve, which is by far the larger amount, it will be observed that the agreements provide that this reserve is to be invested, on behalf of the Association, in procuring facilities for handling the grain, or in the capital stock of any company formed for the acquisition of such facilities. The evidence shews that the Association organized and incorporated the Saskatchewan Pool Elevators Limited, of which it owns all the capital stock.

To the Pool Elevators Limited the Association handed over all the moneys retained by it as an elevator reserve and the same were expended in acquiring elevator facilities.

The moneys retained as a commercial reserve were employed as follows:—

1. In paying the expenses of the Association from the beginning of each crop year until the grain of the year was sold and a deduction made from the sale proceeds to cover the operating expenses.

2. In advances to the Pool Elevators Limited.

3. In advances made from time to time to the Canadian Co-operative Wheat Producers Limited, commonly called the Central Selling Agency. This corporation was organized by the wheat pools of the provinces of Manitoba, Saskatchewan and Alberta, and was given charge of the actual selling operations of the three pools.

In ascertaining the final destination of these reserves regard must be had to clause 29 of the agreement, which provides that the Association shall receive the sale proceeds of the growers' grain and shall

account and settle for any moneys so received by crediting the same to the Grower on the Books of the Association, which moneys, less all deductions as herein provided, shall be distributed pursuant to the provisions of this Agreement.

1930

MINISTER OF NATIONAL REVENUE v. SASK. CO-OPERATIVE WHEAT PRODUCERS LTD.

Lamont J.

The whole marketing operation is as follows:—

The grower delivers his grain to the country elevator, either a Line elevator or an elevator belonging to the pool. By an arrangement made by the Association, prior to the commencement of the delivery of grain, the grower receives in cash, from the elevator at which his grain is delivered, a certain price per bushel fixed by the Association. The grain is then forwarded to a terminal elevator operated by the Central Selling Agency, and the documents of title sent to the agency's head office. Upon receipt thereof the Selling Agency remits to the country elevator the amount advanced by it to the grower. The Central Selling Agency from time to time markets the grain, and, out of the proceeds thereof, it retains the sums which it paid to the country elevator for moneys advanced to the growers. The balance it remits to the Association. The Association credits on its books each individual grower with his proportionate share. This it does from time to time as sales are made. One or more interim payments are made to the growers. When the grain has all been sold and the proportionate share of each grower in the proceeds determined, the Association calculates the amount which, under the marketing agreement, should be deducted for, (1) operating expenses; (2) commercial reserve, and (3) elevator reserve. The difference between the aggregate of the deductions, plus payments already made, and the amount credited to the grower in the books of the Association, is remitted to him as a final payment. After the deductions are made a notice is sent to the grower informing him of the amounts retained out of the proceeds of his grain for the commercial reserve and for the elevator reserve. Interest at 6% has been paid each year by the Pool Elevators Limited on the elevator reserves handed over to it, and, at the expiration of the agreement (1927) this interest was distributed among the growers in proportion to the amount deducted from each for the elevator reserve. The only distribution that has been made of the principal moneys of the two reserves has been in cases where the grower died, leaving his family in not very affluent circumstances. In 119 of these cases the directors have remitted, to the personal representatives of the deceased grower, the moneys retained by it out of the

proceeds of his grain, except that retained to cover operating expenses.

In view of these facts can it properly be said that the amount of these two reserves formed part of the income of the Association within the meaning of the *Income War Tax Act?*

On the argument it was contended that the Association received and marketed the grain merely as agent and that it held the proceeds thereof in trust for the growers in whom the beneficial title always remained. On this view the moneys comprising the reserves would not be moneys belonging to the Association and, therefore, would not be taxable. In my opinion the marketing agreement and the confirming Act do more than simply create the relationship of principal and agent, or mercantile agent, in the ordinary sense, between the growers and the Association. That relationship the agreement, without doubt, creates, but, in addition thereto, the property in the grain and in the proceeds is vested in the Association and all rights of ownership thereto without limitation are exercisable by it, for all or any of the purposes set out in the agreement. One of the purposes is to settle all claims for damages or otherwise that may arise in connection with the exercise by the Association of any of the powers or authority granted by the agreement. If, therefore, the reserves assessed in this case could properly be considered as assessable income of the Association, if no question of agency were involved, they can still be considered as income and the tax thereon a claim which the growers have authorized the Association to pay. Can these reserves properly be said to be "income"?

The definition of "income" for the purposes of the Act is found in section 3 thereof. As applied to this case "income" means the annual net profit or gain directly or indirectly received by a person from any trade or business, whether such profit or gain is distributed or not.

In revenue cases it is a well recognized principle that "regard must be had to the substance of the transactions relied on to bring the subject within the charge to a duty

1930

MINISTER OF NATIONAL REVENUE v. SASK. CO-OPERATIVE WHEAT PRODUCERS LTD.

Lamont J.

and the form may be disregarded." Pollock M.R., in *Inland Revenue Commissioners* v. *Eccentric Club, Ltd.* (1).

It is also well established that once the sum assessed has been ascertained to be profits of a trade or business, neither the motive which brought these profits into existence nor their application when made is material. *Mersey Docks & Harbour Board* v. *Lucas* (2). Nor does it signify that they were obtained by a company through trading with its own members as customers. Although a company may be given very wide powers, "its business is the business of doing what is necessary to carry out the objects which it elects to carry out." Lord Sterndale M.R., in *Commissioners of Inland Revenue* v. *Korean Syndicate, Ltd.* (3).

The business which the Association in this case elected to carry out was the marketing of grain for those who had entered into contracts with it for that purpose. Was that business being carried on for profit?

What is considered to be a profit or gain arising from a trade or business has been discussed in numerous cases. In *Gresham Life Assurance Society* v. *Styles* (4), Lord Herschell said:—

> When we speak of the profits or gains of a trader we mean that which he has made by his trading. Whether there be such a thing as profit or gain can only be ascertained by setting against the receipts the expenditure or obligations to which they have given rise.

In *Ryall* v. *Hoare* (5), Rowlatt J. said:—

> Without giving an exhaustive definition, therefore, we may say that where an emolument accrues by virtue of service rendered whether by way of action or permission, such emoluments are included in "profits or gains."

The test to be applied laid down in *Californian Copper Syndicate* v. *Harris* (6), is whether the amount in dispute was

> a gain made in an operation of business in carrying out a scheme for profit making.

This principle was approved by the Privy Council in *Commissioner of Taxes* v. *Melbourne Trust, Limited* (7), and by the House of Lords in *Ducker* v. *Rees Roturbo Development Syndicate Ltd.* (8).

(1) [1924] 1 K.B., 390, at p. 414.
(2) (1883) 8 App. Cas., 891.
(3) [1921] 3 K.B., 258, at p. 270.
(4) [1892] A.C. 309, at pp. 322-323.
(5) [1923] 2 K.B., 447, at p. 454.
(6) (1904) 5 T.C. 159.
(7) [1914] A.C. 1001.
(8) [1928] A.C. 132.

On the argument numerous cases were cited to us for the purpose of shewing when a company's surplus would be considered "profits or gains of a trade or business" and when it would not.

The cases of *Last* v. *London Assurance Corporation* (1), and *New York Life Insurance Co.* v. *Styles* (2), were cited respectively on either side. In the former case an insurance company, whose shareholders and policyholders were two different bodies, issued participating policies, according to the terms of which at the end of each quinquennial period the "gross profits" of such policies were distributed thus: Two-thirds were returned by way of bonus or abatement of premiums to the holders of such policies, and one-third went to the company. It was held by the House of Lords that the two-thirds returned to the policyholders were profits or gains to the company, and, therefore, taxable. In the latter case the company had no shares or shareholders. The only members were the holders of participating policies, each of whom was entitled to a share of the assets and liable for losses. The policyholders paid in premiums an amount in excess of the sums required for expenses and liabilities, and this excess of payment was returned to the policyholders at the end of the year in the shape of a cash reduction from future premiums or an addition to the amount of the policy. It was held that the amounts returned to the policyholders were not profits made by the company. The distinction between these two cases made by their Lordships was, that in *Last*'s case the company was making profits, and intending to make profits, not only from its own members but from others, which profits were divided between the participating policyholders and the shareholders of the company, which were entirely different bodies; while in the *Styles* case the individuals had associated themselves together for mutual insurance, that is to say "they contributed annually to a common fund out of which payments were to be made in the event of death to the representatives of the persons thus associated together. These persons were alone the owners of the common fund and entitled to its management. It was only

(1) (1885) 10 App. Cas. 438. (2) (1889) 14 App. Cas. 381.

1930

MINISTER OF NATIONAL REVENUE v. SASK. CO-OPERATIVE WHEAT PRODUCERS LTD.

Lamont J.

in respect of his membership that any person was entitled to be assured a payment upon death." In regard to these facts Lord Herschell, at page 409 of the report, uses this language:—

> Can it be said that the persons who are thus associated together for the purpose of mutual insurance, carry on a trade or vocation from which *profits* or *gains* accrue to them? I cannot think so.

At page 394 Lord Watson laid down the following:—

> When a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive * * * why contributions returned to them should be regarded as profits.

See also judgment of Vaughan Williams L.J., in *Equitable Life Assurance Society of the United States* v. *Bishop* (1).

The case of *Commissioners of Inland Revenue* v. *Sparkford Vale Co-operative Society Limited* (2), is clearly distinguishable: there the company bought milk from its own members and sold it to non-members, but, as Rowlatt J. pointed out in his judgment, the company (so far as appeared from the facts shewn), bought the milk outright and was in no sense a consignee for sale for its own members. Then it sold the milk to the public on its own account, and the difference between what it paid and what it received was profit to the company.

In *Fraser Valley Milk Producers' Association* v. *Minister of National Revenue* (3), the facts, in some respects, resemble those at bar. There is, however, this vital distinction: that in that case the contract provided for the payment of cash dividends on the paid up shares; it also provided that for the moneys retained by the association, under the contract, for purchasing facilities and equipment and so applied, paid up shares were to be issued and distributed to the purchasers in proportion to the butter fat value supplied by each. There it was held that the dividends received by the shareholders were received by them as shareholders. The dividends were, therefore, moneys paid out of profits, and, as profits, were assessable.

Two other cases were cited on behalf of the Minister. In *Liverpool Corn Trade Association, Limited* v. *Monks* (4),

(1) [1900] 1 Q.B., 177, at p. 189.
(2) (1925) 133 L.T. 231.
(3) [1929] Can. S.C.R. 435.
(4) [1926] 2 K.B. 110.

an incorporated company with a share capital of £6,000, provided a corn exchange and marketing facilities for its members, who were all engaged in the corn trade. Every member was required to subscribe for one share. Members paid an entrance fee and an annual subscription. Non-members might use the marketing and other facilities but they paid therefor a higher subscription than was charged against members. The company could, and at one time did, declare a dividend on its share capital. The articles of association provided that the directors might set aside out of the profits a reserve fund. This fund, in 1921, amounted to £74,000. It was held that the company's operations resulted in profits which were taxable. This case was distinguished from the *Styles* case (1) by the fact that the company had a share capital on which dividends might be paid if declared, and by the fact that both members and non-members paid individually for the services rendered and facilities provided. One of the purposes of the association, therefore, was the making of a profit on these services and facilities.

A somewhat similar case was that of *Cornish Mutual Assurance Co. Ltd* v. *Commissioners of Inland Revenue* (2). There the appellant was incorporated as a company limited by guarantee. It had no share capital and carried on a mutual fire insurance business. Each policyholder became a member on the issue to him of a policy. The revenue of the company was derived from: (*a*) entrance fees payable by members on taking up policies; (*b*) calls on members at the discretion of the directors, and (*c*) interest on investments. These funds were applicable by the directors to the general expenses of the company including payment of claims under its policies. The company was assessed in respect of the surplus arising from the contributions of its members. The House of Lords held that, although a mutual organization, the association carried on a trade or business and that such surplus was taxable. It was held taxable because, by a statute passed in 1920, it had been enacted that

> profits shall include in the case of mutual trading concerns the surplus arising from transactions with its members.

(1) (1889) 14 App. Cas. 381. (2) [1926] A.C. 281.

1930

MINISTER OF NATIONAL REVENUE v. SASK. CO-OPERATIVE WHEAT PRODUCERS LTD.

Lamont J.

The issuing of insurance policies by the association and the payment of fees and calls in respect thereof, was, without doubt, a transaction between the association and its members. The question however, was, did it arise from mutual trading? Their Lordships were of opinion that the term "mutual trading concerns" in the Act was intended to include such an association as the Cornish Mutual Company. A perusal of the judgment of the Lord Chancellor, rather indicates, in my opinion, that, but for the statutory provision (which has no counterpart in our Act), the surplus contributed by the members in that case might not have been considered taxable income.

The only other case to which reference need be made is *Jones* v. *S. W. Lancashire Coal Owners Association Limited* (1). In that case a mutual association was formed the sole activity of which was the indemnifying of its members, who were coal owners, against liability for compensation in respect of fatal accidents to workmen. The members of the association were the members protected by it, every member being liable to contribute a sum, not exceeding £25, in the event of a winding-up. The association formed a general fund by making calls upon members proportionate to the wages paid them for the time being, and the balance of the ordinary call fund was transferred to the reserve fund into which the extraordinary calls were also paid. Upon retirement a member could get back in cash a portion of his share in the reserve fund but, apart from that, members had no right at all to the cash in the reserve fund. It was held that the surplus, in respect of which the association was assessed, was not a profit made by it, as the association was mere machinery for the purpose of enabling members to insure themselves. In his judgment, Rowlatt J., at page 404, said:—

> As I understand it, all that the company does is to collect money from a certain number of people and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it. As I understand the *New York* case (*supra*), (2), the decision was that in such a case there is not any profit; it does not matter whether these people are called members of the company, or participating policyholders, or anything else; all that the company is doing is to collect

(1) Reported, along with *Thomas* v. *Richard Evans & Co. Ltd.*, in 42 T.L.R. 401 (1926).

(2) (1889) 14 App. Cas. 381

money from people for those people, to do certain things for them, and let them have the balance of their profit in some form or other, and there is no profit to the company in that transaction. If the people do it for themselves there is no profit. If they incorporate a legal entity to do it for them, and to provide the machinery for them, there is equally no profit * * *

and at page 405:—

I think the broad principle there laid down was that, if the interest in the money does not go beyond the people who subscribe it, or the class of people who subscribe it, then, just as there is no profit of any sort earned by the people themselves, if they act for themselves, so there is none if they get a company to act for them.

Just what is the line which separates the two classes of cases is difficult to define. Each case must depend upon its own particular facts. Although the Association has a share capital, the prohibition against paying a dividend thereon shews that it is not a profit making scheme for the Association or its shareholders. That of itself might not be conclusive. The material before us, however, shews that the reserves assessed were not contributed by the growers as payment for services rendered by the Association. Nor did they result from any trading between them, they were rather advances made by the growers to their agent to enable it to carry out the provisions of the marketing agreement. These advances were made on the understanding that, until, in the opinion of the agent, they were no longer required for the purposes for which they were advanced, they need not be returned to the growers, but, that, until they were returned, each grower would have a credit on the books of the Association for the amount contributed by him. No one but a grower who contributed to the reserves was entitled to a credit in respect thereof, or to participate in their distribution when distributed. Stress was laid by counsel for the Minister on the fact that there was no obligation upon the Association to distribute the reserves among the growers either in cash or in specie. The answer to this contention seems to be that there is no necessity for any contractual or statutory obligation. As the growers who contribute the reserves have, in their capacity as shareholders who elect the directors, the absolute control and management of the Association, it must be amenable to their will without any express provision to that effect. As the basis of chargeability to income tax is the operation of a trade or business giving rise to a profit, and as the Asso-

1930

MINISTER OF NATIONAL REVENUE v. SASK. CO-OPERATIVE WHEAT PRODUCERS LTD.

Lamont J.

ciation in this case in respect of the reserves assessed is merely machinery for collecting contributions from the growers, not as shareholders of the Association but as subscribers to the fund, and for using those moneys for the benefit of the growers and handing them back in some form or other when no longer required, I am of opinion that the sums assessed cannot properly be said to be "profits or gains" of the Association. The appeal, therefore, should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *C. F. Elliott.*

Solicitor for the respondent: *O. M. Biggar.*

1930

*Mar. 12, 13.
*April 22.

LAURA LITTLEY AND STANLEY LITTLEY, AN INFANT BY HIS NEXT FRIEND, LAURA LITTLEY (PLAINTIFFS) ..... APPELLANTS;

AND

MANSFORD BROOKS AND CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANTS) ..... RESPONDENTS.

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

Negligence—Railways—Action against railway company for damages from accident at railway crossing—Sufficiency of evidence as to negligence —Admissibility of evidence—Wrongful withdrawal of case from jury —New trial—Railway line formerly under provincial jurisdiction, but, prior to accident, coming under federal jurisdiction—Admissibility in evidence of order made by provincial railway board during its period of jurisdiction.

Plaintiffs sued under the *Fatal Accidents Act,* Ont., for damages for the deaths of occupants of an automobile through its collision with defendant company's electric train at a crossing near Lambton, Ontario. At conclusion of the evidence for plaintiffs, the trial judge withdrew the case from the jury and dismissed the action. An appeal to the Appellate Division, Ont., was dismissed, on equal division (36 Ont. W.N. 268). On appeal to this Court:

Held: There were facts in evidence from which negligence of defendants *might be* reasonably inferred by a jury; it was for the jurors to say whether from those facts negligence *ought to be* inferred (*Metropoli-*

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

tan Ry. Co. v. *Jackson,* 3 App. Cas., 193, at p. 197). Therefore the case should not have been withdrawn from the jury, and there must be a new trial.

The railway line had formerly been operated by a provincial company. By 9-10 Geo. V, c. 13 (Dom.), the line was declared (as the work of a "constituent and subsidiary company comprised in the Canadian Northern System") to be a work for the general advantage of Canada. At the trial there was tendered as evidence for plaintiffs, and rejected as inadmissible, an order of the Ontario Railway and Municipal Board, made in 1917, when the line was under provincial jurisdiction, and made under s. 123 of the *Ontario Railway Act,* R.S.O., 1914, c. 185. The order was expressed to be made "for the protection of the public," after the Board had "inspected" the crossing and had instructed its engineer to inspect it and report and he had done so. It provided a rule concerning the safety of persons using the crossing.

Held: The order had no continuing effect, once the line became (under the declaration aforesaid) a Dominion railway. Secs. 7 and 2 (28) of the Dominion *Railway Act, 1919,* (9-10 Geo. V, c. 68) were especially discussed in this regard. The question of precautions at highway crossings was one specially dealt with by ss. 308, 309 and 310 of that Act, to which, by the declaration, the line immediately became subject; these sections applied to the exclusion of any provincial statute and, *a fortiori,* of any provincial regulation; they were inconsistent with the order in question.

Held, further, however, that, while the order was not admissible as a rule enforceable against the defendant company, it was (subject to the qualification *infra*) admissible as affording evidence of an adjudication by a competent tribunal upon the dangerous character of the crossing—a matter of public concern—at the time the order was pronounced, and presenting a standard of reasonableness upon which a jury might act (*Pim* v. *Curell,* 6 M. & W., 234, at p. 266; *Neill* v. *Duke of Devonshire,* 8 App. Cas., 135, at p. 147; *Sturla* v. *Freccia,* 5 App. Cas., 623; Phipson on Evidence, 6th ed., p. 355; Taylor on Evidence, 10th ed., pp. 442-3, 1213). But, in such cases, if, as a result of a subsequent enquiry made by the same or a similarly competent public authority, such an order were set aside or superseded, it would cease to have any evidentiary value; that would be the case here should it be established at the trial that, since the railway came under federal control, the Board of Railway Commissioners made an enquiry of its own and concluded that, by providing for other and different means of safety, or simply by following the general railway law, the crossing was protected to its satisfaction. It would also be open to defendants to shew that, since the order in question was made, the conditions at the crossing had ceased to be substantially the same as at that time.

APPEAL by the plaintiffs from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing (on equal division of the court) the plaintiffs'

(1) (1929) 36 Ont. W.N. 268.

1930

LITTLEY v. BROOKS AND CANADIAN NATIONAL RY. CO.

appeal from the judgment of Wright J. (sitting with a jury) who at the close of the plaintiffs' case granted the defendants' motion for a non-suit and dismissed the action. The action was brought under the Ontario *Fatal Accidents Act* to recover damages for the deaths of certain persons, occupants of an automobile, resulting from a collision between an electric train of the defendant company and the said automobile, which collision the plaintiffs alleged was caused by the negligence of the defendant company, its servants or agents, and of the defendant Brooks, who was the motorman of the train. The non-suit was granted on the ground that there was no evidence upon which the jury could reasonably find a verdict against the defendants. The material facts of the case and the issues in question, so far as was necessary for the disposition of the present appeal, are sufficiently stated in the judgment now reported. The appeal was allowed, with costs in this Court and in the Appellate Division, and a new trial ordered, the costs of the abortive trial to abide the event of the new trial.

J. R. Robinson and *J. L. Kemp* for the appellants.

R. E. Laidlaw for the respondents.

The judgment of Anglin C.J.C., and Rinfret, Lamont and Smith JJ., was delivered by

RINFRET J.—Walter Littley and three of his children were killed on the 18th day of June, 1928, in a collision between his automobile and an electric train operated by the respondent, Canadian National Railway Company, on which the respondent, Mansford Brooks, was the motorman.

The accident occurred on a level crossing, where the electric railway line intersects Dundas street, on the hill above Lambton, in the province of Ontario.

The appellants are the widow and an infant son of Walter Littley. They brought an action against the company and the motorman, under the provisions of *The Fatal Accidents Act* (ch. 183 of the Revised Statutes of Ontario, 1927). At the trial, after the appellants had concluded their evidence, the case was withdrawn from the jury and the presiding judge dismissed the action. Upon appeal, a motion to set

aside the judgment and for a new trial was dismissed on an equal division in the judges of the Appellate Division (1).

The judgment of the trial judge complained of had held that the evidence of negligence in the record was not sufficient to be submitted to the jury. So far as at least concerned the company, this judgment was sustained by all the judges of appeal; but two of them were of the opinion that the result at the trial was "due, in part at least, to the rejection of evidence by the learned trial judge, with whose ruling (they were) not in accord"; and they would have directed a new trial.

We propose to discuss, first, the sufficiency of the evidence actually put in by the plaintiffs and, then, the admissibility of what was rejected by the trial judge.

One of the allegations of negligence against the defendants was the "failure to give an adequate warning by sounding whistle, horn or bell, of the approach of the electric train."

The railway is subject to federal legislation and, under the *Railway Act* (R.S.C., 1927, c. 170), when the train was approaching the highway crossing at rail level, the engine whistle had to "be sounded at least eighty rods before reaching such crossing" (s. 308). In addition to that—and that might indicate the peculiar danger of Dundas street crossing—evidence was given that the company had placed a whistle post on the right of way alongside the railway track, at a distance of 331 feet from the travelled portion or pavement of Dundas street, and that, in this particular instance, it was the duty of Mansford Brooks, the motorman, to sound the whistle at that post.

Now, the evidence of one Gordon Worgan was given on behalf of the plaintiffs. Worgan lived on Church street, south of Dundas street. His house was 300 yards south of the whistle post. From there he could see the tracks of the electric railway. At the time of the accident, he was standing on his verandah, facing the right of way and talking with a man who had come to see him on some business. Worgan testified as follows:

Q. What signals did it give as it approached the crossing?—A. I heard it whistle.

Q. Whereabouts was it when it whistled?—A. It whistled at the crossing, I cannot say how near but it seemed to be at the crossing.

(1) (1929) 36 Ont. W.N. 268.

1930

LITTLEY v. BROOKS AND CANADIAN NATIONAL RY. CO.

Rinfret J.

Q. Was the locomotive in sight at the time it whistled?—A. It was a loud whistle.

Q. Was the locomotive in your line of vision when it whistled?—A. No.

Q. What kind of whistle was it?—A. It was a loud whistle, then I heard the crash.

Q. Were there any other signals given?—A. No, not that I heard.

Q. How long after the whistle stopped did you hear the crash?—A. The two seemed to be together, for it kind of startled me; I said to Mr. Chambers—

HIS LORDSHIP: Never mind what you said.

Mr. ROBINSON: Where was the train in reference to the whistle post when you heard the whistle?—A. I could not say that.

HIS LORDSHIP: You could say then had it passed the whistle post at that time?—A. I could not see from where I was, whether it had or not; I heard it whistle at the crossing an extra loud whistle it seemed to me.

Q. When you heard the loud whistle the train was near the crossing then?—A. Yes.

Q. It would have passed the whistle post then when you heard the loud whistle?—A. Yes.

Mr. ROBINSON: Can you indicate on this plan where your line of vision stops on the railway from the point where you were standing there? —A. Which is the whistle post?

Q. Here; that is the Hydro tower at the corner, here is the orchard in here?—A. I could see it through here all right, to the end of this (indicating).

Q. When you are looking across the fields you could see, as you say, 300 yards down the track, from the crossing, how close to the crossing can you see?

HIS LORDSHIP: He said before about 50 yards are obscured?—A. Yes.

Mr. ROBINSON: Did you hear any other signal besides the whistle?— A. No, sir.

That he did not hear the sound of the whistle is, as a general rule, the most any witness can say as to whether the particular signal was or was not given. No doubt, his evidence will not be relevant or material, if, at the time, the witness was not in a position to hear or was shown not to have been paying any attention whatever. But, in a later part of his testimony, Worgan said that "what first attracted (his) attention to the train" was "the sound of it going along the line." He could "hear the rumble of this train for a distance of 300 yards." If he could hear the train, it would not be unreasonable to assume that had the whistle been sounded, he could also have heard it. And if, under the circumstances he described, Worgan did not hear it, a fair and even logical inference may be that the whistle was not sounded either at eighty rods from the crossing or at the whistle post.

That evidence, if believed by the jury, would establish the fact of non-performance by the motorman of a specific positive duty laid on him by the statute or imposed as a precautionary measure by the company itself; and if, in the opinion of the jury, the omission caused or contributed to the accident, it would entail the responsibility of both the motorman and the company.

That would bring this case within the rule laid down by Lord Cairns in *Metropolitan Railway Company* v. *Jackson* (1):

> The Judge has a certain duty to discharge, and the jurors have another and a different duty. 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. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the Jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.

In the passage quoted from Worgan's testimony, we think there was "evidence—more than a mere scintilla—from which negligence *may be* reasonably inferred"; and it was for "the jurors to say whether, from those facts, when submitted to them, negligence *ought to be* inferred." Accordingly the case should not have been withdrawn from the jury, and there must be a new trial as against both respondents.

Following our practice when a new trial is directed, we refrain from expressing any opinion on the evidence as a whole beyond what is necessary to warrant the conclusion we have reached. Having found a state of facts on which, in our opinion, the jurors would be entitled to hold that negligence might be inferred, that is sufficient for the purposes of disposing of the appeal. We go no further. We do not say that there is not, in the record, other evidence of the same character as that of Worgan and in respect of which a similar comment might be made. Nor do we say that Worgan's evidence is strong or ought to be believed.

(1) (1877) 3 App. Cas. 193, at 197.

1930

LITTLEY v. BROOKS AND CANADIAN NATIONAL RY. CO.

Rinfret J.

We appreciate that the trains go past Worgan's house quite frequently, that "this was not anything out of the ordinary" and that, moreover, at the time of the accident, Worgan was talking to another man. Those were circumstances to be drawn to the attention of the jurors and to be weighed by them.

We would add, however, that as regards the motorman Brooks alone, there were certain statements put in from his examination on discovery which, though not evidence against the company, would have warranted the trial judge in submitting to the jury at least the issue between the appellants and that respondent. But it is advisable not to say anything further, since the case must be retried.

There remains to be discussed the alleged improper rejection of evidence.

An order of the Ontario Railway and Municipal Board, bearing no. P.F. 4478 and dated September 20, 1917, was tendered as an exhibit on behalf of the plaintiffs and was refused at the trial, when the following discussion took place:

Mr. ROBINSON: I propose to file an order of the Ontario Railway and Municipal Board.

HIS LORDSHIP: What have they to do with this case?

Mr. ROBINSON: There is an order of the Railway Board.

HIS LORDSHIP: They have no jurisdiction over this railway.

Mr. ROBINSON: They have jurisdiction over it until it is superseded.

HIS LORDSHIP: They have no jurisdiction over a Dominion railway.

Mr. ROBINSON: At the time this order was made they had jurisdiction.

HIS LORDSHIP: That would not make any difference. You allege in your pleadings that this is a railway incorporated under the Revised Statutes of Canada; the Ontario Railway and Municipal Board has no jurisdiction over a railway so incorporated.

Mr. ROBINSON: I am suing the Canadian National Railway and at the time this order was made—

HIS LORDSHIP: That does not make a particle of difference, and I am not going to admit the evidence because you allege that this is a Dominion railway and no order of the Ontario Board has any effect over a Dominion railway. I refuse the evidence. You have tendered it and—

Mr. ROBINSON: I might be permitted to speak in support of my application?

HIS LORDSHIP: What have you to say in support?

Mr. ROBINSON: At the time this order was made there was jurisdiction in the Ontario Railway and Municipal Board to make it: that order has never been superseded.

HIS LORDSHIP: It does not need to be because when it becomes a Dominion railway it goes out; and that is my ruling.

Mr. ROBINSON: I would like a note made that this evidence is tendered, my Lord, and I further tender it on this point as proving that it is a dangerous crossing.

HIS LORDSHIP: That cannot declare it is a dangerous crossing—no jurisdiction at all.

Mr. ROBINSON: It is tendered on that point as well.

Mr. LAIDLAW: I think my friend should not have made that statement before the jury.

HIS LORDSHIP: Well, I will correct it.

Mr. ROBINSON: I have to tender that on that point, and I do not know any other way I could have put it.

HIS LORDSHIP: It would be unheard of if that were so, a railway under the jurisdiction of two railway boards, who make conflicting orders.

Mr. ROBINSON: Two have.

HIS LORDSHIP: Well, I have ruled, that is the end. I don't want to hear any more.

The circumstances are these:

The order is addressed to The Toronto Suburban Railway Company, a provincial company operating the electric railway at the time the order was made. By an Act to incorporate Canadian National Railway Company and respecting Canadian National Railways (ch. 13 of Statutes of Canada, 9-10 George V), The Toronto Suburban Railway Company was stated, in the first schedule, to be a "constituent and subsidiary company comprised in the Canadian Northern system" and, as such, by the 18th section of the Act, it was declared to be a work for the general advantage of Canada.

The question is whether the regulations made by the provincial railway board still continued to apply as such to that railway.

We agree with those of the learned judges below who held that they did not.

The effect of the declaration, by force of section 7 of *The Railway Act, 1919* (ch. 68 of 9-10 George V), was to subject the railway to federal legislation and control, "to the exclusion of such of the provisions of (its) Special Act as (were) inconsistent with the (said Railway) Act, and in lieu of any general railway Act of the province."

1930

LITTLEY v. BROOKS AND CANADIAN NATIONAL RY. CO.

Rinfret J.

The Special Act, when used with reference to a railway, is defined in the *Railway Act* (subsection 28 of section 2 of c. 68, 9-10 George V) as meaning

> any Act under which the company has authority to construct or operate a railway, or which is enacted with special reference to such railway, whether heretofore or hereafter passed, and includes,—
>
> (*a*) all such Acts,
>
> (*b*) [refers to Grand Trunk Pacific Railway],
>
> (*c*) any letters patent, constituting a company's authority to construct or operate a railway, granted under any Act, and the Act under which such letters patent were granted or confirmed.

Such only, therefore, of the provisions of the Special Act so defined as were not inconsistent with the federal *Railway Act, 1919,* continued to apply to the respondent company's railway. Otherwise, the railway was withdrawn from the authority of the provincial laws and of the regulations adopted by the provincial boards. For, as said by Middleton J.A., (with whom Mulock C.J.A., concurred), these regulations could "have no greater authority or validity than if they were found in The Ontario Railway Act," and we would add: or in the Special Act enacted with reference to the railway.

The question of precautions at highway crossings is one specially dealt with by sections 308, 309 and 310 of the federal *Railway Act* to which, by the declaration, the railway immediately became subject. These sections applied to the exclusion of any provincial statute and, *a fortiori,* of any provincial regulation. They were inconsistent with the Order of the Ontario Railway and Municipal Board tendered in evidence by the plaintiffs.

The Board of Railway Commissioners for Canada, under whose jurisdiction the railway was placed, was immediately vested with full and exclusive authority to make orders in respect of Dundas street crossing. This authority was to be exercised unhampered by any pre-existing regulation or order of the provincial board, which could not be done unless the effect of section 7 is to exclude all such regulations, for the Dominion Railway Act contains no provision empowering the Board of Railway Commissioners to rescind or cancel a provincial regulation or order. We think, therefore, the latter had no continuing effect once the road became a Dominion Railway. But, contrary to what was urged before us, this does not make for a period of lawless-

ness, for the federal legislation must be presumed to be adequate to fully cover the situation and there is nothing to prevent The Board of Railway Commissioners from immediately adopting any measures required in special cases. Moreover, the Act of the Parliament of Canada declaring the railway to be a work for the general advantage of Canada might, if thought necessary or desirable, well contain a provision continuing in force provincial orders and regulations unless and until reconsidered by the Dominion Board.

The learned trial judge was therefore right in ruling that the Order of the 20th day of September, 1917, was no longer in force as an order binding on the respondent railway company.

But the Order was made by the Ontario Railway and Municipal Board " in the matter of section 123 of The Ontario Railway Act," being then chapter 185 of the Revised Statutes of Ontario, 1914. Section 123 of that Act provided that

> where a railway is already constructed upon, along or across any highway the Board may, upon its own motion, or upon complaint or application by or on behalf of the Crown, or any municipal or other corporation, or any person aggrieved, order the company to submit to the Board, within a specified time, a plan and profile of such portion of the railway and may cause inspection of such portion and may inquire into and determine all matters and things in respect of such portion, and the crossing, if any, and may make such order as to the protection, safety and convenience of the public as it deems expedient * * * and that such other work be executed, watchmen or other persons employed, or measures taken as under the circumstances appear to the Board best adapted to remove or diminish the danger or obstruction, in the opinion of the Board, arising or likely to arise in respect of such portion or crossing, if any, or any other crossing directly or indirectly affected.

The Order was made while the Ontario Board had jurisdiction over the Dundas street crossing. It is expressly stated to have been made " for the protection of the public," after the Board had " inspected " the crossing and had " instructed its Engineer to inspect and report on the said crossings, and the said Engineer having completed his inspection and filed his Report." It provided a rule concerning the safety of persons using the crossing.

The plaintiffs alleged that the train was being operated at an excessive and immoderate rate of speed considering the dangers of the crossing. While the Order was rightly rejected as a rule binding on the company, it was further tendered as affording evidence that Dundas street crossing

1930

LITTLEY v. BROOKS AND CANADIAN NATIONAL RY. CO.

Rinfret J.

was dangerous, and that it was not unreasonable to require that some precaution be taken there such as it prescribes. Documents such as these will be received in evidence when they contain the results of inquiries made, as here, under competent public authority in the exercise of a judicial or quasi-judicial duty and concerning matters in which the public are interested. (See speech of Lord Blackburn in *Sturla* v. *Freccia* (1); see also Phipson, Law of Evidence, 6th ed., p. 355). Lord Abinger's words in *Pim* v. *Curell* (2) are apposite:

> In the cases where reputation is evidence, that is, cases involving a general right, in which all the Queen's subjects are concerned, a verdict or a judgment upon the matter directly in issue between the parties (although between other parties) is also evidence; not, however, that it is evidence of any specific fact existing at the time, but that *it is evidence of the most solemn kind, of an adjudication of a competent tribunal upon the state of facts, and the question of usage at that time.*

These words are quoted with approval by Lord Selborne L.C., in *Neill* v. *Duke of Devonshire* (3) who adds:

> Such evidence * * * is not itself, in any proper sense, evidence of reputation. It really stands upon a higher and a larger principle.

We think, therefore, that the Order was admissible not as a rule that could be enforced against the railway company, but as affording evidence of an adjudication by a competent tribunal upon the dangerous character of the crossing—a matter of public concern,—at the time the Order was pronounced, (Taylor, on Evidence, 10th ed., pp. 442-443 and 1213) and presenting a standard of reasonableness upon which a jury might act.

We must qualify what we have just said by adding that if, as a result of a subsequent inquiry made by the same or a similarly competent public authority, the regulation, order, rule or decree was set aside or superseded, it would, of course, cease to have any evidentiary value. That will be the case, should it be established at the new trial that, since the railway came under federal control, the Board of Railway Commissioners proceeded to make an inquiry of its own and came to the conclusion that, by providing for other and different means of safety, or simply by following the general railway law, "the said crossing is protected

(1) (1880) 5 App. Cas., 623.

(2) (1840) 6 M. & W. 234, at p. 266.

(3) (1882) 8 App. Cas. 135, at p. 147.

to the satisfaction of the Board." It may be—although we express no opinion on this point—that this will be shown to be the actual condition, as a result of Order No. 39895 of the Board of Railway Commissioners, dated the 19th day of November, 1927. This Order was tendered as exhibit, but was refused because it did not bear the certificate required by section 68 of the *Railway Act* (R.S.C., 1927, ch. 170). No doubt, at the new trial, the copy of the Order will have been properly certified and its admissibility on that ground at least will be no longer in dispute.

For the reasons stated, we direct a new trial, with costs here and in the Court of Appeal; the costs of the abortive trial to abide the result. We further hold that the Order of the Ontario Railway and Municipal Board dated the 20th day of September, 1917, may be received in evidence for the limited purpose we have indicated, unless it is shown to have been superseded by a subsequent order of the same Board made while it was still in control or of the Board of Railway Commissioners for Canada, and subject, of course, to the right of the defendants to shew that, since the Order, the conditions at or about the Dundas street crossing have ceased to be substantially the same as when the Order in question was made.

DUFF J. concurred in the result.

Appeal allowed with costs, and new trial ordered.

Solicitor for the appellants: *Church & Robinson.*

Solicitor for the respondents: *R. E. Laidlaw.*

1930
*Mar. 10, 11.
*April 10.

FRANK RYAN (DEFENDANT).....APPELLANT;

AND

KATHERINE CHARLESWORTH, ADMINISTRATRIX OF THE ESTATE OF PETER RYAN, DECEASED, AND THE SAID KATHERINE CHARLESWORTH (PLAINTIFF) ..... } RESPONDENT.

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

Executors and Administrators—Fraudulent conveyances—Attack by plaintiff, claiming as judgment creditor of deceased and as administratrix

*PRESENT:—Duff, Newcombe, Rinfret, Smith and Cannon JJ.

1930

of his estate, on alleged transfers by deceased in fraud of creditors—Status of plaintiff in said capacities—Doctrine as to extinguishment of debt due to an executor by his testator.

Plaintiff, a daughter of R., deceased, purchased judgments which had been obtained against R. in his lifetime. She later became administratrix of his estate. She then, as administratrix and in her personal capacity, sued her brother, the defendant, attacking transfers made by R. to defendant as having been made to defraud creditors. The Appellate Division, Ont. (36 Ont. W.N. 265), held that the transfers were fraudulent and void as against creditors; and that defendant must account and pay over, out of what had been transferred to him, sufficient to meet creditors' claims; but rejected plaintiff's claim as administratrix to the further moneys in defendant's hands. On appeal and cross-appeal:

Held (1) The findings below that the transfers were made in fraud of creditors should be sustained.

(2) As to defendant's contention that plaintiff's claims against R.'s estate were extinguished by operation of law upon the grant of letters of administration followed by the acquisition of assets by her as administratrix—putting the doctrine, as to extinguishment of a debt due to an executor from his testator, in the form most favourable to defendant, it had no application in this case, as there was nothing to show the existence of assets in plaintiff's hands "sufficient and properly applicable to pay" the judgments acquired by her (*In re Rhoades*, [1899] 2 Q.B. 347, at pp. 352-353).

(3) Plaintiff's position as administratrix did not entitle her to attack the fraudulent transfers. A debtor who fraudulently transfers his property cannot himself attack his fraudulent transaction, and his administrator has no greater right (*Shaw* v. *Jeffery*, 13 Moo. P.C., 432; *Hawes* v. *Leader*, 1 Brownl. & G. 111; *Orlabar* v. *Harwar*, Comb. 348; *Ayerst* v. *Jenkins*, L.R. 16 Eq., 275; *Colman* v. *Croker*, 1 Ves. 160).

Judgment of the Appellate Division, Ont. (*supra*) affirmed.

APPEAL by the defendant from the judgment of the Appellate Division of the Supreme Court of Ontario (1) varying, but as varied affirming, the judgment of Raney J. (2).

The plaintiff and defendant are children of Peter Ryan, late of the city of Toronto, deceased, who died on October 26, 1925, intestate. Letters of administration of his property were granted to the plaintiff on October 31, 1927.

The plaintiff alleged that judgments had been obtained against the said deceased in his life time; that she in her personal capacity had purchased all such judgments as were in force at the date of his death of which she had been able to obtain any knowledge, and was the assignee thereof.

(1) (1929) 36 Ont. W.N. 265. (2) (1928) 34 Ont. W.N. 284.

The dates of the plaintiff's acquisition of the judgments were prior to the date of her taking out letters of administration.

The plaintiff, as administratrix of the deceased's estate, and in her personal capacity, brought action in the Supreme Court of Ontario, alleging that said deceased had from time to time transferred to the defendant various sums of money, stocks, bonds and other assets of said deceased, with intent to defeat, delay and hinder his creditors from obtaining payment of their judgments; that such transfers were fraudulent and void as against the judgment creditors and as against her as their assignee; and that defendant had full knowledge of the circumstances and of said intent and was a party to the fraudulent scheme to defeat the creditors; further that all assets transferred to defendant as aforesaid were to be held by him in trust for the said deceased and form part of his estate. She claimed an account, an order requiring defendant to assign and transfer all of said assets to her as administratrix of the estate of said deceased, and incidental relief.

The defendant denied the plaintiff's allegations; and alleged that, while it was true that from time to time the deceased had given to him sums of money and securities, these were given to him as absolute gifts and advancements for the purpose of assisting him in his business; that many transfers of property had been made by deceased to plaintiff and other members of the family in addition to those made to defendant, and that the transfers made to defendant represented that share or portion which the deceased desired that defendant should have in his estate; and that all transfers made by the deceased to the defendant or other members of the family were matters of common knowledge to plaintiff and other members of the family.

Raney J. (1) gave judgment against the defendant. The formal judgment at trial was as follows:

> 2. * * * that the moneys, stocks, bonds and other assets of the said Peter Ryan transferred or caused to be transferred to the defendant were not gifts to the defendant or advances to him, but were so transferred for the sole purpose of defeating, delaying and hindering the creditors of the said Peter Ryan from obtaining payment of their claims and that all such transfers were and are fraudulent and void and doth order and adjudge the same accordingly;

(1) (1928) 34 Ont. W.N. 284.

1930

RYAN
v.
CHARLESWORTH.

3. * * * that it be referred to the Master of this Court to inquire and state what moneys, stocks, bonds and other assets were transferred by the said Peter Ryan to the said defendant and what of such assets remained in the hands of the said defendant at the date of the issue of the writ in this action and when and for what consideration the defendant disposed of the remainder of said assets and the market value thereof on this date, and the said Master is hereby directed to advertise for creditors of the said Peter Ryan and to pass on the claims of said creditors and to report;

4. * * * that the moneys and securities received by the plaintiff from the said Peter Ryan and the securities still in the hands of the defendant that were received by him her sister, Margaret Monteith, and her brother, Bernard Ryan, belong to the Estate of the said Peter Ryan, and doth order and adjudge the same accordingly. [*Reporter's Note:* Apparently there is some omission or error in this paragraph. As to what was directed by the trial judge, see 34 Ont. W.N., at p. 286.]

5. * * * appoints the Sheriff of the City of Toronto Receiver of the assets of the Estate of the said Peter Ryan and directs the plaintiff and the defendant to turn over to the said receiver all moneys and securities in their hands belonging to the said estate and that the solicitor for the said sheriff shall act as solicitor for all creditors of the said Peter Ryan other than those whose claims have been assigned to the plaintiff until such creditors are ascertained and are otherwise adequately represented on the said reference;

6. * * * that further directions and the question of costs and of the Sheriff's compensation be reserved until the said Master shall have made his report.

On appeal by the defendant, the Appellate Division (1) varied the judgment below, but, subject to the variation, dismissed the appeal with costs. The formal judgment in the Appellate Division was as follows:

Upon motion * * * by way of appeal * * * and the plaintiff by her counsel agreeing not to assert any individual claim to the moneys recovered from the defendant save for her out of pocket expenses in obtaining the assignments of the judgments on which this action is brought and to hold the moneys recovered from the defendant for the benefit of the next of kin of the said Peter Ryan, deceased, other than the defendant, * * *

1. This Court doth order that the said Judgment be varied and as varied be as follows:

(1) "* * * that the moneys, stock, bonds and other assets of the said Peter Ryan transferred or caused to be transferred to the defendant were so transferred for the sole purpose of defeating, delaying and hindering the creditors of the said Peter Ryan from obtaining payment of their claims and that all such transfers were and are fraudulent and void as against the plaintiff Katharine Charlesworth and other creditors of the said Peter Ryan, deceased, and doth order and adjudge the same accordingly.

(1) (1929) 36 Ont. W.N. 265.

(2) "* * * that it be referred to the Master of this Court at Toronto to ascertain and state whether the judgments of the plaintiff are the only liabilities of the estate of the said Peter Ryan, deceased, and the said Master is directed to advertise for creditors of the estate of the said Peter Ryan, deceased, and that the said Master do ascertain the amount of the plaintiff's claim and that he do ascertain and pass upon the claims of the other creditors, if any, of the said estate.

(3) "* * * that the defendant do pay to the plaintiff the amount found due to her by the said Master forthwith after the confirmation of the said Master's report and that the said money when recovered by the plaintiff be disbursed in accordance with her undertaking.

(4) "* * * that after payment of the plaintiff's costs the defendant do pay to the other creditors of the said Peter Ryan, deceased (if any), the amounts found due to them by the said Master's report forthwith after the confirmation thereof.

(5) "* * * that Margaret Ryan and Bernard Ryan be added as party defendants in the Master's Office.

(6) "* * * that the plaintiff do recover from the defendant her costs of this action and of the reference before the said Master forthwith after taxation thereof.

7. "* * * that the said Master do also take an account of the costs of the plaintiff as between solicitor and client and the costs, charges and expenses and disbursements of the plaintiff of and incidental to this action over and above the plaintiff's costs as between party and party and apportion the difference among the creditors who have proved their claims before him, including the plaintiff, in proportion to the amounts of their respective claims, and that the said creditors other than the plaintiff do pay to the plaintiff their respective proportions of such difference."

2. And this Court doth further order that in all other respects this appeal be and the same is dismissed.

3. [Costs of the appeal.]

The defendant appealed from the judgment of the Appellate Division to the Supreme Court of Canada. The plaintiff, while submitting that the judgment appealed from was correct in so far as it gave effect to her claim as a judgment creditor, submitted, by way of cross-appeal, that the judgment should be amplified to give effect to her claim as administratrix to recover from the defendant all the property of the deceased that came into his hands in order that she might administer the estate according to law.

The appeal and cross-appeal were dismissed with costs.

D. L. McCarthy K.C. and *S. Haydon* for the appellant.

I. F. Hellmuth K.C. and *M. Des Brisay* for the respondent.

1930

RYAN v. CHARLESWORTH.

Duff J.

The judgment of the court was delivered by

DUFF J.—This appeal should, in my opinion, be dismissed. Three substantial points were raised on the argument and these I shall discuss *seriatim*.

First, Mr. McCarthy's principal contention was that the respondent's claims against the estate of Peter Ryan were extinguished by operation of law upon the grant of letters of administration followed by the acquisition of assets by her as administratrix. This, I think, is completely answered by the judgment of Lindley M.R., in *In re Rhoades* (1):

> The older common law authorities go far to shew that if an executor was a creditor of his deceased testator and had assets in his hands sufficient to pay his debt (and all others of a higher degree, if any) such debt was treated as extinguished. Sufficient assets to pay his own debt and properly applicable thereto being in the executor's hands, such assets were treated without more as applied by him to such payment. Blackstone says so distinctly. His words are (Bl. Com. by Kerr, 4th ed., vol. iii, p. 18): "So much as is sufficient to answer his own demand is, by operation of law, applied to that particular purpose." Plowden goes further, and says that the property in the assets is changed: See *Woodward* v. *Darcy* (2). But this can only be true if the assets spoken of can be identified and appropriated to the debt which they have satisfied, and this presupposes the exercise of the right in fact; and in the case in Plowden it had been so exercised: See *ibid.*, p. 184. [The learned judge then referred to the facts stated in the report of *Woodward* v. *Darcy* (3), and proceeded:—]
>
> Until the executor does some act to shew which assets he retains, it is obvious that the property in them cannot be changed. This has been noticed before: See [1898] 1 Q.B. 286, and Wentworth's Office of Executor, cited in the margin of 1 Plowden, p. 185a. But it was settled that an executor sued by a creditor could give a retainer by himself in satisfaction of his own debt in evidence under a general plea of plene administravit, and that he need not plead a retainer specially: 1 Wm. Saunders, 333, n.6. The extent to which the doctrine that his debt was extinguished was carried is further illustrated by the cases collected in Williams on Executors, vol. ii, p. 1180, which shew that an executor, having assets sufficient and properly applicable to pay a debt due to him from his testator, could not sue the testator's heir nor any third person who might be liable with the testator for the debt in question.

There is nothing in this case to shew the existence of assets in the respondent's hands "sufficient and properly applicable to pay" the judgments acquired by her, and, therefore, it is quite clear that, putting the doctrine in the form most favourable to Mr. McCarthy, it has no application here.

(1) [1899] 2 Q.B., 347, at pp. 352, 353.
(2) 1 Plowd. 184, at p. 186. (3) 1 Plowd. 184.

Second, Mr. McCarthy contends that the respondent was a party to the scheme under which the property in question was acquired by the appellant. It is sufficient to say that while more than one member of the family seems to have been aware of the transactions by which the intestate intended to put his property beyond the reach of his creditors, there is no evidence implicating the respondent.

Third, the concurrent findings of the courts below that the property in question was in fact transferred in fraud of creditors were attacked, but quite unsuccessfully.

The form of the order is perhaps a little exceptional, but in view of the special circumstances there appears to be no good ground for interfering with the disposition of the case by the Appellate Division.

It is necessary to notice a point, urged by Mr. Hellmuth by way of cross-appeal, which, we think, also fails. The argument advanced is very clearly and concisely stated in the respondent's factum in these words:

> The respondent submits that the defendant is retaining property to which he has no right and which was never intended to be his and the equitable rule that a settlor cannot recover from his transferee property fraudulently transferred does not estop an administrator of the settlor seeking to recover assets forming part of the deceased's estate for the benefit of persons not parties to the fraud and that to refuse relief would be to make an equitable rule an instrument of iniquity.
>
> The respondent will submit that the point as to whether or not an administrator in the circumstances present here could recover has not been settled by any decision binding on this Court.

We agree with the Appellate Division (1) that this contention is not sustainable, and that as to the property transferred into the name of Frank Ryan by his father, for the purpose of defeating his father's creditors; the respondent, as administratrix, stands in no better position than that which her father would have occupied. "Transfers made by him which were fraudulent and void as being for the purpose of defeating his creditors could not be attacked by him and can not be attacked by his administratrix. A debtor who fraudulently transfers his property cannot himself attack his own fraudulent transaction, and his administrator has no greater right." This passage in the judgment of the learned judge states a settled proposition of

(1) (1929) 36 Ont. W.N. 265.

1930
RYAN
v.
CHARLESWORTH.
Duff J.

law. *Shaw* v. *Jeffery* (1); *Hawes* v. *Leader* (2); *Orlabar* v. *Harwar* (3); *Ayerst* v. *Jenkins* (4); *Colman* v. *Croker* (5).

The appeal and cross-appeal are dismissed with costs.

Appeal and cross-appeal dismissed with costs.

Solicitor for the appellant: *Guy R. Roach.*

Solicitors for the respondent: *Cassels, Defries & Des Brisay.*

1930
*Mar. 4, 6, 7.
*April 10.

THE CANADIAN SURETY COMPANY (DEFENDANT) ..... APPELLANT;

AND

HIS MAJESTY THE KING, REPRESENTED BY THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF) ..... RESPONDENT;

AND

THE SCOTIA IMPORT AND EXPORT COMPANY, AND P. A. McDONNELL (THIRD PARTIES) ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Bond given, pursuant to s. 101 of Customs Act, R.S.C., 1906, c. 48, as amended by 12-13 Geo. V, c. 18, s. 6, in respect of export of liquors—Goods not exported to the place named—False landing certificate—Purported cancellation of bond—Crown's right to recover on the bond—Amount recoverable—Limitation period for action—Defect in form of bond—Interest.

Appellant gave a bond to the Crown, pursuant to s. 101 of the *Customs Act*, R.S.C., 1906, c. 48, as amended by 12-13 Geo. V, c. 18, s. 6, in respect of certain liquors entered at Halifax, N.S., by the S. Co., for export to Georgetown, Grand Cayman, by the steamer *G.* The required form of bond in such cases was expressed to secure actual exportation to the place provided for in the entry and production of proof thereof. The steamer reported outwards from Halifax on February 3, 1925, for Georgetown, *via* St. John, which she reached on February 5, where additional liquors were loaded for transport to

(1) (1860) 13 Moo. P.C., 432.
(2) 1 Brownl. & G. 111.
(3) Comb. 348.
(4) (1873) L.R. 16 Eq., 275.
(5) (1790) 1 Ves. 160.

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

Havana, Cuba. On February 25 she cleared at St. John for Georgetown. On March 3 she reported inwards at Shelburne, N.S., in ballast, and, therefrom, she cleared for Halifax on March 10. At Shelburne the master made a sworn statement before a customs officer that the goods with which the *G.* was laden on departure from St. John had been disposed of on the high seas, 30 miles off the United States' coast, and transferred on board lighters. On February 27 there was deposited with the collector of customs at Halifax, purporting to proceed from the customs office at Georgetown, a certificate, dated February 16, that the goods described in the Halifax export entry had been delivered over to the customs at Georgetown. The goods had not been so delivered and the certificate was a concocted document. The collector acted on this fraudulent certificate (believing, as was found, in its genuineness) and, purporting to proceed under the authority given by s. 102 of the Act, cancelled the bond and surrendered it to appellant. In September, 1928, the Crown brought action in the Exchequer Court for the amount of the bond and interest. Maclean J. sustained the claim ([1929] Ex. C.R. 216). On appeal:

Held (1) It could not be said that the conditions of the bond were in effect complied with, even assuming that the principal object of the statute and regulations was to provide special precautions against the clandestine re-importation of wines and liquors into Canada. Parliament, and the Minister, under its authority, had laid down rules which were deemed necessary in order to secure that object. The bond and the statute and regulations must be held to take effect according to their plain meaning.

(2) Appellant could not rely upon the collector's act in delivering up the bond with the intention of cancelling it, even assuming such delivery to have misled it to its prejudice (*Mayor, etc., of Kingston-upon-Hull* v. *Harding,* [1892] 2 Q.B. 494). Even if the collector had (contrary to the finding) been a party to the fraud, a purported cancellation based upon it could not, as between the Crown and persons bound by the acts of parties implicated in the fraud, or civilly responsible for the non-observance of the law, have any effect as against the Crown.

(3) The amount recoverable by the Crown was not limited to damages proved. Where a bond is given to secure the performance of the provisions of a revenue statute, it is forfeited if the condition is not performed, especially where the bond is required by statute (*The King* v. *Dixon,* 11 Price, 204, at p. 211; *The King* v. *Canadian Northern Ry. Co.,* [1923] A.C., 714, at p. 722).

(4) It could not be said that the object of the proviso to s. 101 was to obtain a guarantee for the payment of the penalties exacted by s. 237 (now s. 235 of R.S.C., 1927, c. 42) and that the limitation period applicable thereto applied; the proviso created a substantive additional protection in the case of wines and liquors, and could not be fairly read as subsidiary to s. 237. The claim was not statute barred under s. 279 (now s. 277); s. 279 must be read with s. 272 (now s. 270), and s. 272 shews that the words "prosecutions or suits for the recovery" of "penalties or forfeitures imposed by this Act" do not embrace a proceeding upon a bond required by the statute; they apply to penalties, etc., imposed directly by the Act rather than to guarantee bonds.

1930

CANADIAN SURETY CO. v. THE KING.

Duff J.

(5) Notwithstanding the omission of certain words in the condition of the bond (as proved at trial by production of a copy) it should be read as of the form prescribed by the regulations. The recitals established clearly that the bond was given under the Act and regulations, and it was therefore necessary to look at these before deciding that a substantive clause in the condition, in which obviously the intention was not completely expressed, was entirely nugatory; the intention as to the form of the condition could be ascertained with certainty by reference to the Act and regulations, and it was one of the cases in which it is the court's duty to supply the missing words, to avoid the purpose of the document being defeated.

Judgment of the Exchequer Court (*supra*) affirmed, subject to a variation disallowing the claim for interest prior to date of judgment in that court.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiff was entitled to recover from the defendant the amount of a certain bond. The bond was dated January 31, 1925, and was given pursuant to the provisions of s. 101 of the *Customs Act*, R.S.C., 1906, c. 48, as amended by 12-13 Geo. V, c. 18, s. 6, in respect of certain liquors entered at Halifax, N.S., by the Scotia Import and Export Company, Ltd., for export to Georgetown, Grand Cayman, by the steamer *Gemma*. The material facts of the case and questions in issue are sufficiently stated in the judgment below (1) and the judgment now reported. The Crown brought the action in September, 1928, claiming $41,500 (the amount of the bond) with interest at 5% from February 28, 1925. The claim was allowed by the Exchequer Court (1). The defendant's appeal to this Court was dismissed with costs, subject to a variation disallowing the claim for interest prior to the date of the judgment in the Exchequer Court.

W. N. Tilley K.C. and *W. L. Scott K.C.* for the appellant.

N. W. Rowell K.C. and *G. Lindsay* for the (plaintiff) respondent.

The judgment of the court was delivered by

DUFF J.—This appeal arises out of proceedings by way of information in the Exchequer Court taken by His Majesty the King to recover the sum of $41,500 under a

(1) [1929] Ex. C.R. 216.

bond given pursuant to the provisions of section 101 of the *Customs Act* as amended by 12-13 Geo. V, c. 18, s. 6. We have had the advantage of an elaborate and rather protracted argument, but the decisive considerations can be stated in comparatively few pages.

Section 101, as so amended, is as follows:

101. Upon the entry outwards of any goods to be exported from a Customs warehouse, either by sea or by land or by inland navigation, as the case may be, the person entering the same for such purpose shall, by and upon the making of such entry, whether so expressed in such entry or not, become bound, when the entry aforesaid is for exportation by sea, to the actual exportation of the said goods, and, when the entry aforesaid is for exportation by land or inland navigation, to the actual landing or delivering of the goods at the place for which they are entered outwards, or, in either case, to otherwise account for the said goods to the satisfaction of the collector or other proper officer, and to produce, within a period to be named in such entry, such proof or certificate that such goods have been exported, landed or delivered or otherwise lawfully disposed of, as the case may be, as shall be required by any regulation of the Governor in Council, or by the collector or other proper officer.

Provided, however, that upon the entry outwards of wines and spirituous liquors to be exported from a Customs Warehouse either by sea or by land or inland navigation, as the case may be, the person entering the same for such purpose shall give security by bond of an incorporated guarantee company authorized to do business in Canada, and whose bonds are acceptable to the Dominion Government, such bond to be in form approved by the Minister, in double the duties of importation on such goods, that the same shall, when the entry aforesaid is for exportation by sea, be actually exported to the place provided for in said entry, and when the entry aforesaid is for exportation by land or inland navigation, shall be landed and delivered at the place for which they are entered outwards, unless in either case the said goods were after leaving Canada lost and destroyed, and that such proof or certificate that such goods have been so exported, landed or delivered, or lost and destroyed, as the case may be, as shall be required by any regulation of the Minister, shall be produced to the Collector or other proper officer within a period to be appointed in such bond. * * *

The goods in respect of which the security was given were certain liquors entered at Halifax, by the Scotia Import and Export Company Limited, for export to Georgetown, Grand Cayman, by the steamer *Gemma*.

The steamer reported outwards from Halifax, February 3, 1925, for Georgetown *via* St. John, which she reached on February 5, where additional liquors were taken on board for transport to Havana, Cuba. On the 25th February, she cleared at St. John for Georgetown; on the 3rd of March, she reported inwards at Shelburne in ballast, and, therefrom, she cleared for Halifax on the 10th of the same

1930

CANADIAN SURETY CO. v. THE KING.

Duff J.

month. It is not contended that the liquors, or any part of them, entered for export at Halifax, reached Georgetown, or that the intended destination of the *Gemma* was in fact Georgetown. At Shelburne, on reporting inwards, the master made a sworn statement before a customs officer that the goods with which the *Gemma* was laden on departure from St. John had been disposed of on the high seas, thirty miles off the coast of the United States, and transferred on board lighters. On the 27th of February, two days after the ship had cleared from St. John for Georgetown, a written certificate was deposited with the Collector of Customs at Halifax, professing to be under the signature of L. A. R. Adams, and purporting to proceed from the office of Customs at the port of Georgetown, bearing date the 16th of February, certifying that the goods described in the Halifax export entry had been delivered over to the customs at Georgetown.

On this certificate the Collector at Halifax acted, believing it to be genuine (as the learned trial judge found), and, purporting to proceed under the authority given by section 102 of the Act, cancelled the bond, and surrendered it to the appellants.

The first question for consideration, is, whether the act of the Collector at Halifax in delivering up the bond with the intention of cancelling it, operated as a cancellation of that document. It is first necessary to notice a defect in the form of the bond as proved at the trial, by the production of a copy.

The form of bond approved by the Minister of Customs is as follows:

KNOW ALL MEN BY THESE PRESENTS, that we..... hereinafter called "the Guarantee Company," are held and firmly bound unto His Majesty the King, His Heirs and Successors in the sum of.....dollars, currency money of Canada, to be paid to His said Majesty the King, His Heirs and Successors, and for which payment well and truly to be made we bind ourselves and our successors and assigns firmly by these presents.

Sealed with our seal and dated this.....day of....., 192....

WHEREAS.....hath passed an entry, ...to export to.....by the..... whereof.....is Master.

.....

and which goods are now deposited in..... at....., in the Port of....., under the provisions of the "Customs Act" and Regulations thereunder.

AND WHEREAS the Guarantee Company has agreed to guarantee that the said goods shall be duly exported, landed and delivered as required by the Customs Act and Regulations thereunder.

NOW THE CONDITION OF THE ABOVE WRITTEN OBLIGATION is such that if the said goods shall, when the entry aforesaid is for exportation by sea, be actually exported to the place provided for in said entry, and when the entry aforesaid is for exportation by land or inland navigation, shall be landed and delivered at the place for which they are entered outwards, unless in either case the said goods are after leaving Canada lost and destroyed, and if such proof or certificate that such goods have been so exported, landed or delivered, or lost and destroyed, as the case may be, as required by Regulations of the Minister of Customs and Excise, be produced to the Collector or other proper officer of Customs and Excise at the Port of....., within..... days from the date hereof, then this obligation shall be void; but otherwise shall be and remain in full force and virtue.

IN WITNESS WHEREOF the Guarantee Company has hereunto affixed its Corporate Seal.

SEALED AND DELIVERED AND COUNTERSIGNED by..... of the Guarantee Company.

IN THE PRESENCE OF

....

The bond, as proved at the trial, omits the words (following "Minister of Customs and Excise") "be produced to the Collector or other proper officer of Customs and Excise." The point need not detain us. The recitals establish clearly that the bond was given under the *Customs Act* and Regulations, and it is therefore necessary to look at these before deciding that a substantive clause in the condition, in which, it is obvious, that the intention is not completely expressed, is entirely nugatory. The intention of the parties as to the form of the condition can be ascertained with certainty by reference to the Act and Regulations made under it, and this is one of those cases in which it is the duty of the court to supply the missing words, in order that the purpose of the document may not be defeated, and the document should therefore be read as of the form, prescribed by the Regulations, above set forth.

It is argued that the bond must be regarded as cancelled, because in effect the condition was in fact complied with, and because the appellants, being mere sureties, are en-

1930

CANADIAN SURETY CO. v. THE KING.

Duff J.

titled to act, as they did act upon the apparent cancellation, the obligee is precluded from denying that this apparent cancellation was valid, and, in their favour, effective.

As to the first of these contentions, it is argued that the aim of the proviso in section 101, and the Regulations made thereunder, was to provide special precautions against the clandestine re-importation of wines and liquors into Canada, as to which there is (as is well known) a powerful inducement for smuggling, in the exceptionally high duties on such commodities. It is said, moreover, that it was quite well known to the Customs officers that the goods in question were destined for the United States, and that the venture of the exporters proceeded in the usual course, and in conformity with the expectations of those officers.

The learned trial judge has found that in fact the Collector at Halifax accepted the certificate produced as a genuine certificate, and acted in full belief in its genuineness. The document now proves to be, obviously, a concocted document, concocted for the purpose of defeating, and committing a fraud upon, the Customs law, and even if the Customs Collector had been a party to such a fraud, a purported cancellation based upon it could not, as between the Crown and persons implicated in the fraud, or persons bound by the acts of parties so implicated or civilly responsible for the non-observance of the law, have any effect as against the Crown. The authority and the duty of customs officials in respect of such matters is to be found in, or in instructions authorized by, the Statute or the Regulations; such officials possess no dispensing capacity unless a discretion is reposed in them by or under the authority of some enactment or regulation. Assuming that the principal object of the Statute and Regulations is that contended for, Parliament and the Minister under the authority of Parliament, have laid down rules which are deemed necessary in order to secure that object. A power is vested in the Governor-in-Council to deal with exceptional cases in which penalties have been incurred by remitting them in whole or in part. R.S.C. (1927) c. 178, s. 91. This would enable the Government to deal in a practical way with pen-

alties incurred under section 235 in the special cases suggested in the appellants' factum (*). The Act does not apply to bonds, but that is not a reason for holding that the bond and the regulations and the statute are not to take effect according to their plain meaning.

Now, as to the second contention, the appellants, dealing with Government officials, are presumed to know the statutes under which the officials act, and the limitations of their powers. But apart from this, assuming the delivery of the cancelled bond to the appellants to have misled them to their prejudice, there is a final answer to this contention, in the fact that it was a condition of the bond, as required by the proviso to section 101, that such proof or certificate of the export of the goods to the place named in the export entry should be furnished, as might be prescribed by the Regulations. It is not alleged that the certificate required by the Regulations was in fact produced, and it was, as the learned trial judge found, the production of the fraudulent certificate that led to the cancellation of the bond. The appellants can in these circumstances get no advantage from what the Collector did. The case, in principle, is covered by *Mayor, etc., of Kingston-upon-Hull* v. *Harding* (1).

Then, it is argued that the plaintiff can only recover such damages as have been proved. It is settled law, I think, that where a bond is given to secure the performance of the provisions of a revenue statute, the bond is forfeited if the condition is not performed, especially where the bond is required by the statute. *The King* v. *Dixon* (2); *The King* v. *Canadian Northern Ry. Co.* (3).

Two further contentions must be considered. It is argued that the object of the proviso to section 101 is to obtain a guarantee for the payment of the penalties exacted

(*) *Reporter's Note:* Cases suggested were, e.g., destination of cargo changed *en route,* possibly under compelling conditions; slight lateness of shipper in presenting landing certificate, owing to mishap; ship forced to take refuge short of destination and delayed pending repairs; or ship disabled.

Section 235 referred to would seem to be s. 235 of the *Customs Act,* c. 42 of R.S.C., 1927, which corresponds to s. 237 of c. 48 of R.S.C., 1906.

(1) [1892] 2 Q.B. 494.
(2) (1822) 11 Price, 204, at p. 211.
(3) [1923] A.C. 714, at p. 722.

1930

CANADIAN SURETY CO. v. THE KING.

Duff J.

by section 235, and that the limitation clause of that section applies. I cannot agree. The proviso creates a substantive additional protection in the case of wines and liquors; it cannot be fairly read as subsidiary to section 235. Then the appellants rely on section 277, as showing that the claim is statute-barred. I think that section 277 must be read with section 270, and this latter section shows that the words "prosecutions or suits for the recovery of penalties or forfeitures imposed by this Act" do not embrace a proceeding upon a bond required by the statute. I think they apply to penalties, seizures and forfeitures imposed directly by the Act rather than to guarantee bonds (*).

The appellants cannot therefore succeed except in respect of interest, which admittedly was not exigible prior to judgment.

Subject to a variation of the judgment below, disallowing interest prior to judgment, the appeal is dismissed with costs.

Appeal dismissed with costs (subject to variation disallowing claim for interest prior to date of judgment in Exchequer Court).

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

Solicitor for the respondent: *W. Stuart Edwards.*

(*) *Reporter's Note:* Sections 235, 277 and 270 referred to in this paragraph would seem to be sections of c. 42 of R.S.C., 1927. The corresponding sections in c. 48 of R.S.C., 1906, are ss. 237, 279 and 272.

FRITS RICDOLF CHRISTIANI AND AAZE NIELSEN, TRADING UNDER THE NAME, FIRM AND STYLE OF CHRISTIANI & NIELSEN, AND THE SAID CHRISTIANI & NIELSEN (PLAINTIFFS)..... APPELLANTS;

1929
*Nov. 13, 14, 15.
1930
*May 9.

AND

JOHN A. RICE (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Patent Act, Canada, 1923, c. 23, s. 7—"Not patented or described in any printed publication in this or any foreign country more than two years prior to his application"—"Not known or used by others before his invention thereof"—Relief under s. 31, as to patent pro tanto.

Defendant and B., working independently of each other and in good faith, each invented the same process for manufacture of a cellular concrete building material known as porous cement.

Defendant applied for a patent in the United States on December 21, 1922. He filed his application in Canada within twelve months from the passing of the *Patent Act* of 1923 (c. 23). The United States being a foreign country which affords "similar privilege to citizens of Canada," defendant's filing date in the United States was his Convention filing date in Canada, under s. 8 (2) of the Act.

The evidence established that a year before the earliest date to which defendant's invention could be carried back, B., in Denmark, conceived the idea, disclosed it to "others," instructed experiments, made some on his own account and produced porous cement. B. filed his application in Denmark on September 11, 1922, and the patent issued on July 2, 1923.

Held, that defendant's process was "not patented or described in any printed publication in this or any foreign country more than two years prior to his application," and therefore was not barred in this respect.

An application for patent is not a "printed publication" within the meaning of s. 7. This construction is indicated by the use of the word "patented" in the immediate context; and is supported by the existence of the provisions for secrecy which safeguard a pending application in Canada; and, in absence of evidence to the contrary, it must be presumed that the secrecy of application in a foreign country is likewise safeguarded.

Held, however, that defendant's process did not fulfil the condition in s. 7: "not known or used by others before his invention thereof." According to Canadian patent law, B. was the first who had in-

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

1930

CHRISTIANI & NIELSEN v. RICE.

vented the process. To bar fulfilment of said condition in s. 7, prior knowledge or use in a foreign country is sufficient (*Wright & Corson* v. *Brake Service Ltd.*, [1926] Can. S.C.R., 434; *Canadian General Electric Co. Ltd.* v. *Fada Radio Ltd.*, [1930] A.C. 97, at pp. 106-107), and need not be by the public. If the first inventor has formulated, either in writing or verbally, a description which affords the means of making that which is invented, and has communicated his invention to "others", although without disclosure to the public or application for patent, he is the first and true inventor in the eyes of the present Canadian patent law, so as to prevent any other person from securing a Canadian patent for the same invention. Such prior knowledge, however, must be demonstrated; evidence of this character should be very closely scrutinized; the burden of establishing anticipation on such basis is a weighty one; it cannot be satisfied by mere proof of conception.

Canadian General Electric Co. Ltd. v. *Fada Radio Ltd.* [1930] A.C. 97, and *Permutit Co.* v. *Borrowman*, 43 R.P.C., 356, cited and discussed. *Alexander Milburn Co.* v. *Davis-Bournonville Co.*, 270 U.S. Rep., 390, at pp. 400-401, referred to. *The Queen* v. *La Force*, 4 Can. Ex. C.R. 14, and *Gerrard Wire Tying Machines Co. Ltd. of Canada* v. *Cary Mfg. Co.*, [1926] Ex. C.R. 170, discussed and, so far as inconsistent herewith, overruled.

On the question of anticipation by B., which was the sole issue, the sufficiency of B.'s specification in his Danish application for patent should not be judged by applying the rules in s. 14 of the Canadian Act. Moreover, B.'s invention should not be envisaged from the starting point only of his Danish application; he invented a new principle and a practical means of applying it; he was not bound to describe every method by which his invention could be carried into effect (Terrell on Patents, 7th ed., p. 144); the conception of the idea, coupled with the way of carrying it out (*Hickton's Patent Syndicate* v. *Patents, etc., Ltd.*, 26 R.P.C., 339, at p. 347) and reduced to a definite and practical shape (*Permutit Co.* v. *Borrowman, supra*) constituted the invention of his process, which he communicated to others. He had, on the evidence, made a workable invention, notwithstanding the fact of continuance of laboratory experiments, in endeavours to improve the foam ingredient.

Held, further, that—as to defendant's claim to be entitled to his patent *pro tanto*, under s. 31 of the Act, in respect of certain specifically defined claims in his application embodying suggestions as to the use of glue (it being argued that B. suggested only mucilage) as a foam developing substance—assuming that, under the circumstances, the evidence justified a distinction between mucilage and glue, and without deciding whether s. 31 would, in a proper case, permit the court to discriminate in the way indicated, such relief could not be granted in this case, in view of Rule 14 of the Patent Office (that "two or more separate inventions cannot be claimed in one application, nor included in one Patent") and in view of the nature and extent of the expressed object for which his patent was applied for and granted.

Judgment of Maclean J., President of the Exchequer Court of Canada, [1929] Ex. C.R., 111, reversed in the result, and defendant's patent held invalid.

1930

CHRISTIANI & NIELSEN v. RICE.

(Comment and direction as to an apparent omission, causing apparent untruth of an allegation, in an applicant's oath accompanying petition for patent.)

APPEAL by the plaintiffs from the judgment of Maclean J., President of the Exchequer Court of Canada (1), dismissing their action, in which they asked that Canadian Letters Patent Number 252,546, issued to the defendant on August 11, 1925, be declared invalid and adjudged cancelled. The material facts of the case and the questions in issue are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

W. D. Herridge K.C. for the appellants.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The appellants are manufacturers of Copenhagen and they own, by assignment from Erik Christian Bayer, Canadian patent No. 265,601, issued on the 9th of November, 1926, for "processes of manufacturing porous building material." They were plaintiffs in the Exchequer Court and sought to impeach Canadian patent No. 252,546 for "cellular cement products and processes of making same," issued on a date anterior to that of the appellants' patent, to wit: on the 11th of August, 1925, and owned by the respondent, who was the defendant in the court below.

The particular objection on which the appellants relied was that Rice was not the true and first inventor of the process described in his patent, because, prior to the date of his alleged invention, the same process had been invented by Bayer, in Copenhagen, and formed the subject matter of a patent issued in Denmark on the 2nd of July, 1923.

The action was dismissed (1) and is now brought to this court by way of appeal.

The invention claimed by Bayer and Rice relates to a new building material consisting of a cellular concrete produced by mixing cementitious material, such as gypsum or cement, with a tenacious foam containing bubbles sufficiently strong to remain unbroken while the cement is being

(1) [1929] Ex. C.R. 111

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

mixed and is setting. "It is stated that the bubbles displace the cement or other material with which it is mixed, and that a product considerably lighter in weight than that produced in the ordinary way from concrete mixtures is obtained, and further, that the cellular voids improve the heat insulating and sound insulating properties of the finished material."

The process thus consists in mixing a stable foam with a cement and in regulating the porosity by the simple expedient of making this foam mechanically rather than developing it chemically. It is identical in the Bayer patent and in the Rice patent. The product is the same in the one as in the other. And the trial judge found that "both Bayer and Rice had the same idea in mind." In fact, it was conceded at bar that both processes are the result of the same conception and the same invention in the popular sense.

The judgment appealed from also found that each inventor "was in good faith" and that "they were working independently of each other." The only question for determination therefore was: As between the two, who was the first inventor in the legal sense; and the judgment held that it was Rice.

The decision of that question involves a consideration of section 7 of chapter 23 of the statutes of 1923, which was the legislation current at the time of the grant to Rice. It is as follows:

> 7. (1) Any person who has invented any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvements thereof, not known or used by others before his invention thereof and not patented or described in any printed publication in this or any foreign country *more than two years prior to his application* and not in public use or on sale in this country *for more than two years prior to his application* may, on a petition to that effect, presented to the Commissioner, and on compliance with the other requirements of this Act, obtain a patent granting to such person an exclusive property in such invention.
>
> (2) No patent shall issue for an invention which has an illicit object in view, or for any mere scientific principle or abstract theorem.

It may be convenient to point out that the wording is different in some respects from that of the corresponding section in the *Patent Act* as contained in the Revised Statutes of 1906, and we shall have to consider how far, if at all, the effect of previous decisions is modified by the

amendments made by Parliament. It will at once be noticed that, in the new section, the public use or sale for more than two years (N.B.—In the statute of 1906, it was one year) prior to the application is now expressly stated to be public use or sale "in this country," thus indicating on that point anticipation by Parliament of the judgment in *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills, Limited* (1). A further change is that consent or allowance of the inventor is no longer essential to make public use or sale in Canada, previously to the application, a bar to the valid grant of a Canadian patent.

That part of the section, however, has no bearing upon the present litigation. Suffice it to say that, on the facts, it is abundantly clear that the appellants cannot rely on it for the purposes of their case. But the other parts of the section must receive careful examination.

We are now dealing with a process and may limit our discussion to that species of invention. Under section 7, to form a valid subject matter of a patent, a process must, of course, be useful—and the utility of Rice's process is not disputed. It must also be new and its novelty must be such that it was "not known or used by others before the invention thereof and not patented or described in any printed publication in this or any foreign country more than two years prior to (the) application." The validity of Rice's patent depends on the interpretation of this part of the enactment and its application to the particular facts.

The words "not patented or described in any printed publication in this or any foreign country" are new. They were not in the former section of the *Patent Act*. Except possibly for the express declaration that the provision applies to a patent or publication either "in this or in a foreign country," these words, however, do not introduce new law. Subject to this exception, they are to be found in section 25 of the Act respecting Patents for Inventions, being chapter 34 of Consolidated Statutes of Canada, 22 Vict., 1859, and, no doubt, in earlier legislation. They embody a well known principle of patent law.

So far as it may be sought to apply that principle in this case, the matter may be disposed of at once.

(1) [1929] A.C. 269.

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

Rice applied for a patent in the United States on December 21, 1922. That application, the trial judge found, "covered the same subject-matter" as his Canadian application. We agree with this finding and, on the record before us, we entertain no doubt that the case was fought, at the trial, on the understanding that Rice's United States application was substantially the same as his Canadian application. Now Section 8 (2) of the Act reads in part as follows:

> An application for patent for an invention filed in Canada by any person who has previously regularly filed an application for a patent for the same invention in a foreign country which by treaty, convention or law affords similar privilege to citizens of Canada, shall have the same force and effect as the same application would have if filed in Canada on the date on which the application for patent for the same invention was first filed in such foreign country, provided the application in this country is filed within twelve months from the earliest date on which any such foreign application was filed, or from the passing of this Act.

The United States is one of the foreign countries affording "similar privilege to citizens of Canada." Rice, having previously applied for a patent in the United States, filed his application in Canada "within twelve months * * * from the passing of (the Canadian) Act." Accordingly the trial judge rightly decided that "Rice's filing date in the United States is his Convention filing date in Canada."

That fixes the date of Rice's application for all relevant purposes as of the 21st December, 1922. It is not claimed that, before that date, the process was patented anywhere. There was no printed publication "in this or any foreign country" describing Rice's invention prior to the 21st of December, 1922.

Bayer filed his application in Denmark on the 11th of September, 1922. But a pending application in Canada is not open to the inspection of the public (Sec. 52 of the *Patent Act*). Information in relation thereto may be furnished only to the applicants or persons authorized by them (Rule 19). It does not therefore properly come under the designation of a "printed publication." It must, in the absence of evidence to the contrary, be presumed that the secrecy of application in Denmark is likewise safeguarded.

Moreover, the use in section 7 of the word "patented" in the same sentence: "Patented or described in any printed publication" determines the matter in our opinion,

since it would have been quite unnecessary to enact that no person may in Canada obtain a patent for an invention already "patented * * * in this or any foreign country," if a mere application for a patent was to be taken as a "*printed publication*," within the meaning of the statute, sufficient to preclude the grant of a Canadian patent for the thing therein described. (*The Queen* v. *La Force* (1)).

The filing in Canada of an application for a patent will, subject to the conditions prescribed in the Act, prevent a subsequent applicant from obtaining a patent for a similar invention. The filing of a previous application in a foreign country may have the same effect. In neither case, however, will it be because the application is viewed as an antecedent publication, but for other considerations presently to be discussed.

Section 7 requires that the process be "not known or used by others before (the) invention thereof." It may be at least questionable whether these words are qualified by the other words "in this or any foreign country," now inserted in the enactment after the sentence: "and not patented or described in any printed publication," but whether they are or are not would seem to be immaterial, in view of the decision of this court in *Wright & Corson* v. *Brake Service Limited* (1), that the words "which was not known or used by any other person before his (the applicant's) invention thereof," are not qualified by the words "in Canada," from which, "as a mere question of construction of the statute," the Judicial Committee of the Privy Council in *Canadian General Electric Company, Limited* v. *Fada Radio Limited* (2) was "not prepared to differ."

Prior knowledge or use in a foreign country is therefore sufficient. But, in the *Wright & Corson* case (3), Cady, who produced the anticipating machine, had been using it openly, in his public garage in Canastota, in the State of New York. That was, at least, a user in a public way; and the question whether antecedent knowledge or user not public was also contemplated by the section did not come

(1) (1894) 4 Can. Ex. C.R., 14, at p. 38.

(1) [1926] Can. S.C.R. 434.

(2) [1930] A.C., 97.

(3) [1926] Can. S.C.R. 434.

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

up for decision. It has now become necessary that we should discuss that question; and we agree with the learned trial judge as to its importance and its difficulty.

In *The Queen* v. *LaForce* (1), Burbidge J. delivered an elaborate and considered judgment, in the course of which he said that the words "not known or used by any other person" in their true meaning have reference not to "a secret use or the knowledge of an earlier inventor or of those to whom in confidence he may have disclosed it, but to such a publication or use as affords the public the means of information or knowledge of the invention." His conclusion was that "under the patent law of Canada, a prior foreign invention, of which the public had no knowledge or means of knowledge is not sufficient to defeat a patent issued to an independent Canadian inventor."

In *Gerrard Wire Tying Machines Company, Ltd. of Canada* v. *Cary Manufacturing Co.* (2), the present President of the Exchequer Court expressed the same view:

> I cannot accept Mr. Anglin's proposition, as expressing the law, even with the evidence of the alleged inventor as to the conception being accepted as proven, nor can I agree that a "physical embodiment" of the conception, which was never disclosed would void the patent of a subsequent inventor who had first and effectively disclosed his invention. It must be conceded I think, without qualification, that a mere conception of anything claimed to be an invention, that is concealed and never disclosed or published, is not an invention that would invalidate a patent granted to a subsequent inventor. To say that mere conception is invention or that a first inventor in the popular sense who has not communicated or published his invention is entitled to priority over a later invention accompanied by publication, and for which a patent was granted, or applied for, would I think throw this branch of our jurisprudence into such utter confusion as to render the law of little practical value owing to uncertainty. If this is the policy and meaning of the Patent Act, an inventor might safely withhold from the public his invention for years, while another independent but subsequent inventor of the same thing, who had secured or applied for a patent, and who had proceeded to manufacture and sell his invention without any knowledge of the undisclosed invention, would always be in danger if the prior inventor could secure a patent by merely proving an unpublished invention. The situation should not I think be changed by the production of drawings, plans, etc., evidencing the date of the prior invention, or even a physical embodiment of the invention by the alleged inventor. All this might be done and still be within the knowledge of the inventor alone, it having been kept a secret, and which so far as the public is concerned is no more effective publication than a mere conception uncommunicated to the public. There

(1) (1894) 4 Can. Ex. C.R. 14.

(2) [1926] Ex. C.R. 170, at pp. 179-180.

must be a publication or a use in public of a satisfactory kind in order to bar the claim of a subsequent inventor who discloses the same and first applies for a patent.

And again (pp. 185-186):

> Invention without publication, in my opinion, is of no effect as against another inventor who discloses the invention and who applied for a patent. Whether this rule rests upon the principle of estoppel or laches, or for want of consideration for the monopoly inherent in a patent, or whether it is a rule of evidence which presumes against invention in law when undisclosed, it seems to me to matter little. It is a safe rule to follow. It imposes no hardship or injustice upon any person, it appears well within the letter and spirit of the statute and seems to have the support of weighty authority. It is a bar to the fabrication of evidence and other objectionable practices, and will render assurance to many whose position ought to be secure.

We have quoted rather extensively from this judgment, because it puts forward with great force the reasons in favour of construing the relevant words of section 7 as meaning "not known or used" by the public.

The words "by the public," however, are not in the section, and one must accept with caution an interpretation requiring the addition of other words to the language the legislator has seen fit to adopt.

It is not without significance that, in the same section, the words "public use" are to be found in a different connection. If a similar use was meant with regard to the time preceding the invention, it is likely that it would have been expressed in a similar way. In fact, there is a qualification in the language of the section, which rather repels the idea of the necessity for public knowledge or user. "Not known or used *by others*" is clearly a more limited expression than "not known or used by the public." The prior use or knowledge need not be widespread; if it be knowledge or use by more than one person besides the inventor and not confidential, it is sufficient and the language of the enactment is satisfied.

What appears to us a conclusive argument is that, with such a construction, we adhere to the grammatical and ordinary sense of the words (See Lord Macnaghten in *Vacher & Sons Ltd.* v. *London Society of Compositors* (1)). This well known rule in construing statutes, leading, as it does

(1) [1913] A.C. 107.

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

in this case, to no absurdity, repugnancy or inconsistency, should, in our opinion, prevail over an inference based on the assumed intention of Parliament to reward the discoverer who offers his invention to the public, or on the danger of opening the door to perjury and the fabrication of evidence. The reward of the inventor is a matter of policy for Parliament, and, after all, in the present case, the question is not one of Bayer's rights, but whether Rice is entitled to a monopoly as against the public. As was said by Lord Haldane in *British Thomson-Houston Company Ltd.* v. *Corona Lamp Works Ltd.* (1):

> If inventors have to be protected, so have the public. Every patent, if valid, restricts the liberty of other inventors, and confers a monopoly * * *. The stimulus to development due to the protection of the Patent Acts may prove to be less of an advantage to the State than would have been the stimulus to free production in the interest of the consumer. But with the question of policy your Lordships sitting as Judges have no concern. That question is for Parliament. We as Judges have only to interpret the law as Parliament has enacted it.

As for the incentive to perjury and the fabrication of evidence likely to result if proof of private knowledge is to be accepted, that is of course a serious danger; but it is of a character which the courts are not unaccustomed to dealing with.

Since the judgments in *The Queen* v. *LaForce* (2) and in *Gerrard* v. *Cary* (3), a change has occurred in the phraseology of the section we are now discussing. It was then "not known or used by *any other* person," and, of necessity, the knowledge might, therefore, have been confined to one person. It now is: "not known or used by others" and would appear to require that the knowledge be held by at least two persons other than the inventor. But whether it was or was not meant, by this substitution of words, to alter the law, it is needless to say that such prior knowledge must be demonstrated. Evidence of this character should be subjected to the closest scrutiny. Anyone claiming anticipation on that basis assumes a weighty burden which cannot be satisfied by mere proof of conception—if, indeed, it can be said that conception alone constitutes an anticipating invention.

(1) (1922) 39 R.P.C. 49, at p. 67. (2) (1894) 4 Can. Ex. C.R. 14.
(3) [1926] Ex. C.R. 170.

Fortunately two recent decisions of the Privy Council afford us guides in this respect.

The first was rendered in *The Permutit Company* v. *Borrowman* (1). It will be remembered that, in that case, one Spencer, in 1917, filed an application in the Canadian Patent Office for a patent for the use of greensand or glauconite for the purpose of softening water. In 1919, Borrowman filed a similar application. The Commissioner declared a conflict between the applications and the assignees of Spencer commenced an action in the Exchequer Court claiming a declaration that Spencer, and not Borrowman, was the inventor. Borrowman counterclaimed for a declaration to the same effect in his favour.

The Lord Chancellor (Viscount Cave) delivered the judgment of the Board. We reproduce the following passage (p. 359), stating the facts and the conclusion of the Judicial Committee:

> As to the Respondent Borrowman, there is no question as to the date on which he made the invention. It is undisputed that in the month of November, 1913, he conceived the idea, that he then made some experiments for the purpose of testing it, that he actually made a few filters in which greensand was used for the purpose of softening water and sold one of those filters to a friend. In the year 1914 he made an application in the United States of America for a patent, but on that occasion without success. In June, 1916, having further developed his process, he made another application for a patent in the United States of America, which ultimately succeeded; and it is admitted that in the month of August, 1916, he put the invention fully upon the market.
>
> Those being the facts as regards the Respondent, the question is whether Mr. Spencer, the predecessor of the Appellants, has been proved to have made the same invention, in the true sense of the word "invention," before that date. Mr. Spencer gave evidence in this case, and he said that he had the idea, or (as in one passage in his evidence he calls it) the vision, of this process in or just before the month of May, 1912, and he referred to certain letters and other documents which he says indirectly corroborate his statement. This evidence is not strong, and is open to considerable comment; but it is needless to examine it in detail, because it appears to their Lordships that, assuming it to be true, it is not proved that there was an invention by Mr. Spencer within the true meaning of the statute. Mr. Spencer did not test his idea; he made no experiments for that purpose; he did no work for that purpose. It is said that he communicated the idea through his agent to a Dr. Duggan, who was then connected with the Permutit Company, and that Dr. Duggan tested it and came to some conclusion about it; but it is plain that what Dr. Duggan did he did for his own purposes, and not as the agent of Mr. Spencer. Mr. Spencer in his evidence makes that clear, for he says that he took a portion of greensand and carried it to his agent's office for the purpose of

(1) (1926) 43 R.P.C. 356.

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

having it forwarded to parties in New York with the idea that they would do the necessary work and report to him, but that those parties were unknown to him, that he heard nothing from them, and they made no report to him; and apparently he did nothing whatever further until late in the year 1916, that is to say, at a date after Mr. Borrowman's invention was fully made and completed.

These being the facts, it appears to their Lordships that it is not proved that any invention in the true sense of the word was made by Mr. Spencer in 1912. It is not enough for a man to say that an idea floated through his brain; he must at least have reduced it to a definite and practical shape before he can be said to have invented a process. Still less could it be said that the invention as described in the Appellants' application for a Patent was made in that year 1912. If so, that is enough to dispose of this appeal.

We have it, therefore, that, for the purpose of section 7, "it is not enough for a man to say that an idea floated through his brain; he must at least have reduced it to a definite and practical shape before he can be said to have invented a process."

The second decision of the Privy Council to which we wish to refer is that in *The Canadian General Electric Company, Limited* v. *Fada Radio, Limited* (1). This was also (*inter alia*) a case of priority as between two inventors.

The application was made by the inventor, Alexanderson, on the 17th of September, 1920, and the patent was granted to his assignees, the Canadian General Electric Company, on the 15th of February, 1921. Among the grounds of defence raised by Fada Radio, Limited, was anticipation by the specification of a German patent granted, on the 23rd of June, 1919, to Schloemilch and Von Bronk, on an application made on the 9th of February, 1913, which, however, remained unpublished until the grant of the patent.

Their Lordships came to the conclusion that, upon the true construction of the respective specifications, the ground of anticipation by the German patent was not established and the attack upon Alexanderson's patent failed. But they also discussed the point now under consideration. After having referred to the particular words in section 7 and to the decision of this court in *Wright & Corson* v. *Brake Service Ltd.* (2), Lord Warrington of Clyffe, speaking for the Board, said (pp. 106-107):

(1) [1930] A.C. 97. (2) [1926] Can. S.C.R. 434.

It undoubtedly overturns patent law as understood in England, for it is quite certain that in English law if A. applied for and took out a patent it would be neither here nor there for B. to come forward and say: "I will show that I had already made the discovery, but I kept it to myself." A. had made a contribution to the public by showing them how to practice the invention. B. had made no such contribution, and therefore he had no rights in the matter. Also it obviously opens the door to defeat any invention, it may be after a long space of time when it has shown itself to be really valuable, by parol evidence which may be hard to check. Nevertheless, as a mere question of construction of the section, their Lordships are not prepared to differ from the Supreme Court on this point.

Having thus pointed out what he calls "the danger of the matter," his Lordship proceeds to state the facts and, again we deem it advisable to quote *in extenso,* because the passage is illuminating and places the conclusion in full light:

Alexanderson had been enjoying the profits of his patent for many years, yet now it may be set aside not by Schloemilch and Von Bronk's specification but by what from the parol testimony may be held to be their knowledge. It must be clearly kept in view that the date of the knowledge or use by any other person is a date before the *invention,* not before the patent. This therefore lets in parol evidence to uphold, just as it has let it in to cut down. Now, taking the knowledge of Schloemilch and Von Bronk, as the Supreme Court has done, as at least ten or fourteen days prior to February 9, 1913, the date of the application for the German patent, how stands it here as to Alexanderson's invention? On February 4 Alexanderson wrote a letter to Davis in which he describes "the new system of tuning which I have devised," and he clearly sets out his method of tuning, as he expresses it, by geometrical progression. A copy of that letter was sent to Dr. Langmuir, who had had conversations with Alexanderson in January, and this is what he says about it, and the conversations he had: "Q. I would ask you to state whether or not, as one skilled in the art, at that time, the letter formed a disclosure to you of the subject-matter of the Alexanderson patent later in suit in this action?—A. This letter covers practically the same ground as the conversations that I had had with Mr. Alexanderson during the preceding weeks. It gives a very clear summary of Mr. Alexanderson's ideas and describes the principles involved in the idea of tuning in geometrical progression, so clearly that it would have been sufficient even if I had not had any previous conversation with Mr. Alexanderson, to have enabled me to build the device and obtain the advantages of geometrical tuning which Mr. Alexanderson foresaw. Not only is the theory of the operation of this system described in this letter, but the means of accomplishing it by use of the audion is clearly described." The respondents' expert witness, Mr. Hazeltine, is asked as to this letter, and he criticises the use of the word "rectify" used in it, but in cross-examination he admits that the writer is really referring not to a rectifier but to a type of audion which DeForest invented and which he expected Langmuir to improve.

The question really comes to this, and it is the root of the matter. The letter taken owing to Langmuir's evidence as being a mere reproduc-

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

tion of the conversation in January, shows the whole method, but indicates that one of the necessary parts of the contrivance must be of a certain quality. That is indicated by this sentence: "The device necessary to accomplish this is some form of high frequency relay which enables one high frequency current to control another high frequency circuit without the first circuit being influenced by the phenomena in the second circuit. Such a relay is the incandescent rectifier where the flow of current in the local circuit is controlled by a potential introduced in the path of the radiating energy." The well known relay was that of DeForest. It was suspected, though not actually proved, that it might prove too sluggish for a high frequency relay, but Langmuir improved on the DeForest relay and that was the relay that was included in the specification for the patent. Now, the Supreme Court has held that Alexanderson's invention was not completed till May, when, to quote their words, Dr. Langmuir had constructed audions which when tested were found to give a frequency in the relayed current equal to the incoming oscillations. The point is a narrow one, but their Lordships think that what is meant in the section by using the word "invention" instead of "application" or "patent" is that what is to be considered is the description whether spoken to (*sic*) or put in writing which really gives the means of making the desired thing which is to be the subject of the patent. In other words, the arrangement as to the audion was complete. The invention was a tuning by geometrical progression associated with a suitable audion which the modification of the DeForest audion proved to be. DeForest's audion might do. If it did not, then a modification of it would. It is just analogous to saying that a certain part of a machine should be of a strength capable to bear such-and-such a strain without an indication of what the exact strength should be. Their Lordships are therefore of opinion that, fairly read, the evidence shows that Alexanderson had discovered his "invention" in January, 1913, and therefore he is not hit by the fact which is assumed that Schloemilch and Van Bronk also discovered it in February, 1913, though they did not proceed to make practical use of that discovery.

The holding here, therefore, is that by the date of discovery of the invention is meant the date at which the inventor can prove he has first formulated, either in writing or verbally, a description which affords the means of making that which is invented. There is no necessity of a disclosure to the public. If the inventor wishes to get a patent, he will have to give the consideration to the public; but, if he does not and if he makes no application for the patent, while he will run the risk of enjoying no monopoly, he will none the less, if he has communicated his invention to "others," be the first and true inventor in the eyes of the Canadian patent law as it now stands, so as to prevent any other person from securing a Canadian patent for the same invention.

Coming now to apply these guiding principles to the facts of this case, we find that the commission evidence

taken in Denmark establishes that in 1921—almost a year before the earliest date to which Rice's invention can be carried back—Bayer conceived the idea, disclosed it to "others" (Maule, Jacobsen, Philipsen, Schnadorph), instructed experiments, made some on his own account and produced porous cement. Therefore, he had invented the process.

The learned trial judge disregarded that evidence because it did not indicate a disclosure to the public. As we have seen, it is now determined by authority that disclosure to the public is not necessary, under our law, to establish invention in the true sense of the word. On the other hand, the learned judge envisaged Bayer's invention from the starting point only of the Danish application and, as he considered that the specification therein was insufficient, he decided that Bayer had failed to establish priority over Rice. But he arrived at that opinion by applying to the Danish specification the rules governing specifications in section 14 of the Canadian statute. We do not think Bayer's application should have been judged by that standard for the purposes of this case.

In the passage quoted above from the judgment in *Canadian General Electric Co. Ltd.* v. *Fada Radio, Ltd.* (1), Lord Warrington said:

> Their Lordships think that what is meant in the section by using the word "invention" instead of "application" or "patent" is that what is to be considered is the description whether spoken to or put in writing which really gives the means of making the desired thing which is to be the subject of the patent.

Bayer invented a new principle and a practical means of applying it. He "was not bound to describe every method by which his invention could be carried into effect." (Terrell on Patents, 7th ed., at p. 144). The conception of the idea "coupled with the way of carrying it out" (*Hickton's Patent Syndicate* v. *Patents, etc., Limited* (2), and "reduced to a definite and practical shape" (*Permutit Co.* v. *Borrowman* (3)) constituted the invention of his process, which he communicated to others.

(1) [1930] A.C. 97, at pp. 108-109.
(2) (1909) 26 R.P.C. 339, at p. 347.
(3) (1926) 43 R.P.C. 356.

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

The question of the validity of the Danish patent was not in issue—far less that of the compliance of that foreign patent with the statutory requirements of the Canadian law. The only question in issue was whether the prior knowledge of the invention by Bayer, communicated as established by the evidence, anticipated Rice. The learned trial judge found that "Bayer preceded Rice in his conception of his alleged invention and in his experimental work developing the same"; but thought that he had not yet made a "workable invention," when Rice filed his United States Application.

His opinion appears to have been formed largely—if not altogether—upon the fact that, at that time, experiments were still being made in the laboratory of Mr. Jacobsen, in Copenhagen. But those experiments were not for the purpose of discovering a method of carrying out the process; they were endeavours to make the foam "better and better."

Bayer had completed his invention when he added a foam made of frothy substance to the paste of cement and got a porous cement product. In the words of Mr. Philipsen: "You may always try to make a thing better in working with it and there are innumerable ways of mixing cement, foam and water together." But Bayer had already found and adopted at least one method of mixing them effectively so as to carry out his idea. He tells us that, about New Year 1921, he conceived it by seeing his wife make a sponge cake, "by seeing her mix the whipped white of eggs into the dough." He immediately went to his laboratory and, his shaving soap being the most frothy substance he had at hand, he used it to mix up with the cement paste, and it turned out that it immediately gave an excellent result. Later on he experimented with many different substances: ordinary soap, several kinds of mucilage, gelatine and gelatine mixed with formaldehyde. He produced samples and showed them to an engineer, Mr. Fox Maule, in the first days of September, 1921. He applied to Professor Jacobsen, at the Royal Technical High School, with similar samples. Mr. Jacobsen was interested and asked his assistant, Professor Philipsen, "to help them with the work of that invention." The latter made experiments as

a result of Bayer instructing him and showing him how to do them; and, asked: "Q. What was the product?," he answers: "A. It was what we now call cell concrete."

Bayer sold his invention, in the spring of 1923, to Christiani and Neilson, who have since manufactured it with much commercial success.

It seems reasonably clear on the evidence that, so far as concerns the invention, the precise manner in which the foam would be produced was a matter of no consequence. This was decidedly Rice's own view, as appears from his specification, where he said:

> I have indicated above a number of substances and methods for producing the foam or froth which is to be added to the mortar, but I wish it to be distinctly understood that my invention, in its broad aspects, is not limited thereto, inasmuch as any foam, no matter how made and no matter of what it may consist, falls within the scope of my invention.

It was common knowledge at the time that a stable foam could be made from a great many well known mucilaginous substances. The experts agree that "it is a very simple process," requiring no scientific training, and that any ordinary workman would be able to work. On that point, reference may be made to two short extracts of the evidence. Mr. A. E. MacRae, one of appellants' witnesses deposed:

> Mr. HERRIDGE: Now, Mr. MacRae, in those experiments which you have referred to, and which you say were based on this Bayer disclosure, were you in any difficulty in carrying them out because of the suggested scarcity of bubble in the Bayer disclosure?
>
> A. None whatever.
>
> Q. And why do you say that the Bayer disclosure contains adequate instructions to enable these experiments to be done.
>
> Mr. BIGGAR: He has not said that.
>
> HIS LORDSHIP: He has said so inasmuch as he did it himself.
>
> WITNESS: The disclosure clearly discloses enough to enable anyone to carry out the process there described.
>
> HIS LORDSHIP: I understand you, Mr. MacRae, to say that everything about this is simple.
>
> A. Extremely simple.

Mr. Rice, the rival inventor himself said:

> Mr. HERRIDGE: Well, it is a thing (the process) that could be carried out by any practical minded person if the general idea is disclosed?
>
> Mr. RICE: One would think so.

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

Paraphrasing the words of Lord Warrington in the *Fada Radio* case (1): When Bayer went to Professor Jacobsen, the invention was complete. The process was the addition to the paste of cement of a stable foam, which the foam adopted by Bayer "proved to be." Bayer's foam "might do." It may be that other foam producing agents would equally do; but Bayer's foam was sufficiently effective to produce the porous cement.

We are, therefore, of opinion that Bayer had "discovered" his invention in September, 1921, or more than a year prior to the earliest date to which Rice can carry his invention back. He had then made it impossible for Rice to claim the invention at a later date (*Alexander Milburn Company* v. *Davis-Bournonville Company* (2)) and accordingly to secure a valid grant for it under the *Patent Act.*

There remains one point to be disposed of. On behalf of the respondent, it was contended that the use of glue is a distinctive mark of the Rice patent. While Bayer, it was argued, suggests only mucilage as a foam developing substance, Race suggests glue in a certain specified form and has embodied the suggestion in certain specified claims, to wit: claims 13 and 18 of his patent. It is said that those are specific suggestions in respect of which he is entitled to his patent *pro tanto* and the court is urged to render a judgment in accordance with those facts under section 31 of the *Patent Act.*

Assuming that, under the circumstances, the evidence justifies a distinction between mucilage and glue, and without deciding whether section 31 would, in a proper case, permit the court to discriminate in the way indicated, we do not think such relief can be granted in this case.

Under rule 14 of the Rules and Regulations of the Patent Office of Canada, made pursuant to section 59 of the Act and effective the first of September, 1923, "two or more separate inventions cannot be claimed in one application, nor included in one Patent." The invention named and described in Rice's patent, in accordance with the imperative requirements of sections 13 and 14 of the Act, was de-

(1) [1930] A.C. 97.

(2) (1926) 270 U.S. Rep. 390, at pp. 400-401.

clared as having for "its particular object" the providing of a "cellular composition or product adapted to be used for walls, constructional purposes, fireproofing of the frame work of steel buildings and practically all purposes that concrete can be used for." The patent that Rice got is for the principle of producing a cellular or porous cement product by mixing a tenacious stable foam with a cementitious material. The patent is not for an invention consisting in a particular new method of applying the principle. In other words: it was not applied for, nor was it granted for the subordinate discovery of certain foam producing agents or mixtures such as may be specifically defined in claims 13 and 18. Rice did not claim that as a separate invention. His patent may not now be transformed into and restricted to a patent for that kind of invention.

Our conclusion is that the judgment appealed from should be reversed and that Letters Patent number 252,546 should be declared invalid and adjudged cancelled, with costs here and in the Exchequer Court.

We think, however, we should not part with this case without taking yet another step. The *Patent Act* was enacted for the public and the grant of a patent is a matter of public concern. For that reason, attention should be drawn to the following facts: It was demonstrated, in this case, that the invention made by Bayer formed the subject-matter of a patent issued to him in the Kingdom of Denmark on the 19th of June, 1923, and there published on the 2nd of July, 1923, upon an application filed on the 11th of September, 1922. When application for the same invention was filed in the Canadian Patent Office on the 6th of December, 1924, the oath accompanying the petition to the Commissioner of Patents (taken by one who cannot escape the imputation of full knowledge of the matter) was to the effect that no application for a patent for "the said improvements had been filed in any foreign country except as follows: Germany, German Patent Application No. 111,020, filed on September 8, 1923." No mention was made of the Danish application or patent, and a material allegation in the declaration of the applicant was, therefore, apparently untrue. Possibly this circumstance is susceptible of satisfactory explanation and we do not wish

1930

CHRISTIANI & NIELSEN v. RICE.

Rinfret J.

to be understood as casting any reflection on anybody since the facts have not been fully investigated and ascertained. But we deem it our duty to direct that notice of this apparent omission should be sent by the Registrar to the Commissioner of Patents and to the Minister of the Crown entrusted with the administration of the *Patent Act*, so that they may be informed of this situation and enabled to act upon it as they may deem advisable.

Appeal allowed with costs.

Solicitors for the appellants: *Henderson & Herridge.*

Solicitors for the respondents: *Osler, Hoskin & Harcourt.*

1929

*Nov. 20, 21, 22, 23.

1930

*Feb. 4.

FRENCH'S COMPLEX ORE REDUCTION COMPANY OF CANADA (DEFENDANT) ..... } APPELLANT;

AND

ELECTROLYTIC ZINC PROCESS COMPANY (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Specification—Claims of invention—Clear and distinct statement as to alleged invention—Jurisdiction of the court—Construction of specification—Professional or expert witnesses—When more than five to be examined—When leave to be obtained from court—Patent Act, R.S.C., 1906, c. 69, s. 13—Canada Evidence Act, R.S.C., 1927, c. 59, s. 7.

Under the *Patent Act*, R.S.C., 1906, c. 69, an applicant for a patent must present to the Commissioner a petition under oath giving the title or name of the invention and accompanied by a specification containing the claims of the alleged inventor.

Held that the object of the specification, under section 13, is to give a clear and distinct statement of what the alleged inventor "claims as new and for the use of which he claims an exclusive property and privilege." The effect of the patent is to grant him, for a fixed period of years, a monopoly in what he has so claimed. The condition for the grant is that the thing so claimed be truly new and useful and that there be given out to the public a correct and full description of the mode or modes of operating the invention, as contemplated by the inventor.

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

1930

FRENCH'S COMPLEX ORE REDUCTION CO. v. ELECTROLYTIC ZINC PROCESS CO.

Held, also, that, to that extent, the jurisdiction of the courts is not limited by section 29 of the Act. By the very terms of the patent, the grant is made "subject to the conditions contained in the Act" and also "subject nevertheless to adjudication before any court of competent jurisdiction." Therefore, unless the claims or the description or both comply strictly with the requirements of the Act, the monopoly should not be granted, and the patent is accordingly invalid and should be declared null and void.

Held, further, that obviously the decision on the point referred to above, depends upon the construction of the specification. It should not be construed astutely. The patent should be approached, in the words of Sir George Jessel "with a judicial anxiety to support a really useful invention" (*Hinks & Son* v. *The Safety Lighting Co.* (4 Ch. D. 607, at p. 612)); but, on the other hand, the consideration for a valid patent is that the inventor must describe in language free from ambiguity the nature of his invention, including the manner in which it is to be performed; and he must define the precise and exact extent of the exclusive property and privilege which he claims. Otherwise the specification is insufficient and the patent is bad.

At the trial, the depositions of three expert witnesses, who had previously been examined in Europe on commission, had been read and the testimony of a fourth witness similarly examined in Europe was about to be put in, when an argument took place as to the right of the respondent to call more than five of such witnesses without leave having been applied for before the examination of any one of them, as required by section seven of the *Canada Evidence Act.* The trial judge suggested that leave might then be applied for; and, notwithstanding objection by counsel for the appellant, the application for leave was held to be still in time and was allowed.

Held that such application was made too late and ought not to have been entertained at that stage of the proceedings. The application should at least have been made before the testimony of any of the witnesses examined on the Commission was read at the trial.

Semble that, in a case tried before a judge, it should not be necessary, on account of the evidence so improperly admitted, to refer it back to the trial court, such as would have to be done in a case tried before a jury or by arbitrators (*Canadian Northern Western Ry. Co.* v. *Moore,* (58 Can. S.C.R. 519)); but that it should be sufficient for an appellate court to disregard the evidence improperly admitted and to base its decision solely upon the record as it would then stand.

Judgment of the Exchequer Court of Canada ([1927] Ex. C.R. 94) aff.

APPEAL from the judgment of the Exchequer Court of Canada (1), maintaining the respondent's action to impeach a patent granted to appellant's author, for an alleged process to extract zinc from zinc lead ore by electrolysis.

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

(1) [1927] Ex. C.R. 94.

1930

FRENCH'S COMPLEX ORE REDUCTION CO. v. ELECTROLYTIC ZINC PROCESS CO.

R. S. Smart K.C. and *Henri Gérin-Lajoie K.C.* for the appellant.

W. N. Tilley K.C., A. Geoffrion K.C. and *R. C. Crowe* for the respondent.

The judgment of the court was delivered by

RINFRET J.—The action of the Electrolytic Zinc Process Company impeaches the Canadian patent no. 140,402 granted to Andrew Gordon French on the 14th of May, 1912, and now owned by French's Complex Reduction Company of Canada Limited.

The patent is a process patent for alleged improvements in the treatment of zinc and manganese sulphate solutions obtained in the hydro-metallurgical process for the extraction of zinc from zinc lead refractory ores containing manganese by the use of electrolysis.

The validity of the patent was disputed on several grounds which may be summarized as follows:

(*a*) No invention;
(*b*) Lack of novelty and anticipation;
(*c*) Lack of utility;
(*d*) Insufficiency of the specification;
(*e*) Wilful omission and misleading, deceptive or false statements in the specification;
(*f*) The specification did not specifically state or claim, and was not limited to, that which was the novelty, if any, of the alleged invention.

The trial judge, Audette J., in the Exchequer Court of Canada, held practically that all of these grounds of attack were established and, upon the conclusion of the argument, he delivered judgment adjudging the patent invalid and declaring it null and void.

He found that there was no invention;

that the defendant's patent does not possess any element of invention and (he could) in no sense, find any creative work of an inventive faculty which the patent laws are intended to encourage and reward; (and again) it cannot be found there was invention in the present case.

He found lack of novelty and anticipation:

It cannot be said that the improvement claimed lies so much out of the track of former use as to involve ingenuity of invention * * *

Dr. Ingalls (he said), a witness of unusual knowledge and experience in the metallurgical art, has described and considered with great competence, every substantial allegation in the defendant's patent and has

demonstrated and established beyond any doubt that each and every one of them has been anticipated and belongs to the prior art. There is, according to his view, not one single element of the patent which is not found in the prior art.

On the ground of usefulness, the learned judge remarked that the patent "has never been put into practice" and "has never been used commercially." He points out that "No purification is mentioned in the patent and it is in the evidence that purification is necessary"; and further that "The patent does not show that the impurities must be taken out." Although he does not state whether he considers the absence in the patent of any reference to purification as insufficiency in the specification or as wilful omission, both misleading and deceptive, it may be noted that that statement in the judgment comes immediately after his reference to section 13 of the Act, and the averment that if the patentee "designedly or unskilfully makes it ambiguous, vague or indefinite, the patent becomes obviously bad." He does say that "there is not in this indefinite and uncertain patent a new clearly and well defined process or method dealing with complex ore containing manganese," that it does not "point out clearly the method by which the process is to be performed."

Finally, he agreed with the Electrolytic company that the specification does not state or claim, and is not limited to, that which was the novelty, if any, of the alleged invention. If it consisted in

> fixing the proportion of manganese to be used, (that) does not amount to ingenuity of invention—however valuable it may be, and it is not defined in the patent.

If the invention consisted only in the discovery that "the presence of manganese sulphate in the electrolyte is a benefit," the learned judge says

> that no such statement as alleged can be found in any of the eight claims of the patent; and were it so, could it be a valid subject-matter under the circumstances of the present case?
>
> Even if it were in the specification—a statement which I do not find—if it is not embodied in the claims, it becomes *publici juris*. It has been given to the public. The patentee must define and limit with precision what he claims to have invented and I cannot find such a statement in the claims.

And the learned judge concludes:

> The use of manganese as mentioned in the patent, I am unable to take as a patentable improvement under the circumstances.

From such judgment the French's Ore Company now appeals to this court.

1930

FRENCH'S COMPLEX ORE REDUCTION CO. v. ELECTROLYTIC ZINC PROCESS CO.

Rinfret J.

Whether in a particular case there is invention, novelty or utility is always a question of fact depending on the special circumstances and stands to be decided on the evidence of those having the technical skill and knowledge enabling them to understand the new art, machine, manufacture, process or composition of matter or the improvement thereon for which the patent was granted.

The subject-matter of the French patent is such that the specification must be envisaged as a description addressed primarily to persons possessing a not inconsiderable amount of chemical knowledge (Lord Parker in *Osram Lamp Works Limited* v. *Pope's Electric Lamp Co.* (1)). The trial judge,

(1) (1917) 34 R.P.C. 369, at p. 391.

in this case, had the advantage of the assistance of eminent chemists and metallurgists of several countries in Europe, America and Australia; men, as he rightly says, " the most qualified to speak upon this subject-matter in our days." For reasons which he gives—and which have our approval —he made his choice in the conflict of testimony. From his judgment on these points—agreeing as it does " with the weighty evidence of the plaintiff,"—we are not prepared to differ.

Counsel for the French company, however, drew our attention to the fact that, at the hearing of the case, the depositions of Messrs. Ashcroft, Cowper-Coles and Laszczynski, who had previously been examined in Europe, on commission, were read and put in evidence by counsel for the Electrolytic company. The testimony of yet another witness similarly examined in Europe, Dr. Victor Engelhardt, was about to be put in, when a discussion arose as to the character of these witnesses,—whether they were professional or expert witnesses—and as to the right of the plaintiff to call more than five of such witnesses, without leave having been applied for before the examination of any one of them, as required by the 7th section of the *Canada Evidence Act.*

The contention of counsel for the Electrolytic company was that the witnesses heard in Europe were " only accounting for what they did " and giving the results they obtained, that they were not " experts with regard to the validity of the patent." The learned trial judge held a different view and, for greater certainty, suggested that leave

might now be applied for, to which counsel acceded without prejudice to his contention that none of the witnesses so far examined had given opinion evidence. Application was therefore made orally by counsel for the plaintiff for leave to examine five expert witnesses outside of those examined in Europe. Objection was taken by counsel for the defendant, but the learned judge held that the application was still in time and he allowed it.

With due respect, we think such application was made too late and ought not to have been entertained at that stage of the proceedings. The rule is clear that

such leave shall be applied for before the examination of any of the experts who may be examined without such leave (s. 7-2).

In this case, the application should therefore at least have been made before the testimony of any of the witnesses examined on the commission was read at the trial. Their evidence became part of the trial as soon as it was put in. It already formed part of the trial when the application was made and the testimony of three of the witnesses had already been read and dealt with by counsel for the plaintiff.

In *Canadian Northern Western Ry.* v. *Moore* (1), this court, holding that s. 7 of the Canada *Evidence Act* had been infringed, set aside the award and referred the case back to the arbitrators. But this was a judgment in arbitration proceedings. No doubt also, in a jury trial, the like situation would have to be remedied in a similar way. In a case like this however, tried before a judge, the same result does not necessarily ensue. It should be sufficient, we think, to disregard the evidence improperly admitted and to base the decision solely upon the record as it would then stand. But we do not find it necessary to express an opinion upon the remedy, if any, to be applied, because of the views we hold upon other points, which do not depend on the evidence and which remain presently to be discussed.

The French patent was granted under the law in force in 1912. This was *The Patent Act,* to be found in Revised Statutes of Canada, 1906, chapter 69. Under it, an applicant for a patent must present to the Commissioner a petition under oath giving the title or name of the invention

(1) (1916) 53 Can. S.C.R. 519.

1930

FRENCH'S COMPLEX ORE REDUCTION CO. v. ELECTROLYTIC ZINC PROCESS CO.

Rinfret J.

and accompanied by a specification containing the claims of the alleged inventor. Under section 13 of the Act,

> The specification shall correctly and fully describe the mode or modes of operating the invention, as contemplated by the inventor; and shall state clearly and distinctly the contrivances and things which he claims as new and for the use of which he claims an exclusive property and privilege.

In compliance with this requirement of the law, French filed the following specification of his invention accompanied by the following claims. We shall omit those parts of the specification having reference to a process of calcination where bisulphate of sodium is used. That is covered by another patent against which the action was originally directed, but as to it a discontinuance was filed, and the process is not made an essential element of the patent in issue, it being distinctly stated that any other mode of calcination may be used for the oxidating and sulphating of the ores.

> This invention has for its object the electrolytic treatment of zinc and manganese sulphate solution obtained by the lixiviation of calcined zinc lead and manganese refractory ores * * *
>
> The mole of practising my invention is as follows:
>
> In my process the solution of the sulphates of zinc and manganese resulting from the lixiviation of the calcined zinc lead and manganese ores either with a dilute solution of bisulphate of sodium, or with water acidulated with sulphuric acid is placed in electrolytic tanks of any convenient form which are provided with anode plates of lead, and cathode plates of zinc or any other convenient metal for receiving the deposit of metallic zinc. The solution of zinc and manganese sulphates should be as near the saturation as possible, say from 1·25 to 1·30 specific gravity and a direct electric current of a minimum of four volts is passed through the solution from anode to cathode. The proportion of manganese to zinc in the solutions may be from one-half to three-fourths, i e., one pound of zinc to from one-half to three-fourths of a pound of manganese, but the process works well with only an eighth part of manganese to one of zinc.
>
> An immediate and constant deposit of reguline zinc takes place on the cathode plates, whilst a simultaneous formation of manganese dioxide occurs at the anode plates partly adhering thereto and partly falling as a black mud to the bottom of the electrolytic tank. The advantages of this formation of dioxide of manganese by the action of the current on the sulphate of manganese in the solution are threefold, namely: (1) Polarization by free oxygen at the anode is prevented. (2) Peroxidation of the lead anodes and consequent destruction is prevented. (3) The manganese in the solution obtained from the ores is recovered in a commercially valuable form. The solution obtained from ores poor in manganese may be mixed with that from ores richer in manganese so as to get a good average. The sulphuric acid originally combined with the zinc and the manganese in the solution as it reaches the electrolytic tanks is separated by the current from those metals.

Then comes a description of what will happen if bisulphate of sodium was used in the calcination and the specification proceeds:

* * * In the case of plain calcining of the ores without the bisulphate of sodium the liberated sulphuric acid remains free in the effluent liquor from the electrolytic tank and is used again for leaching fresh ores * * * In order to obtain the highest efficiency in the electrolytic tanks, it is necessary to maintain the zinc and manganese solution at as high a strength as possible, and to keep the acidity from rising to such an extent as will cause a local back current at the cathodes, thereby diminishing the deposition of zinc. To effect these objects the solution is caused to circulate continuously between the leaching and the electrolytic tanks and not allowed to fall below 1·2 specific gravity or rise above 2 per cent of active sulphuric acid.

The applicant is aware that attempts have been made to electrolyse solutions of zinc obtained from zinc ores, but owing partly to inherent defects in the roasting or calcining and largely to the absence of manganese in the solution, such attempts have never reached the commercial working stage.

What I do claim and desire to secure by Letters Patent is:—

Claims:

1. In the electrolytic separation of zinc and manganese in hydrometallurgical solutions obtained from zinc lead ores containing manganese, the deposition of zinc in reguline form.

2. In the electrolytic separation of zinc and manganese in hydrometallurgical solutions obtained by treating zinc lead ores containing manganese, the deposition of zinc in reguline form on the cathode and manganese dioxide at the anode.

3. In the electrolytic separation of zinc and manganese in hydrometallurgical solutions obtained by treating and leaching zinc lead ores containing manganese, the precipitation of manganese dioxide at the anode.

4. In the electrolytic separation of zinc and manganese from an aqueous solution of their sulphates and sodium sulphate, the regeneration and recovery of sodium bisulphate.

5. In the electrolytic separation of zinc and manganese in an aqueous solution of their sulphates, the combination of the nascent oxygen formed at the anode with manganese and the consequent freedom from liberated gas.

6. In the electrolytic separation of zinc and manganese in an aqueous solution of their sulphates, the combination of the nascent oxygen formed at the anode with manganese producing manganese dioxide and the consequent freedom from oxidation of the lead anode itself.

7. In the electrolytic separation of zinc and manganese in hydrometallurgical solutions obtained by heating complex zinc lead ores containing manganese, with bisulphate of sodium and leaching, the deposition of reguline zinc on a zinc cathode and granular manganese dioxide on or in the vicinity of the anode and the regeneration and recovery of the bisulphate of sodium.

8. In the separation of zinc and manganese by the electrolysis of a concentrated aqueous solution of the sulphates of these metals having a specific gravity of from 1·25 to 1·30 with a direct current of four volts or over, the precipitation of manganese dioxide at the anode and pure reguline zinc at the cathode.

1930

FRENCH'S COMPLEX ORE REDUCTION CO. v. ELECTROLYTIC ZINC PROCESS CO.

Rinfret J.

The object of the specification, as we have seen is to give a clear and distinct statement of what the alleged inventor "claims as new and for the use of which he claims an exclusive property and privilege." The effect of the patent is to grant him, for a fixed period of years, a monopoly in what he has so claimed. The condition for the grant is that the thing so claimed be truly new and useful and that there be given out to the public a correct and full description of the mode or modes of operating the invention, as contemplated by the inventor. To that extent, at least, we do not think the jurisdiction of the courts is limited, as was urged upon us, by section 29 of the Act. By the very terms of the patent, the grant is made "subject to the conditions contained in the Act" and also "subject nevertheless to adjudication before any court of competent jurisdiction." And we take it that unless the claims or the description or both comply strictly with the requirements of the Act, the monopoly should not have been granted, and the patent is accordingly invalid and should be declared null and void.

Obviously the decision on this point depends upon the construction of the specification. It should not be construed astutely. The patent should be approached, in the words of Sir George Jessel "with a judicial anxiety to support a really useful invention" (*Hinks & Son* v. *Safety Lighting Co.* (1); but, on the other hand, the consideration for a valid patent is that the inventor must describe in language free from ambiguity the nature of his invention, including the manner in which it is to be performed; and he must define the precise and exact extent of the exclusive property and privilege which he claims. Otherwise the specification is insufficient and the patent is bad.

Now if we come to examine the specification sent in by French, reading first the description of the invention and looking afterwards to what he has claimed, in accordance with the rule laid down by Lord Hatherley in *Arnold* v. *Bradbury* (2), we find that it describes a process wherein refractory complex zinc lead ores containing manganese are crushed in their crude state; these ores are then subjected to roasting or calcination, and subsequently to leaching or

(1) (1876) 4 Ch. D. 607, at p. 612.

(2) (1871) 6 Ch. App. 706, at p. 707.

lixiviation with water acidulated with sulphuric acid, the resulting solution of the sulphates of zinc and manganese being placed in tanks wherefrom zinc is recovered in metallic form by means of electrolysis. At the same time as zinc is deposited in the electrolytic cells, the sulphuric acid is regenerated in the cells and sent back to the leaching tanks for the dissolving of new ores.

It is therefore a cyclic process for the treatment of zinc lead ores containing manganese by means of electrolysis. But the cyclic process for the recovery of zinc and all the general features of the process described by French had obtained in the prior art. Calcination and leaching in the manner suggested were well known and formed part of the common knowledge. Electrolysis is considered a very simple operation. It is one which had been used in many departments of metallurgy. On the other hand, in the specification no mention is made of purification. It is now conceded to play an important part in the process and Thomas French, the son of the inventor and himself a consulting metallurgist and chemical engineer, emphasized the necessity of purification of the solution (or, as he said, of obtaining a "finished liquor") before it went into the electrolytic cell. This was in a letter written by him, at the time when he went to Trail, British Columbia, for the purpose of experimenting with his father's process. He had previously carried on operations under the process jointly with his father; and, in that letter, he was answering certain questions that had been asked of him in writing by Mr. Stewart, one of the officers of the Consolidated Mining and Smelting Company of Canada, for whose benefit the experiments were being made.

In explanation of the omission to mention purification, counsel for the appellant argues that leaching includes the purifying of the solution and that a skilled worker at the time of the patent would have understood that purification must therefore be read into the patent as forming part of the leaching operation. That is not what a reading of the specification suggests. It does not convey the impression that the patentee left out in his description anything which he expected craftsmen to read into it. He referred to every step of the operation in the order in which it took place,—

1930

FRENCH'S COMPLEX ORE REDUCTION CO. v. ELECTROLYTIC ZINC PROCESS CO.

Rinfret J.

whether in his own mind such step was a matter of common knowledge or whether it was not. Yet purification is not mentioned. Contrast this with the interpretation of the language of the specification put forward by some witnesses on behalf of the French company, to the effect that the invention consisted in the discovery of the properties of manganese in inhibiting the toxic effect of the impurities in the solution. This would dispense with purification by other means and, instead of inducing one to read such purification into the patent (as urged before us by counsel for the appellant), would rather lead in the other direction. The evidence being undoubtedly that purification is a necessary part of the process, as found by the trial judge, it may well be argued that the absence of any reference to it in the specification amounts to an omission wilfully made for the purpose of misleading.

But the most serious difficulty in the way of the appellant is that of finding in the specification in precise and unambiguous terms, both the nature and ambit of the invention which French claims to have made. The widely different constructions put upon it show in themselves how much it lacks in the clarity which is essential and which is indeed imperatively required by law.

Counsel for the respondent expressed the view that French was making the whole claim of being the inventor of the application of electrolysis to zinc lead ores containing manganese. We do not think he does; but if he did, it would be conclusive against the validity of the patent.

We think the patent is only intended to cover a stage in the treatment by electrolysis. Experts heard on behalf of the French company thought the fundamental idea was the usefulness or beneficial effect of manganese sulphate in the electrolyte. Thomas French was put the question:

> What in your opinion are the essential features of patent 140,402?

The answer was:

> The essential feature is that manganese should be present in the solution.

This answer does not agree with his letter to Mr. Stewart of 12th January, 1915, already referred to. That letter is valuable at least to indicate how Thomas French under-

stood the patent at the time and also what a metallurgist and a chemist reading the specification would understand from it.

It should be remembered that the patent deals with ores containing manganese. It does not pretend to deal with other ores. It will at once be apparent that no patent could issue granting the exclusive privilege of having manganese in a solution of complex zinc lead ores containing manganese. But assuming the beneficial effect of manganese sulphate in the solution, we are unable to find that the patentee made such a broad claim. Had it been made, the claim itself would have been sufficient to defeat the patent.

The appellant's position as to the invention was not so stated at bar by counsel. In the transcript of trial proceedings, Mr. Smart "puts his case in this way":

> Now the electrolysis of a zinc sulphate solution was of course known before; and it was also known before that when zinc sulphate solutions were derived from a complex ore containing manganese there would necessarily be some manganese sulphate in that solution; but this patentee discovered that if that manganese sulphate were maintained in certain proportions and in a certain way that it had a beneficial result; and he added to that discovery a practical means of applying it. Now that in brief is the invention with which we are concerned here.

Mr. Smart maintained that position before this court. It requires some ingenuity to discover that that is what the description of the invention in the specification means. But be it so, while no limit is fixed in the patent, none of the experts regarded the reference in the specification to the proportion of manganese to zinc in the solution as forming part of the alleged invention in the sense that such proportion must be adhered to. We are told by Mr. Witherell that

> the real range * * * is the highest possible degree of manganese to zinc which you can get in the ore, or has been known of, as the maximum; and the minimum is down so fine and so low you could not discover it.

This would amount to claiming the whole range and if the patent were to be so read, it would be obviously bad. Assuming there was ingenuity in the conception of the idea that manganese should be maintained in the solution instead of being eliminated, such conception "coupled with the way of carrying it out" might support a claim for the broad idea; *Hickton's Patent Syndicate* v. *Patents, etc.,*

1930

FRENCH'S COMPLEX ORE REDUCTION Co. v. ELECTROLYTIC ZINC PROCESS Co.

Rinfret J.

Limited (1). Admittedly French does not make such a claim. Neither could he claim all modes of carrying the idea or the principle into effect. In such a case, the words of Baron Alderson in *Neilson* v *Harford* (2), would be apposite:

> In the first place, it is necessary to ascertain what the patentee has claimed as his invention; and, in the next place, if he has claimed the principle and all the modes of applying it, his claim will be indistinguishable from a claim to the principle itself and will be too large.

Further, it is shown that the proportions mentioned in the specification are of no importance; and no intention is apparent on the part of the patentee to ascribe to them any special significance.

According to the appellant's own experts, none of the particular conditions set forth concerning proportion of manganese to zinc, saturation of solution, specific gravity, voltage or acidity have any real bearing as a means for obtaining whatever may be the beneficial effect of manganese. These proportions and these particular conditions were discarded by Thomas French, as appears from his letter to Stewart, while he was conducting operations at Trail, and also by Mr. Witherell in the experiments he made. In fact, the results of the latter would show that greater efficiency was obtained from a solution containing no manganese.

Thus far, while dealing with the specification, we have confined our attention to the description of the alleged invention; but, as was said by Lindley M.R. in *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co. Limited* (3),

> whether a patentee has discovered a new principle or whether he has not, his monopoly is confined to what he has already invented, and what he has claimed as his invention.

If we turn to the claims, we do not find in any of them the necessity of maintaining manganese, still less of securing in the solution a certain relationship between zinc and manganese sulphates. Each claim begins by the words: " In the electrolytic separation of zinc and manganese." No one reading those claims would imagine that the patentee thereby intended to " claim as new " the idea of preserving man-

(1) (1909) 26 R.P.C. 339, at p. 347.
(2) (1841) 1 W.P.C. p. 342, at p. 355.
(3) (1898) 15 R.P.C. 236, at p. 241.

ganese or a certain proportion of manganese in the hydro-metallurgical solutions of zinc lead ores containing manganese. If the novelty or the utility of the process lay in the use of manganese in certain proportions, French had to claim it in order to secure for that use an exclusive property and privilege. And if he did not claim it, he may be taken to have disclaimed it. At all events, he made no claim for what is now suggested to be the invention, and there is no invention or subject-matter left in what he did claim and the patent is therefore bad.

Assuming that the process was new, no claim was made for the process itself. Results alone are stated in the claims; not the process whereby these results are obtained. Through the operation of the ordinary laws of nature and on account of the inherent properties of manganese, these results are said to happen as a necessary consequence of the process for which no protection is claimed. It would follow that the process, if patentable, was given to the public and, of course, the natural results, for which alone claims were made, were not patentable. So far as they are involved, the grant made was wholly invalid.

To sum up our views, on this branch of the case, we think the specification is insufficient. It fails to comply with the conditions of clarity and distinctness required by section 13 of the Act and does not state in precise and unambiguous terms in what the alleged invention consists. If the descriptive part of the specification be construed as suggested by counsel for the French Company, the claims were not made to conform with it and they are inadequate for that purpose. We can find in the patent no other subject-matter patentable in law. The utility or the beneficial effect of manganese or of certain proportions of manganese are not what French

claimed as new and for the use of which he claimed an exclusive property and privilege.

At least, he did not clearly and distinctly do so. In the words of Fletcher Moulton L.J., the claim is

a separate part of the specification primarily designed for delimitation.

British United Shoe Machinery Company Limited v. *A. Fussel & Sons, Limited* (1). The delimitation must be

(1) (1908) 25 R.P.C. 631 at p. 650.

1930

FRENCH'S COMPLEX ORE REDUCTION CO. v. ELECTROLYTIC ZINC PROCESS CO.

Rinfret J.

clearly marked out. And, in conclusion, we will quote the following passage from Lord Halsbury's speech in *The British Ore Concentration Syndicate Limited* v. *Minerals Separation Limited* (1).

> The statute requires it (the specification) to be a distinct statement of what is the invention. In construing a specification one has to remember that it is a document not only assuring a monopoly to the patentee, which but for the statute would be contrary to the common law, but so (also?) prohibiting any one, other than the patentee, doing what he would be free to do, but for the right which is granted, subject to the condition, among other things, that the patentee states distinctly what his invention is. If he designedly makes it ambiguous, in my judgment the patent would undoubtedly be bad on that ground; but even if negligently and unskilfully he fails to make distinct what his invention is, I am of opinion that the condition is not fulfilled, and the consequence would be that the patent would be bad."

The appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kavanagh, Lajoie & Lajoie.*

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

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(1) (1909) 27 R.P.C. 33, at p. 47.

1929

CANADIAN CONSOLIDATED RUBBER CO. (PLAINTIFF) ..... } APPELLANT; *Oct. 17, 18, 21.

AND

1930

*Feb. 4.

T. PRINGLE & SON, LIMITED
AND
THE FOUNDATION COMPANY LTD. (DEFENDANTS) } RESPONDENTS.

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

Architect—Builder—Building perishing in whole or in part within ten years—Vices du sol—Liability of builder acting under employer's architect—Evidence—Onus on builder—Art. 1688 C.C.

The approval and direction of a competent architect, or his omission to ascertain the nature of the soil of the foundation by known and available tests, does not exonerate the builder from the consequences of following such direction or of building on the foundation without making himself sure of its efficiency.

When there has been a breach of warranty of the stability of a building, the onus is on the builder to shew that he is exempted from liability by some exception in his favour, which must be made out (if at all) by legal implication.

Such construction to be put upon article 1688 C.C., respecting the liability of the builder in case of a building perishing in whole or in part within ten years, has been authoritatively settled since 1871 by the decision of the Privy Council in *Wardle* v. *Bethune* (L.R. 4 P.C. App. 33).

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Duclos J., and dismissing the appellant's action.

The material facts of the case are stated in the judgment now reported.

Ls. St-Laurent K.C. and *Errol M. McDougall K.C.* for the appellant.

Geo. H. Montgomery K.C. and *J. A. O'Gilvy* for the respondent T. Pringle & Son Ltd.

Gregor Barclay K.C. for the respondent The Foundation Company Ltd.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

1930

CANADIAN CONSOLIDATED RUBBER CO. v. PRINGLE.

The judgment of the court was delivered by

SMITH J.—The respondent T. Pringle & Son, Limited, pursuant to agreement with the appellant, prepared plans and specifications for a dam to be erected for the appellant in connection with its mill on the North River at St. Jérome, and supervised the carrying out of the work as provided in the agreement. The respondent The Foundation Company, Limited, pursuant to agreement with the appellant, constructed the dam from the plans and specifications so furnished, and under the supervision of the respondent T. Pringle & Son, Limited, the work having been completed in August of 1919.

In March of the following year cracks were discovered in seven of the nine piers of the dam so constructed, which, appellant claims, necessitated extensive repairs and additional works to secure the stability of the dam, which both the respondents refused or neglected to make after request and which appellant, in consequence, was obliged to make at its own cost, which, it is alleged, amounts to $89,612.79. This action is brought to recover this amount from the respondents as damages, for which it is claimed they are jointly and severally liable.

Article 1688 of the Civil Code reads as follows:

> If a building perish in whole or in part within ten years, from a defect in construction, or even from the unfavourable nature of the ground, the architect superintending the work, and the builder are jointly and severally liable for the loss.

The declaration does not expressly state that the claim is based on this article, and if the article were to be regarded as introducing into the law of the province a new statutory liability, questions might arise as to its construction and meaning. Such questions, however, have been settled to a large extent by the decision of the Privy Council in the case of *Wardle* v. *Bethune* (1). There the action was brought before the enactment of article 1688 of the Civil Code, but the appeal was heard after that enactment. At p. 52 of the report it is stated that articles 1688 and 1689 C.C. are declaratory of the law of Lower Canada as it was before the enactment of these articles, and are expressly founded on the case of *Brown* v. *Laurie* (2), affirmed on appeal by the

(1) (1871) L.R. 4 P.C. App. 33. (2) (1851) 5 L.C.R. 65.

Court of Queen's Bench in 1854, and not open to review because incorporated into the Civil Code. At pages 54 and 55 there is the following statement:

> The broad general rule of law established by the case of *Brown* v. *Laurie*—the rule certain for architects and builders in the execution of the works entrusted to them (1)—is that there is annexed to the contract, by force of law, a warranty of the solidity of the building that it shall stand for ten years at least.

It is further pointed out that it was not decided whether this was to be taken as an absolute warranty or with an implied exception of cases in which the building gives way within the time, wholly or in part, from causes that could not have been discovered or removed by due diligence and competent skill, but it was decided that the approval and direction of a competent architect, or his omission to ascertain the nature of the soil of the foundation by known and available tests does not exonerate the builder from the consequences of following such direction or of building on the foundation without making himself sure of its efficiency.

It is also stated (p. 55) that when there has been a breach of warranty of the stability of the building, the onus is on the builder to shew that he is exempted from liability by some exception in his favour, which must be made out (if at all) by legal implication.

To this extent, then, the construction to be placed on article 1688 C.C. is authoritatively settled.

In appellant's factum a long list of authorities in the Quebec courts is cited to shew that it has there been uniformly held that the old law of Lower Canada as stated above and article 1688 C.C. apply to works such as the dam here in question, and this proposition is not contested in the factums of the respondents.

Much was said on the argument as to the onus of proof. On the authority referred to it would seem that on proof by the appellant of the contracts with the respondents and the construction of the work pursuant to these contracts and its failure for reasons stated in the article within the ten years, the onus would be on respondents to exonerate themselves from liability. The respondents, however, contend that the appellant, by alleging specific causes for the failure and by first proceeding to prove failure from these causes,

(1) 5 L.C.R. 65, at p. 69.

1930

CANADIAN CONSOLIDATED RUBBER CO. v. PRINGLE.

Smith J

placed on itself the onus of establishing these allegations. It is quite conceivable that a plaintiff, in making a *prima facie* case, might by the same evidence establish the existence of some condition which, without more, might be held to be the cause of the failure, and which, on such finding, would exonerate the defendants. In such a case a plaintiff might very well at the outset undertake to shew that such condition was not the cause of failure, and to establish the real cause. This may have been the reason for the appellant in this case alleging and attempting to prove facts which, as claimed in the declaration, it was not necessary to allege or prove.

The question of onus does not, however, seem to be very material here, because the question of whether or not the failure resulted from the conditions that the respondents claim exonerate them from liability is one of fact as to which there is much contradictory evidence, and as to that fact there is a finding in the courts below in the respondents' favour not arrived at by reason of onus one way or the other, but deduced from consideration of the contradictory evidence.

What has now to be determined is whether or not this finding of fact on the evidence submitted should be reversed as the appellant contends, and, if not reversed, whether or not on that state of fact the respondents are exonerated, or are not to be held to have warranted stability under these conditions found to have existed and to have caused the failure. The conditions that the respondents rely on as exonerating them from liability are established solely by the appellant's witnesses, and are not in dispute.

To understand the relevancy of these conditions it is necessary to consider the design of the dam, and how, according to that design, it was intended to be operated to accomplish the object for which it was built.

(Smith J. then makes an extensive review of the voluminous evidence produced at the trial by the parties and adds:)

According to the decision of the Privy Council referred to, (1) article 1688 of the Civil Code imported into the contracts between the appellant and the respondent a warranty of the stability of the dam for ten years. This lia-

(1) L.R. 4 P.C. App. 33.

bility would not be different from the liability on such a warranty expressly written into the contracts, and would not apply where the use of operation is not in compliance with the design, and the failure is the result of departure in use or operation from the design. The departure from the designed mode of operation in this case is unquestionable, and the failure resulted from that departure, according to the finding already discussed. It is contended, however, that the respondents are nevertheless liable because they failed to instruct the appellant how to operate the dam according to the design. No authority is cited in support of this proposition and article 1688 C.C. does not purport to impose such an obligation. If it were deemed to exist, designers and contractors would be compelled at their peril to give instructions complete to the minutest detail as to the manner of use and mode of operation of every structure. In this case the appellant's engineers had, as such, expert knowledge of the construction, use and operation of dams. They had prepared plans themselves for the proposed development and collaborated with respondent T. Pringle & Son's engineer in the preparation of the plans adopted, and therefore knew all about the design and mode of operation. Henthorne says they had all the information required. Ruiter says he knew enough himself to take out the stop logs. He says Jenner, one of the respondents' engineers, told him the dam would operate itself, and, being asked what was meant by that, Mr. Ruiter answers,

He meant by that, "You would only have to take out the stop logs when the high water came." Those were just the words he said.

Later he tries to explain this away by saying he did not understand the question, but that does not change his statement at all, because he was giving the words Jenner used, and they did not in any way depend on the form of the question.

(Smith J. then continues the review of the evidence and concludes that, upon the evidence, the appeal should be dismissed with costs.) *Appeal dismissed with costs.*

Solicitors for the appellant: *Casgrain, McDougall & Demers.*

Solicitors for the respondent T. Pringle & Son, Ltd.: *Brown, Montgomery & McMichael.*

Solicitors for the respondent The Foundation Company, Ltd.: *Lafleur, MacDougall, Macfarlane & Barclay.*

1930

*Feb. 10.
*May 9.

CANADIAN NATIONAL RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

SAINT JOHN MOTOR LINE LIMITED (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK (APPEAL DIVISION)

Negligence—Railways—Crown—Action against Canadian National Ry. Co. for damages for alleged negligence in operation of what was formerly the Intercolonial (a Canadian Government) railway—Defence of contributory negligence—Application of provincial Contributory Negligence Act (R.S.NB., 1927, c. 143)—Canadian National Railways Act, R.S.C., 1927, c. 172, ss. 12, 15, 33, 2 (a), 3, 16, 19, 21—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19—Consideration by Supreme Court of Canada of question of law not raised below.

Plaintiff sued defendant, the Canadian National Ry. Co., for damages for alleged negligence causing a collision, at Saint John, N.B., between plaintiff's omnibus and defendant's train, in defendant's operation of what was formerly the Intercolonial (a Canadian Government) railway. Defendant pleaded contributory negligence of plaintiff. The jury found, on questions submitted to them, that the injury was caused by joint negligence of the parties; defendant's negligence being in its flagman not remaining long enough to warn traffic properly, and plaintiff's being in insufficient attention of the bus chauffeur and excessive speed; that the proportions of fault were: defendant 90%, plaintiff 10%. Plaintiff recovered judgment for the damages assessed, subject to above apportionment, which judgment was, subject to reduction of amount, affirmed by the Supreme Court of New Brunswick, Appeal Division. Defendant appealed to this Court. The *Contributory Negligence Act* of New Brunswick (R.S., 1927, c. 143) provides for apportionment of liability according to degrees of fault. Its application was not questioned in the courts below, but was attacked by defendant (in its factum and argument) on its appeal to this Court.

Held (1): As the evidence upon which the question as to the application of said Act depended was before the Court and it was not suggested that any further proof material to its elucidation would or could have been produced had the question been made prominent at the trial, it was proper for this Court to decide it (*The Tasmania*, 15 App. Cas., 223, at p. 225; *Connecticut Fire Ins. Co.* v. *Kavanagh*, [1892] A.C., 473, at p. 480, and other cases referred to).

(2): The trial judge, in charging the jury, should have ignored said Act with its provisions for apportionment of the damages, and instructed the jury to ascertain the cause of the collision, and, if there were negligence on both sides, to find, by application of the principles of the common law, whether it was the negligence of the plaintiff or that

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

1930

CANADIAN NATIONAL RY. CO. v. SAINT JOHN MOTOR LINE LTD.

Newcombe J.

of the defendant which operated directly as the effective cause. In the different course taken there was serious misdirection. This Court could not, therefore, do justice to the case upon the present findings, and there must be a new trial, subject, however, to defendant's election therefor upon terms imposed as to costs.

Defendant, with relation to the Intercolonial Railway, was answerable only for the liabilities to which the Crown would have been subject if the railway's management and operation had not been transferred to defendant and the action had been brought in the Exchequer Court directly against the Crown; defences available to the Crown were available to defendant; (*Canadian National Railways Act,* R.S.C., 1927, c. 172, especially ss. 12, 15, 33, also ss. 2 (*a*), 3, 16, 19, 21; and orders in council as to defendant company, of October 4, 1922, and January 20, 1923, considered); contributory negligence is a defence (*Wakelin* v. *London & South Western Ry. Co.,* 12 App. Cas. 41, at p. 48); the Crown's, and therefore defendant's, responsibility was to be regulated by the general law of New Brunswick as it prevailed on October 30, 1887, when (in its original form) what is now s. 19 of the *Exchequer Court Act,* R.S.C., 1927, c. 34, came into effect (*Ryder* v. *The Queen,* 36 Can. S.C.R., 462, and earlier decisions referred to therein; *Armstrong* v. *The King,* 11 Can. Ex. C.R., 119; 40 Can. S.C.R., 229, at p. 248); and, therefore, the provincial *Contributory Negligence Act,* which was not in force earlier than 1925, c. 41, had no application.

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division, which, in effect, dismissed its appeal (except to the extent of reducing the damages recovered, from $3,711.60 to $2,933.20) from the judgment of Byrne J. (on the findings of a jury) for the recovery by the plaintiff against the defendant of damages in respect of a collision between an omnibus of the plaintiff and a freight train of the defendant on March 11, 1927, at Saint John, New Brunswick.

The material facts of the case are sufficiently stated in the judgment now reported. By this judgment a new trial was ordered upon the defendant electing for it within thirty days, upon certain terms imposed as to costs; otherwise the appeal to be dismissed with costs.

I. C. Rand K.C. for the appellant.

C. F. Inches K.C. and *A. M. Latchford* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The plaintiff (respondent) sued the defendant railway company (appellant) for damages sustained in a collision between the plaintiff's motor omnibus

1930

CANADIAN NATIONAL RY. CO. v. SAINT JOHN MOTOR LINE LTD.

Newcombe J.

and a freight train of the defendant company, which took place at Saint John, N.B., on 11th March, 1927, at the junction of Marsh street, upon which the defendant operates a spur line of railway, and City Road, alleging negligence on the defendant's part by reason of excessive speed, absence of proper lookout and failure to sound its engine whistle and bell. These allegations of fact were denied, and the defendant moreover pleaded contributory negligence of the plaintiff, in that the plaintiff's omnibus was proceeding, without chains, at dangerous and excessive speed, and without maintaining a proper lookout. The train suffered some slight damage in the accident, and the defendant counterclaimed for this; but, as the damage proved to be inconsiderable, the counterclaim was withdrawn at the trial.

The case was tried at Saint John before Byrne J., with a jury, and the evidence adduced covers 127 printed pages of the case. The learned judge submitted questions, upon which the jury found that the accident was caused by the joint negligence of the parties, in the proportions of 90 per cent. on the defendant's part, and 10 per cent. on the plaintiff's part; apportionment being authorized by the general provisions of the *Contributory Negligence Act* of New Brunswick, R.S., 1927, ch. 143, the application of which was not questioned in the courts below; and the jury assessed the damages at $4,124.11, which included $1,000 for the plaintiff's loss of the use of its omnibus while undergoing repairs. The plaintiff accordingly recovered damages for $3,711.60.

The defendant appealed to the Appellate Division of New Brunswick, where the findings were attacked on its behalf as unjustified by the proof, and it was contended that the action should be dismissed, or, in the alternative, that the damages should be reduced. The defendant's grounds of appeal were thus stated in the judgment of the Appellate Division:

1. On the findings of the jury it appears that the legal cause of the accident was the negligence of the plaintiff and the action should have been dismissed with costs.

2. There was no basis in fact or in law on which the jury could find the proportions of responsibility declared, and in the absence of such the damages should have been equally divided.

3. There was no sufficient basis on the evidence submitted to justify the jury in awarding damages of $1,000, for loss of use of the bus.

The court, upon consideration of these objections, reduced the judgment entered at the trial, holding that, in respect of the damage, amounting to $1,000, which the jury had found for the loss of use of the plaintiff's omnibus, there was no proof to establish an amount in excess of $135, and that the total recovery should therefore be limited to $2,933.20.

The defendant appealed to this court, and at the hearing, upon the assumption that the judgment was right in the particular which remains to be discussed, the court expressed itself as unwilling to disturb the findings or judgment of the Appellate Division.

But Mr. Rand, for the defendant, raised ingeniously a new and important point, which had not been considered or mentioned at the trial, or upon the provincial appeal. The point is, however, stated in the appellant's factum; and, as I understand the submission of the learned counsel, it depends upon the interpretation and effect of the *Canadian National Railways Act*, R.S.C., 1927, ch. 172; the contention being that the action is, in reality, against the Crown, and that, in relation to the undertaking which was formerly known as the Intercolonial Railway, the Canadian National Railway Company is no more than an officer or servant of the Crown entrusted with the management and operation; that the Act, and the executive orders thereunder, substitute the present method of administration for that which previously prevailed under the *Government Railways Act* (now ch. 173 of R.S.C., 1927) and are not intended to enable the company, either on its own behalf, or for the Crown, to assume any responsibility to which the Crown would not, in the like case, formerly have been subject; and, moreover, seeing that the *Contributory Negligence Act* of the province does not apply to or affect the Crown in the right of the Dominion, it cannot serve to alter the rights of the parties as they would, but for that Act, have been found to exist.

It was objected on behalf of the respondent that it is now too late to raise such a question; but the practice of this court has, I think, conformed very closely to that which

1930

CANADIAN NATIONAL RY. CO. v. SAINT JOHN MOTOR LINE LTD.

Newcombe J.

is well established in England, and we have for our guidance the rulings of the House of Lords and of the Judicial Committee of the Privy Council in such cases as *The "Tasmania"* (1), where the general rule is stated by Lord Herschell; and in *Connecticut Fire Insurance Co.* v. *Kavanagh* (2), a judgment of the Judicial Committee, in which Lord Watson says:

> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea. To accept the proof adduced by a defendant in order to clear himself of a charge of fraud, as representing all the evidence which he could have brought forward in order to rebut a charge of negligence, might be attended with the risk of doing injustice.

See also *Banbury* v. *Bank of Montreal* (3); *Wilson* v. *United Counties Bank Ltd.* (4); *North Staffordshire Railway Co.* v. *Edge* (5).

The Order in Council of 4th October, 1922, constituting the company, is in evidence, also the Order in Council of 20th January, 1923, which recites

> That the Canadian National Railway Company, hereinafter called the Company, has been brought into existence by virtue of an Order in Council passed on the 4th day of October, 1922, whereby certain persons were nominated directors of the Company pursuant to the provisions of Section 1 (now Section 3) of the said Act.
>
> That the powers of the General Manager in respect of the Canadian Government Railways were heretofore entrusted by Order in Council dated 20th November, 1918, to certain persons from time to time constituting the Board of the Canadian Northern Railway Company, and that the powers of General Manager in respect of the Canadian Government Railways so entrusted are now being exercised by the persons who constitute the Board of Directors of the Canadian National Railway Company.
>
> That it is expedient to terminate the authority of the said persons to act as General Manager of the Canadian Government Railways and to entrust in lieu thereof the management and operation of the said railways to the Company, pursuant to the provisions of Section 11 (now Section 19) of the said Act as above in part mentioned. The effect of

(1) (1890) 15 App. Cas., 223, at p. 225.
(2) [1892] A.C., 473, at p. 480.
(3) [1918] A.C., 626.
(4) [1920] A.C., 102.
(5) [1920] A.C., 254.

said change will be to make applicable to the management and operation of the said railways many of the provisions of the said Act, and to accomplish the main purpose of the said Act as expressed in the recital thereto, namely—

"to provide for the incorporation of a Company under which the railways, works and undertakings of the Companies comprised in the Canadian Northern System may be consolidated, and together with the Canadian Government Railways operated as a national railway system."

And thereupon the Order in Council proceeds to declare that the Canadian Government Railways, which for the purpose of section 10 (now section 2) of the said Act, shall include the following lines designated specifically—

The Intercolonial Railway
The National Transcontinental Railway
The Lake Superior Branch leased from the Grand Trunk Pacific Railway Company
The Prince Edward Island Railway
The Hudson Bay Railway,

and as a general designation all other railways and branch lines, the title to which, and to the lands and properties whereon such railways are constructed, is vested in His Majesty, be by Order in Council entrusted in respect of the management and operation thereof to the Company on the terms in the said Act expressly specified, namely, that such management and operation shall continue during the pleasure of the Governor in Council and shall be subject to termination or variation from time to time in whole or in part by the Governor in Council.

It is also provided "that the Order in Council of November 20, 1918, above referred to, be cancelled."

In these circumstances, it appears that the evidence upon which the controversy now under consideration depends is before the court; and it is not suggested that any further proof material to the elucidation of the question would or could have been produced if the point now raised had been made prominent at the trial. Consequently, following the practice above explained, I shall proceed to consider the merits of the appellant's contention.

It is necessary briefly to consider the relevant provisions of sec. 19 of the *Exchequer Court Act*, R.S.C., 1927, ch. 34. By that section, which, in its original form, came into effect on 30th October, 1887, when the Exchequer Court was constituted, it is enacted:—

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—

* * * * *

(c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

1930

CANADIAN NATIONAL RY. CO. v. SAINT JOHN MOTOR LINE LTD.

Newcombe J.

(*d*) Every claim against the Crown arising under any law of Canada or any regulation made by the Governor in Council;

* * * * *

(*f*) Every claim against the Crown arising out of any death or injury or loss to the person or to property caused by the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon, in or about the construction, maintenance or operation of the Intercolonial Railway or the Prince Edward Island Railway.

These clauses must be read in the light of the decisions, of which the earlier leading examples are mentioned in the case of *Ryder* v. *The King* (1); and by these and the later authorities it is well established in this Court that not only does the Exchequer Court acquire jurisdiction to adjudicate the classes of claims above described, but also that in such cases liability is imposed upon the Crown to respond in damages for the negligence of its officers or servants where, in the like circumstances, such a liability would rest upon a subject corporation or individual according to the law of the province in which the claim arose, as that law existed at the time when the *Exchequer Court Act* began to operate.

The judge of the Exchequer Court reviewed the cases in *Armstrong* v. *The King* (2). He said:—

> It may be taken to be settled by the general concurrence of judicial opinion in the cases referred to that it was the intention of Parliament that the liability of the Crown should be determined by the general laws of each province in force at the time when such liability was imposed.

And he proceeds to explain, and to elaborate his view. This judgment was maintained by the Supreme Court (3), Davies J. (afterwards the Chief Justice) saying, at page 248:—

> On all the legal points debated so fully at bar I am in agreement with the conclusion of the learned trial judge. I think our previous decisions have settled, as far as we are concerned, the construction of the clause (*c*) of the 16th section of the *Exchequer Court Act,* and determined that it not only gave jurisdiction to the Exchequer Court but imposed a liability upon the Crown which did not previously exist, and also that such liability was to be determined by the general laws of the several provinces in force at the time such liability was imposed and that the case at bar is within the provision of the above cited amendment.

And an application for special leave to appeal to the Judicial Committee of the Privy Council was refused.

In this state of the authorities, I do not consider that the court is now at liberty to take a different view as to the

(1) (1905) 36 Can. S.C.R. 462. (2) (1907) 11 Can. Ex. C.R. 119.
(3) (1908) 40 Can. S.C.R. 229.

interpretation of the statute; and, if the defendant company, with relation to the Intercolonial Railway, answers only for the liabilities to which the Crown would have been subject if the management and operation of the railway had not been transferred to the company; and, if the responsibility of the Crown is to be regulated by the law of New Brunswick as it prevailed on 30th October, 1887, there is, of course, no authority for the application of the provincial *Contributory Negligence Act,* which was in force not earlier than chapter 41 of New Brunswick, 1925.

That Act, as revised, now appears as ch. 143 of the Revision of 1927, and it provides:—

2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:

Provided that:

(*a*) If having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally, and

(*b*) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed.

3. In actions tried with a jury the amount of damage, the fault (if any), and the degrees of fault shall be questions of fact for the jury.

Questions were submitted to the jury, and the material findings were these:—

5. Was the injury suffered in the collision caused by the joint negligence of the servants of the plaintiff and defendant company?—A. Yes.

6. If so, in what proportion do you say that each party was at fault? —A. Defendant: 90 per cent. Plaintiff: 10 per cent.

9. If the injury suffered was caused by the joint negligence of the plaintiff and defendant,

(*a*) In what did the negligence of the servants of the defendant consist?—A. The flagman did not remain in the street sufficiently long enough to properly warn vehicular or pedestrian traffic.

(*b*) In what did the negligence of the servant of the plaintiff company consist?

A. Not sufficient attention was paid by the bus chauffeur to the entrance of Marsh Street, and he was exceeding the limit of speed set by the City of Saint John.

Therefore, in a case controlled by these findings, the *Contributory Negligence Act,* if it apply, is apt so to operate as to compel the defendant company to bear a part of the loss, which it might otherwise have entirely escaped by reason of the plaintiff's contributory negligence. Hence the question now raised as to whether the Crown has, by the effect of the Orders in Council under the *Canadian Na-*

1930

CANADIAN NATIONAL RY. CO. v. SAINT JOHN MOTOR LINE LTD.

Newcombe J.

tional Railways Act, so enlarged or affected its liabilities with respect to the operation of the Intercolonial Railway as to become subject to the general legislation of the respective provinces in which the railway operates as it may, from time to time, exist.

The governing provisions of the *Canadian National Railways Act* are these:—

By sec. 2 (*a*), the expression "Canadian Government Railways" includes all railways and parts thereof

or interests or any of them as may be designated, whether generally or in detail, in any Order in Council from time to time subsisting, entrusting the management and operation thereof to the Company under the provisions of section nineteen of this Act.

The incorporation of the company is provided for by sec. 3, whereby the Governor in Council nominates directors, and thereupon the persons so nominated and their successors, and others who may from time to time be nominated in like manner as directors, "shall be and are hereby incorporated as a company, under the name of Canadian National Railway Company."

By sec. 12,

The Company may, in respect of the operation of its lines of railway or the lines of railway of the Canadian Northern System or the Canadian Government Railways, use the name "Canadian National Railways" as a collective or descriptive designation of all lines of railway or railway works under its control, without, however, affecting the rights or liabilities of any of the respective corporations, including His Majesty, for any of their respective acts or omissions.

There is a pertinent suggestion in the last three lines, and it should be recalled in connection with sec. 33, which I shall presently quote.

Section 15 is a more important section; it reads as follows:—

Notwithstanding anything in the *Government Railways Act* or the *Consolidated Revenue and Audit Act,* all expenses incurred in connection with the operation or management of the Canadian Government Railways, under the provisions of this Act, shall be paid out of the receipts and revenues of the Canadian Government Railways.

2. In the event of a deficit occurring at any time during any fiscal year the amount of such deficit shall from time to time be payable by the Minister of Finance out of any unappropriated moneys in the Consolidated Revenue Fund of Canada, the amounts paid by the said Minister under this section to be included in the estimates submitted to Parliament at its first session following the close of such fiscal year; and in the event of a surplus existing at the close of any fiscal year such surplus shall be paid into the said fund.

Section 16 provides that, notwithstanding anything in the *Government Railways Act* or any other Act, the provisions of the *Railway Act* respecting the operation of a railway shall apply to such of the Canadian Government Railways

as would but for the passing of this Act be subject to the *Government Railways Act,* during such time as the operation and management thereof is entrusted to the Company under the provisions of this Act.

I have not discovered that, for present purposes, this substitution of the *Railway Act* for the *Government Railways Act* makes any material difference; but there are sections 385 and 419 of the *Railway Act* that should not escape attention, if, upon a new trial, it should be found that the negligence causing the accident consists in breach of their provisions.

By section 19,

The Governor in Council may from time to time by Order in Council entrust to the Company the management and operation of any lines of railway or parts thereof, and any property or works of whatsoever description, or interests therein, and any powers, rights or privileges over or with respect to any railways, properties or works, or interests therein, which may be from time to time vested in or owned, controlled or occupied by His Majesty, or such part or parts thereof, or rights or interests therein, as may be designated in any Order in Council, upon such terms and subject to such regulations and conditions as the Governor in Council may from time to time decide; such management and operation to continue during the pleasure of the Governor in Council and to be subject to termination or variation from time to time in whole or in part by the Governor in Council.

By section 21 the company may, with the consent of the Governor in Council, construct and operate railway lines, branches and extensions.

And, finally, by section 33, it is enacted that

Actions, suits or other proceedings by or against the Company in respect of its undertaking or in respect of the operation or management of the Canadian Government Railways, may, in the name of the Company, without a fiat, be brought in, and may be heard by any judge or judges of any court of competent jurisdiction in Canada, with the same right of appeal as may be had from a judge sitting in court under the rules of court applicable thereto.

2. Any defence available to the respective corporations, including His Majesty, in respect of whose undertaking the cause of action arose shall be available to the Company, and any expense incurred in connection with any action taken or judgment rendered against the Company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, may be charged to and collected from the corporation in respect of whose undertaking such action arose.

1930

CANADIAN NATIONAL RY. CO. v. SAINT JOHN MOTOR LINE LTD.

Newcombe J

When, in the concluding lines of subs. 2 of sec. 33, it is provided that any expense incurred in connection with any action taken or judgment rendered against the company in respect of its operation or management of any lines of railway or properties, other than its own lines of railway or properties, " may be charged to and collected from the corporation in respect of whose undertaking such action arose," it is meant, I think, that it is the Canadian National Railway Company by which the charge may be made and collected, and that the word " corporation " must be taken to include His Majesty, because, at the beginning of the subsection, His Majesty is expressly included among the corporations to which the subsection applies.

Now, of course, if the *Canadian National Railways Act* had not been passed, and if the Intercolonial Railway were still working under the former system, this action would have been brought against the Crown, and, by the ordinary procedure of the Exchequer Court, a fiat would have been requisite; but, from the last quoted section, which declares that such an action may be brought against the company without a fiat in any court of competent jurisdiction, it reasonably follows that a provincial court, having general jurisdiction in cases of tort, may entertain an action against the company to recover damages for negligence in the operation of the railway which could formerly have been adjudged against the Crown in the Exchequer Court, and may determine the liability and declare and enforce it against the company where the Exchequer Court could, under the former procedure, have authorized the recovery.

Then, while by sec. 12 it is suggested that the rights or liabilities of His Majesty are not to be affected by the incorporation of the Canadian Government Railways in the Canadian National Railway System, it is plainly enacted by subs. 2 of sec. 33 that, as to actions against the company in respect of the operation of the Canadian Government Railways, defences available to His Majesty shall be available to the company; and contributory negligence is a defence; *Wakelin* v. *London and South Western Ry. Co.* (1); moreover, by the same subsection, and by sec. 15, the liabilities incurred are chargeable to His Majesty, and

(1) (1886) 12 App. Cas., 41, at p. 48.

therefore it seems plain enough that it was not intended to charge the company with any greater obligation than that which the Crown would have incurred if, in the absence of these provisions, the action had been instituted in the Exchequer Court directly against the Crown.

From these considerations it results that there was serious misdirection in the learned judge's charge to the jury. If I am right in my conclusions, he should have ignored the *Contributory Negligence Act,* with its provisions for apportionment of the damages, and instructed the jury to ascertain the cause of the collision, and, if there were negligence on both sides, to find, by the application of the principles of the common law, whether it was the negligence of the plaintiff, or that of the defendant, which operated directly as the effective cause. It is impossible, therefore, to do justice to the case upon the present findings, and there must be a new trial, if the defendant so elect, having regard to the terms which, I think, should reasonably be imposed; and it seems only right that the plaintiff should not, in any event, be put to expense by reason of the costs of the trial and of the appeal to the Appellate Division of New Brunswick, which have been lost by reason of the defendant's failure to raise, in the lower courts, the contention upon which it now succeeds. Therefore I think that this appeal may properly be disposed of by a direction that there should be a new trial upon payment by the defendant of the plaintiff's costs of the former trial and of the appeal to the Appellate Division, as between solicitor and client, and that the costs of the present appeal shall abide the event, subject, however, to the condition that the defendant must so elect within thirty days; and, if the defendant do not comply with these terms, that this appeal shall be dismissed with costs.

New trial ordered upon appellant electing within 30 days to take the same, on certain terms imposed as to costs; should appellant not so elect within 30 days, appeal to be dismissed with costs.

Solicitor for the appellant: *Thomas J. Allen.*

Solicitor for the respondent: *Hugh H. McLean.*

1930
*April 24.
*June 11.

AGNES SCHULTZ MONTGOMERY AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

THE RURAL MUNICIPALITY OF ASSINIBOIA (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Municipal corporations—Drainage—Municipality's right to make and maintain drains on private land—Sufficiency of by-laws—Remedy of land owners—Municipal Act, Man., R.S.M., 1913, c. 133—Jurisdiction of County Court in Manitoba as to equitable right.

Plaintiff municipality (in the province of Manitoba) proposed to enlarge a ditch or drain on land then owned by T., now owned by defendants. Its engineer interviewed T. who assented, with certain stipulations, to the work being done. In 1915 a contract was prepared between the municipality and a contractor for the doing of the work and the municipality passed by-law no. 837 authorizing this contract, which was then executed, and the work was done. In 1928 the municipality passed by-law no. 1987 enacting that a certain other drain running through the land (which was then owned by defendants) "be cleaned, altered and deepened" according to plans, etc., and that the municipality's officers, servants, etc., "are hereby authorized and empowered to enter upon said land for the aforesaid purpose;" and the work was done. In 1929 defendants blocked up both drains, and the municipality sued in the County Court for damages. The question was as to the municipality's right to make and maintain the said works.

Held: As to the first work, the municipality could not recover judgment based on an equitable right to make and maintain the ditch by reason of T.'s assent, and execution of the work in pursuance thereof, as the County Court had no jurisdiction, even in the absence of objection by either party, to hear and determine an equitable right of this character; but, as to both works, under s. 590 of the *Municipal Act*, R.S.M., 1913, c. 133, the municipality had the power, having passed a by-law for the purpose, to do the work in question (without expropriating any land under s. 574) subject to the owner's right to compensation. Each of said by-laws was sufficient, for the purpose of s. 590, as authority for the work done in pursuance of it, although by-law no. 837 was not drawn in the form that a skilled draughtsman would adopt. Defendants' certificate of title was subject to said statutory rights of the municipality. Defendants' rights were confined to claiming compensation, to be determined as provided in the Act.

Judgment of the Court of Appeal for Manitoba, 38 Man. R., 527, reversed in part.

*PRESENT:—Anglin C.J.C. and Duff, Lamont, Smith and Cannon JJ.

1930

MONTGOMERY ET AL. v. R.M. OF ASSINIBOIA.

APPEAL by the defendants (by special leave granted by the Court of Appeal for Manitoba), and cross-appeal by the plaintiff, from the judgment of the Court of Appeal for Manitoba (1) which maintained in part and reversed in part the judgment of McPherson, C.C.J., in favour of the plaintiff.

The plaintiff is a Rural Municipality in the province of Manitoba, and brought action in the County Court of Winnipeg, in said province, claiming damages against the defendants for blocking up certain drain work done by the plaintiff on land now belonging to the defendants. The real question in issue was whether or not the plaintiff was within its rights in making and maintaining the works in question. McPherson, C.C.J., gave judgment for the plaintiff. The defendants' appeal to the Court of Appeal was allowed in part, and the judgment below varied by reducing the damages awarded, the court holding that the defendants were justified in stopping up one of the ditches in question, but had no right to stop up the other one (1).

The material facts of the case are sufficiently stated in the judgment now reported. The defendants' appeal to this Court was dismissed with costs, and the plaintiff's cross-appeal allowed with costs both in this Court and in the Court of Appeal, and the judgment of the trial judge restored.

E. F. Newcombe K.C. and *J. K. Morton* for the appellants.

F. Heap K.C. and *C. Isbister* for the respondent.

The judgment of the court was delivered by

SMITH J.—Prior to the year 1915, the late Honourable John Taylor was the owner of a large tract of land at and around Headingley, in the respondent municipality. The natural drainage of these and neighbouring lands was in a southeasterly direction, passing south of Portage Avenue, through a depression or ravine on the Taylor property to the Assiniboine River. The late Mr. Taylor granted these lands to himself and wife for life, and, after their death, to his daughters, the appellants.

(1) 38 Man. R. 527; [1930] 1 W.W.R., 500.

1930

MONTGOMERY ET AL v. R.M. OF ASSINIBOIA.

Smith J.

There was a small artificial ditch passing from a culvert at Portage Avenue through the ravine mentioned, and also a small ditch on the north side of Portage Avenue, leading to the culvert. The late Honourable John Taylor had endeavoured to get relief from surface water lying on part of his lands at Headingley, but nothing was done until about 1915, when Portage Avenue was being paved. This resulted in bringing water more quickly to the culvert crossing Portage Avenue, and it became necessary to enlarge this culvert and provide an enlarged outlet. The respondent municipality, about this time, instructed its engineer, G. W. Rogers, to interview the Honourable John Taylor in reference to the proposed enlargement of the ditch south of Portage Avenue on his property, and a meeting was brought about by Councillor Taylor, a son of the Honourable John Taylor, at the property, at which the two Taylors and Mr. Rogers were present. Mr. Rogers explained what was proposed to be done, and the Honourable John Taylor asked that the culvert across the existing ditch be enlarged, and that some of the dirt be put north, to improve the grade, and that otherwise no dirt be left on his property. With these stipulations, he assented to the municipality entering and doing the work.

Plans and specifications were prepared by the engineer, and tenders asked for, and the tender of Elgin Real was accepted. An agreement was accordingly prepared between the municipality and Elgin Real, bearing date the 25th May, 1915, for building and completing the proposed ditch; and on the 1st June, 1915, a by-law of the municipality, No. 837, was passed, authorizing the entering into of this contract with Elgin Real, " for building an open drain running in a southeasterly direction from the northeast corner of the Headingley Ferry Road, as shewn on profile prepared by G. W. Rogers, Municipal Engineer, and marked No. 2 by him," and instructing and authorizing the Reeve and Clerk of the municipality to sign an agreement with Real attached to the by-law and marked " A "; and to attach the seal of the municipality thereto. The contract was accordingly signed, and the work completed and paid for by the municipality.

On the 19th day of September, 1928, the respondent municipality passed a by-law, No. 1987, to provide for the cleaning, deepening and altering of a certain drain on lots 50, 51 and 52 of the Parish of Headingley north of Portage Road, commencing at the municipal ditch on Dodds Street opposite a dry well put down by the municipality, and running thence in a southeasterly direction to the culvert under the C.P. Ry. tracks and along the railway tracks and opposite the Headingley Agricultural grounds. This by-law enacted that

> The said drain be cleaned, altered and deepened, in accordance with the recommendations, plans and specifications, of William Fulton, District Engineer, for the Provincial Government, heretofore annexed marked Exhibit A and identified by the signature of the Reeve and Secretary-Treasurer, and that said work be carried out under the supervision and direction of Councillor Taylor, of Ward No. 1, Headingley; and the officers of the Municipality its servants, agents and workmen, are hereby authorized and empowered to enter upon said land for the aforesaid purpose.

The work was carried out accordingly. This drain passes through the lands of the appellants lying north of Portage Avenue.

In the year 1929, the appellants caused both of these drains to be blocked up, and the respondent municipality brought action in the County Court against the appellants for damages for this alleged wrongful act of the appellants, and were awarded the sum of $22, the amount agreed on as the cost of removing the obstructions.

The Court of Appeal (1) varied the judgment of the court below by reducing the damages to $11, holding that the municipality had the right to maintain the ditch south of Portage Avenue, and that the appellants had wrongfully blocked the same, but that the municipality had no right to make the ditch on appellants' lands north of Portage Avenue, and that therefore the appellants had committed no wrong in blocking the same.

The judgment of the Court of Appeal as to the ditch south of Portage Avenue proceeds upon the ground of the equitable right of the municipality to make and maintain the ditch by reason of the assent of the late Honourable John Taylor and the execution of the work in pursuance of that assent. It seems quite clear that the County Court

(1) 38 Man. R., 527; [1930] 1 W.W.R., 500.

1930

MONTGOMERY ET AL. v. R.M. OF ASSINIBOIA.

Smith J.

had no jurisdiction to hear and determine an equitable right of this character, but the Court of Appeal deals with it because no objection was taken by either party to the jurisdiction. This lack of objection, however, would not confer jurisdiction, and the conclusion arrived at as to the ditch south of Portage Avenue cannot be upheld, as a judgment for the enforcement of an equitable right.

The ground relied upon as respondent's justification for the ditch south of Portage Avenue is by-law No. 837; and for the ditch north of Portage Avenue is by-law No. 1987. In the Court of Appeal it is stated that the municipality had no right to enter upon the appellant's land and construct a ditch without taking the necessary proceedings to expropriate the property required for the purpose, and it is pointed out that section 574 (*a*) of the *Municipal Act*, R.S.M., 1913, ch. 133, gives the power to expropriate land required for the construction of a ditch through the appellants' land. Section 574 does not seem to have any relation to the ditches in question in this action. The section upon which the respondent relies is section 590, under which the council of every municipality is given power to pass by-laws for opening, making, preserving, improving, maintaining, repairing, flushing, widening, altering, diverting, stopping up and pulling down drains, sewers or water courses within the jurisdiction of the council; and for entering upon, breaking up, taking or using any land in or adjacent to the municipality in any way necessary or desirable, in the opinion of the council, for the said purposes, or for the purpose of providing an outlet for any drain, sewer or water course, or for the purpose of carrying off through private property any water on a public highway; but subject always to the payment of compensation to persons who may suffer injury therefrom. Under this section it is not necessary to expropriate the land, and no notice whatever to the owner of the lands to be entered upon is provided for. The moment that work of the kind mentioned is done upon the owner's land, under authority of a by-law, the owner's right to compensation arises for any injury suffered therefrom.

By-law No. 837 is not drawn in the form that a skilled draughtsman would adopt, but it authorizes the doing of the

very thing that the municipality is authorized to do by by-law; and the municipality and its contractor entered upon the lands in question in pursuance of this by-law. It is true that the engineer in the first place talked the matter over with the late Honourable John Taylor, the owner of the lands, and explained to him the nature of the contemplated work, and intimated that his wishes as to enlargement of the culvert on his lands and disposal of the material would be complied with. Mr. Taylor assented to the work being done, but his assent was in no way necessary, because the municipality had, under the statute, full authority to pass the by-law and carry out the work without any such assent.

The by-law, No. 1987, authorizing the work that was done north of Portage Avenue, is in better form, and fully authorizes the work under section 590 referred to, and the appellants' rights in connection with that work are, as in the other case, confined to claiming compensation, as provided by that section.

The method of determining, by arbitration, in case of dispute, the amount of compensation for injury occasioned is provided by the statute.

The certificate of title is subject to the statutory rights conferred upon the municipality, under section 590.

The judgment of the trial judge should therefore be restored, with costs to the respondent of this appeal and of the appeal to the Court of Appeal.

Appeal dismissed with costs. Cross-appeal allowed with costs.

Solicitors for the appellants: *Jacob, Morton & Irwin.*

Solicitors for the respondent: *Isbister & Morton.*

1930

*Mar. 13, 14.
*June 11.

HIS MAJESTY THE KING (RESPONDENT) ..... APPELLANT;

AND

DOMINION OF CANADA POSTAGE STAMP VENDING COMPANY LIMITED (SUPPLIANT) ..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Licence—Revocation—Licence by Postmaster General to sell postage stamps, etc., by automatic machines—Period of agreement—Termination by Postmaster General—Right to terminate—Authority of Postmaster General in contracting for the Crown—Post Office Act, R.S.C., 1927, c. 161, ss. 2 (1), 4, 5, 7, 8, 66-80.

By agreement between the Postmaster General of Canada and respondent, the Postmaster General granted to respondent a general licence to sell (on commission) postage stamps, etc., by means of automatic machines, "such licence to be for a period of ten years * * * and if this contract has been properly fulfilled then for a further period of ten years without further agreement and upon the termination of the said periods above the licence shall be renewed for further periods of ten years each successively unless and until" either party terminated by notice. The Postmaster General agreed that "during the term of this agreement or licence he will not licence the use of any other machine than those used by the licensee * * * if such other machine depends substantially on similar principles for its operation. But this clause shall not be interpreted as meaning that the department shall be precluded from using or licensing any other more satisfactory or advantageous machine." Provision was made for machines to have compartments for mailing of letters. The Postmaster General terminated the agreement at the end of 10 years. In an action by respondent for damages, and on questions of law raised, the Exchequer Court held that the agreement, if properly fulfilled by respondent, was to continue for 20 years, and could not be terminated by the Postmaster General at the end of 10 years. The Crown appealed.

Held (Anglin C.J.C. and Lamont J. dissenting): The licence was revocable at the Postmaster General's discretion. He had no authority to grant it so as to bind his successor or the country at a future time. It is of the quality of a licence that it shall be revocable. An implied covenant in this case not to exercise his power of revocation would be in excess of his powers to bind the Crown. A minister cannot by agreement deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion, upon grounds of public policy, to execute it (*Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas., 623). The question was one of statutory administration of the public service; the Minister could depute the performance of

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

his duties only so far as authorized by Parliament; and, compatibly with the statute (*Post Office Act*, R.S.C., 1927, c. 161; ss. 2 (1), 4, 5, 7, 8, 66-80, referred to), he should have remained free to revoke the licence as the exigencies of the case in the public interest might require.

Per Anglin C.J.C. and Lamont J. (dissenting): The Postmaster General, in making the agreement, did not exceed his powers under the *Post Office Act*. S. 9 (*n*) of c. 66, R.S.C., 1906, as amended, 1911, c. 19, (now s. 7 (*m*) of c. 161, R.S.C., 1927), on its proper construction, authorizes him to secure by contract the erection and use of machines such as those in question, and implies authority to contract for a period of time, that period, in the absence of statutory limit, being left to his discretion, which in this case he exercised by fixing the period provided in the agreement. That period was not shown to have been, in the circumstances, unreasonable. While he cannot by contract deprive either himself or his successors of the right to close a post office if the public interest requires its closing, that right was not interfered with by the agreement; a machine was a post office only when, with his consent, mailable matter might be placed in a compartment thereof, and on the closing of that compartment the machine would cease to be a post office. The granting in the contract of permission to respondent to have and use compartments in the machines for certain purposes of its own, was within the Minister's authority. The Postmaster General had no right to determine the agreement as he did, even assuming that it was a mere licence. A licence, if given for value, or a licence with an agreement not to revoke it, if given for value, is an enforceable right and cannot be revoked without sufficient cause; further, if the agreement for the giving or continuing of a licence, or the circumstances under which it is given or continued, are such as to make it inequitable that the licence should be revocable at the will of the licensor a court will exercise its equitable jurisdiction to prevent an unjust revocation (*Ramsden* v. *Dyson*, L.R. 1 H.L., 129; *Plimmer* v. *Mayor, etc., of Wellington*, 9 App. Cas., 699; *Hurst* v. *Picture Theatres Ltd.*, [1915] 1 K.B. 1; *Whipp* v. *MacKey*, [1927] I.R., 372, and other cases, cited). Even if the agreement in question could have been revoked before respondent expended money in construction of the machines (as to which *quaere*), once it had expended money on the faith of the licence, an equity was created in its favour which rendered a revocation unjust; the agreement, in the light of what was contemplated by and done under it, should be construed as containing an implied contract not to revoke it except in accordance with its provisions for its determination.

APPEAL by the Crown from the judgment of Maclean J., President of the Exchequer Court of Canada, holding that it was not competent for the Postmaster General of Canada to terminate the agreement in question at the expiration of 10 years from its date arbitrarily and without cause, but reserving to the parties the right to have determined the issue as to the proper fulfilment of the agreement.

1930

THE KING
v.
DOMINION OF CANADA POSTAGE STAMP VENDING CO., LTD.

The original agreement was dated 20th May, 1911, and was made between the Postmaster General of Canada and one Katrine Ellen Fawns. It was amended by agreement dated 22nd May, 1913, made between the Postmaster General and the respondent, the latter, as recited in the agreement, being then the holder of the licence granted by the original agreement. The licence was to have effect as if originally granted by the agreement as amended, and as if the respondent were the original licensee.

By the agreement the Postmaster General granted to respondent a general licence to sell (on commission) postage stamps, etc., by means of automatic machines;

Such licence to be for a period of ten years from the date hereof, and if this contract has been properly fulfilled then for a further period of ten years without further agreement and upon the termination of the said periods above the licence shall be renewed for further periods of ten years each successively unless and until either party shall during the six months preceding the expiry date of any such period give to the other party notice of intention to terminate this agreement.

The material clauses of the agreement, with regard to the questions before the Court on this appeal, are sufficiently set out in the judgments now reported, and are indicated in the above head-note.

By letter dated November 3, 1920, signed by the Acting Deputy Postmaster General, the respondent was notified that the Postmaster General intended to terminate the agreement "at the end of the ten-year period, namely, on the 19th May, 1921," and the Postmaster General terminated the agreement accordingly. The respondent claimed that the Postmaster General had no right to do so, and sued for damages by way of petition of right. Clauses 2 and 4 of the Crown's answer read as follows:

(2) * * * it was competent for His Majesty rightfully to terminate the agreement * * * at the expiration of ten years from the said 20th day of May, 1911, by giving to the suppliant during the six months preceding the expiration of the said period of ten years notice of his intention to terminate the same, which notice was duly given * * *.

(4) * * * the petition of right does not disclose any cause of action which entitles the suppliant to relief sought herein.

The questions of law raised in said paragraphs 2 and 4 were (pursuant to order made for that purpose) set down for hearing. Maclean J. held

that paragraph one [above quoted in part] of the agreement * * * means, that if the agreement was being properly fulfilled by the licensee, the contract was to continue for two ten year periods, altogether twenty

years, and the Postmaster General could not arbitrarily terminate the agreement without cause, at the end of the first ten year period, which was attempted to be done. I do not think that this clause of the agreement is capable of any other interpretation. I am therefore of the opinion that it was not competent for the Postmaster General to terminate the agreement of May 20, 1911, as amended, at the expiration of ten years from such date, by giving to the suppliant six months notice preceding the expiration of the said period of ten years. I am of the opinion therefore that the Petition of Right does disclose a cause of action.

The Crown appealed to the Supreme Court of Canada.

F. P. Varcoe for the appellant.

Hamilton Cassels for the respondent.

The judgment of the majority of the court (Duff, Newcombe and Smith JJ.) was delivered by

NEWCOMBE J.—The action is by Petition of Right, upon an instrument under seal of 20th May, 1911, to which the parties are the Postmaster General of Canada, of the first part, and Katrine Ellen Fawns, of the second part, as amended by a supplementary instrument of 22nd May, 1913, executed in like manner, between the Postmaster General and the suppliant company; the latter substituted for the party of the second part. The Postmaster General grants to the suppliant a general licence to sell, by means of automatic machines, postage stamps, post cards, stamped envelopes and such other post office supplies, as may from time to time be specified by the Postmaster General, the licence to be for ten years from the date of the original instrument, and, " if this contract has been properly fulfilled," then for another period of ten years, and, at the end of that term, to be renewed for a further period of ten years, and so on, successively, " unless and until either party shall during the six months preceding the expiry date of any such period give to the other party notice of intention to terminate this agreement."

It is recited by the amending instrument that the suppliant company (now the respondent), " are the present holders of the said licence and the Postmaster General has requested that certain amendments be made thereto to which request the Company has agreed." There are many clauses regulating in detail the business provided for; but these clauses are interwoven and dependent, the whole being

1930

THE KING
v.
DOMINION OF CANADA POSTAGE STAMP VENDING CO., LTD.

Newcombe J.

based upon the main licensing provision, whereby the suppliant becomes a general licensee of the Postmaster General for the sale of the commodities mentioned, and, assuming performance on the suppliant's part, the licence is to continue in force for a period of at least twenty years or perhaps thirty years, and thenceforward indefinitely, subject to the agreed terms. The licence is thus designed to continue forever, unless, after twenty years, it be terminated by notice within the six months next preceding any subsequent decennial. Not only so, but by the second paragraph of clause 1, of the indenture of 20th May, 1911,

> The Postmaster General agrees that during the term of this agreement or licence he will not licence the use of any other machine than those used by the Licensee from time to time to carry out this agreement, if such other machine depends substantially on similar principles for its operation;

although, by the amending indenture of 22nd May, 1913, this paragraph is modified by adding the following provision:

> But this clause shall not be interpreted as meaning that the department shall be precluded from using or licencing any other more satisfactory or advantageous machine.

And thus the Postmaster General undertakes to limit the power which is committed to him generally by paragraphs (*m*) and (*o*) of section 7 of the Act which I am now going to quote.

The powers and duties of the Postmaster General are defined by the *Post Office Act,* R.S.C., 1927, chap. 161. By sections 4 and 5 it is provided that

> 4. There shall be at the seat of Government of Canada a department, known as the Post Office Department, for the superintendence and management, under the direction of the Postmaster General, of the postal service of Canada.
>
> 5. The Postmaster General shall be appointed by the Governor General, by commission under the Great Seal of Canada, and shall hold office during pleasure.

By section 7 the Postmaster General may

> (*a*) establish and close post offices and post routes;
>
> (*b*) remove or suspend any postmaster or other officer or servant of the post office;
>
> (*c*) enter into and enforce all contracts relating to the conveyance of the mails, or other business of the post office;
>
> * * * * *
>
> (*f*) cause to be manufactured and distributed postage and registration stamps necessary for the prepayment of postages and registration charges, under this Act; also stamped envelopes for the like purpose, and post cards and stamped post bands or wrappers for newspapers or other mailable matter not being post letters;
>
> * * * * *

(*m*) establish and provide street letter boxes or pillar boxes or boxes of any other description, for the receipt of letters, and such other mailable matter as he deems expedient, or for the sale of stamps or other post office supplies, in the streets of any city or town in Canada, or at any railway stations or other public places where he considers such boxes necessary;

* * * * *

(*o*) grant licences to agents other than postmasters, for the sale to the public of postage stamps and stamped envelopes, and allow to such agents a commission not exceeding two per centum of the amount of their sales;

* * * * *

(*w*) make and alter rules and orders for the conduct and management of the business and affairs of the Department and for the guidance and government of the postmasters and other officers, clerks and servants of the post office in the performance of their duties;

(*x*) make such regulations as he deems necessary for the due and effective working of the post office and postal business and arrangements, and for carrying this Act fully into effect.

By subsection 2

Every such regulation shall have force and effect as if it formed part of the provisions of this Act.

By section 8

Every regulation made by the Postmaster General under this Act, other than those made solely for the guidance and government of the officers or other persons employed in the postal service, which may be communicated by departmental order or otherwise, as the Postmaster General sees fit, shall have effect from and after the day on which the same is published in the *Canada Gazette*.

By section 2, which embodies the interpretation clauses,

In this Act, unless the context otherwise requires,

* * * * *

(*l*) "post office" means any building, room, post office railway car, street letter box, street stamp-vending box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched.

By the fasciculus of sections 66 to 80, under the title, "Mail Contracts and Contractors," the Postmaster General is expressly empowered to make contracts for carrying the mail; but these are not to stipulate for more than four years; see section 77, as follows:

No contract shall be entered into for a longer term than four years: but the Postmaster General may, in special cases, when in his opinion the service has been satisfactorily performed under an expiring contract, and on conditions advantageous to the public interest, renew the contract with the same contractor for a further term not exceeding four years.

I find nothing to authorize or suggest that the Postmaster General may grant a licence for the sale of postage stamps, by means of automatic machines or otherwise, so as to bind his successor or the country at a future time, when this method of conducting the business of the post

1930

THE KING v. DOMINION OF CANADA POSTAGE STAMP VENDING CO., LTD.

Newcombe J.

office may, in the discretion of the ruling authority, be found to be undesirable or in conflict with the public interest. The licence, as I have shewn, is granted by the Postmaster General under an express statutory power to grant licences to agents. It is of the quality of a licence that it shall be revocable; it is said to be implied in the instrument that the licence will not be revoked; but, if it can continue beyond the will of the Postmaster General only upon an implication that he has covenanted with the suppliant not to exercise his power of revocation, that covenant is, I think, in excess of his powers to bind the Crown; and such a covenant would, I am persuaded, serve to aggravate rather than to cure the vice of the transaction. A Minister cannot, by agreement, deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion, upon grounds of public policy, to execute it; that follows, I think, as a deduction from the principle enunciated by the judgment of the House of Lords in *Ayr Harbour Trustees* v. *Oswald* (1). The whole question here is one of statutory administration of the public service; and, in my view, the Minister has invoked a power which he did not possess. It seems to me that he can constitutionally and validly depute the performance of his duties, only so far as authorized by Parliament; and, compatibly with the statute, the Postmaster General should have remained free to revoke the licence as the exigencies of the case in the public interest might require.

I would therefore allow the appeal and declare the licence revocable at the discretion of the Postmaster General. There are raised by the petition some minor questions of accounting and responsibility for loss of commission earned, as to which the suppliant may proceed if so advised; otherwise the petition should be dismissed with costs and the respondent should have the costs of the appeal.

(1) (1883) 8 App. Cas., 623.

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

LAMONT J.—This is an appeal by His Majesty the King from a decision of the President of the Exchequer Court in favour of the respondent in an action for damages for breach of contract.

On May 20, 1911, the Postmaster General of Canada and one Katrine Ellen Fawns entered into an agreement in writing by which Katrine Ellen Fawns obtained the right to erect stamp vending machines and a licence to sell stamps by means thereof. The respondent was incorporated to take over the rights and obligations of Katrine Ellen Fawns under the agreement and did take them over. The agreement, with some minor alterations, was confirmed to the respondent by the Postmaster General by an agreement dated May 20, 1913. Clauses 1, 2, 3 and 4 of the agreement as confirmed read as follows:—

1. The Postmaster General hereby grants to the Licensee a general licence to sell postage stamps, post cards, stamped envelopes and such post office supplies as may from time to time be specified by the Postmaster General, by means of automatic machines. Such licence to be for a period of ten years from the date hereof, and if this contract has been properly fulfilled then for a further period of ten years without further agreement and upon the termination of the said periods above the licence shall be renewed for further periods of ten years each successively unless and until either party shall during the six months preceding the expiry date of any such period give to the other party notice of intention to terminate this agreement.

The Postmaster General agrees that during the term of this agreement or licence he will not licence the use of any other machine than those used by the Licensee from time to time to carry out this agreement, if such other machine depends substantially on similar principles for its operation. But this clause shall not be interpreted as meaning that the department shall be precluded from using or licensing any other more satisfactory or advantageous machine.

2. The Licensee shall have the right to erect automatic machines at any point or place at which the Postmaster General under the Post Office Act or otherwise has authority to place boxes for the receipt of letters or machines for vending stamps, but no automatic machine shall be erected in a place outside of a district or territory served by letter carriers if such automatic machine is to be under the control of a postmaster until the written consent of the Postmaster General has been obtained. Machines may be placed in any post office under the conditions above mentioned providing that in the event of a machine being already installed it shall be purchased by the Licensee from the Postmaster General if he so desires. In any event except as to post offices and points where boxes are already erected, the other points and places where such automatic machines will be erected must have been submitted beforehand to the Postmaster General and approved by him.

1930

THE KING
v.
DOMINION OF CANADA POSTAGE STAMP VENDING CO., LTD.

Lamont J.

3. All automatic machines erected in public streets and highways shall be erected by the Licensee for or on behalf of the Postmaster General but at the expense of the Licensee. Such machines may, as hereinafter provided, contain suitable compartments for the mailing of letters as well as for the vending of stamps or other postal supplies but the Licensee shall have the right to control and use all the other parts or compartments in such automatic machines as set out in paragraph ten other than such stamp and postal supply vending and letter receiving compartments. On the termination of this agreement such automatic machines shall become the property of the Licensee with the exception of the locks thereof, and any other devices connected therewith, that have been provided by the Postmaster General.

4. When the Licensee reports to the Postmaster General that an automatic machine has been erected under the authority of this agreement and with his consent as above provided, the Postmaster General shall thereupon supply and keep supplied the nearest post office or other supply office with the required rolls of stamps.

In the agreement the Postmaster General agrees to keep a full and complete record of all stamps or other postal supplies sold by means of the automatic machines erected under the agreement and also agrees to pay to the Licensee quarterly a commission of 2% on the amount so sold, (clauses 6 and 7).

The stamp vending compartments of all automatic machines erected within any district which is served by letter carriers or any other place approved by the Postmaster General are to be under his exclusive control; the locks for these compartments are to be furnished by the Post Office Department and the key for each lock is to be held by a postmaster named by the Postmaster General (clauses 9 and 10).

The last paragraph of clause 10 reads as follows:—

The Postmaster who is in charge of any automatic machine shall be required to see that all moneys are collected from and that such automatic machines are kept supplied with the necessary stamps or other post office supplies.

By clause 11 it is provided that where automatic machines are erected by the Licensee and the stamp vending compartment is not under the control of the Postmaster General he shall issue a stamp vending licence to the Licensee, or to any other person designated by the Licensee, and approved of by the Postmaster General, who shall be paid a commission of 2% on all stamps or other postal supplies sold by means of such machine.

On November 3, 1920, the respondent was notified that the Postmaster General intended to terminate the agreement on May 19, 1921, and the privileges which the re-

spondent had thereunder were terminated accordingly. On November 14, 1922, the respondent brought action by way of a petition of right in the Exchequer Court alleging that His Majesty had no right to terminate the agreement, and claiming damages for breach thereof. In answer to the petition His Majesty's Attorney-General for Canada appeared and filed a statement of defence on behalf of His Majesty, paragraphs 2 and 4 of which are as follows:—

2. His Majesty's Attorney-General says that it was competent for His Majesty rightfully to terminate the agreement of May 20, 1911, as amended by the agreement of May 22, 1913, (both of which agreements are referred to in the Suppliant's Petition of Right) at the expiration of ten years from the said 20th day of May, 1911, by giving to the Suppliant during the six months preceding the expiration of the said period of ten years notice of his intention to terminate the same, which notice was duly given to the Suppliant in November, 1920.

4. His Majesty's Attorney-General further says that the Petition of Right does not disclose any cause of action which entitles the Suppliant to relief sought herein.

Upon motion on behalf of the respondent the court ordered that the question of law raised in paragraphs 2 and 4 of the statement of defence be set down for hearing.

This motion was heard by the President of the Exchequer Court, who was of opinion that

paragraph one of the agreement as it originally stood, and as amended, means, that if the agreement was being properly fulfilled by the Licensee, the contract was to continue for two ten year periods, altogether twenty years, and the Postmaster General could not arbitrarily terminate the agreement without cause, at the end of the first ten year period.

He therefore held that the Petition of Right disclosed a cause of action. He, however, left it open to the parties to try out the issue as to the proper fulfilment of the agreement by the Licensee during the first ten years. From that decision His Majesty appeals to this court.

On the argument before us counsel for His Majesty did not seriously question the correctness of the construction placed by the learned President upon clause 1 of the agreement, and with that construction I entirely agree. The main questions argued before us was as to the authority of the Postmaster General to make the contract, and his right subsequently to terminate it. Counsel for His Majesty contended that he had no authority to make it because authority had not been given to him to make a contract for the vending of stamps which would fetter the future exercise of his discretion, or that of his successor in office, as to what might be in the public interest.

1930

THE KING v. DOMINION OF CANADA POSTAGE STAMP VENDING CO., LTD.

Lamont J.

That the Postmaster General could only exercise the power vested in him admits of no doubt. It also, in my opinion, admits of no doubt that as the executive head of the Post Office Department, carrying on the business of the department for the public good, the Postmaster General would have no authority, by means of a contract, to restrict or limit the exercise of his discretion, or that of his successor in office, as to what at any time the public interest required unless authority to make such a contract had been vested in him either expressly or by necessary implication. Without such authority the contract would not be binding upon His Majesty. This, I think, is clear upon the decided cases, to one of which only I need refer. In *Ayr Harbour Trustees* v. *Oswald* (1), the legislature had conferred upon the Harbour Trustees power to compulsorily take land for a particular purpose. The trustees took the respondent's land but sought to lessen the compensation which should be paid to him by agreeing that the conveyance to them should restrict their use of the land taken so as not to interfere with the access from the remaining property of the owner to the harbour. It was held that the trustees could not bind either themselves or their successors by the agreement. In his judgment, at page 634, Lord Blackburn says:—

> I think that where the legislature confers powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void.

The question then is: Was authority vested in the Postmaster General to make the contract which he, in fact, did make?

Section 2 of the *Post Office Act* then in force (R.S.C., 1906, c. 66, as amended 1911, c. 19), defines a post office as follows:—

> In this Act, unless the context otherwise requires, "post office" means any building, room, post office railway car, street letter box, street

(1) (1883) 8 App. Cas. 623.

stamp vending box, receiving box or other receptacle or place where post letters or other mailable matter are received or delivered, sorted, made up or despatched.

and section 9, in part, reads:—

The Postmaster General may, subject to the provisions of this Act,—

(*n*) establish and provide street letter boxes or pillar boxes or boxes of any other description, for the receipt of letters, and such other mailable matter as he deems expedient, or for the sale of stamps or other post office supplies, in the streets of any city or town in Canada, or at any railway stations or other public places where he considers such boxes necessary.

(*o*) grant licences, to agents other than postmasters, for the sale to the public of postage stamps and stamped envelopes, and allow to such agents a commission not exceeding two per centum of the amount of their sales.

As the Parliament of Canada has, by section 91 (5) of the *British North America Act, 1867*, exclusive legislative jurisdiction over the Postal Service, section 9, above quoted, vests in the Postmaster General authority to establish and provide in the places therein mentioned boxes for the sale of stamps, that is automatic stamp vending machines. It also authorizes him to grant licences for the sale of stamps and to pay a commission on the amount of the stamps sold thereunder. To "provide" boxes, means to procure, furnish or supply them. It is not, in my opinion, confined to furnishing boxes by purchase, but includes obtaining them by hire or lease, or securing their erection and use by means of a contract to that effect. Authority to hire, lease or contract for the use of automatic vending machines, implies authority to make a contract for a certain period of time. The statute places no limit upon the time for which a contract, under the section, may be made. That is left to the discretion of the Postmaster General and, in the present case, he has exercised his discretion by fixing the period at that set out in the agreement.

In his petition the respondent alleges that he has expended large sums of money "in the acquisition of the said licence and in erecting pillar boxes and vending machines." To recoup himself for this expenditure by means of a 2% commission on the sales made would require some considerable time. As a matter of business therefore, the Postmaster General, in order to secure the construction and erection of the machines, with an expenditure only of a 2% commission, was necessarily obliged to grant a licence to sell stamps for a long period. Without such a licence no

1930

THE KING v. DOMINION OF CANADA POSTAGE STAMP VENDING CO., LTD.

Lamont J.

one would incur the initial expenditure for the machines. It is not suggested that the period fixed by the agreement was more than sufficient to enable the respondent to recoup himself for his expenditure and secure a reasonable interest thereon. The period for which the licence was granted is, therefore, not shewn to have been unreasonable.

The object the parties had in view is, I think, clear: The Postmaster General was obtaining, for the convenience of the public, without the expenditure of one dollar of the public money beyond the statutory 2% commission, machines which would automatically sell to the public whatever stamps it might require; while the respondent was obtaining a virtual monopoly of the stamp vending business for twenty years (unless machines more suitable for the purpose were invented) and a 2% commission on the stamps sold. In addition he would have whatever advantages might be derived from advertising or vending his own goods or those of his assigns or lessees in compartments of the vending machines other than those used for vending stamps or receiving mailable matter. With the advertising and vending of these goods the Postmaster General had nothing to do beyond granting permission to the respondent to have compartments for these purposes in the boxes erected in streets and highways, and to use them for such purposes. It was contended that the Postmaster General had no authority to make a contract " whereby the Post Office business was to be mixed up with a merchandising and advertising scheme." In my opinion, if the Postmaster General had been buying stamp vending machines he could, without at all exceeding his authority, have purchased machines having all the compartments which the respondent's machines possessed, and, if certain of these compartments were not required for post office purposes, I can see no reason why they should not, by leasing or otherwise, be made to yield a revenue for the department.

It was also contended that if section 9 were construed as giving authority to contract for the use of stamp vending machines for a definite period of time, it would enable the Postmaster General " to contract himself and his successors out of the right to close post offices and discontinue stamp vending boxes in his discretion." In my opinion the right

of the Postmaster General to close a post office depends upon considerations entirely different from his right to discontinue the use of a stamp vending machine, the use of which he has contracted to continue. The right in the former case depends upon a consideration of what the public interest requires. The public has no more interest in the individual who sells stamps than it has in the individual with whom the Postmaster General contracts for post office supplies. I quite agree that the Postmaster General cannot, by contract, deprive either himself or his successors in office of the right to close a post office if the public interest requires that it should be closed. Authority to close a post office is given to him by the statute, but his right to close a post office is in no way interfered with by the agreement in question. Under section 2 (1) a stamp vending box becomes a post office only when it contains a receptacle or compartment in which letters or other mailable matter may be placed. They can only be so placed with the consent of the Postmaster General. In my opinion section 2 does not mean that a street stamp vending machine which, during the time letters were deposited in a compartment thereof, was a post office, continues to be a post office after the Postmaster General has closed that compartment. The moment the compartment has been closed, the vending machine ceases to be a post office.

Another contention advanced was that the Postmaster General, being the owner of the vending machines erected in streets and highways and having the exclusive control of the stamp vending compartments therein, could use or refrain from using those compartments at his option. This, I think, would be true unless he was under a contractual obligation to continue the use of the vending compartments during the term of the agreement. Such a contractual obligation I find in the last paragraph of clause 10.

I am therefore, of opinion that the Postmaster General, in making the agreement in question with the respondent, did not exceed the powers vested in him by the statute. Had Parliament altered the law so as to no longer require the use of stamps on mailable matter, other considerations would apply, but as Parliament by authorizing the use of stamp vending machines declared such use not to be con-

1930

THE KING DOMINION v. OF CANADA POSTAGE STAMP VENDING CO., LTD.

Lamont J.

trary to the public interest, and has, up to the present, continued in force that statutory provision, a change in the personal views of the Postmaster General would not, in my opinion, justify the breaking of a contract validly made by him for the sale of stamps.

The only remaining question is, had the Postmaster General authority to determine the agreement at the end of the first period of ten years? If the agreement is to be construed as a valid contract, then its termination by the Postmaster General undoubtedly constituted a breach thereof for which His Majesty is liable. In *Windsor and Annapolis Railway Co.* v. *The Queen and the Western Counties Railway Co.* (1), the Privy Council said:—

> Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown.

It is, however, suggested that the agreement on its true construction amounts to no more than a bare licence to sell stamps by means of stamp vending machines if the respondent wished to set up such machines. It is quite true that the agreement places the respondent under no obligation whatever to erect a single machine or to sell a single stamp. The agreement, nevertheless, was based on the assumption that he would do both. And, in view of the fact that the Postmaster General was to have vested in him the property in the machines erected in streets and highways until the termination of the agreement and to have the exclusive control of the stamp vending compartments in all machines, except those referred to in clause 11, I find it difficult to reach the conclusion that the agreement was not something more than a mere licence. Assuming however, in favour of His Majesty, that it was not, I am still of opinion that the respondent is entitled to succeed.

At common law a mere licence (that is one not coupled with a grant or an interest), whether under seal or not and whether for valuable consideration or not, was revocable at any time by the licensor. If coupled with a grant or interest it was not in general revocable because the licence was necessary to make the grant effective. *Wood* v. *Lead-*

(1) (1886) 11 App. Cas., 607, at p. 613.

bitter (1). Even before the *Judicature Act,* if the licence was continuous and the licensee had expended money on the faith of it, courts of equity would not permit the licence to be revoked except upon terms. *Jackson* v. *Cator* (2); *Ramsden* v. *Dyson* (3). Since the *Judicature Act* the court is bound to give effect to equitable rules and it can no longer be said that a mere licence is always revocable.

In *Plimmer* v. *Mayor, etc., of Wellington* (4), the plaintiff's lessor had, prior to 1856, obtained a revocable licence from the Government to erect a wharf and a jetty. In 1856, at the request of the Government and for its benefit, he incurred a large expenditure for the extension of his jetty and the erection of a warehouse. These the Government used and made payments for such use. In 1880 the land was vested in the defendants by statute and two years later they took possession. Plimmer claimed compensation. In giving the judgment of the Privy Council, Sir Arthur Hobhouse, at page 712, after referring to the *Ramsden* v. *Dyson* case (3), said:—

> In the present case, the equity is not claimed because the landowner has stood by in silence while his tenant has spent money on his land. This is a case in which the landowner has, for his own purposes, requested the tenant to make the improvements. The Government were engaged in the important work of introducing immigrants into the colony. For some reason, not now apparent, they were not prepared to make landing-places of their own, and in fact they did not do so until the year 1863. So they applied to John Plimmer to make his landing-place more commodious by a substantial extension of his jetty and the erection of a warehouse for baggage. Is it to be said that, when he had incurred the expense of doing the work asked for, the Government could turn round and revoke his licence at their will? Could they in July, 1856, have deprived him summarily of the use of the jetty? It would be in a high degree unjust that they should do so, and that the parties should have intended such a result is, in the absence of evidence, incredible.

In *Hurst* v. *Picture Theatres, Limited* (5), the plaintiff purchased a ticket for a seat in the theatre and paid for it and was shewn to a seat by an attendant. Under the mistaken belief that he had not paid for it the defendant ejected him. He brought an action for damages and it was held that he was entitled to recover. At page 10, Buckley L.J., says:—

> There is another way in which the matter may be put. If there be a licence with an agreement not to revoke the licence, that, if given for

(1) (1845) 13 M. & W., 838; 153 E.R., 351.
(2) (1800) 5 Ves. 688.
(3) (1865) L.R. 1 H.L., 129.
(4) (1884) 9 App. Cas. 699.
(5) [1915] 1 K.B. 1.

1930

THE KING
v.
DOMINION OF CANADA POSTAGE STAMP VENDING CO., LTD.

Lamont J.

value, is an enforceable right. If the facts here are, as I think they are, that the licence was a licence to enter the building and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke the licence until the play had run to its termination. It was then a breach of contract to revoke the obligation not to revoke the licence, and for that the decision in *Kerrison* v. *Smith* (1) is an authority.

In *Whipp* v. *MacKey* (2), the court had before it an agreement in writing, dated May 10, 1919, by which the defendant's assignor obtained liberty to moor eel tanks to an island in the river Shannon at an annual rental. One of the clauses provided that if the tenant should "commit any breach of this agreement the landlord shall be at liberty, upon giving one week's notice, * * * to determine the licence hereby created." A breach was committed by the non-payment of rent and the requisite notice given. The plaintiff brought an action in which he claimed an injunction restraining the defendant from mooring eel tanks to the island. It was held that the agreement was simply a licence for valuable consideration for the period specified; that such an agreement was revocable according to the terms of the contract *but not otherwise;* that the non-payment of the rent was a breach thereof, but that it was one against which the defendant ought to be relieved on equitable grounds as the clause had been inserted as a penalty.

See also *British Actors Film Co.* v. *Glover* (3); *King* v. *David Allen & Sons Bill Posting, Limited* (4); *McManus* v. *Cooke* (5); *Wilson* v. *Tavener* (6); *Lowe* v. *Adams* (7); *James Jones & Sons* v. *Tankerville* (8).

These authorities establish that a licence, if given for value, or a licence with an agreement not to revoke it, if given for value, is an enforceable right and cannot be revoked without sufficient cause. I think they go even further and justify the conclusion that if the agreement for the giving or the continuing of a licence, or the circumstances under which it is given or continued, are such as to make it inequitable that the licence should be revocable at the will of the licensor, a court will exercise its equitable

(1) [1897] 2 Q.B. 445.
(2) [1927] I.R. 372.
(3) [1918] 1 K.B. 299.
(4) [1916] 2 A.C. 54.
(5) (1887) 35 Ch. D. 681.
(6) [1901] 1 Ch. 578.
(7) [1901] 2 Ch. 598.
(8) [1909] 2 Ch. 440.

jurisdiction to prevent the unjust revocation of the licence. If the agreement itself contains a clause providing for its determination that method of terminating it must be followed. If no such provision is made then reasonable notice must be given and the court may in applying equitable remedies select that remedy which is most suitable to the circumstances of the particular case.

In the case before us, even if the agreement could have been revoked before the respondent expended money in the construction of the machines, as to which I express no opinion, once the respondent had expended money on the faith of the licence given by the agreement, an equity, in my opinion, was created in his favour which rendered it unfair and unjust that the licence should be revoked. The agreement, in the light of what was contemplated by and done under it, should, therefore, be construed as containing an implied contract not to revoke it except in accordance with the provisions for its determination contained therein. As it has not been shewn that the respondent failed to properly fulfil his obligations under the agreement during the first ten year period, its determination at the end of that period constituted a breach of the agreement.

The respondent's petition therefore shews a cause of action to be tried. That cause of action is the loss which he has sustained through being deprived of his right to vend stamps for the period of his agreement and to earn a 2% commission on the amount which would have been sold.

The appeal should be dismissed with costs.

Appeal allowed with costs, reserving right to suppliant to proceed on questions of accounting and responsibility for loss of commission earned as alleged by it.

Solicitor for the appellant: *W. Stuart Edwards.*

Solicitors for the respondent: *Cassels, Brock & Kelley.*

1929
*Oct. 2.
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*Feb. 4.

KNIGHT SUGAR COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

WILLIAM B. WEBSTER (DEFENDANT) ... RESPONDENT.

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

Contract—Sale of land—Printed form—Alteration by pen and ink—Whether ambiguity or repugnancy between clauses—Interpretation—Evidence of intention by use of deleted words.

The appellant sold to the respondent two large areas of land in Alberta. The parties in formulating their agreement employed the printed form which the vendor customarily used for such transactions, filling up the blanks in typewriting; but there were some handwritten interlineations in the print, and the printed clause immediately following the blank in which the description of the parcels of land was typewritten appeared in the original executed agreement in the following form:

"* * * excepting thereout and therefrom ~~all coal and~~ any overriding royalty of ten per cent of all oils or gas found or produced from said ~~other minerals, including petroleum, natural gas, and~~ lands ~~valuable stones in or under the said land, and the right to use so much of the said land or the surface thereof as the vendors or their assigns may consider necessary for the purpose of working and removing the said coal or other minerals, including petroleum or natural gas,~~ and any portion of the said lands taken for roads or public purposes * * *;"

Later in the instrument, and as part of the printed form not stricken out, there was a covenant by the vendor that, if the purchaser pay the purchase money and perform all and singular the conditions of the agreement, he shall be entitled to receive from the vendor a transfer of the land in fee simple, "excepting thereout and therefrom all coal mines and other minerals including petroleum and natural gas and valuable stones." The sale was for a price of $190,219.80 of which $45,000 was paid upon the execution of the agreement and the balance was made payable in five yearly instalments with interest and taxes. None of the deferred payments was in fact made by the respondent except a sum of $384; and, the agreement not being fulfilled, the appellant brought this action for specific performance. The respondent resisted payment on the ground that the land agreed to be sold embraced all coal mines, coal pits, seams and veins of coal and the right to work the same, which coal mines, etc., were the property of the Crown, and the appellant being unable to make title thereto

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

as required by its agreement, the respondent counterclaimed for the repayment of $45,000 and a declaration that the agreement was cancelled.

Held, Anglin C.J.C. dissenting, that, according to the meaning of the deed, it was not the intention of the agreement that the vendor should convey the mines and minerals with the lands.

Held, also, Anglin C.J.C. dissenting: In order to reach the conclusion that, according to the meaning of the deed, the mines and minerals were to go with the lands, the trial judge and the Appellate Division had to take into consideration "the printed form as it existed before the erasures," relying upon the authority of *Strickland* v. *Maxwell* (2 Cr. & M. 539). But, although it is difficult to distinguish the material facts of that case with those in the present one, the opinion therein expressed by Bayley and Vaughan B.B., who held it admissible to reason from the obliteration, cannot be followed, because that seems contrary in principle to the rule against extrinsic evidence as laid down by the books and, moreover, in conflict with the judgment in *Inglis* v. *Buttery* (3 App. Cas. 552).

The original grant from the Crown contained the reservation by it of "all coal mines, etc., * * * together with full power to work the same * * *" and while there is an exception embodied in the agreement which, according to the above holding, embraces coal mines, etc., if there be any, it does not provide expressly for the working powers and liberties. There are however powers and liberties incident to the ownership and they rest upon the implications of the case. But the respondent raised the ground that the powers for working, as expressly reserved by the Crown, are more comprehensive than those which are incident to the exception created by the agreement and therefore the appellant company has less than it has agreed to convey. *Fuller* v. *Garneau,* (61 Can. S.C.R. 450) relied on.

Held, further, per Duff, Newcombe, Lamont and Smith JJ., that there was no evidence that the lands subject to the agreement contained any coal, or, if any, that it could not be worked without causing damage to the surface. The Crown grants are in common form, and no inference can be drawn that a parcel of land contains coal because the grant by which the parcel is conveyed contains the common form of reservation. But if there be coal upon which the reservation operates, it is only "to such an extent as may be necessary for the effectual working" of it that the right "to enter upon or use or occupy the said lands" may be exercised. The necessity must therefore be shewn, either by the vendor or by the purchaser, before the reservation of the Crown grant can be found to extend beyond the exception for which the agreement provides. The onus is upon the party who suggests or relies upon the necessity, namely the respondent, to produce the proof or to establish this evidence, and the respondent has failed to do it.

Per Anglin C.J.C. (dissenting).—While, under ordinary circumstances, it is not proper to look at deleted words in an instrument as an aid to its construction (*Inglis* v. *Buttery,* 3 App. Cas. 552), that rule does not apply where, as a result of the deletion, there is ambiguity between different clauses of an agreement. And when the ambiguity is obvious, as in the present case, the principle which governs is that laid down in *Strickland* v. *Maxwell* (2 Cr. & M. 539), namely, that "the works struck out might be looked at to shew what the intention of the parties was."

1930

KNIGHT SUGAR CO. v. WEBSTER.

Judgment of the Appellate Division (24 Alta. L.R. 174) reversed, Anglin C.J.C. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J., dismissing the appellant's action for specific performance and allowing the respondent's counterclaim for rescission.

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

A. McL. Sinclair K.C. and *D. H. Elton K.C.* for the appellant.

P. H. Russell and *J. B. Barron* for the respondent.

The judgment of the majority of the court (Duff, Newcombe, Lamont and Smith JJ.) was delivered by

NEWCOMBE J.—The parties made a contract in writing, dated 1st April, 1926, whereby the plaintiff agreed to sell and the defendant agreed to purchase two large areas of land in the province of Alberta, firstly and secondly therein described as comprising respectively 10,762.32 acres and 1,920 acres, for the sum of $190,219.80, of which the purchaser paid $45,000, and agreed to pay the balance in five equal annual payments of $29,043.96, with interest, beginning on 2nd April, 1927; also to pay the taxes. None of the deferred payments was in fact made, but it appears that the purchaser did pay, in addition to the $45,000 above mentioned, a sum of $348, which is credited on account on 1st June, 1926.

Thus the agreement was not fulfilled; and, on 9th February, 1928, the plaintiff commenced this action for specific performance. On 9th March, next following, the defendant wrote the plaintiff, referring to the agreement of sale and the payment of $45,000, and continuing thus:

> I have just discovered that in respect to sections one to eighteen, in township three, range twenty-three, west of the fourth meridian, you are unable to deliver to me title to the coal mines, coal pits, seams and veins of coal, which, together with the right to work them, are reserved to the King of Great Britain, who also owns all coal lying under sections thirty-four, thirty-five and thirty-six, in township two, range twenty-three, west of the fourth meridian.

(1) (1929) 24 Alta. L.R. 174; [1929] 2 W.W.R. 505.

As I am entitled under agreement with you to call for title to all coal mines, coal, coal pits, seams and veins of coal and the right to work them, and as you have not the title to these, I hereby notify you that I repudiate the agreement of April 2, 1926, made with you and demand from you the repayment to me forthwith of the sum of forty-five thousand dollars which I have paid you in connection therewith.

On 13th March, 1928, the defendant pleaded a defence and counterclaim, whereby, along with the usual denials, he alleged that

* * * the land agreed to be sold embraced all coal mines, coal pits, seams and veins of coal and the right to work the same, which said coal mines, coal pits, veins and seams of coal are not owned by the plaintiff but are in fact the property of His Majesty King George V., who also has the right to work the same.

The defendant also relied upon the letter quoted above as repudiating the agreement, and he counterclaimed for the amount of $45,000.

It is admitted that the original grant from the Crown contains the following:

* * * excepting and reserving unto Us, Our Successors and Assigns, all coal mines, coal pits, seams and veins of coal, as well open as not open, which shall or may be wrought, found out or discovered or which may exist within, upon or under the said lands, together with full power to work the same, and for this purpose to enter upon and use and occupy the said lands or so much thereof, and to such an extent as may be necessary for the effectual working of the said mines, pits, seams and veins; * * *.

In making the agreement, the parties used a printed form, filling up the blanks in typewriting, but there were some handwritten interlineations in the print, and the printed clause immediately following the blank in which the description of the parcels is typewritten appears in the original executed agreement in the following form:

"* * * acres to be the same more or less, excepting thereout and therefrom ~~all coal and other minerals, including petro-~~ any overriding royalty of ten per cent of all oils or gas found or produced from said ~~leum, natural gas, and valuable stones in or under the~~ lands ~~said land, and the right to use so much of the said land or the surface thereof as the vendors or their assigns may consider necessary for the purpose of working and removing the said coal or other minerals, including petroleum or natural gas,~~ and any portion of the said lands taken for roads or public purposes; * * *"

Follows in the agreement a statement of the consideration money, and terms of payment, and certain covenants, the third of which reads as follows:

1930

KNIGHT SUGAR CO. v. WEBSTER.

Newcombe J.

And the purchaser hereby agrees with the vendors, and this agreement is made on the express stipulations and conditions:

* * *

(3) If the purchaser or legal representative or approved assignee shall pay the several sums of money aforesaid punctually at the several times above fixed, and shall in like manner strictly and literally perform all and singular the aforesaid conditions, then the purchaser, as hereinafter provided, upon request at the office of the vendors, at the town of Raymond, and the surrender of this agreement, shall be entitled to a transfer of the said land in fee simple excepting thereout and therefrom all coal mines and other minerals, including petroleum, natural gas and valuable stones.

The agreement does not expressly provide for the possession of the premises, but the eighth and ninth admissions are as follows:

8. The defendant became entitled to the possession of the said lands immediately after the completion of the said agreement for sale.
9. The plaintiff has not at any time received any rents or profits of the said lands since the date of the said purported agreement.

The case was tried before Ives J., of the Supreme Court of Alberta, and he maintained the action, because, while he had no hesitation in holding that the intention of the agreement was that the vendor should convey the minerals, nevertheless he thought that the defendant, by leasing a part of the area which he had agreed to purchase, after he knew that the minerals were reserved, had elected not to take advantage of the alleged defect in the plaintiff's title, and was therefore bound to complete his purchase. The Appellate Division, however, reversed the learned trial judge upon this point, considering that the leases were made *pendente lite* and subject to the litigation, and that there was no evidence sufficient to establish waiver or intention to waive. At the hearing before this court a similar view prevailed, and the defence of waiver was accordingly denied.

The Appellate Division was, nevertheless, in agreement with the trial judge that, according to the meaning of the deed, the minerals were to go with the lands, but in reaching that conclusion the learned judges took into consideration " the printed form as it existed before the erasures," relying upon the authority of *Strickland* v. *Maxwell* (1). I confess that I find it difficult to distinguish the material facts of that case, but I cannot follow the opinion of the two learned judges (Bayley and Vaughan B.B.), who held it admissible to reason from the obliteration, because that

(1) (1834) 2 Cr. & M. 539, 4 Tyr. 346; 3 L.J. Ex., 161.

seems to me contrary in principle to the rule against extrinsic evidence as laid down by the books, and, moreover, in conflict with the judgment of the House of Lords in *Inglis* v. *Buttery* (1), by which we are bound. In the latter case fourteen material words had been deleted, and Lord Hatherley said in his speech, at page 558, their Lordships being unanimous upon the point,

> Nor can I think, and I believe your Lordships will concur with me in this opinion, that it is legitimate to look at those words which appear upon the face of the agreement with a line drawn through them, and which are expressly, by the intention of all the parties to the agreement, deleted, that is to say, done away with, and wholly abolished. It is not legitimate to read them and to use them as bearing upon the meaning of that which has become the real contract between the parties, namely, the final arrangement of the document which we must now proceed to construe.

See also *Leggott* v. *Barrett* (2), per James L.J. at pp. 309, 310; *Manchester Ship Canal Co.* v. *Horlock* (3).

Reading the first exception as it stands, it is this:

> Excepting thereout and therefrom any overriding royalty of ten per cent of all oils or gas found or produced from said lands.

And, in clause no. 3 above quoted, which is introduced as a "stipulation or condition" of the contract, it is provided that when the purchaser, having made the payments or performed the conditions stipulated, becomes entitled to a transfer of the land purchased, the transfer shall be in fee simple,

> excepting thereout and therefrom all coal mines and other minerals, including petroleum, natural gas and valuable stones.

At the hearing nobody was able to explain precisely what was meant by the handwritten exception; and there is no evidence of any lease or the constitution of any royalty. The expression "any overriding royalty of ten per cent of oils or gas" is indefinite; while apparently intended to include any royalty of the character described, constituted before the grant, it seems to contemplate a state of uncertainty as to whether or not there were any such royalty.

There is no repugnancy that I can see between the printed exception in clause no. 3 and the preceding handwritten exception. They operate in the same field only with relation to oils or gas, and there they do not conflict. More-

(1) (1878) 3 App. Cas. 552. (2) (1880) 15 Ch. D. 306.
(3) [1914] 1 Ch. 453, at pp. 463, 464.

1930

KNIGHT SUGAR CO. v. WEBSTER.

Newcombe J.

over, so far as appears by the case, no point is raised with regard to oil or gas. The objection relates to the coal.

The meaning, of course, must be ascertained by interpretation of the instrument. It is true, as said by Lord Ellenborough C.J., in *Robertson et al* v. *French* (1), speaking of words superadded in writing to a printed form of contract, that such words are entitled,

> * * * if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.

And see *Glynn* v. *Margetson and Coy. et al* (2).

But while, therefore, the written words may prevail, or have the right of way, in case of competition, there is, of course, nowhere a suggestion that printed language is not a perfectly good and lawful medium of expression. Lord Herschel indeed says in terms, in the last mentioned case, page 354, that "It would not be legitimate to discard the printed words," and I say the same here.

Moreover, suppose there were no royalty, and it is consistent with the agreement that there may be none, clearly the exception printed in clause no. 3 would remain in operation; and, if the respondent rely upon the handwriting, or contend for an advantage in the interpretation of the instrument by reason of the fact of any overriding royalty within the meaning of the written exception, it is surely incumbent upon him to prove the existence of that royalty, and to make the language of the deed intelligible. All relevant parts of the instrument have to be read together when necessary in order to ascertain the meaning. There is an exception printed in clause 3, and it has been quoted. I see no reason to doubt that the coal mines and other minerals are excepted by force of that clause, and the words "other minerals" therein may I think be interpreted as suggested by my brother Duff at the hearing to mean minerals other than coal in coal mines.

It follows that the plaintiff should succeed upon the questions already considered, but the defendant raises an additional ground. I have referred to the reservation by the

(1) (1803) 4 East 130, at p. 136. (2) [1893] A.C. 351.

Crown of the coal and the power to work it. That power is expressed in very broad terms; and while, if the court adopt my view, there is an exception embodied in the agreement which embraces coal mines, coal pits, seams and veins of coal, if there be any, it does not provide expressly for the working powers and liberties. There are however powers and liberties incident to the ownership, and they rest upon the implications of the case. But it is said that the powers for working, as expressly reserved by the Crown, are more comprehensive than those which are incident to the exception created by the agreement, and therefore that the plaintiff company has less than it has agreed to convey, and the defendant relies upon *Fuller* v. *Garneau* (1), in which it was held by the majority of this court that the reservation in a Crown grant of the mines and minerals, associated with express powers identical with those reserved in the present case, created an easement for the exercise of working powers in excess of those implied by the mere exception of mines and minerals. And it seems to follow, applying the last cited authority, that, if the lands agreed to be sold contain coal mines, there are working rights expressly reserved to the Crown which are not implied in the exception of " all coal mines and other minerals " expressed in the third article of the stipulations and conditions of the agreement; and consequently, upon the like assumption, that the agreement would extend to rights which are withheld from the plaintiff company, and therefore not competent to it to grant.

I think this objection admits of a sound answer; and it is this: There is no evidence whatever that the lands subject to the agreement contain any coal, whether in mines, pits, seams or veins, or, if there be any coal there, that it cannot be worked without causing damage to the surface. The Crown grants are in common form, and no inference can in my opinion be drawn that a parcel of land contains coal because the grant by which the parcel is conveyed contains the common form of reservation. But, if there be coal upon which the reservation operates, it is only "to such an extent as may be necessary for the effectual working" of it that the right " to enter upon or use or occupy the said lands " may

(1) (1920) 61 Can. S.C.R. 450.

1930

KNIGHT SUGAR CO. v. WEBSTER.

Newcombe J.

be exercised. The necessity must therefore be shewn, either by the vendor or by the purchaser, before the reservation of the Crown grant can be found to extend beyond the exception for which, as I have shewn, the agreement provides. And who is to produce the proof, or to establish this condition? I would think it must be he who suggests or relies upon the necessity, namely, the defendant, and his case fails for lack of such proof.

The appeal should be allowed with costs in all courts, and the counter-claim should be dismissed with costs.

ANGLIN C.J.C. (dissenting).—I have had the advantage of reading the opinion in this case prepared by my brother Newcombe, in which I understand the other members of the court concur.

In so far as he would affirm the conclusion of the Appellate Division that the evidence was not sufficient to establish waiver by the respondent or intention to waive the defect in the vendor's title, consisting of its inability to convey the mines and minerals in and under the lands agreed to be sold, I entirely agree. But, in so far as my learned brother holds that, on the proper construction of the agreement between the parties, the vendor did not agree to sell such mines and minerals, I find myself unable to share his view.

As the trial judge pointed out, the parties in formulating their agreement employed the printed form which the vendor customarily used for such transactions. From that form was struck out the exception and reservation from the land agreed to be sold of

> all coal and other minerals, including petroleum, natural gas, and valuable stones in or under the said land, and the right to use so much of the said land or the surface thereof as the vendors or their assigns may consider necessary for the purpose of working and removing the said coal or other minerals; including petroleum or natural gas.

For this the parties substituted the words,

> any overriding royalty of ten per cent of all oils or gas found or produced from said lands,

these words being inserted by the vendor's attorney in handwriting following the printed words "excepting thereout and therefrom" which in turn follow the description, in typewriting, of the land sold.

It is precisely here, i.e., immediately following the description of the land sold that one would expect to find any exception or reservation intended to be made therefrom of that which the agreement to sell such land would otherwise carry by implication. While the words struck out do not correspond exactly with the words of exception or reservation in the Crown grant, they do so substantially; and they would (speaking generally) have sufficed, had they remained in the instrument, to preclude a claim by the purchaser of a right to receive what had been so reserved to the Crown.

Later in the instrument, and as part of the printed form not stricken out, we find a covenant by the vendor that, if the purchaser pay the purchase money and perform all and singular the conditions of the agreement, he shall be entitled to receive from the vendor a transfer of the land in fee simple,

excepting thereout and therefrom all coal mines and other minerals including petroleum and natural gas and valuable stones.

Ex facie there is an ambiguity in this document the only exception from the description of the property purchased being

any overriding royalty of ten per cent of all oils or gas found or produced from said lands.

Prima facie the purchaser is entitled to get the land agreed to be sold subject only to this exception; but, in the covenant to convey, the exception, subject to which the title is to be transferred, reads

excepting thereout and therefrom all coal mines and other minerals including petroleum, natural gas, and valuable stones

which forms the most substantial part of the very exception that the parties had deliberately stricken from the printed form where it was appended to the description of the property sold. That he was satisfied of the *bona fides* and honesty of the defendant in refusing the vendor's demand that he carry out the purchase, on the ground of the latter's inability to make title to the mines and minerals, is a necessary implication of the learned trial judge's judgment, which the Appellate Division has accepted. That court, under these circumstances, considered itself entitled to look at the words which had been so stricken out and for which the words, "any overriding royalty, etc.," were substituted, not to vary nor to contradict them, but to con-

1930

KNIGHT SUGAR CO. v. WEBSTER.

Anglin C.J.C.

firm their completeness. As I read the opinion of my learned brother, on the authority of *Inglis* v. *Buttery* (1), he thinks this course was unjustified. He would reconcile the words of exception in the vendor's covenant for the deed with the exception in the description of the lands to be sold by saying that

> they operate in the same field only with relation to oils or gas, and there they do not conflict.

With the utmost respect, I am unable to accept the view that they can be so reconciled. The idea that a clause in the sale agreement which excludes from the property to be conveyed

> all coal mines and other minerals including petroleum, natural gas and valuable stones,

is not hopelessly inconsistent with a clause therein which excepts from the property purchased only

> any overriding royalty of ten per cent of all oils or gas found or produced from said lands

I have, with deference, much difficulty in appreciating. While, no doubt, under ordinary circumstances, it is not proper to look at deleted words in an instrument as an aid to its construction (*Inglis* v. *Buttery* (1)), that rule, I venture to think, is sometimes too broadly stated and does not apply where, as a result of the deletion, there is an ambiguity such as that now before us. In *Inglis* v. *Buttery* (1) Lord O'Hagan said (p. 571) that the court was asked to commit the error of "attempting to construe a contract, perfect in itself, by acts antecedent to it." In that case no ambiguity whatever resulted from the deletion. After the words had been stricken out the contract was clear, unambiguous and complete. In the case at bar, on the contrary, the ambiguity is obvious and, under such circumstances, the principle on which the Court of Exchequer decided *Strickland* v. *Maxwell* (2), in my opinion, governs. While I cannot find that that judgment has been followed or expressly approved in subsequent cases, on the other hand, its correctness has never been challenged so far as I am aware; and it is cited in modern text books of repute as authoritative. See Norton on Deeds, 2nd Ed., (1928), at p. 94; Beal on Legal Interpretation, 3rd Ed., (1924), pp.

(1) 3 App. Cas. 552. (2) 2 Cr. & M. 539.

123-4. It upholds the conclusion reached by the Appellate Division that the exception inserted in handwriting in place of the words stricken out, was the whole exception which the parties intended to make from the property that formed the subject of their contract. The material facts of *Strickland* v. *Maxwell* (1) are indistinguishable in substance from those now before us and, as I read the judgment in that case, it does not at all conflict with that of the House of Lords in *Inglis* v. *Buttery* (2). In the latter case no ambiguity whatever resulted from the striking out of the words at which, it was there held, the court should not look for the purpose of construing the contract. Effect was given to the words left after the deletion, viz:—

the plating of the hull to be carefully overhauled and repaired,

as if the words stricken out,

but if any new plating is required the same to be paid for extra,

had never been in the draft contract. Here the respondent relies upon the substituted words of exception and merely invokes the deleted words in order to put it beyond doubt that the former expressed the entire exception which the parties intended. But for the existence, in a later part of the printed form, of the vendor's covenant restricting the scope of the deed which he undertook to give by an exception almost as wide as the printed words stricken out after the description, the resultant inconsistency presumably having escaped attention, this case would have been clearly within the authority of *Inglis* v. *Buttery* (2) and must have been decided as the Appellate Division has decided it. It is perhaps needless to add that in *Inglis* v. *Buttery* (2) there is no allusion whatever to *Strickland* v. *Maxwell* (1).

The presence of the words of exception in the vendor's covenant at the highest creates an ambiguity in the agreement before us and makes the intention of the parties doubtful. The fact that nobody seems to know precisely what was meant by the handwritten exception following the description does not lessen the uncertainty of the situation. Under these circumstances, several pertinent rules of interpretation seem to require that effect should be given to the vendor's covenant as if its stipulation for an exception

(1) 2 Cr. & M. 539. (2) L. R. 3 A.C. 552.

1930

KNIGHT SUGAR CO. v. WEBSTER.

Anglin C.J.C.

were the same as that in the defendant's agreement to purchase. It is of the latter's undertaking to pay the purchase money for the lands sold, which alone contains the obligation of the purchaser, that the plaintiff demands specific performance. Specific performance of a contract such as this, at the instance of either party, should, if resisted, be refused. (*Stuart* v. *Alliston* (1); *In re Davis and Cavey* (2). Specific performance with compensation for the inability to transfer mines and minerals by abatement in the purchase price has not been suggested, probably because the difference in value would be so problematical that it could not be fairly computed. (*Brooks* v. *Rounthwaite* (3); *Holiday* v. *Lockwood* (4).

In aid of the view I have taken, reference may be made to the rule of construction that, if there be conflict between the written and the printed parts of an instrument, ordinarily the written part must be given effect to (*Robertson* v. *French* (5); *Gumm* v. *Tyre* (6), rather than the printed part, inasmuch as attention had been pointedly drawn to the change made in writing and it, rather than mere printed words of a general formula, may be supposed to express, in their own language, the intention of the parties.

Another ordinary rule of construction, in case of conflict between earlier and later provisions of instruments *inter vivos*, is that the earlier is usually held to prevail.

No case had been made for reformation of the exception to the description to make it conform to the terms for which the vendor's covenant provides; and, if such a case had been made, it is doubtful whether a decree for specific performance of an agreement so reformed should be granted. Moreover, the reservation in the deed, for which the vendor's covenant stipulates, does not include the right to go upon the land and full power to work the mines, etc., which were explicitly covered by the exception in the Crown grant. The materiality of such an omission was considered by this court in *Fuller* v. *Garneau* (7).

(1) (1815) 1 Mer. 26.
(2) (1888) 40 Ch. D. 601.
(3) (1846) 5 Hare 298.
(4) [1917] 2 Ch. 47.
(5) (1803) 4 East 130, at p. 136.
(6) (1864) 4 B. & S. 680, at pp. 707, 713-714.
(7) 61 Can. S.C.R. 450.

1930

KNIGHT SUGAR CO. v. WEBSTER.

Anglin C.J.C.

For the foregoing reasons I would uphold the judgment of the Appellate Division dismissing the vendor's claim for the special, extraordinary and discretionary equitable remedy of specific performance. (*Re Scott and Alvarez's Contract* (1)).

Appeal allowed with costs.

Solicitor for the appellant: *D. H. Elton.*

Solicitors for the respondent: *Jamieson, Russell & Co.*

1930

*March 14.
*May 5.
*June 11.

HIS MAJESTY THE KING (PLAINTIFF);

AND

W. J. HUME (DEFENDANT);

AND

CONSOLIDATED DISTILLERIES LIMITED (DEFENDANT) ..... } APPELLANT;

AND

CONSOLIDATED EXPORTERS CORPORATION LTD. (THIRD PARTY).... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Exchequer Court—Jurisdiction—Third party procedure introducing matter purely of civil right as between subject and subject—B.N.A. Act, s. 101 (establishment of courts for better administration of "the laws of Canada")—Exchequer Court Act, R.S.C., 1927, c. 34, ss. 30, 87, 88 —Exchequer Court Rules 262-269.

The Crown took proceedings in the Exchequer Court to recover from defendant upon certain bonds. Defendant, by third party notice, in the form prescribed by Exchequer Court Rule 262, claimed indemnity against the third party under an agreement between defendant and the third party. Upon motion by the third party, Audette J. ([1929] Ex. C.R., 101) set aside the third party notice, without prejudice to any existing right of indemnity which defendant might have. Defendant appealed.

Held (Newcombe J. dissenting): The third party notice was rightly set aside. It was not authorized by the Exchequer Court Rules, construed with due regard to s. 101 of the *B.N.A. Act*, which authorized

(1) [1895] 2 Ch. 603.

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

1930

CONSOLIDATED DISTILLERIES LTD. v. CONSOLIDATED EXPORTERS CORP. LTD.

the creation of that court, and to the terms in which Parliament has conferred jurisdiction on it (*Exchequer Court Act*, R.S.C., 1927, c. 34; s. 30 particularly dealt with). The words "the laws of Canada" in said s. 101 mean laws enacted by the Dominion Parliament and within its competence; s. 101 does not enable Parliament to set up a court competent to deal with matters purely of civil right in a province as between subject and subject. Therefore, even if, *ex facie*, said rule 262 might be broad enough to include a third party procedure in a case such as that in question, it cannot have been intended to have any such effect, since so to construe it would be to attribute to the Exchequer Court an intention, by its rules, to confer upon itself a jurisdiction which it would transcend the power of Parliament to give to it. Nor can it be said that it is "necessarily incidental" (*Montreal* v. *Montreal Street Ry.*, [1912] A.C., 333, at pp. 344-6) to the exercise by that court of the jurisdiction conferred upon it, that it should possess power to deal with matters such as were here attempted to be introduced by the third party procedure, even where they arise out of the disposition of cases within its jurisdiction.

Per Newcombe J. (dissenting): The words "the laws of Canada" in s. 101 of the *B.N.A. Act* include any law which operates in the Dominion, whether by statute or as part of the common law. The Dominion's powers under s. 101 were not intended so to be restricted or controlled as to cease to be exercisable when they come into contact with an issue between individuals relating to property and civil rights in a province. In the *Exchequer Court Act* Parliament has validly given the Exchequer Court jurisdiction in cases within which the present action falls; and the third party procedure in question was authorized by rules (which are statutory rules) validly made.

APPEAL by the defendant Consolidated Distilleries Limited from the judgment of Audette J., of the Exchequer Court of Canada (1), granting (without prejudice to any existing right of indemnity which the defendant might have) a motion made by the third party to set aside the third party notice issued herein by the said defendant, on the ground that the issue raised by the third party notice between the defendant and the third party was one over which that court had no jurisdiction. The material facts of the case are sufficiently stated in the judgment of Anglin C.J.C., now reported. The appeal was dismissed with costs, Newcombe J. dissenting.

F. T. Collins for the appellant.

R. S. Robertson K.C. and *G. H. Sedgewick K.C.* for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Rinfret, Lamont and Cannon JJ.) was delivered by

(1) [1929] Ex. C.R., 101.

ANGLIN C.J.C.—The Attorney-General, by his information, filed in the Exchequer Court of Canada, on the 26th of December, 1928, claimed, upon seven export bonds, to recover from the defendant (appellant) the sum of $445,093, with interest at five per cent. from the 15th of October, 1924, the date of the bonds. An agreement under seal of the 24th of October, 1924, is produced, whereby the third party covenants to indemnify the appellant against any loss, damages or expenses which the appellant may suffer or be put to by reason of these bonds; and, by third party notice, filed on the 31st of January, 1929, the appellant claimed indemnity under the said agreement, adopting the third party procedure of the Exchequer Court, Rules 262 to 269 inclusive, according to the form prescribed by Rule 262, whereby the third party is notified in the following terms:—

> And take notice that if you wish to dispute the plaintiff's claim in this action as against the defendant, Consolidated Distilleries Limited, or your liability to the defendant, Consolidated Distilleries Limited, you must cause an appearance to be entered for you within eight days after service of this notice.
>
> In default of your so appearing you will be deemed to admit the validity of any judgment obtained against the defendant Consolidated Distilleries Limited and your own liability to indemnify to the extent herein claimed, which may be summarily enforced against you, the whole with costs.

The defendant, by its defence filed on the 12th of February, 1929, pleaded, among other allegations, its right to indemnity and the issue and service of the third party notice.

It should here be observed that Rule 262 of the third party procedure, as it appears at p. 503 of Audette's Exchequer Court Practice, 2nd ed., was rescinded on the 28th of May, 1921, and replaced by the following:—

> Where a defendant claims to be entitled to contribution or indemnify from or entitled to relief over against any person not a party to the action, he may issue a notice (hereinafter called the third party notice) in the form given in schedule "Z" to these rules, with such variations as circumstances may require, which shall be stamped with the seal of the Court and shall state the nature and grounds of the claims.
>
> A copy of the notice shall be filed with the Registrar, and a copy together with a copy of the information, petition of right, or statement of claim, as the case may be, shall be served on the third party within the time limited for the delivery of his defence.

The third party, immediately upon the service of the notice, obtained a summons against the defendant, dated the 8th of February, 1929, to shew cause why the third

1930

CONSOLIDATED DISTILLERIES LTD. v. CONSOLIDATED EXPORTERS CORP. LTD.

Anglin C.J.C.

party notice should not be set aside. The motion was heard on the 12th of February before Audette J., and, by order of the 4th of March, that learned judge directed that the third party notice " be and the same is hereby set aside, without prejudice to any existing right of indemnity which the defendant may have." This order proceeded upon the ground that the Exchequer Court had no jurisdiction, the learned judge holding that the issue involved

> is a separate and distinct controversy from the one raised between the plaintiff and the defendant; it is resting upon a separate cause of action which must be tried and determined in the provincial court having jurisdiction over such matters (1).

The defendant appealed to this Court. Although its case was not, perhaps, very fully submitted, in substance its counsel contended that the third party notice, which it had given, is authorized by the Exchequer Court Rules (262 to 269 inclusive) and that the rules so authorizing it are within the competence of that Court.

In construing the rules of the Exchequer Court, however, attention must always be paid to s. 101 of the *British North America Act* (1867), which authorized the creation of that Court, and to the terms in which Parliament has conferred jurisdiction on it. It is not conceivable that, by mere rule of court, it should have been intended to enlarge the jurisdiction thus conferred, so as to embrace matters which it would not be otherwise competent for that Court to hear and determine. S. 101 of the *British North America Act* reads as follows:

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

It is to be observed that the " additional courts ", which Parliament is hereby authorized to establish, are courts " for the better administration of the laws of Canada." In the collocation in which they are found, and having regard to the other provisions of the *British North America Act,* the words, " the laws of Canada," must signify laws enacted by the Dominion Parliament and within its competence. If they should be taken to mean laws in force anywhere in Canada, which is the alternative suggested, s. 101 would be

(1) [1929] Ex. C.R. 101, at p. 102.

wide enough to confer jurisdiction on Parliament to create courts empowered to deal with the whole range of matters within the exclusive jurisdiction of the provincial legislatures, including "property and civil rights" in the provinces, although, by s. 92 (14) of the *British North America Act*,

> The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts

is part of the jurisdiction conferred exclusively upon the provincial legislatures.

When we come to look at the *Exchequer Court Act* itself (R.S.C., 1927, c. 34) we find that by s. 30, which outlines its general jurisdiction, that court is given,

> concurrent original jurisdiction in Canada
>
> (*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including, etc.;
>
> (*b*) in all cases in which it is sought at the instance of the Attorney-General of Canada, to impeach or annul any patent of invention, or any patent, lease or other instrument respecting lands;
>
> (*c*) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer; and
>
> (*d*) in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

It will be noted that in every instance the jurisdiction of the Court is confined to matters directly affecting the Crown in the right of the Dominion and to cases affecting its revenue, "in which it is sought to enforce any law of Canada."

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

1930

CONSOLIDATED DISTILLERIES LTD. v. CONSOLIDATED EXPORTERS CORP. LTD.

Anglin C.J.C.

vincial jurisdiction, concerning, as it does, a civil right in some one of the provinces (s. 92 (13)).

It would, therefore, in our opinion, be beyond the power of Parliament to legislate directly for the enforcement of such a right in the Exchequer Court of Canada, as between subject and subject, and it seems reasonably clear that Parliament has made no attempt to do so. What Parliament cannot do directly, by way of conferring jurisdiction upon the Exchequer Court, that court cannot itself do by virtue of any rule it may pass. It follows that, even if, *ex facie,* rule 262 of the Exchequer Court might be broad enough to include a third party procedure in a case such as that now before us, it cannot have been intended to have any such effect, since so to construe it would be to attribute to the Exchequer Court an intention, by its rules, to confer upon itself a jurisdiction which it would transcend the power of Parliament to give to it.

On this short ground the present appeal should be dismissed.

While it might conceivably be convenient in some cases to have the Exchequer Court exercise, by way of third party procedure, a jurisdiction such as that here invoked, it certainly cannot be said that it is " necessarily incidental " (*City of Montreal* v. *Montreal Street Railway* (1)) to the exercise by that court of the jurisdiction conferred upon it by Parliament, that it should possess power to deal with such matters, even where they arise out of the disposition of cases within its jurisdiction. On the other hand, in many cases, and not at all improbably in the present case, it would be highly inconvenient that the Crown should be delayed in its recovery against the defendant liable to it while that defendant litigated with the third party a claim—possibly very contentious—to be indemnified by it.

NEWCOMBE J.—Notwithstanding what was said at the hearing, and the view entertained by the majority of the Court, I am not persuaded to join in the dismissal of this appeal, and I shall mention briefly some of my reasons in favour of the jurisdiction.

(1) [1912] A.C. 333, at pp. 344-6.

The question depends upon the interpretation of sec. 101 of the *British North America Act, 1867,* by which it is provided that

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

By sec. 30 of the *Exchequer Court Act,* R.S.C., 1927, chapter 34,

> The Exchequer Court shall have and possess concurrent original jurisdiction in Canada
>
> (*a*) in all cases relating to the revenue in which it is sought to enforce any law of Canada, including actions, suits and proceedings by way of information to enforce penalties and proceedings by way of information *in rem,* and as well in *qui tam* suits for penalties or forfeiture as where the suit is on behalf of the Crown alone;
>
> * * * * *
>
> (*d*) In all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner.

Lord Robertson, pronouncing the judgment of the Judicial Committee in *Crown Grain Company Ltd.* v. *Day* (1), said, with respect to the jurisdiction of the Supreme Court of Canada:

> The appellants maintain that the implied condition of the power of the Dominion Parliament to set up a Court of Appeal was that the Court so set up should be liable to have its jurisdiction circumscribed by provincial legislation dealing with those subject-matters of litigation which, like that of contracts, are committed to the provincial Legislatures. The argument necessarily goes so far as to justify the wholesale exclusion of appeals in suits relating to matters within the region of provincial legislation. As this region covers the larger part of the common subjects of litigation, the result would be the virtual defeat of the main purposes of the Court of Appeal.
>
> It is to be observed that the subject in conflict belongs primarily to the subject-matter committed to the Dominion Parliament, namely, the establishment of the Court of Appeal for Canada. But, further, let it be assumed that the subject-matter is open to both legislative bodies; if the powers thus overlap, the enactment of the Dominion Parliament must prevail. This has already been laid down in *Dobie* v. *Temporalities Board* (2); and *Grand Trunk Ry. Co. of Canada* v. *Attorney-General of Canada* (3).

From this it may be inferred that the Parliament of Canada, in the execution of its powers under s. 101, has ancilliary legislative authority of the same character as it possesses under the enumerations of s. 91. But the case is capable of being stated even more strongly, seeing that the

(1) [1908] A.C., 504, at p. 507. (2) (1882) 7 App. Cas. 136.
(3) [1907] A.C. 65.

1930

CONSOLIDATED DISTILLERIES LTD. v. CONSOLIDATED EXPORTERS CORP. LTD.

Newcombe J.

powers of Parliament under s. 101 are expressly declared to be exercisable, "notwithstanding anything in this Act"; so that not only may the Parliament, within the scope of what is comprised in

> the constitution, maintenance and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada

effectively exercise powers of the ancillary variety, like those which are exemplified in such cases as *Tennant* v. *The Union Bank of Canada* (1), and *The Royal Bank of Canada* v. *Larue* (2); but it has moreover, perhaps by the most comprehensive language which the Imperial Parliament could have adopted, the unfettered power to establish courts "for the better administration of the laws of Canada"; an expression which it is my purpose to shew is apt to include any law which operates in the Dominion, whether by statute or as part of the common law. It is of no use to suggest interference with the exclusive powers of the provinces. The Exchequer Court, constituted under s. 101, is not intended to interfere with or affect provincial powers or courts under the 14th head of s. 92; and that clause must, of course, be read with s. 101, which, within the intent of its language, is meant to prevail over anything to the contrary.

The law by which the defendant seeks to have its claim for indemnity established is, I think, a law of Canada not less truly than the law by which the Attorney-General, on behalf of the Crown, seeks to recover the penalties stipulated by the bonds in suit. If this meaning be admissible, it simplifies the application of the statute; whereas the restricted interpretation which has been adopted involves difficulties and improbabilities which are, I fear, too serious to be overcome.

The respondent is willing to concede that "the laws of Canada", in the context, embrace not only the statutes competently enacted by the Dominion, but also those provisions of the common law, as it exists in each of the provinces, which Parliament is empowered, in its discretion, to declare or change. It is thus suggested that anything is a law of Canada which the Parliament of Canada has power

(1) [1894] A.C. 31. (2) [1928] A.C. 187.

to enact; but there can be no law without a sanction; and therefore it must come to this, if such a contention can prevail, that the power of Parliament to enact constitutes the subject matter a law of Canada, although there has been no enactment; a proposition which seems to me incomprehensible. But, if I correctly apprehend the view expressed by the majority of the Court, the words extend only to laws competently enacted by the Parliament of Canada.

Now, with great respect, I find it impossible to reconcile with reason or probability the suggestion that, if the Imperial Parliament had intended so to limit the Dominion power, it would have chosen an expression so ill qualified for the purpose, and so well adapted to a broader and more natural meaning; seeing, especially, that elsewhere throughout the Act, other and more apt words have been used to distinguish Parliamentary enactments from those which derive their force from the legislatures; and seeing moreover that, if there be no laws of Canada except those which are enacted by the Parliament of Canada, the Exchequer Court is, I venture to think, denuded of the greater part of the jurisdiction which it was designed to possess, and has heretofore generously and habitually exercised.

It is true that in 1897, before the the third party rule was promulgated, Burbidge J. refused to make a third party order in *The Queen* v. *Finlayson* (1), saying that he had no jurisdiction over an issue between the defendant and Mr. Corby, and that he had made such an order in one case only, where the Crown was defendant and all parties consented. This suggests that the learned judge may have refused in the exercise of his discretionary power; but his reason for denying the application is not very perfectly stated, and at that time the practice was not regulated, as now, by the procedure subsequently introduced and sanctioned by the learned judge's successor, on 28th May, 1921, which provides:

> Where a defendant claims to be entitled to contribution or indemnity from or entitled to relief over against any person not a party to the action, he may issue a notice (hereinafter called the third party notice) in the form given in schedule "Z" to these rules, with such variations as circumstances may require, which shall be stamped with the seal of the Court and shall state the nature and grounds of the claims.

(1) (1897) 5 Ex. Court of Canada Reports, 387.

1930

CONSOLIDATED DISTILLERIES LTD. v. CONSOLIDATED EXPORTERS CORP. LTD.

Newcombe J.

A copy of the notice shall be filed with the Registrar, and a copy together with a copy of the information, petition of right, or statement of claim, as the case may be, shall be served on the third party within the time limited for the delivery of his defence.

I wonder whether every clause of the *British North America Acts* is not a law of Canada? What about such sections as 41 and 65? Then there are the two great sections, 91 and 92, designed for the distribution and sanction of the Dominion and provincial legislative powers and enactments which are to have force in any part of the Dominion or of a province. Surely these are laws of Canada. There are legislative powers which may be exercised concurrently; see s. 95, respecting *Agriculture and Immigration;* and there are enactments of provincial origin which remain in force, although the power to supersede or alter them has passed to the Dominion, as in the case of works wholly situate within a province, which are, after their execution, declared by the Parliament of Canada to be for the general advantage, under the 10th enumeration of s. 92. And there is s. 93, respecting *Education.* In the case of agriculture and immigration, there might be identical laws in force in a province at the same time, one enacted by Parliament, the other by the legislature. If Parliament were then to repeal its Act, the law would, I suppose, nevertheless remain, by virtue of its provincial sanction. But would that law, which had until then been a law of Canada, and still continued to operate as theretofore, not persist as a law of Canada?

It was not doubted at the hearing that there might be a law of Canada having local operation confined to a single province or part of a province; then if the sanction be adequate, why is a law not a law? What about the uniform laws, which might be produced by the execution of the powers conferred by s. 94?

Section 129 must not be overlooked. To which category are to be referred the Imperial Acts included within the exception? Are these not laws of Canada, or are they laws of Canada only if they relate to matters which, had it not been for the exception, would have been within the legislative authority of the Parliament of Canada?

The late Mr. Lefroy, who was a very careful commentator, in his Canadian Federal System, at pages 685 *et seq.*,

1930

CONSOLIDATED DISTILLERIES LTD. v. CONSOLIDATED EXPORTERS CORP. LTD.

Newcombe J.

referring to *Attorney-General for Ontario* v. *Attorney-General for Canada* (1), and the submission of Sir Robert Finlay, that "the laws of Canada" mean the laws of the Dominion as distinguished from the laws of the provinces, tells us that,

In the course of the argument, on Sir Robert Finlay so contending, Lord Macnaghten is reported as observing: "Is that so very clear? I am not quite sure about that. I should have thought that the laws of Canada might embrace the laws of the several provinces."

But as this proved to be a side-point, it was not decided.

Mr. Lefroy also calls attention to the discussion which took place upon Mr. Bethune's application to the Judicial Committee for special leave to appeal in *McLaren* v. *Caldwell* (2), the notes of which are printed in (1883) 3 Can. Law Times, 343-346. The question was there debated as to the application and effect of the concluding words of s. 101 in relation to the general court of appeal for Canada, which, by the earlier words of the section, the Parliament of Canada is empowered to constitute, maintain and organize; and Sir Barnes Peacock, pronouncing the decision, although granting leave to appeal upon other points involved, said (3):

There is one other point to which their Lordships wish to allude, that is, the objection which has been made to the jurisdiction of the Dominion Parliament to pass the law with reference to the Supreme Court of Canada, and also the power of the Supreme Court of Canada to entertain such an appeal as this, which involves a question of the construction of the Acts of the Provincial Parliament. Their Lordships do not think there is any ground for allowing that question to be raised on the hearing of the appeal.

See also the observations of Strong, C.J., in *The City of Quebec* v. *The Queen* (4).

If the Exchequer Court has jurisdiction only for the administration of Dominion statutes, or laws which might be enacted as Dominion statutes, then what is to be done with civil proceedings by or against the Crown, involving the enforcement of contracts, actions of assumpsit, etc., and petitions of right generally? See the reporter's note in

(1) [1912] A.C. 571.
(2) (1882) 8 Can. S.C.R. 435.
(3) (1883) 3 Can. Law Times, 343, at p. 346.
(4) (1894) 24 Can. S.C.R., 420, at pp. 428-430.

1930

CONSOLIDATED DISTILLERIES LTD. v. CONSOLIDATED EXPORTERS CORP. LTD.

Newcombe J.

Smith v. *Upton* (1); *Feather* v. *The Queen* (2); *Thomas* v. *The Queen* (3). All such actions, when the Dominion Crown is a party, have been uniformly entertained and adjudicated in the Exchequer Court, and nobody has questioned its jurisdiction, although there would seem to be no adequate foundation for it if "the laws of Canada" consist only in Dominion statutes. What possible jurisdiction, I wonder, has the court to adjudge a simple action of assumpsit for or against the Crown, if its jurisdiction be limited to Dominion statutes, or even if, by any ingenuity of interpretation, it extend also to provisions which, though not enacted, would be competent to Parliament to enact? Or, for instance, if the Dominion Crown, having become an ordinary bailee of goods in one of the provinces, fail to fulfil its obligation to deliver the goods, doubtless a petition of right would lie, but the case would not be ruled by any Dominion statute, or, I shall assume, any law that the Parliament of Canada could make. Nevertheless the Exchequer Court would readily, in accordance with all past practice, try and determine the petition, and it would be governed by the common or statute law effective in the province. I confess I do not see how such a case is admitted to a jurisdiction which extends only to the administration of Dominion statutes.

The exclusive jurisdiction of the Exchequer Court is defined by the *Exchequer Court Act* in secs. 18 and 19, *et seq.*, and one cannot read these sections without realizing that Parliament interpreted its powers as extending far beyond the limit which is now suggested. It was said by Sir Montague Smith, in the course of his judgment in *Citizens and Queen Insurance Companies* v. *Parsons* (4), that

> The declarations of the Dominion Parliament are not, of course, conclusive upon the construction of the *British North America Act;* but when the proper construction of the language used in that Act to define the distribution of legislative powers is doubtful, the interpretation put upon it by the Dominion Parliament in its actual legislation may properly be considered.

The Crown frequently interpleads two subjects—a procedure which is specially provided for by s. 25 of the *Ex-*

(1) (1843) 6 M. & Gr. 251, at pp. 252, 253.
(2) (1865) 6 B. & S., 257, at p. 294.
(3) (1874) L.R. 10 Q.B. 31, at p. 43.
(4) (1881) 7 App. Cas. 96, at p. 116.

chequer Court Act. Proceedings under this clause have not been uncommon, and, like third party proceedings, they have for their object the determination of claims between individuals, but the jurisdiction in cases of interpleader has, so far as I am aware, never been doubted.

To mention another example, the principle of *Lord Campbell's Act* had, at the Union, been legislatively adopted by all the uniting provinces, and it was therefore the law in every one of them. Is it not to be embraced within the laws of Canada for the purposes of s. 101?

I have already shewn that, in the constitution of the Exchequer Court of Canada, Parliament has given the court original jurisdiction, concurrent with that of the provincial courts, in all cases relating to the revenue in which it is sought to enforce any law of Canada, and in all other actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner; and the present action falls under one or other or both of these descriptions.

The rules defining the practice and procedure of the Exchequer Court are statutory rules, and not subject to be reviewed judicially, so long as they are not *ultra vires* of Parliament to enact, and the procedure now in question, which has been condemned by the learned judge below, has been expressly sanctioned in the manner authorized by secs. 87 and 88 of the *Exchequer Court Act.* See *Institute of Patent Agents* v. *Lockwood* (1). The rules of court are designed for the better administration of the laws of Canada, and there can be no question as to the advantage, in experience and fact, of the practice introduced and authorized by third party procedure.

For my part, I cannot suppose that the Dominion powers under s. 101 are intended so to be restricted or controlled as to cease to be exercisable when they come into contact with an issue between individuals relating to property and civil rights in a province. *Appeal dismissed with costs.*

Solicitors for the appellant: *Meredith, Holden, Heward & Holden.*

Solicitors for the respondent: *Fasken, Robertson, Aitchison, Pickup & Calvin.*

(1) [1894] A.C., 347, at pp. 359, 360.

1930
*April 28.
*June 11.

ISABELLA STEWART AND ARNOLD E. STEWART, EXECUTORS AND TRUSTEES OF AND UNDER THE LAST WILL AND TESTAMENT OF THOMAS E. STEWART, DECEASED (PLAINTIFFS) ..... APPELLANTS;

AND

THE ROYAL BANK OF CANADA AND ROY C. FRASER (DEFENDANTS)..... RESPONDENTS;

AND

ROY C. FRASER.....THIRD PARTY.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Banks and banking—Evidence—Sums withdrawn without authority by local branch bank manager from customer's account—Suit by customer's executors for recovery—Defence of repayment—Onus—Evidence as to repayment—Evidentiary value of documents signed by customer as to bank balance and vouchers.

F., a local branch bank manager, took without authority certain sums from S.'s account in the bank. S. having died, his executors sued the bank and F. to recover these sums. It was contended in defence that F. had repaid them to S. Chisholm J. dismissed the action ([1930] 2 D.L.R. 617). His judgment was sustained, on equal division, by the Supreme Court of Nova Scotia *in banco* (*ibid*). Plaintiffs appealed.

Held (reversing the judgments below, Cannon J. dissenting), that, on the evidence, defendants had not acquitted themselves of the onus of establishing repayment, and plaintiffs were entitled to recover; that, as to certain documents signed by S. at various times as to bank balance and vouchers, these documents, having regard to their form and the meaning which a customer would, in the circumstances, probably attach to them, and having regard to the facts that the sums in question were taken without authority and there were no vouchers in respect to them, were founded upon a fundamental error, and could have no evidentiary value in defendants' favour.

Per Cannon J. (dissenting): The said documents, which were not shewn to have been obtained by any misrepresentation or fraud, were effective as corroboration and confirmation of F.'s evidence of repayment, which was also corroborated in part by other material evidence; on the whole evidence, the judgments below in defendants' favour should not be disturbed.

APPEAL by the plaintiffs from the judgment of the Supreme Court of Nova Scotia *in banco* (1), which, on equal division of the court, affirmed the judgment of Chis-

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

(1) [1930] 2 D.L.R., 617.

holm J. (1), dismissing their action. The plaintiffs were executors under the will of Thomas E. Stewart, deceased, and sued to recover certain sums alleged to have been withdrawn, during the deceased's lifetime, without deceased's authority, from the deceased's current account in the defendant bank, by the defendant Fraser, who was the local branch manager of the defendant bank. The main issue was as to whether or not the said sums had been repaid by the defendant Fraser to the deceased. The material facts of the case, as found in this Court, are sufficiently stated in the judgments now reported. The appeal was allowed with costs, Cannon J. dissenting.

Hector McInnes K.C. for the appellants.

Frank Smith for the respondent Fraser.

C. B. Smith K.C. for the respondent The Royal Bank of Canada.

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

DUFF J.—The action with which this appeal is concerned was brought by the executors of the late Thomas E. Stewart against the respondent, the Royal Bank of Canada, and Roy C. Fraser, who was at the time of the material occurrences, manager of the bank's branch at Middle Musquodoboit. Mr. Stewart in his lifetime was engaged in farming, contracting, cattle dealing and lumber dealing, and kept a current account of considerable dimensions, as well as a savings account, at this branch. The plaintiffs claim to recover $5,000 and interest, which they allege was wrongfully abstracted from this current account by the defendant Fraser, while manager of the branch, in two sums: $3,500 on the 28th of February, 1922, and $1,500 on the 14th of February, 1924. The testator died in November, 1924.

It is not denied by either Fraser or the bank, indeed, it is explicitly admitted by both, that these sums were taken by Fraser without any authority, and it was conceded at the trial, and the trial proceeded upon the basis, that the sole issue was whether or not these sums had been repaid by Fraser in Stewart's lifetime. Fraser, it seems, had, in

(1) [1930] 2 D.L.R. 617.

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Duff J.

disobedience to his instructions, permitted the Musquodoboit Creamery Company, a customer of the bank, to exceed its credit. The sums abstracted from Stewart's account, were, it is alleged by Fraser, advanced by him as a personal loan to the Creamery Company in order to reduce that company's credit to the limit permitted by the bank; in form, however, the advance was made as an advance by the bank, and interest upon it was paid by the Creamery Company to the bank, although appropriated by Fraser.

Fraser's story is that the sum of $5,000 was restored to Stewart by the delivery to him of bearer bonds of the Dominion of Canada. As to the sum abstracted in February, 1922, that, in his examination-in-chief, he said was restored in the manner indicated on the occasion of the first visit of Stewart to the bank after the date of the abstraction, which would be about two months later than that date. In cross-examination he endeavoured to qualify that, and to fix the date of restitution at about six weeks later than the date of abstraction. As to the item of $1,500, only general evidence is given as to restitution by delivery of bonds; no date is mentioned.

The question then is, whether restitution by the delivery of bonds has been proved. No memorandum of any description is in existence containing any record of these transactions. Fraser is unable to give any description of the bonds except that they were "Government of Canada bonds" or "War bonds"; he stated at the trial that he had segregated these bonds at the times of the several abstractions and attached a note to them indicating that they were the property of Stewart. But his evidence at the trial is not really consistent with the story he told to Mr. Melvin, who having discovered, as inspector, the irregularity in the Creamery Company's accounts, asked Fraser for an explanation. According to Mr. Melvin's account of this conversation, Fraser told him that he, Fraser, had made personal loans to the company and that the interest appropriated by him was interest upon these loans. On further inquiry the inspector eventually obtained the dates of the loans and the amounts of them. The form in which the loans were made was not consistent with the statement that they were personal loans; notes had been taken from

the company payable to the bank, and the proceeds credited to the company's account in the ledger. The inspector wished an explanation of these facts, on the assumption that these loans were personal loans, and he says that after pressing Fraser for an explanation, Fraser "eventually" told him that both amounts credited to the Creamery Company had been taken from Stewart's account. Fraser then informed the inspector that he had made restitution to Stewart by giving him his own bonds. When pressed as to the character of the bonds, and as to particulars by which they might be identified, Fraser was unable to give any information. Mr. Melvin's evidence is this: "I asked him if he could tell me what the character of the bonds was; he said he could not. Q. What reason did he give?—A. He did not remember. Q. That is all you got?—A. That is in effect all I got at any time."

It is not without significance in considering the credibility of Fraser that he dealt with two other accounts in the same manner in which he dealt with Stewart's; that, these two customers being alive, when the wrongful dealing was discovered, the bank accounted to them for the sums abstracted. It is desirable, I think, to cite verbatim Fraser's evidence on this point:

Q. I want to know if when the money was abstracted from Cole's account, whether there were bonds put aside for his account; you took money from Cole's account exactly in the same way you took it from Stewart's?—A. Mr. Cole denies me taking any money from him at all.

Q. In any event, the Royal Bank have paid Cole a $1,000.—A. I don't know about that.

Q. Did you know that the contention of the Royal Bank is that Mr. Cole—that the Musquodoboit Creameries is credited in exactly the same way from Cole's, as the $3,500 and the $1,500 from Stewart's account. Is that a fact?—A. I can't swear to that.

Q. What about Mr. P. G. Archibald's account?—A. He has given me authority to charge his account whenever I wanted it.

Q. You took money from Mr. Archibald's account in the same manner?—A. I won't swear to that.

Q. And the Royal Bank have returned to Mr. Archibald the amount that was taken from the account?—A. I will not swear to that.

Q. They were sent credit slips?—A. Not that I know of; I don't know they were sent credit slips or not.

Q. Did you know they were accounted for; both these sums were accounted for to Archibald and Cole?—A. Yes.

Q. They happen to be living and Stewart is dead.—A. Probably they are.

Fraser's conduct after his interview with Mr. Melvin must also be considered. The bank declined to accept his

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Duff J.

explanation of the transaction and required him to procure an affidavit from the personal representatives of Stewart, confirming his statement. He did succeed in procuring from the son a letter, by telling him that he had given bonds to his father and that these sums were in payment of these bonds, and suggesting that there were reasons for silence with regard to the transaction. He begged him not to disclose the matter to his mother. The bank refused to accept the letter and he pressed both mother and son for an affidavit. In order to influence the mother to execute an affidavit, he told her that the son had given him a letter, upon which he had taken legal advice, and that he had been advised that the letter was binding. I can see no reason whatever for disbelieving the evidence of the plaintiffs as to what occurred between Fraser and themselves, and, putting it in the mildest way possible, I cannot credit him with having acted straightforwardly. His entire absence of recollection with respect to the character of the bonds, the date of their delivery, and with respect to any other particular of the transaction, when he was interviewed by Mr. Melvin, gives to his whole story a doubtful hue, and his transactions in relation to the Cole and Archibald accounts throw discredit on him personally. Considering the evidence, as far as I have reviewed it, alone, I should have no hesitation in concluding that the respondents have not acquitted themselves of the onus of establishing that restitution was made to Stewart by Fraser.

There remains, however, a further point, which is really the point upon which the majority of the court below proceeded. It is this: five documents dated respectively, May 2, 1922; October 3, 1922; October 20, 1923; March 24, 1924, and July 10, 1924, are produced from the possession of the bank. The first of them is as follows and the others are in the same form:

THE ROYAL BANK OF CANADA

Incorporated 1869

MIDDLE MUSQUODOBOIT, N.S., May 2, 1922.

RECEIVED from THE ROYAL BANK OF CANADA, Middle Musquodoboit, N.S., statement of my/our account as at the close of business on April 29, 1922, showing a balance of $6,684.05 in my favour, together with vouchers for all amounts charged to the said account up to and including the said date.

For valuable consideration I/we agree to examine forthwith into the accuracy of the said statement and the regularity and validity of the said vouchers, and I/we further agree that at the expiration of ten days from the date hereof, the said statement shall be conclusive evidence of the correctness of the balance therein shown, and the bank shall be and is released from all claims by me/us in respect of any and every item shown in the said statement, save such as shall have been questioned or objected to in writing within the said ten days.

(Sgd.) T. E. STEWART.

N.B.—This Receipt and Undertaking must be signed by the Customer or his Attorney.

It is first necessary to observe that the document is a receipt for vouchers, for vouchers for all amounts charged to the "said account" up to and including the "said date." Now this is a receipt produced to the customer by the bank for signature, and there can be no possible doubt as to the meaning of the word voucher used in it; it is something in the nature of authority or some evidence or record of authority to the bank to dispose of the sums charged. Admittedly, there never was any such voucher in respect of these sums of $3,500 and $1,500; as to the sum of $3,500, there is a vague suggestion, but as evidence it is negligible. And here it must be insisted on, because it is vital, that the case has proceeded from the beginning to the end on the basis that neither the bank nor Fraser had authority to abstract these sums. Fraser's story from the beginning was that he took the money and with it made personal loans to the Creamery Company. It is perfectly plain, therefore, that this document is founded upon a fundamental error and as against the deceased Stewart can have no evidentiary weight as to the state of the account. It is to be observed that the document as drawn by the bank, and presented by the bank to its customer, is one of those documents which, being in ambiguous form, can be no protection. Read without extraordinary care by a customer, relying not only on the honesty, but upon the reasonable care of his banker, he might very well receive from it the idea: here are vouchers for all the sums charged, examine them and see whether or not they are genuine and if we do not hear from you within ten days, we are to be at liberty to assume that the balance is correct. That, I think, in the circumstances, is the meaning a customer would probably attach to this piece of paper; and the customer's signature is of no value whatever as evidence in favour of the bank or anyone else.

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Duff J.

I have come to the conclusion that the reasons given by Mr. Justice Paton are conclusive. The learned trial judge, I think, with very great respect, has misdirected himself as to the onus of proof; and so, also, again with very great respect, Mr. Justice Mellish.

One observation seems proper. In view of Fraser's stand, the bank cannot properly be censured for submitting the dispute to the courts, and nothing said above should be construed as a reflection upon their conduct.

The appeal should be allowed, and the appellants should have judgment for the amount of their claim with costs in all courts.

CANNON J. (dissenting).—The plaintiffs, as executors and trustees of Thomas E. Stewart, who died on or about the 7th day of November, 1924, sued, on the 3rd January, 1929, the Royal Bank of Canada and Roy C. Fraser. They claimed that on the 28th day of February, 1922, the sum of $3,500, and on the 14th day of February, 1924, a further sum of $1,500, were withdrawn from the current account of the said deceased at the branch of the Royal Bank of Canada at Middle Musquodoboit, in the County of Halifax, by the defendant Roy C. Fraser, or under his direction, without the knowledge, authority or direction of the deceased. No restitution or refund of said sums of money or any part thereof having been made to the deceased, or to his executors, the executors and trustees claim:

1. $3,500 with interest at the rate of 5% from the 28th day of February, 1922;

2. $1,500 with interest at the rate of 5% from the 14th day of February, 1924; and

3. An accounting with respect to all the accounts and dealings of the said deceased with the bank.

The respondents filed separate defences.

The Royal Bank admits that the amounts were withdrawn from the current bank account of the deceased, at the dates mentioned, by the defendant Fraser, or under his direction; but the bank has no knowledge, and does not admit, that the said withdrawals, or either of them, were made by the said Fraser without the knowledge, authority or instruction of the deceased. The bank further admits that no restitution or refund of the said sums of money, or

any part thereof, has been made to the deceased or his estate by the bank; but alleges that it does not know and does not admit that no restitution or refund of the said sums of money or any part thereof has been made to the deceased, or his estate, by Fraser.

The substantial defence of Fraser is found in the following paragraphs of his plea:

(*c*) He denies that the said sums of $3,500 and $1,500 were withdrawn from the current bank account of the said Thomas E. Stewart, deceased, without his knowledge, authority or instructions and he further denies that no restitution thereof in whole or in part was ever made. On the contrary he says that shortly after the said amounts were deducted from the said current account he paid and delivered over to the said Thomas E. Stewart with full knowledge of the said withdrawals and in complete discharge thereof bonds in the one case in the amount of $3,500 and in the other case in the amount of $1,500 which the said Thomas E. Stewart accepted in full and thereupon and thereafter on at least three occasions the said Thomas E. Stewart by acknowledgments in writing—having received the said bonds as aforesaid—acknowledged his current account with the defendant Bank and the balances showing to his credit to be absolutely true and correct although the said charges against his said current account remained standing on the books.

(*d*) The said defendant repeats paragraph 2 (*c*) hereof and says that the acknowledgments in writing were in the following forms *mutatis-mutandis*—

"The Royal Bank

"Received from the Royal Bank of Canada statement of my account as at the close of business on 19 , showing a balance of $ in my favour, together with vouchers for all amounts charged to the said account up to and including the said date.

"For valuable consideration I agree to examine forthwith into the accuracy of the said statement and the regularity and validity of the said vouchers and I further agree that at the expiration of ten days from the date hereof the said statement shall be conclusive evidence of the correctness of the balance therein shown and the Bank shall be and is released from all claims by me in respect of any and every item shown in the said statement save such as shall have been questioned or objected to in writing the said ten days," and that neither within ten days after the signing of the said acknowledgment nor within any other time nor at all did the said Thomas E. Stewart in his lifetime nor the plaintiffs as his legal representatives after his death nor any other person ever question or object to in writing or otherwise the said statements of account as referred to in the preceding sub-paragraph hereof and the plaintiffs are thereby estopped and precluded from now calling into question either the said statements or the absolute correctness thereof.

The appellants, in their reply to this defence, denied the delivery of bonds to Thomas E. Stewart in his lifetime, and stated that any acknowledgments as to the correctness of his balance at the bank were obtained by the fraud and

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Cannon J.

misrepresentation of Fraser; and that, at no time, was Thomas E. Stewart given a full disclosure of his correct account with the bank, and that Fraser concealed from Stewart the true facts as to the state of his account.

The action came for trial before Mr. Justice Chisholm.

The plaintiffs produced their own evidence, together with that of Willard Melvin, inspector of the bank, who explained how he discovered, in 1928, certain irregularities in the management of the branch by Fraser, and exacted from the latter that he should secure first a letter, then an affidavit from plaintiffs respecting the deceased's dealings with the bank. Plaintiffs' evidence describes the embarrassed efforts made by Fraser to secure from them, four years after the settlement of the account, and after they had destroyed all vouchers, the additional documents requested by this very cautious inspector. Another witness for the plaintiffs was one George Wilson, whom Fraser asked, when he was threatened with the present action, to see Arnold E. Stewart, in order to try and reach an amicable settlement. The plaintiffs did not produce the deceased's pass-book and claim that it could not be located.

Defendant Fraser was heard and swore positively that he had on both occasions acted under implicit instructions from the deceased and had given satisfaction or consideration to the latter, with bonds of the value of $3,500 in one instance, and of $1,500 in the other; and that, on both occasions, in 1922 and in 1924, they were accepted by Stewart and taken away by him.

This evidence, by itself, would not be sufficient under R.S.N.S., 1923, c. 225, c. 37, which provides that

in any action, or proceeding in any court, by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall *not* obtain a verdict, judgment, award, or decision therein on *his own testimony,* or that of his wife, or of both of them, in respect to any dealing, transaction, or agreement with the deceased, or in respect to any act, statement, acknowledgment, or admission of the deceased, *unless such testimony is corroborated by other material evidence.*

The decision of this case rests entirely on the solution of the question whether or not Fraser's testimony is corroborated by sufficient material evidence to support the judgment dismissing the action. I quite agree that if we had only Fraser's evidence to support his plea of payment and

satisfaction on the two occasions above mentioned, the appeal should be maintained. But the Executors cannot have more rights before this court than Stewart himself would have been able to exercise in his lifetime, and they are bound by Stewart's signature, given on five different occasions, on the bank's verification receipts dated May 2, 1922, October 3, 1922, October 20, 1923, March 24, 1924, and July 10, 1924. This man in active business, who, according to his wife's evidence, "whenever he came home would have a statement verified at the bank", must be credited with enough intelligence to perceive that during that period his current account had been reduced on two occasions by the rather large amounts of $3,500 and $1,500; surely he must have received satisfaction or consideration for his money before he acknowledged that the balances shewn by his account at those dates were correct. His signature, and his failure to question or object to these statements within ten days from the dates thereof, unless induced by fraud and misrepresentation, bind his heirs and representatives. The latter grasped this, when, in their reply to the plea, they claimed that these receipts or acknowledgments had been secured through misrepresentations and fraud. No attempt whatever has been made by the plaintiffs to prove these allegations, so that we must accept and give their full value to these documents signed by the deceased: *mortus adhuc loquitur,* and he gives evidence for the defence. This is more than corroboration; it is confirmation of Fraser's defence.

Moreover, Robert McFetridge, who was in the employ of the bank from January 1, 1924, gave material evidence corroborating in part Fraser's version. He swore that Stewart, in the last year of his life, was frequently in the bank and asked for his balance from the ledger keeper. This witness also saw Stewart with his pass-book, which was written up and handed to him on several occasions; and he also remembers that, in the latter part of the winter of 1924, Mr. Fraser brought out his own deposit box, at a time when Mr. Stewart was in the bank, set it on witness's desk, took out some bonds and took them into his office; a few minutes later Fraser called witness to bring a large envelope; Fraser put these bonds in the envelope and handed them over to

1930

STEWART v. ROYAL BANK OF CANADA AND FRASER.

Cannon J.

the late Mr. Stewart. This witness was not cross-examined by the plaintiffs.

The whole of the evidence of record, except that part based on more or less suspicious circumstances which occurred four years after the death of the bank's client, favours the defendant. In presence of the five receipts and quit claims bearing the signature of the testator, and the latter's inaction from May 2, 1922, to the time of his death in November, 1924, the Executors had to prove their allegation of error through defendant's fraud and misrepresentation; this they have failed to do. The trial judge saw and heard Fraser in the witness box; and, to use his own words, he was not prepared to find his statement untrue, as it was supported by the vouchers and acknowledgments already mentioned. Two of the learned judges of the Court of Appeal have also found that the defendant had proven his plea of payment, that he had given satisfaction to Stewart in his lifetime; and I do not see any reason why this Court should decide that these findings are contrary to the facts of the case.

I would dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondent The Royal Bank of Canada: *C. B. Smith.*

Solicitor for the respondent Fraser: *James A. Sedgewick.*

1930

*Feb. 17, 18.
*June 10.

IN THE MATTER OF A REFERENCE AS TO THE LIABILITY OF THE PROVINCE OF NOVA SCOTIA FOR EXPENSES INCURRED IN CALLING OUT TROOPS IN AID OF THE CIVIL POWER IN CAPE BRETON.

Constitutional law—Riot—Calling of Active Militia—Requisition by Attorney General of the province—Liability of the province for expenses incurred—Militia Act, R.S.C., 1906, c. 41, sections 8 to 90; 1924 (D.) c. 57—Public Service Act, R.S.N.S., 1923, c. 9, s. 2, s. 3 (1), s. 4, s. 40.

The question referred to this court is whether the province of Nova Scotia is liable, or not, to pay to the Dominion of Canada all expenses and costs incurred by the latter by reason of part of the active militia of

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

Canada being called out and serving in aid of the civil power in the county of Cape Breton in 1925, in a case of riot, upon a requisition, made by the Attorney-General of Nova Scotia in the form prescribed by s. 85 of the *Militia Act* (R.S.C., 1906, c. 41; (D) 1924, c. 57), which included an undertaking by him that these expenses and costs would be paid to the Dominion Government by the province.

Held, Newcombe J. dissenting, that the question should be answered in the negative. Sections 80 to 90 of the *Militia Act* repose certain powers in the person occupying the position of Attorney-General in the province for the time being, but the exercise of these powers does not in any way depend upon the consent of the Lieutenant-Governor or of the provincial legislature. The *Militia Act* envisages the Attorney-General, not in his capacity as Attorney-General to His Majesty as the Sovereign Head of the province, but as a person in whom certain powers are vested and on whom certain duties are laid by the statute. These sections apply to every province and go into operation independently of the scope of the Attorney-General's authority to bind the province in respect of the expenditure of moneys for such purpose. Therefore these enactments do not contemplate a duty to pay, proceeding from a contract between the province and the Dominion. The revenues of the province are vested in His Majesty as the supreme head of the province, and the right of appropriation of all such revenues belongs to the legislature of the province exclusively. *Semble* that the Attorney-General (whose duties, in so far as now material, include the supervision of the administration of justice within the province) has no statutory authority to undertake the payment now demanded by the Dominion: the subject matters comprised within the supervision of the administration of justice would not embrace authority to enter into such an undertaking.

Per Newcombe J. (dissenting).—Assuming that sections 84, 86 (3) and 89 of the *Militia Act* are ineffective to bind the province without provincial sanction, there are other valid provisions remaining, respecting *Aid of the Civil Power,* which are independent of and separable from the impugned Dominion provisions, and which provide all legislation that the Dominion requires to enable it to maintain the claim now under consideration. An Order in Council was not necessary in order to bind the province, seeing the authority which the provincial Attorney-General, who requisitioned the troops, had by statute, as the political head to whom adequate executive power was delegated; and the provincial Government, during the long period of military activity, had stood by consenting.

Per Cannon J.—Such an undertaking, signed by the Attorney-General acting as such on behalf of the province of Nova Scotia, to be valid and binding on the province, would have to be ratified by the legislature, as it would affect the finances and dispose of the revenues of the province. But it is the spirit of our constitution that, in emergencies beyond the control of the civil power in one province, the cost of the aid given by the Dominion militiamen should be borne by the province. In this case, the province of Nova Scotia is only conditionally liable to the Dominion for the expenses now claimed, because, since the amending of the *Militia Act,* in 1924, the legislature has not yet passed legislation concurrent with that Act and has not yet voted the necessary funds to honour the signature of its Attorney-General who, under the rule of ministerial solidarity, acted for and on behalf of the government of the province.

1930

REFERENCE re TROOPS IN CAPE BRETON.

REFERENCE by the Governor General in Council to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of s. 55 of the *Supreme Court Act*, R.S.C., 1927, c. 35, of the following question:

"Is the province of Nova Scotia, on the facts (hereinafter) set out, liable to pay to His Majesty in the right of the Dominion all expenses and costs incurred by reason of the calling out of part of the Active Militia in aid of the civil power in Cape Breton as aforesaid?"

The facts, as stated in the Order in Council, are as follows:

"Upon and in pursuance of a requisition dated 11th June, 1925, from the Attorney-General of Nova Scotia (a true copy whereof is contained in the Schedule hereto annexed, marked "A"), made by him under the provisions of sections 81, 85 and 86 of the Militia Act, as enacted by chapter 57 of the Statutes of Canada, 1924, the District Officer Commanding, Military District No. 6, at Halifax, pursuant to the provisions of said section 81 and of section 82 of the Militia Act, as enacted by said Chapter 57 of the Statutes of 1924, called out a portion of the Permanent Force to aid the civil power in connection with certain riots and disturbances in the County of Cape Breton, and as specified in the said requisition.

"Subsequently, it appeared to the District Officer Commanding, Military District No. 6, to whom the said requisition was addressed, that the services of the Active Militia in Districts other than the one of which he was in Command were necessary for the purpose of suppressing or preventing the riot or disturbance mentioned. The said District Officer Commanding, pursuant to the provisions of Section 83 of the Militia Act, as enacted by the said Chapter 57 of the Statutes of 1924, notified the Adjutant-General of the number of officers and other ranks, horses and equipment which he considered necessary, and of which number the said section 83 makes the District Officer Commanding the sole judge.

"On receipt of this notification, the Adjutant-General, pursuant to the powers vested in him by the said Section 83, ordered the despatch to Cape Breton of the further number of troops, horses and equipment required, the per-

sonnel, horses and equipment of the Permanent Force in Military Districts Nos. 1 (London), 2 (Toronto), 3 (Kingston), 4 (Montreal), 5 (Quebec), and (10 (Winnipeg), being used to fulfil the requirements of the District Officer Commanding, Military District No. 6.

"The troops so called out remained on duty in aid of the civil power from the 12th June, 1925, to the 24th August, 1925, both dates inclusive, on which latter date they were finally withdrawn pursuant to the notification, dated 25th August, 1925, received from the Attorney-General of Nova Scotia (a true copy whereof is contained in the Schedule annexed hereto, marked "B"), that the services of the Active Militia were no longer required.

"The expenses and costs incurred by His Majesty in the right of the Dominion, by reason of the Active Militia being called out as aforesaid, amount to $133,116.73, the details whereof are set out in the statement contained in the Schedule annexed hereto, marked "C."

"The Minister is informed by the Deputy Minister of National Defence that the said statement sets out only those expenses which were actually incurred by His Majesty in the right of the Dominion by reason of the Militia being called out in aid of the civil power as aforesaid, and that there are not included in such expenses any sums with respect to the pay and allowances paid to the officers and men so called out which would have been paid or with respect to the costs of the rations which would ordinarily have been issued to them in any event irrespective of whether or not they had been called out in aid of the civil power.

"The Minister observes that the expenses and costs so incurred by His Majesty in the right of the Dominion are, by section 89 of the Militia Act, as enacted by chap. 57 of the Statutes of 1924, required to be paid to His Majesty by the province of which the Attorney-General made the requisition, and the Attorney-General of Nova Scotia purporting to act for and on behalf of the Province of Nova Scotia, moreover, gave an undertaking in the terms set forth in the requisition made by him as aforesaid that all expenses and cost so incurred by His Majesty should be paid to His Majesty by the said province.

1930

REFERENCE *re* TROOPS IN CAPE BRETON.

"The Minister reports that he has received from the Attorney-General of Nova Scotia in confirmation of allegations of fact first communicated to the Dominion Government or any officer thereof by telegram from the Attorney-General of Nova Scotia to the Deputy Minister of Justice, dated 3rd February, 1928, satisfactory proof, in the form of a statutory declaration, dated 9th February, 1928, made by one Arthur S. Barnstead of the city of Halifax, in the Province of Nova Scotia, Clerk of the Executive Council for the said province, of the statements of fact hereinafter set out, and the Minister recommends that the said statements of fact be embodied in the narrative of facts herein set out, subject to the reservation of all pleas or claims in law or equity which are or may be open or available to the Crown in the right of the Dominion. The said statements of fact, numbered paragraphs (1) and (2) are as follows:

"(1) That His Honour the Lieutenant-Governor of Nova Scotia in Council made no order authorizing, ratifying, or confirming, or in any way whatever referring to the making of a requisition by the Honourable W. J. O'Hearn, Attorney-General of Nova Scotia, addressed to the District Officer Commanding Military District No. 6, Halifax, N.S., or to any other official or person, requiring such officer, official or person to call out the Active Militia or any part or portion thereof for the purpose of suppressing or dealing with any riot or disturbance, or authorizing, ratifying or confirming, or in any way whatever referring to the giving of an undertaking by the said W. J. O'Hearn that all of any expenses and costs, or either of them incurred by His Majesty by reason of the Militia or any part or portion thereof being called out or serving in aid of the civil power pursuant to any requisition should be paid to His Majesty by the Province of Nova Scotia, and that there is no record of any such authorizing, ratifying or confirming by His Honour the Lieutenant-Governor in Council in any other way, nor is there any record of any advice respecting the matter having been tendered to His Honour the Lieutenant-Governor by the Executive Council for the Province of Nova Scotia; and

"(2) That His Honour the Lieutenant-Governor of Nova Scotia in Council made no order authorizing, ratify-

ing, or confirming, or in any way whatever referring to the giving of a notification by the late the Honourable John C. Douglas, Attorney-General of Nova Scotia, addressed to the District Officer Commanding Military District No. 6, Halifax, N.S., or the officer appointed to administer that District or for the time being performing the duties of the District Officer Commanding that District, or to any other official or person, that the services of the Active Militia were no longer required in aid of the civil power, and that there is no record of any such authorizing, ratifying or confirming by His Honour the Lieutenant-Governor in Council in any other way, nor is there any record of any advice respecting that matter having been tendered to His Honour the Lieutenant-Governor by the Executive Council for the Province of Nova Scotia.

"The Minister further reports that there was not communicated, in any manner or form, to the Crown in the right of the Dominion, or to its officers, either at the time the said requisition with the undertaking therein embodied was made or during the whole period the Active Militia so called out remained on duty in Cape Breton, any notice of repudiation on the part of the Lieutenant-Governor in Council or Government of Nova Scotia of the authority of the Attorney-General to give the said undertaking for and on behalf of the Province or disavowal of the liability of the Crown in the right of the Province, under the said undertaking, to pay to the Crown in the right of the Dominion the expenses aforementioned, and that the first intimation received by the Dominion Government or by any of its officers of any intention on the part of the Province of Nova Scotia to repudiate the authority of the Attorney-General of Nova Scotia to give such undertaking for and on behalf of the said Province, was contained in the telegram of the 3rd February, 1928, from the Attorney-General of Nova Scotia to the Deputy Minister of Justice aforementioned.

"The Minister further reports that at the conference recently held at Ottawa between representatives of the Dominion and the several provincial governments, the representatives of the Government of Nova Scotia disputed the liability of the province of Nova Scotia to pay the expenses

1930

REFERENCE *re* TROOPS IN CAPE BRETON.

and cost incurred by His Majesty in the right of the Dominion as aforesaid, and it was agreed that this question was a proper question for the determination of the Supreme Court of Canada."

L. Cannon K.C. and *F. P. Varcoe* for the Attorney-General of Canada.

W. L. Hall K.C. for the Attorney-General of Nova Scotia.

Aimé Geoffrion K.C. for the Attorney-General of Quebec.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Rinfret, Lamont and Smith JJ.) was delivered by

DUFF J.—The liability which the province of Nova Scotia is alleged to have incurred is based, if it exists, upon the requisition printed in the case, in these words:

Schedule

"A"

ATTORNEY-GENERAL OF NOVA SCOTIA

Province of Nova Scotia

To Wit: Halifax

Whereas a notification has been received by me from the County Court Judge having jurisdiction in such place, that a riot or disturbance of the peace beyond the powers of the civil authorities to suppress or to deal with, and requiring the aid of the Active Militia to that end has occurred and is in progress at the Waterford Power plant at or near the town of New Waterford in the county of Cape Breton and elsewhere in the said county.

And whereas it has been made to appear to my satisfaction that the services of the Active Militia are required in aid of the civil power.

Now therefore I, the Attorney-General of Nova Scotia under and by virtue of the powers conferred by the *Militia Act* do hereby require you to call out the Active Militia or such portion thereof as you consider necessary for the purposes of suppressing or dealing with such riot or disturbance.

And for and on behalf of the said province of Nova Scotia I, the said Attorney-General, hereby undertake that all expenses and costs incurred by His Majesty by reason of the militia, or any part thereof being called out or serving in aid of the civil power pursuant to this requisition shall be paid to His Majesty by the said province.

Dated at Halifax, this eleventh day of June, 1925.

(Sgd.) W. J. O'HEARN,
Attorney-General.

The District Officer Commanding,
M.D. No. 6,
Halifax, N.S.

On behalf of the Dominion, it is contended that the effect of the pertinent sections of the *Militia Act* (sections 80-90 inclusive) is to prescribe certain specified duties for the militia, upon a requisition being made by the Attorney-General of a province which includes an undertaking by the province to pay the expenses and costs incurred in the execution of the prescribed duties; that these provisions constitute in effect an offer by the Dominion to the province, and that upon the acceptance of the offer, accompanied by such an undertaking, a contractual obligation arises binding the province to pay such expenses and costs.

On behalf of Nova Scotia, it is contended that such is not the effect of the statute, and, moreover, that the Attorney-General of Nova Scotia, who signed the requisition upon which the Dominion's claim is based, had no authority to bind the Crown in right of the province by any such undertaking.

To deal with the second question first, I am not satisfied that the Attorney-General (whose duties, in so far as now material, include the supervision of the administration of justice within the province) had any statutory authority to undertake the payments now demanded. I think the subject matters comprised within the supervision of the administration of justice would not embrace authority to enter into such an undertaking.

In the view I am about to state, however, it is really unnecessary to pass upon any question as to the scope of the authority of the Attorney-General of Nova Scotia. I think Mr. Geoffrion's contention is unanswerable, that the sections of the *Militia Act*, upon which the Dominion relies, repose certain powers in the person occupying the position of Attorney-General in the province for the time being, but that the exercise of these powers does not in any way depend upon the consent of the Lieutenant-Governor, or of the provincial legislature. That, I think, is made clear by subsection 3 of section 86, which is in these words: .

(3) Every statement of fact contained in any requisition made under the provisions of this Act shall be conclusive and binding upon the province on behalf of which the requisition is made; and every undertaking or promise in any such requisition contained shall be binding upon the province and not open to any question or dispute by reason of any alleged incompetence or lack of authority on the part of the Attorney-General to make the same, or for any other reason.

1930

REFERENCE *re* TROOPS IN CAPE BRETON.

Duff J.

Obviously this statute envisages the Attorney-General, not in his capacity as Attorney-General to His Majesty as the Sovereign Head of the province, but as a person in whom certain powers are vested, and on whom certain duties are laid by the statute. The sections apply to every province and go into operation independently of the scope of the Attorney-General's authority to bind the province in respect of the expenditure of moneys for such purposes.

It follows that these enactments do not contemplate a duty to pay proceeding from a contract between the province and the Dominion. The Solicitor-General in his very candid argument did not contend that the duty to pay these expenses could be imposed by the Dominion on the province *in invitum,* and that, of course, would be a plain violation of the fundamental principle of the *British North America Act.* The revenues of the province are vested in His Majesty as the supreme head of the province, and the right of appropriation of all such revenues belongs to the legislature of the province exclusively.

The provision authorizing the deduction of moneys due by a province under these sections from the annual subsidy does not help the Dominion. Obviously such a deduction could not constitutionally be made unless the province was under an obligation to pay.

NEWCOMBE J. (dissenting).—I shall state very briefly my view, which, unfortunately, differs from that of the majority.

Let it be assumed that sections 84, 86 (3) and 89 are ineffective to bind the province without provincial sanction. Nevertheless, the other provisions of the *Militia Act* respecting *Aid of the Civil Power* are independent of these, and, having regard to the facts as I interpret them, establish the liability in question. I suggest that if the sections mentioned above had been re-enacted by the legislature of Nova Scotia, the province could not have escaped responsibility upon any of the grounds which have been urged. I am not convinced that it was the purpose of Parliament to subject the province, *in invitum,* to a statutory charge; I do not think it is necessary to infer such an intention from any of the provisions of the *Militia Act.* It is, I think, on

the other hand, reasonably apparent that the foundation of the Dominion provisions, as enacted in 1924, rests upon an assumed authority in the Attorney-General, existing or provincially recognized, to bind his province by the terms of his requisition.

Now the conditions under which the military forces may become serviceable are subject exclusively to Dominion regulation, and I think it must be considered, in view of the distribution of legislative power, as it exists, that the intention of Parliament in enacting the pertinent clauses was to formulate an offer to each of the provinces, setting forth the terms upon which the requisite military aid might be had. That, I am persuaded, is the meaning—the pith and substance—of the statutory requirements regulating the requisition; and, although it may be that provincial legislation is desirable, in order to facilitate the proof, and to implement and give comprehensive effect to the Dominion project, I am not satisfied that it is necessarily frustrated in the absence of a provincial enactment establishing the conclusive character of the requisition; or that a province, which has in form and in fact, by the proceedings of its Attorney-General, accepted the legislative offer of the Dominion and availed itself of the services of the militia and the benefits of the Act, should, in the circumstances of this case, be permitted to evade the payment of indemnity upon the contention that the Attorney-General has exceeded his authority. If Parliament has, in some particulars, such as sections 84, 86 (3) and 89, transcended its powers, or if the Dominion executive has acted in advance of the provincial legislation which may have been contemplated, the impugned Dominion provisions are nevertheless, separable, and there are valid clauses remaining which provide all legislation that the Dominion requires to enable it to maintain the claim now under consideration.

By the *Public Service Act* of Nova Scotia, chapter 9, of the Revised Statutes of the province, 1923, section 2,

> For the administration of the public affairs of the Province there shall be the following departments:—
>
> (1) The department of the Attorney-General, presided over by the Attorney-General * * *.

1930

REFERENCE *re* TROOPS IN CAPE BRETON.

Newcombe J.

Follows the enumeration of seven other departments, namely, Crown Lands, Provincial Secretary, Provincial Treasurer, Public Works and Mines, Education, Agriculture and Highways; and, by subsection (1) of section 3, it is enacted that the Governor in Council may create other departments, not exceeding three in number, and may from time to time assign thereto such affairs as are deemed expedient. There is thus the usual distribution and delegation of executive authority. By section 4 it is declared that

> The functions, powers and duties of the Attorney-General shall be the following:—
>
> (1) He shall be the law officer of the Crown, and the official legal adviser of the Lieutenant-Governor, and the legal member of the Executive Council.
>
> (2) He shall see that the administration of public affairs is in accordance with law, and shall have the superintendence of all matters connected with the administration of justice in the province not within the jurisdiction of the Dominion of Canada.
>
> * * * * *
>
> (5) He shall have the regulation and conduct of all litigation for or against the Crown or any public department in respect to any subject within the authority or jurisdiction of the Government.
>
> (6) He shall have the functions and powers which belong to the office of the Attorney-General of England by law or usage so far as the same are applicable to this Province, and also the functions and powers which previous to coming into force of *The British North America Act*, 1867, belonged to the office of Attorney-General, in the Province of Nova Scotia and which under the provisions of that Act are within the scope of the powers of the Government of the province.

It is, moreover, provided by section 40:

> Every official appointed under the authority of this chapter or any other statute of the province shall have such powers and perform such duties as are specified in any statute in that behalf, or are from time to time determined by the Governor in Council.

The Dominion, therefore, in naming the Attorney-General, selected the head of that provincial department of Government which is charged by the local statutes with these wide-reaching powers relating to the administration and enforcement of law and order, and with whom the provincial decision as to the propriety and necessity of invoking military intervention seems constitutionally to rest. The question submitted is based upon stated facts, and it is not suggested that the Attorney-General came to an erroneous conclusion, or that his government was in any manner misled. The military force assigned to the duty was called out and remained on service from 12th June until

24th August, a period of 72 days, when the successor in office of the requisitioning Attorney-General gave the statutory notice that the services of the militia were no longer required. We are told that there was no order of the provincial executive council for either of these proceedings, also that there was no notice repudiating the authority of the Attorney-General; but, seeing the authority which the Attorney-General had by statute as the political head to whom adequate executive power was delegated, an Order in Council was not, in my view, essential; and, of course there is the plain inference, which is irresistible, that the Government, during the long period of military activity, stood by consenting; and, as said by Lord Eldon in *Dann* v. *Spurrier* (1):

> The circumstance of looking on is, in many cases, as strong as using the terms of encouragement.

There is no evidence as to the state of the provincial appropriations for the expenses incurred, but that is an internal matter; besides, there is at least the presumption of regularity, which is not in anywise rebutted; and, if the province deny the authority of its Attorney-General in matters apparently within the scope of his powers, it must, in my opinion, in order to maintain its position, make out a case which does not appear upon this record.

I would, with all hesitation and deference which habitually attend upon my conclusion when I am persuaded to differ from my learned brethren, answer "Yes" to the question submitted.

CANNON J.—The Governor General in Council has referred for the consideration of the Supreme Court of Canada the following question: "Is the province of Nova Scotia, on the facts set out in the Order in Council, liable to pay to His Majesty in the right of the Dominion all expenses and costs incurred by reason of the calling out of part of the active militia in aid of the civil power in Cape Breton?"

The Attorney-General of Nova Scotia, by his requisition of the 11th of June, 1925, complied with the provisions of sections 81, 85 and 86 of the *Militia Act*, as enacted by the Parliament of Canada, c. 57, Statutes of Canada, 1924.

(1) 7 Vesey 235.

1930

REFERENCE *re* TROOPS IN CAPE BRETON.

Cannon J.

The requisition signed by the Attorney-General of Nova Scotia contains an unconditional undertaking that the province shall pay to His Majesty all expenses and costs incurred by His Majesty by reason of the militia being called out in aid of the civil power.

It is not contended by the Dominion Government that the *Militia Act* would bind the province of Nova Scotia to pay, but that they are liable, on the facts of the case, either (1) by express contract (*a*) duly authorized, or (*b*) ratified, or (*c*) enforceable by virtue of estoppel, or (2) by implied contract, or (3) by implied constitutional obligation.

Even if such a contract had been duly signed by the Attorney-General acting as such on behalf of the province of Nova Scotia, I believe that such a contract, to be valid, and binding on the province, would have to be ratified by the Legislature, as it affects the finances and disposes of the revenues of the province; and under sections 53, 54 and 90 of the B.N.A. Act, bills for the appropriation of any part of the public revenue must originate in the House of Commons or the Legislature and must first be recommended by message of the Governor General or Lieutenant-Governor in the session in which such vote is proposed. The following remarks of Wurtele J., a well known constitutional authority, *re Demers* v. *Reginam* (1), are in point:

> The legislature enacts laws and grants supplies, but does not administer. The Crown under the advice of its constitutional advisers, or in other words the Executive Government, administers the affairs of the country, and on it rests the responsibility for all contracts which it may be necessary to enter into. The Executive Government deals with all matters respecting the administration of the public affairs of the country as it may deem conducive to the public good when its action is not restricted by a constitutional rule or by a prohibitory statute, but it has no constitutional authority to make a contract which will bind the Legislative Assembly to supply the necessary funds for carrying it on. It may be laid down, therefore, as an axiom that before entering into a contract which requires the expenditure of public monies, it is, in general, proper and expedient that the consent of the Legislature should be first obtained. The Executive Government may however, by exception, make a contract involving the expenditure of public monies before a grant has been made by the Legislature for the purpose contemplated by such contract; but such contract is in the nature of a conditional obligation, is in fact a conditional contract, and the condition is the granting by the Legislature of the necessary funds. Until this event happens, the obligation is suspended, and if the necessary supply should be refused, then the contract is dissolved. The Legislative Assembly has the right to approve or disapprove

(1) Q.R. 7 K.B. 447.

of all such contracts, and therefore it is usual to insert a clause that they are made subject to the ratification of the Legislature, or that the payments to be made on behalf of the same will be made out of monies to be voted by the Legislature. Should the Legislative Assembly, by a resolution, expressly disapprove of a contract which has been entered into without an appropriation for its performance having been made before its execution, even when it does not contain a clause making it subject to the ratification of the Legislature or to the grant of the necessary supply, then also the contract is dissolved. But should the necessary funds be voted, then the contract acquires retroactively full legal force and should be carried out by the Government, and can be enforced by the other contracting party. Every contract entered into by the Executive Government without there being a fund out of which the payment of the price stipulated can be made, or without there being an appropriation which is available for the purpose, is made on the tacit condition that it is dependent for its validity upon the necessary supply being voted; and as every person entering into a contract with the Government is presumed to know the law, he cannot complain, in the event of a grant being refused, or having no right to claim damages for its non-fulfilment.

Although such contracts are conditional, the Executive Government has no right or power of its own motion to rescind them, but, on the contrary, it should ask the Legislature to grant the necessary appropriation and await the action of the Legislative Assembly.

I would therefore say that the province of Nova Scotia, in this case, is conditionally liable to the Dominion for these expenses.

It seems to me that the spirit of our constitution, properly understood and applied, after establishing independent autonomous legislatures and also a central government to look after the common interests, requires that in emergencies beyond the control of the civil power in one province, the aid of the Dominion militiamen to act as special constables might be secured; but the extra cost of such co-operation should be borne by the province within whose limits the local disturbance of the King's peace occurs. The legislation of Nova Scotia, so far, has recognized this as equitable and just and has provided for the payment by the interested municipality of such expenditure. The laws of Nova Scotia concurred with the *Militia Act* before the latter was amended in 1924, to levy this money from the interested municipalities. Since 1924, no concurrent legislation has been passed by Nova Scotia; and under the present state of legislation, we must say that the province is only conditionally bound to pay, because the legislature of Nova Scotia has not yet agreed to do so.

But I am of opinion that the Attorney-General of Nova Scotia, as law officer and legal adviser to the Crown, and

1930

REFERENCE *re* TROOPS IN CAPE BRETON.

Cannon J.

the Government of Nova Scotia, which is continuous, should recommend and secure from the legislature of the province the necessary funds to honour the signature given by his predecessor in office to the requisition in conformity to schedule A of the *Militia Act* of 1924, which requisition and undertaking by the Attorney-General of the province of Nova Scotia should not by the latter be now treated as a mere scrap of paper. Under the rule of ministerial solidarity, the act of the Attorney-General in 1925 was the act and undertaking of the government of Nova Scotia; if the Premier or his colleagues disapproved of his requisition for the aid of the militia, the Attorney-General should have been called upon to resign and his act disallowed; nothing of the sort took place and the province is in honour bound to redeem his pledge and pay the expenditure made in good faith, in their local interest, by the Dominion, as representing the other partners to the Confederation Pact. Quoting again the above mentioned judgment:

> The Government of the Province is not the Government of the Cabinet which may be in office, and when cabinets succeed one another, this fact does not entail the consecution of one Government to another. The Government of the country is the King's Government, which has always to be carried on, and which is in fact continuous. The advisers of the Crown may be changed, and with this change there may be a change of policy. The Government, after a change of advisers, may therefore be carried on in accordance with other political views; but notwithstanding this, the Government of the country and the administration of its affairs are continuous. After a new cabinet has assumed office, the administration of public affairs may be carried on on other lines, but the Executive Government is bound by the ordinary rules of law as regards contracts which may have been entered into under a previous cabinet. Of its own will it has no right to rescind without the consent of the other contracting party a valid and binding contract, and if there should be good legal cause to annul the contract, the legal mode for doing so should be adopted.

Question answered in the negative.

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Nova Scotia: *Fred. F. Mathers.*

Solicitor for the Attorney-General of Quebec: *Charles Lanctot.*

D. J. McDONALD, H. CONTER, AND J. O'HEARN ..... } APPELLANTS;

1930
*June 11.
*June 14.

AND

HIS MAJESTY THE KING.....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Criminal law—Evidence—Tender of evidence given on former trial, under Cr. C., s. 999—Admission by accused's counsel of "every fact essential to the admission of the evidence" under s. 999—Extent of admission—Lack of proof that evidence put in was in fact the evidence given at former trial—Materiality of the evidence as affecting findings against accused—New trial—Warning to jury where evidence tendered under s. 999 which was given on former separate trials of persons now tried together.

The appellants were convicted of removing, and two of them of importing, goods of over $200 in value and liable to forfeiture, contrary to s. 193 of the *Customs Act*, R.S.C., 1927, c. 42. At their trial the Crown proposed to put in, under s. 999 of the *Cr. Code*, evidence given at previous trials (at which the juries had disagreed) by one W. Counsel for the accused admitted "every fact essential to the admission of the evidence of [W.] under s. 999 of the Code," and the evidence offered was put in.

Held: The admission of counsel, while it rendered unnecessary the establishment of the various facts required by s. 999 to be proved before the evidence of W. could have been admitted, did not in any way identify the documents read to the jury as the evidence given by W. on the former trials; and, there being no proof that the statements put in were in fact the evidence of W., and there being no consent that they were, they were wrongly received, and appellants were entitled to a new trial. The appellant C., convicted of removing but not of importing, was so entitled, notwithstanding that the depositions put in did not in terms incriminate him; they were important on the point that the goods in question were goods liable to forfeiture under the Act; that was an essential element of the charge and of the proof, and although C. might have been connected with it only through other evidence, it was not possible to appreciate how far the depositions on the main charge concerning the character of the goods imported might have influenced the jury in its findings.

The said previous trials had been, one of the appellant O. alone, and the other of the other appellants and one P. On the trial in question, at which said depositions were received, they were all tried together. One alleged ground for a new trial was that W.'s evidence on either previous trial was inadmissible against any accused who had not been a defendant on the previous trial at which it was given. The Court found it unnecessary to pass upon the point, but remarked that, should similar circumstances happen at the next trial, and W.'s depositions properly and legally identified be tendered, it would be most

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

1930

McDONALD v. THE KING.

advisable for the trial judge to warn the jury that each deposition should be considered as evidence only against the accused in whose former trial such deposition purported to have been taken.

APPEAL from the judgment of the Supreme Court of Nova Scotia *in banco,* sitting as a Court of Appeal under the provisions of the *Criminal Code,* dismissing the appeals of the present appellants from their convictions for violation of s. 193 of the *Customs Act,* R.S.C., 1927, c. 42.

The three appellants and one Petrie were tried together before Ross J. with a jury on an indictment containing three counts, the charges being that they, at Sydney in the County of Cape Breton, on or about the 3rd September, 1929, did knowingly and unlawfully, and without lawful excuse, assist, or were otherwise concerned in, (1) unshipping goods, (2) the importing of goods, (3) landing or removing goods; to wit (in each case): spirituous liquors over the value of $200 which said goods were liable to forfeiture under the *Customs Act,* contrary to the provisions of s. 193, c. 42, R.S.C., 1927, and amendments thereto.

The jury found the appellants McDonald and O'Hearn guilty on the second count (importing) and all three appellants guilty on the third count (removing). They found Petrie not guilty. The appellants were sentenced to terms of imprisonment, Conter for two years under the third count, and McDonald and O'Hearn for two years under each of the second and third counts, such sentences to run concurrently. Petrie was acquitted.

It appeared that at a previous sittings of the court, O'Hearn had been tried alone, and McDonald, Conter and Petrie had been tried together, and there were disagreements by both juries; that at each of those trials one Captain Wheeler had given evidence; and that he was now absent from Canada. At the present trial it was proposed by the prosecution to put in the evidence given by Captain Wheeler at the previous trials, under s. 999 of the *Criminal Code,* which reads as follows:

If upon the trial of an accused person such facts are proved upon oath or affirmation that it can be reasonably inferred therefrom that any person, whose evidence was given at any former trial upon the same charge, or whose deposition has been theretofore taken in the investigation of the charge against such accused person, is dead, or so ill as not to be able to travel, or is absent from Canada, or if such person refuses to be sworn

or to give evidence, and if it is proved that such evidence was given or such deposition was taken in the presence of the person accused, and that he or his counsel or solicitor if present had a full opportunity of cross-examining the witness, then if the evidence or deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such evidence or deposition was not in fact signed by the judge or justice purporting to have signed the same.

Counsel for the accused made an admission in the following form

[Names of counsel] admit every fact essential to the admission of the evidence of Captain Wheeler under section 999 of the Code.

and the evidence offered was put in.

Appeals taken from the convictions were dismissed by the Court of Appeal, Mellish and Carroll JJ. dissenting, and, pursuant to order of the Court, pronouncing separate judgments.

The judgment of the majority of the court was delivered by Harris C.J. He held that the admission of counsel, on its face and as understood at the trial, meant that the evidence of Wheeler was to be admitted against all the defendants; that the authorities show that the consent of the accused or his counsel is binding in such cases; and the evidence of Wheeler given on the two previous trials was properly received and binding on all the defendants. He further stated:

We think it is proper to point out that the suggestion that the admission of the evidence was only intended to be for the purpose of making it available as against the particular defendant or defendants who had been on trial on the previous occasion is not in our opinion the meaning of the admission which contains no such limitation.

If that view had been maintainable it would have involved a consideration of various questions and among others as to what if any difference there was between the evidence of Captain Wheeler in the two cases and whether or not these differences affected all or any of the issues. It was strongly argued that these differences were immaterial and it was pointed out that even if they were material, none of Wheeler's evidence affected the question of the guilt, if any, of the accused under the third count of the indictment. The guilt of all the accused under that count was clearly established by other evidence and was in no way affected by the admission of Wheeler's evidence. This seems to be so, and as the same punishment was awarded upon each of the convictions to run concurrently it seems to follow that no injustice would have been done any of the prisoners even if we had reached a different conclusion as to the effect of the admission of Captain Wheeler's evidence.

1930

McDONALD v. THE KING.

Another objection raised was that none of the evidence taken on the two previous trials purported to be signed by the Judge, but that objection is obviously covered by the admission of counsel.

The grounds of dissent of Mellish J. were " that the evidence given by Wheeler in the previous trial of McDonald, Conter and Petrie was inadmissible in this trial as evidence against O'Hearn," and " that the evidence given by Wheeler in the previous trial of O'Hearn was inadmissible in this trial as against Conter, McDonald and Petrie;" that s. 999 of the *Criminal Code* is clearly intended to deal with evidence given on the former trial of the same defendant and the admission of counsel aforesaid was therefore " wholly insufficient to allow of the reception of evidence taken on the previous trial of one party as against a different party on a later trial;" further, that " there is no proof that the statements put in were in fact the evidence of Captain Wheeler and there is no consent that they were." Carroll J. concurred with the reasons of Mellish J., and added some further reasons, including the ground (in connection with s. 999) that the evidence was not signed by the judge " before whom the same purports to have been taken;" that this fact of non-signature, apart from all other considerations, made all this evidence non-admissible.

By the judgment of the Supreme Court of Canada, now reported, the appeal was allowed and a new trial ordered as regards the three appellants.

J. W. Maddin K.C. and *M. A. Patterson* for the appellants.

D. A. Cameron K.C. for the respondent.

THE COURT.—In our opinion one ground upon which the appellants are entitled to a new trial is that taken by Mellish J., in his dissenting judgment, namely, that there is no proof that " the statements put in were in fact the evidence of Captain Wheeler and there is no consent that they were." The admission of counsel for the appellants rendered unnecessary the establishment, by the prosecution, of the various facts required by section 999 of the Code to be proved before the evidence of Captain Wheeler could have been admitted, but that admission did not, in any way, identify the document which was read to the jury, as the evidence given by him on the former trial.

It is true that the deposition of Captain Wheeler, as admitted, does not, in terms, incriminate the appellant Conter. The deposition is, however, very important on the point that the goods which the appellants were charged with having assisted or having been otherwise concerned in importing, unshipping, landing or removing were goods liable to forfeiture under the *Customs Act;* that was an essential element of the charge and of the proof, and although Conter may have been connected with it only through other evidence, it is not possible to appreciate how far the depositions of Captain Wheeler on the main charge concerning the character of the goods imported may have influenced the jury in its findings.

Our view on the above point makes it unnecessary to pass upon the other ground of dissent, to wit: " that the evidence given by Wheeler in the previous trial of McDonald, Conter and Petrie was inadmissible in this trial as evidence against O'Hearn " and " that the evidence given by Wheeler in the previous trial of O'Hearn was inadmissible in this trial as against Conter, McDonald and Petrie." We wish only to add that, should similar circumstances happen at the next trial and Wheeler's deposition properly and legally identified be tendered, it would be most advisable for the trial judge to warn the jury that each deposition should be considered as evidence only against the accused in whose former trial such deposition purported to have been taken.

The appeal is allowed and a new trial is ordered as regards the three appellants.

Appeal allowed.

Solicitor for the appellant O'Hearn: *J. W. Maddin.*

Solicitor for the appellants McDonald and Conter: *M. A. Patterson.*

Solicitors for the respondents: *N. R. MacArthur* (Crown Prosecutor) and *D. A. Cameron* (Solicitor for the Department of Inland Revenue of Canada).

1930

*Feb. 28.
*Mar. 3, 4.
*June 11.

THE CANADIAN PACIFIC RAILWAY COMPANY (DEFENDANT) ..... } APPELLANT;

AND

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Crown—Railways—Telegraph lines planted by company on roadway of Government railway—Alleged permission to plant and maintain them —Evidence—Licence—Revocability—Absence of formal contract— —Department of Railways and Canals Act, R.S.C., 1927, c. 171, ss. 7, 15.

The Crown took proceedings in the Exchequer Court against defendant, alleging that it had wrongfully planted and maintained its telegraph lines upon the roadway (belonging to the Crown) of the Intercolonial Railway. Audette J., [1930] Ex. C.R., 26, held that defendant was on the roadway by licence, but not an irrevocable licence, of the Crown. Defendant appealed, asserting an irrevocable licence, and the Crown cross-appealed, denying the existence of any licence. For purposes of its judgment, this Court considered the telegraph lines as in three sections, (1) the "Main Line" (between St. John and Halifax, with a branch from Truro to New Glasgow; built in 1888-1890), (2) the "Branch Line" (from New Glasgow to Sydney, built in 1893), and (3) the "Westville Line" (from Westville to Pictou, built in 1911).

Held (1) As to the "main line," on the evidence, the defence of leave and licence failed, and there was nothing to give rise to any equity in defendant's favour.

(2) As to the "branch line," on the evidence, there was no agreement (giving leave to defendant to use the roadway) proved; or, even if otherwise, the agreement, such as it may have been, had ceased to operate in any particular, unless to negative defendant's liability to remove its poles and wires; and defendant was, when the present action began, in no better position than that of licensee whose leave was terminated or exhausted.

(3) As to the "Westville line," from the evidence it appeared that defendant built it on the roadway by consent, the parties having mutually in view the negotiation of a contract, with adequate sanctions, to regulate their rights and obligations; and, with nothing more definite, defendant had ever since maintained and used the line without notice or warning of intention by the Government to withdraw the licence. The licence was revocable, but the right to revoke should be exercised reasonably; in the circumstances, an abrupt determination, without demand or notice, was unjustifiable. Therefore, as to this line, there was no cause of action when the proceedings were commenced, and the action must fail. *The King* v. *Inhabitants of Horndon-on-the Hill,* 4 M. & S., 562, at p. 565; *Cornish* v. *Stubbs,* L.R. 5 C.P., 334, at pp. 337-340; *Coleman* v. *Foster,* 1 H. & N., 37, at

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

pp. 39, 40; *Kerrison* v. *Smith*, [1897] 2 Q.B., 445, and other cases, cited. (Anglin, C.J.C., dissenting on this point, held that failure to give notice of revocation was not necessarily fatal to the action; on the contrary, inasmuch as defendant asserted that its licence as to this line was irrevocable and contested the Crown's claim to exclude it on the merits, the bringing of the action itself should be regarded as sufficient notice, subject only to the question of costs and allowance of a reasonable time to defendant to remove its poles and wires. *Cornish* v. *Stubbs supra*, *Coleman* v. *Foster supra*, and other cases referred to).

(4) As to all the lines generally, apart from other considerations, the contracts alleged by defendant were ineffective for non-compliance with statutory requirements (*Department of Railways and Canals Act*, R.S.C., 1927, c. 171, ss. 7, 15, referred to; *The Queen* v. *Henderson*, 28 Can. S.C.R., 425, discussed and distinguished). The telegraph rights claimed by defendant in perpetuity with respect to the railway lands in question could not be acquired for defendant's accommodation by the mere laches, acquiescence or tolerance of the executive officers and employees, charged under the Minister with the administration or working of the railway. It was contemplated that whatever concessions might be authorized should be contracted for by the Crown, represented by the Minister, and defendant knew, or is presumed to have known, the statutory requirements. Moreover, as to defendant's claim that it had acquired in perpetuity, and in the manner contended for, the right to use the Government railways for its telegraph lines, effect must be given to the principles expressed in *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas., 623 (see at pp. 634, 639). When planting its poles on the Government railway, defendant must have realized the facts of the case and the risks to be encountered, and the desirability of securing permanent concessions, if possible, or if they could or would be granted by the executive authorities; and there was no foundation upon which to apply the doctrine of estoppel. In so far as any contract competent to the parties could answer the purpose, the defendant neglected entirely the most elementary requirements as to the ascertainment of the terms, and the statutory essentials of form and sanction. (Reference also to Selwyn's Nisi Prius, 13th ed., p. 1086, and to *Blanchard* v. *Bridges*, 4 Ad. & El. 176, at pp. 194-195).

Judgment of Audette J. (*supra*) reversed in part in favour of the Crown.

APPEAL by the defendant (the Canadian Pacific Railway Co.) and cross-appeal by the plaintiff (the Crown) from the judgment of Audette J., of the Exchequer Court of Canada (1).

The Attorney-General of Canada, on behalf of His Majesty the King, took action by information of intrusion in the Exchequer Court, alleging that defendant wrongfully entered and intruded in or upon the plaintiff's possession of certain lands situate in the provinces of New Brunswick and Nova Scotia and comprising the right of

(1) [1930] Ex. C.R. 26.

1930

CAN. PAC. RY. CO. v. THE KING.

way, yards and station grounds of the Intercolonial Railway at and between certain points, and constructed and operated thereon a telegraph line; and (including amendments at the trial) claiming (1) possession, (2) a sum for the issues and profits of the lands, or, in the alternative, a sum for damages for trespass, and (3) "in the alternative a declaration as to the rights, if any, of the defendant in said lands in respect of the said line of poles and wires."

Audette J. (1) concluded his judgment as follows:

The trial was proceeded with only upon the question of law, or, at any rate, leaving the question of damages to be dealt with after the rights of the parties had been determined, and hope was then expressed by counsel that once the rights were determined the terms and conditions could be agreed upon by the parties.

In the result, the prime and controlling issue to be determined by these proceedings is what right, if any, has the defendant on the right of way? Answering the same I find that the defendants are and have been on the right of way from the beginning by the licence of the plaintiff—but not an irrevocable licence, which would be tantamount to an alienation of the property of the Crown.

I do not think that I should be called upon in my judgment to determine more than that; but if I can assist the parties to a full and complete settlement of their difficulties I shall be glad to have them, or either of them, apply, upon notice, for further directions.

There will be judgment accordingly. The question of costs is reserved.

The defendant appealed upon the grounds, that the trial judge was in error in holding that the licence was not irrevocable; and that on the facts as disclosed in the evidence and as found by the trial judge the action should have been dismissed with costs. The plaintiff cross-appealed, contending that the defendant had not been on the right of way under a licence, but was a trespasser, or, in the alternative, that the licence, if any, had been revoked.

The material facts of the case are sufficiently stated in the judgment of Newcombe J., now reported. As to the "Main Line" and the "Branch Line," the defendant's appeal was dismissed with costs, and the plaintiff's cross-appeal allowed with costs. As to the "Westville Line," the defendant's appeal was allowed with costs, the Court holding that, in the circumstances, the action must fail in this particular, but holding also that the licence with respect to the line was revocable; Anglin, C.J.C., dissenting as to the dismissal of the action with respect to this line.

(1) [1930] Ex. C.R. 26, at pp. 37-38.

1930

CAN. PAC. RY. CO. v. THE KING.

W. N. Tilley K.C., W. L. Scott K.C. and *E. P. Flintoft K.C.* for the appellant.

W. P. Jones K.C. and *I. C. Rand K.C.* for the respondent.

The judgment of the majority of the court (Duff, Newcombe, Rinfret and Lamont JJ.) was delivered by

NEWCOMBE J.—The Attorney-General proceeded by information of intrusion, filed in the Exchequer Court of Canada, on 15th September, 1926, claiming to recover possession of lands acquired for railway purposes of the Crown in the provinces of Nova Scotia and New Brunswick; the intrusion alleged consisting in the wrongful planting and maintenance upon the roadway of the Intercolonial Railway by the defendant of its lines of telegraph from Saint John to Moncton (90 miles); from Moncton to Halifax by way of Truro (190 miles); from Truro to New Glasgow (43 miles); from New Glasgow to Sydney (163 miles); and from Westville, near New Glasgow, to Pictou (10 miles); in all a mileage of 496 or thereabouts.

The Attorney-General by his pleading, as amended by leave at the trial, claimed possession, issues and profits, and, in the alternative, a declaration as to the defendant's rights, if any. The defendant pleaded a comprehensive denial, and estoppel by laches and acquiescence, also leave and licence; and the latter constitutes the chief defence upon which the defendant relied at the hearing. There was considerable oral testimony and many exhibits, extending to nearly five hundred printed pages in the case. There is no dispute as to the Crown's title to the lands claimed, nor as to the defendant's occupation of these lands for the purposes of its telegraph lines.

The case was tried in January, 1929, by Audette J., and his findings and conclusion are expressed thus (1):

> The trial was proceeded with only upon the question of law, or, at any rate, leaving the question of damages to be dealt with after the rights of the parties had been determined, and hope was then expressed by counsel that once the rights were determined the terms and conditions could be agreed upon by the parties.
>
> In the result, the prime and controlling issue to be determined by these proceedings is what right, if any, has the defendant on the right of

(1) [1930] Ex. C.R. 26, at pp. 37-38.

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

way? Answering the same I find that the defendants are and have been on the right of way from the beginning by the licence of the plaintiff—but not an irrevocable licence, which would be tantamount to an alienation of the property of the Crown.

I do not think that I should be called upon in my judgment to determine more than that; but if I can assist the parties to a full and complete settlement of their difficulties I shall be glad to have them, or either of them, apply, upon notice, for further directions.

There will be judgment accordingly. The question of costs is reserved.

The defendant appealed upon the grounds:

1. That the learned trial judge was in error in holding that the licence referred to was not irrevocable.

2. That on the facts as disclosed in the evidence and as found by the learned trial judge the action should have been dismissed with costs.

The Attorney-General cross-appealed against the finding which maintained an existing revocable licence, and he submitted that the defendant was a trespasser, or, in the alternative, that its licence, if any, had been revoked.

The telegraph lines in question naturally divide themselves into three sections or parcels, and they must necessarily be considered separately; namely, the lines between St. John and Halifax, with a branch from Truro to New Glasgow, which were constructed in 1888, 1889 and 1890, and which, for convenience, will be hereinafter described as the "Main Telegraph Line"; the line from New Glasgow to Sydney, known in the case as the "Branch Telegraph Line," constructed in 1893, and the short line running from Westville to Pictou, built in 1911, which I shall call the "Westville Telegraph Line."

The facts with regard to these present differences which should be realized, and, in the view which I take, the learned trial judge must have arrived at different results, if he had properly appreciated and applied the evidence in relation to each of these lines, respectively.

There are, as I have said, three separate cases, depending upon different considerations of fact, and I shall consider them separately in the order which I have mentioned.

THE MAIN TELEGRAPH LINE

The correspondence shows that, when, in 1887 or 1888, the defendant was contemplating to undertake the construction of its telegraph system east of St. John, it applied to the Government for permission to construct an exten-

sion of its telegraph line along the Intercolonial Railway from St. John to Halifax via Moncton. Upon considering this request, it was found that the granting of it would create conflict with exclusive rights already conceded by the Government to the Montreal Telegraph Company, a corporation which, along with the Great Northwestern Telegraph Company, was controlled by the Western Union Telegraph Company, then the principal operator of telegraphs in the maritime provinces. The application was refused, and the defendant, in consequence, built its line outside of the plaintiff's railway; having, as it claims, secured a right of way from the proprietors abutting upon the railway; but this location was, for obvious reasons, less advantageous and more expensive for construction and maintenance than that which would have been afforded by use of the Government roadway itself, and, in places where outside construction was difficult, the defendant, notwithstanding the absence of any permission, took the liberty of planting its poles on the roadway acquired and used by the Government, and even within the railway fences. These acts of trespass were discovered and led to complaints. Mr. Schreiber, the Chief Engineer of Government Railways, had written to Mr. Hosmer, the defendant's Superintendent of Telegraphs at Montreal, on 21st June, 1889, stating that in construction of the defendant's line of telegraph between Saint John, Halifax and New Glasgow, via Truro, "outside and near to the Intercolonial Railway fence," the Government would grant all reasonable facilities, as regards the distributing of poles and other materials, the movement of the defendant's boarding and supply cars, and the running of hand-cars; and Mr. Richardson, who was in charge of the construction for the defendant, had written to Mr. Hosmer, on 13th August, 1889:

> As there is no injunction could we not put our poles on the railway side of the fence on the quiet through some of these backwoods places, without any serious consequences? In many places they would not be noticed.

A subsequent example of the zeal displayed on behalf of the defendant in the establishment of its telegraph lines upon the railway reserve is to be found in the correspondence of 1892, when, on 4th July, Mr. Kent, the defendant's Superintendent of Telegraphs, wrote to Mr. Hosmer, requesting him to get permission from the Government

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

to put up about one mile of poles on the Intercolonial Railway's right of way between Stellarton and New Glasgow. Our present route is along the highway and liable to frequent interruptions.

And Mr. Pottinger wrote Mr. Snider on 11th August, refusing this permission. But these poles had already been installed upon the railway; and, on 16th August Mr. Snider wrote Mr. Kent, saying:

> The line is there all the same, and we have a good job but I would not like to swear whose property we are on.

Similarly, on 22nd September, 1892, Mr. Snider telegraphed to Mr. Kent:

> * * * We have moved about 200 poles this summer in different places to straighten out line and I have ordered the men to keep on with the work unless they are stopped. If they leave us alone long enough we will have a moderately good line east soon.

Mr. Hosmer had written to Mr. Bradley, the Secretary of the Department of Railways, on 18th September, 1889:

> You are I presume aware that owing to the exclusive contracts on the Intercolonial Railway our Company has been delayed in the construction of its lines, and we are now obliged to build them outside of the Railway right of way.

Nevertheless, by 14th October, 1889, some of the defendant's poles had been set upon the roadway, and, on that date, Mr. Hosmer wrote to Mr. Richardson:

> I might say privately that I have brought the matter to Mr. Van Horne's attention and have asked him to use his influence at Ottawa to try and get the Government not to disturb any poles that are now erected.

On 7th January, 1890, Mr. Bradley wrote to Mr. Drinkwater, the defendant company's secretary:

> By direction I have to call your attention to the fact that at certain points along the Intercolonial Railway between St. John and Halifax telegraph posts have been erected by your Company on the Government property.
>
> In view of the terms of the agreement at present existing between the Government and the Montreal Telegraph Company the concession of such a privilege as this would imply, were the posts in question allowed to remain, cannot be granted to your Company and I am accordingly to request that they be at once removed.

There was further correspondence; Mr. Hosmer called for a report from Mr. Richardson and was informed, by letter of 1st March, 1890:

> The number of poles we have erected upon I.C.R. property east of St. John is, to the best of my knowledge, as follows:

	Inside fence	Outside fence but in Ry. limits	Total
Between St. John & Moncton.....	12	214	226
Between Moncton & Truro.....	6	4	10
Between Truro & Halifax.....	29	...	29
Between Truro & New Glasgow.....	7	...	7
	54	218	272

Time passed, but nothing was done, although the Department was insisting upon the removal of these poles; proceedings were threatened to enforce their removal, and Mr. Hosmer, on 5th September, 1890, wrote Mr. Dwight, the General Manager of the Great Northwestern Telegraph Company at Toronto, explaining the situation, and saying:

We have inside the fence along the Intercolonial Railroad between St. John and Halifax and New Glasgow, a few poles which it was absolutely necessary to put there, and the Government are urging us to remove them, threatening us with legal action, etc.—I understand that the proceedings they are taking are being instigated by your Company, and I thought it but right to call your personal attention to the matter. The few poles we have on the Railroad cannot possibly be of any damage to your Company or the Western Union, and if we are forced to move them we must consider that it is done simply to annoy us. You know that your Company have several hundred miles of poles on Railroads owned by this Company (with which you have absolutely no contract rights) and that we have never sought to annoy you or obstruct you in their maintenance in any way. In fact, we have gone out of our way to instruct our men to render your repairers every possible assistance. I think, under those circumstances, you can well afford to treat us in a similarly liberal manner. I write you personally rather than officially, as I can understand that there may be reasons why you would not want a precedent established in a matter of this kind.

Five days later the Attorney-General filed an Information in the Exchequer Court for the removal of the defendant's poles, which had thus found their way to "the roadbed and right of way of the Intercolonial Railway." Mr. Dwight replied to Mr. Hosmer, on 16th September, that his company had made no complaint whatever

and you may consider yourself welcome, so far as we are concerned, to any such accommodation of the kind as you may need anywhere along the route. I think we have both reached a period in our experience when we may consider it scarcely worth while to take any action simply for the purpose of annoying each other.

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

If there is anything you wish me to do respecting the matter to prevent any further annoyance please let me know. I will write to Superintendent Clinch, St. John, in regard to the matter, and see what he knows about it.

Then Mr. Van Horne, the President of the defendant company, sent a copy of the correspondence to Sir John A. Macdonald, the Prime Minister, and, on 24th September, Sir John sent a note to the Minister of Justice, saying:

Please stay proceedings—It won't do to have any further difference with the C.P.R. just now. This is an unimportant matter.

The Minister of Justice called for a precis of the case from his Department, and returned it with the following endorsement:

Telegraph Suit vs. C.P.R. Let it go on.

Finally, on 9th October Sir John A. Macdonald replied to Mr. Van Horne:

I have yours of the 22nd ult. and return you the papers therein enclosed, as you desire. The Government have not the slightest objection, so far as they are concerned, to the C.P.R. planting telegraph poles along the line of the I.C.R. The trouble is that long ago, by an absurd agreement, the Montreal Telegraph Company was given the exclusive right to plant poles and wires along the line of the I.C.R. Such being the case, the Government Officials gave notice to your people not to plant poles but the warning was utterly disregarded. The proceedings were taken lest the Government might be held responsible by the Montreal Telegraph Co. for breach of agreement and consequent damage. Dwight's letter to Hosmer is satisfactory enough, but it is not, I take it, binding on the Company, especially if under the control of Wiman. However, if the C.P.R. will stand between the Government and all harm in the event of proceedings being taken, we will not interfere with your telegraph poles.

I have referred, more fully perhaps than is necessary, to the facts leading up to the Prime Minister's letter, because that letter is now put forward by the defendant most prominently as its justification for the removal, several years later, of substantially the whole of its main telegraph line from its original place to the roadway of the Intercolonial Railway, within the fences, the location now in controversy; and thus the conditional promise, given by the Prime Minister in 1890, not to interfere with what is described in Mr. Hosmer's application as "a few poles which it was absolutely necessary to put there," is invoked, even though the condition was never expressly fulfilled, to justify the transplanting of the whole of the main line, for a distance of more than three hundred miles. I have no difficulty in reaching the conclusion, and I think it is obvious, that this contention utterly fails.

Then it is said upon evidence of a witness, named Mersereau, who, in 1904, was working for the defendant on its telegraph line between Saint John and Moncton, making repairs under the direction of Mr. Snider, the defendant's Superintendent of Telegraphs at Saint John, that he, Mersereau, found it convenient to move some of the poles, which were under repair, across the fence to the railway, and that he had been stopped by one of the Government's section foremen. He says he went to Moncton and spoke to Mr. Pottinger, who was then the General Manager of the Intercolonial Railway. This is the conversation, as stated by Mr. Mersereau:

Q. Well what did you state to him?—A. I told him we were stopped moving the poles over on the I.C.R. that Mr. Snider had informed me I could do, by a section foreman; and he listened until I was done, and he told me I could go back to my work, he would see that the man was informed to let the C.P.R. alone.

Q. That is practically the whole conversation?—A. The whole conversation.

Mr. Pottinger's testimony concerning this incident is as follows:

Q. Do you recollect at any time any requests being made to you with reference to putting poles on the right of way of the Government Railway?—A. There was once a request of that kind made to me.

Q. By whom, do you remember?—A. By Mr. Snider, who was Superintendent of the Canadian Pacific Telegraph Company.

Q. At Saint John?—A. His headquarters were Saint John, yes.

Q. You remember about what year that was in?—A. I am afraid I do not.

Q. Was it verbal or in writing?—A. It was verbal.

Q. What was it?—A. Well, he came to me one day and he said, I am rebuilding our line, and part of it runs through bush, and the trees have given me a great deal of trouble, and I would like to move a few of the poles which are outside of the railway fence inside the fence to get past this clump of trees. And I gave him my verbal permission.

Q. Do you recollect anywhere near about the time that was?—A. I am afraid I could not say what time it was.

His LORDSHIP: Do you remember about what space that would cover, or how many poles?—A. No, but it was a definite request for a small concession as I understood, I imagine it would be about five, but not exceeding ten miles.

Mr. JONES: Do you recollect what section of the railway it referred to?—A. I do not know whether he mentioned any section or not, but I was under the impression that it was between Moncton and Saint John. I had seen their line there in a tree-covered area just outside of the railway fence, and I supposed it was that.

Q. Do you know whether or not he did put some poles in on the right of way?—A. I never thought about the matter again, and I never inquired whether he moved the poles or not.

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

Q. Was that the only request made to you in reference to the matter of putting poles on?—A. That is the only one I remember, I do not think there was any other ever made.

* * * * *

Q. Did you ever at any time give permission to any one connected with the Canadian Pacific to place their line as a line upon the right of way?—A. I did not. I never was asked by any one for that permission.

Q. Or to rebuild their line upon the right of way?—A. No, excepting in that instance of Mr. Snider.

Q. Do you remember at any time when a Mr. Mersereau, David W. Mersereau, was working for the Canadian Pacific?—A. The name is familiar, but I cannot recall meeting him in any way.

Q. You do not recall having any conversation at all with him?—A. I do not remember any.

Q. Do you recollect any person asking you to see that certain section men on the railway did not interfere with the building of a telegraph line by the Canadian Pacific?—A. I have no recollection of that.

Q. I think you have already said you were not approached by Mr. Snider in connection with transferring their whole line to the right of way.—A. I was not.

Also a letter from J. McMillan, who had become the defendant's Manager of Telegraphs at Montreal, dated 28th December, 1916, to A. C. Fraser, the defendant's Superintendent of Telegraphs at Saint John, and Mr. Fraser's reply of 1st January, 1917, have been admitted into the record. Mr. Pottinger had retired from the railway service in 1913, and it was at the end of 1916, when he was living at his summer home at Cape Tormentine, that Mr. Fraser went to see him, at Mr. McMillan's request, and at the trial, Mr. Fraser, refreshing his memory by his letter, says:

I have seen Mr. Pottinger in connection with permission granted for any rebuilding to be made on the railroad property. He was approached by the late Mr. Snider in connection with the transferring of line to the right of way. Mr. Pottinger saw no objectionable features and permission was granted verbally. He was in Ottawa a few days later and advised the Minister of Railways and Canals that he had granted the Canadian Pacific Telegraph the right to do their rebuilding on the Intercolonial right of way. The Minister stated that it was quite right and that he could see no reason why the permission should not be granted.

With reference to the line between New Glasgow and Sydney, Mr. Pottinger is not quite clear as to why this line was permitted on the right of way. His recollection is that there was some kind of an agreement whereby the telegraph company, if called upon, were to perform a certain service gratis. He has a clear recollection, however, that the telegraph people had the necessary permission and that there was a *quid pro quo*, the nature of which he is unable to recollect.

Mr. Pottinger has no recollection of the Mersereau incident, but states that had the sectionmen interfered with the telegraph gang he would certainly have taken action, as the work was being prosecuted with his own and the Minister's consent.

Mr. Pottinger is emphatic in his denial. Mr. Fraser's letter is shown to Mr. Pottinger and he testifies:

A. Mr. Fraser evidently is mistaken in what he says here about my statement. It is a misunderstanding of some kind, because he states it in general terms here. The permission I gave was a specific one for a very small affair, to help out Mr. Snider in his difficulties in operating his line, and there was no general movement spoken of at all at any time.

He goes on to say that I was in Ottawa a few days later and advised the Minister of Railways. Well I never reported to the Minister, I reported to Mr. Schreiber. I mean any general business. He was the one I made all reports to. I made no report of this concession given to Mr. Snider, I did not think it was worth while mentioning, and I dismissed it from my mind after the interview was over with Mr. Snider. As for speaking to the Minister about it, I never had the slightest communication with any Minister in regard to it at all. He is mistaken in regard to that.

Q. I think you have said that you never even reported it to Mr. Schreiber?—A. I never reported it to Mr. Schreiber, but I may have said to Mr. Fraser that it was possible that I may have spoken to Mr. Schreiber about it when I saw him.

Q. But you never made any report whatever about anything to the Minister, you say?—A. Never. I never saw the Minister about anything unless he sent for me and wanted to speak to me.

Q. You will notice that Mr. Fraser says you told him that you advised the Minister of Railways and Canals that you had granted the Canadian Pacific Telegraph the right to do their rebuilding on the Intercolonial right of way.—A. Well he is entirely mistaken in regard to that.

Q. Then he goes on to say that you said that the Minister stated it was quite right, and that he could see no reason why the permission should not be granted.—A. Well he is certainly mistaken in what I said.

Mr. Pottinger was a most trustworthy, careful and capable officer and a successful administrator, as shown by his lifelong employment and promotion to the top in the service of the Government railways; and the suggestion that he, advised as he was, and well knowing that the Montreal Telegraph Company had exclusive privileges upon the main line, would permit, still less authorize, the use of the Intercolonial Railway, as the base of a competing line, thereby also reversing the policy to which the Government had deliberately committed itself and which he was directed to enforce, is too improbable for me to entertain. I have no hesitation to accept Mr. Pottinger's testimony as he gave it, and I do not see anything to the contrary in the findings of the learned trial judge.

One easily perceives, upon reading the evidence, that the defendant coveted the right to place its telegraph fixtures upon the lands which the Government had acquired, appropriated and fenced for the Intercolonial Railway, because

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

it was convenient and easy of inspection and access; also that, whether or not, in the absence of the Montreal Telegraph Company's agreement, the Government might have been willing to concede the liberty sought, upon terms to be stipulated, certain it is that the Government consistently throughout refused any concession, for the ostensible reason that it was precluded by the agreement, although in view of the considerations to which the Prime Minister alluded, it was not unwilling to tolerate occasional transgressions, upon terms of indemnity, where, by reason of the difficulties of the ground, it might otherwise, in what the Prime Minister not unnaturally characterized as an "unimportant matter," have been subject to an imputation of unneighbourly conduct. Some ingenuity was manifested for the purpose of showing that there were local, or even national, advantages to be served which might have influenced the Government to adopt a more generous attitude, but for the reality of any such motive, there is not the least evidence.

In the years 1905, 1906 and 1907, it had become necessary to rebuild, and the defendant moved 59 miles of its telegraph line, between Truro and Halifax, from the outside to the inside of the railway fences. There was no communication with the Government respecting this rebuilding. Mr. Pottinger says it was done without his knowledge. In 1910, the defendant, in rebuilding portions of its line between Moncton and Truro, transferred its line to the Government roadway for a distance of 23 miles; in 1911, it similarly rebuilt 59 miles, and in 1912, 43 miles. This is shown by the defendant's exhibit No. 3, at page 482 of the case. No permission for any of these encroachments is disclosed, and it was apparently not until 1915, when Mr. Gutelius was General Manager of Government Railways, that it was discovered that the defendant had substantially rebuilt its main line upon the Government roadway.

After 5th May, 1913, when Mr. Gutelius became General Manager, in substitution for the Managing Board, of which Mr. Pottinger had been a principal member, discussion arose as to the terms of transport upon the Intercolonial Railway of the defendant's boarding cars, men and material, and it was then that Mr. Gutelius appears to have ascertained the fact, which had not previously been realized on

the part of the Government management, that the defendant had transferred its line of telegraph generally to the Government roadway. This was one of the matters which Mr. Gutelius considered with Mr. McMillan, the manager of the defendant's telegraphs at Montreal, on or before 6th March, 1916, when Mr. McMillan passed to Mr. Gutelius a memorandum signed by the former, in which he said:

> After careful checking I find that the Canadian Pacific have along the line of the Canadian Government Railway in New Brunswick and Nova Scotia, pole line on the Government Railway for a distance of 499 (437) miles, leaving a gap of 46 miles where the line is built outside of the right of way, close to the fence, where when having all this rebuilt, we would like to transfer to the side of the right of way. From what I understand from the members of the staff now in Montreal, there was some agreement or understanding between the former Manager of Telegraph and some of your officials that this line would be permitted along your right of way, rent free. Regarding this, I would be glad if you would let me have further information, as it is hardly likely that the line would have been permitted to be placed on your right of way without some mutual understanding.

After enquiry Mr. Gutelius wrote to Mr. McMillan, on 31st October, 1916:

> I find upon investigation that the Canadian Pacific Railway Telegraphs are trespassers with their poles on the right of way of the Canadian Government Railways to the extent of 452 miles.

And he sent a copy of his letter to the Minister of Railways, who answered:

> I have yours of November 14th enclosing copy of your letter to the Manager of C.P.R. Telegraphs in reference to their poles, wires, etc., on our right of way and the joint use of the station for telegraph purposes at St. John.
>
> I trust you will not permit this matter to drop, and, if they do not give you an answer within a reasonable time, I wish you to follow it further and keep me advised.

Some interesting correspondence followed, but it is unnecessary to quote it here; it was in this connection that Mr. Fraser made the enquiry of Mr. Pottinger, to which I have already alluded. There were negotiations for settlement, and Mr. McMillan submitted to Mr. Gutelius a draft proposal, and, finally, a formal agreement was prepared under date of 29th May, 1917, between the King, represented by the Minister of Railways and Canals of Canada, of the one part, and the Canadian Pacific Railway, of the other part. This draft was initialed by Mr. Gutelius and by Mr. Beatty, the defendant's General Counsel, and executed on behalf of the defendant company. Mr. Gutelius resigned his office a day or two afterwards, on 1st June,

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

1917, and, by Order in Council of 5th *idem*, his resignation was accepted and Mr. Hayes, the General Traffic Manager of the Intercolonial Railway, was promoted to the office which Mr. Gutelius had quitted. The Minister was not satisfied with the initialed agreement, which had evidently been sent forward for his consideration, and he wrote Mr. Hayes upon the subject, to which Mr. Hayes on 11th June sent the following significant reply:

> Yours 6th June.
>
> It will be necessary for me to have a little time to enquire into this matter.
>
> My general understanding of the situation is that the Telegraph Co. had been enjoying for a long period all of the privileges granted them by the proposed agreement but without there being any agreement in existence outlining the privileges granted or defining the obligations of either party and Mr. Gutelius had simply endeavoured to get a written undertaking to more clearly define the status of both parties.
>
> You ask "Why should they have these privileges for nothing." I will consider that suggestion although it is my impression the poles of the Telegraph Co. are quite generally placed just outside our right of way line although there are some spots where they encroach on the railway property.

On 17th July, 1917, Mr. Hayes informed Mr. McMillan personally at Montreal, that the Minister had declined to approve the agreement. The correspondence was prolonged. On 3rd August, 1917, Mr. Hayes wrote Mr. McMillan:

> As the draft agreement that has been prepared does not seem to provide for these railways a sufficient consideration for the privileges you enjoy we shall be obliged to review and submit a revised proposition for your consideration.

And, on 29th September, he wrote again, enclosing a revised draft; but this, although considered, was not accepted, and, on 20th March, 1924, the Assistant Deputy Minister of Justice notified the president of the defendant company that

> the wires and poles must be removed from off the Government Railways' lands.

This intimation was repeated by Mr. Edwards' letter to Mr. Flintoft of 29th January, 1926, although the action was not instituted until 15th September of that year.

As to the main line, therefore, the defence of leave and licence fails, and I see nothing to give rise to any equity in favour of the defendant. There was no mistake of title, no misleading conduct on the part of the Government, nothing in the way of invitation or encouragement, nor

even of acquiescence or tolerance, except, in the time of Mr. Gutelius, during the period of negotiations for settlement.

If there be evidence of any of these things, I have failed to appreciate it. The defendant's occupation began in trespass, and I see no reason to doubt that it so continued and remains.

THE BRANCH TELEGRAPH LINE

When the defendant began to construct its line from New Glasgow to Sydney, it applied for leave to use the Government roadway. On 9th March, 1893, Mr. Hosmer wrote to Mr. Schreiber, the Deputy Minister of Railways:

> The Canadian Pacific contemplate the construction of a telegraph line between New Glasgow, N.S., and Sydney, C.B., and desire to know if the Government are free to allow the line to be built along the Intercolonial Railway right of way between these two points. I understand that when the contract for the existing lines was entered into between the Government and the Western Union Telegraph Company the Government reserved the right of allowing another line to be built having in view the fact that our system would be extended between these points.

And on the following day, Mr. Schreiber replied:

> I have yours of the 9th inst. in which you state that the C.P. contemplate the construction of a telegraph line between New Glasgow and Sydney, and asking if the line can be built along the Intercolonial Railway right of way between these two points.
>
> There will be no difficulty about this, but it will be necessary for you to enter into a written agreement similar to the Western Union Telegraph Company.

On 20th March, 1893, Mr. Hosmer wrote the Superintendent of the Commercial Cable Company at Canso:

> I might say to you privately that we intend constructing a telegraph line from New Glasgow, N.S., to Sydney, C.B., this summer and that we expect to get permission from the Intercolonial Railway to build along the line of their road between these two points.

Copy of the Government's agreement with the Western Union Telegraph Company, dated 16th October, 1889, is in evidence, also an amending agreement of 12th January, 1891. Apparently a draft contract with the defendant company was prepared, by or under instructions of the Department of Railways, submitted for Mr. Pottinger's consideration, and, on 27th May, 1893, duplicate copies were despatched to the defendant by the Department, with a request:

> Be pleased to return the same to this Department as soon as they have been duly signed and sealed on behalf of the Company.

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

By letter of 25th July, 1893, the defendant wrote to the Department:

I beg to enclose agreement in duplicate, executed by this Company providing for the construction of a telegraph line on the Intercolonial Railway between New Glasgow and Sydney. Will you please return one copy to me when executed by the Minister of Railways.

On 27th August, Mr. Richardson, in charge of the construction, wrote to Mr. Kent, then the defendant's Superintendent at Montreal:

Offices should be decided upon immediately including our right to enter Railway stations as it is very unsatisfactory building line without knowing where offices are to be located.

Mr. Kent wrote to Mr. Richardson on 19th September:

The Government has not yet signed their agreement and of course until this is done we cannot enter the stations.

Meantime the following telegrams had passed between Mr. Pottinger at Moncton and Mr. Schreiber at Ottawa:

August 9th, 1893.

Dated Moncton
To C. Schreiber,
Ottawa, Ont.

The men in charge of construction of C.P.R. Telegraph line in Cape Breton ask to be allowed to put wire into Mulgrave station is this to be done.

D. Pottinger.

Ottawa, August 10th, 1893.
D. Pottinger, Moncton.

Message received—Council has not yet been asked to authorize the Minister to sign agreement permitting Canadian Pacific Telegraph Co. to place their line between New Glasgow and Mulgrave.

C. Schreiber.

In fact, no recommendation was, at any time, submitted to Council, and the agreement was not authorized or executed on behalf of the Government. The draft which the defendant had executed and returned was sent by the Department to Mr. Pottinger at Moncton for consideration, where it was lost with the file relating to it, probably destroyed in a fire, and now the evidence of its contents is sought to be derived from the Western Union agreement, by reason of Mr. Schreiber's letter of 10th March, already quoted, in which he says:

* * * it will be necessary for you to enter into a written agreement similar to the Western Union Telegraph Company.

Now the Western Union Telegraph Company's agreement extends to five printed pages and contains twenty-seven clauses, not counting the amending document, and it is not

reasonable to suppose that either Mr. Schreiber or the company meant to adopt all these stipulations and details, or that an agreement with the defendant would become definite until the terms to be applied were defined and assented to by both parties. On behalf of the Government, the party to the Western Union agreement was Her Majesty the Queen, represented by the Minister, and it must have been assumed that the agreement in contemplation with the defendant company would require the sanction of the Government. This was, in fact, never obtained; moreover, the Western Union agreement was, by express limitation, to continue in force for twenty years, and afterwards

> until the expiration of one year after written notice shall have been given after the close of said term by either party to the other of an intention to terminate the same,

a period which I take to have been terminated by the notices and facts in proof.

The defendant relies upon clause 25 of the Western Union agreement, which, it contends, must presumptively have been incorporated in the lost draft. This clause provides:

> 25. When this agreement expires, either by lapse of time or pursuant to notice terminating this contract as in the preceding clause stated, the Company shall not be required to remove its poles and wires erected under this agreement from the Railway property, but all other rights herein granted shall thereupon cease and determine.

And the defendant urges that it must, therefore, be deemed to have a perpetual franchise; but I do not so interpret the meaning. Assuming that, upon expiry of the agreement, the Government could not compel the company to remove its poles and wires, nevertheless the company can no longer maintain or operate them, or successfully resist their removal by the Government, whose proprietary rights remain unaffected. The purpose of the clause was, if I do not misunderstand it, that, as the parties had contracted substantially for the life of the poles, it should be optional with the company to remove or abandon the salvage.

Therefore, there is, in my opinion, no agreement proved; or, even if otherwise, the agreement, such as it may have been, has ceased to operate in any particular, unless to negative the defendant's liability to remove its poles and wires; and the defendant was, at the beginning of this action, in no better position than that of licensee whose leave was terminated or exhausted. Evidently the advantages which the defendant enjoyed by use of the roadway,

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

and the prospect that somehow it would not be disturbed, led it to disregard the consequences of the risk which, failing an authorized concession, it seems to have been willing to assume.

THE WESTVILLE TELEGRAPH LINE

There was some preliminary correspondence, and, on 10th March, 1911, at a meeting of the Government Railways Managing Board held at Moncton, the following Minute was recorded:

Minute 1185. Request from the Canadian Pacific Railway Telegraph Company for permission to string their wires from Westville to Pictou on our right of way. Question as to whether we can permit this on account of our contract with the Montreal Telegraph Company. The Department of Justice advise that there is nothing to prevent us from granting this request.

The Board decided to grant the request; the Telegraph Company to give us the use of the line and to put the same into our stations at Westville and Pictou.

On 20th March, 1911, Mr. McNicoll, Vice-President of the defendant company, wrote Mr. Pottinger:

I understand that Mr. E. M. Macdonald, M.P., has been in communication with you with regard to giving us right of way for building telegraph line from Truro to Pictou Junction and that you have decided to grant us this permit on an agreement to be executed by us.

Will you kindly confirm this and let me have draft of agreement so that I may arrange for the building of the line.

And, on 7th April, Mr. Pottinger replied:

I duly received your letter dated March 20th, with reference to building a telegraph line from Truro to Pictou Junction. What was asked by your telegraph officials was for right of way to build a line from Westville Station to Pictou, a distance of 10·59 miles.

As I told you verbally when in Montreal it will be all right for you to go on and build this line, and we will arrange about the agreement at a later period.

Instructions have been given to our Track Department to permit the building of the line. There is a long trestle bridge over a portion of Pictou Harbour and there the wires will have to be attached to the bridge. The position of the poles of the telegraph line on the land and the position of the wires on the bridge can be arranged between the telegraph officials and our Roadmaster. There is a telegraph line of the Western Union Telegraph Company along that part of the Railway and your line of course will be placed so as not to interfere with the Western Union line.

These are the circumstances in which the defendant constructed and maintains and operates the Westville line. The plaintiff's answer is that the request was for a revocable licence, and that nothing more is implied by the Minute of the Managing Board and the letter from Mr. Pottinger to Mr. McNicoll. There is, however, no dispute that the defendant used the Government railway from

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

Westville to Pictou by consent, the parties having mutually in view the negotiation of a contract, with adequate sanctions, to regulate their rights and obligations.

> As I told you verbally when in Montreal it will be all right for you to go on and build this line, and we will arrange about the agreement at a later period,

writes Mr. Pottinger to Mr McNicoll; and the defendant, with nothing more definite, built its line in 1911, and has ever since maintained and used it, apparently without any notice or warning of intention on the part of the Government to withdraw the licence so granted. It is true that this line of telegraph, or most of it, is included in the Information under the words:

> * * * between the following points, namely * * * Stellarton, in the said province, and Pictou, in the said province, a distance of 10·15 miles.

But I am not sure that this did not happen by inadvertence, because there seems to have been no preliminary discussion or disclosure of any points of difference, and the Westville to Pictou line is not mentioned or included in the demand for removal evidenced by the letters from the Department of Justice of 20th March, 1924, and 29th January, 1926. I do not think, therefore, that the Government had a cause of action to enforce the removal of this line when the Information was filed, although I agree with the learned trial judge that the licence is revocable. The defendant saw fit to proceed with its construction, leaving everything about the agreement at loose ends; nevertheless, it presumably anticipated that there would be no difficulty in negotiating the terms, and it seems unjustifiable, in these circumstances, to attempt abruptly to terminate the permission without demand or notice. Consequently I think the action must fail in this particular; although, if the parties be unable to conclude an agreement, I do not doubt that the licence may be reasonably revoked. I refer to the following authorities: *The King* v. *The Inhabitants of Horndon-on-the-Hill* (1); *Coleman* v. *Foster* (2); *Cornish* v. *Stubbs* (3); *Mellor* v. *Watkins* (4); *Aldin* v. *Latimer Clark, Muirhead & Co.* (5); *Kerrison* v. *Smith* (6); *Lowe* v. *Adams* (7).

(1) (1816) 4 M. & S., 562, at p. 565.
(2) (1856) 1 H. & N. 37, at pp. 39, 40.
(3) (1870) L.R. 5 C.P., 334, at pp. 337-340.
(4) (1874) L.R. 9, Q.B. 400, at pp. 404-406.
(5) [1894] 2 Ch. 437, at p. 448.
(6) [1897] 2 Q.B., 445.
(7) [1901] 2 Ch. 598, at pp. 600, 601.

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

ALL LINES

What remains to be said applies generally to the three lines or groups of lines which have been separately considered.

The lands in question were acquired by the Government under legislative authority for the construction, maintenance and operation of Dominion railways, and are devoted to that purpose—a large part of the mileage at least belonging strictly to the railway which Canada was required to construct under the terms of Confederation, as provided by section 145 of the *British North America Act,* 1867; and the defendant's case assumes that the telegraph rights, which the defendant claims in perpetuity with respect to these railway lands, can be acquired for the defendant's accommodation by the mere laches, acquiescence or tolerance of the executive officers and employees, charged under the Minister with the administration or working of the railway, and, moreover, that it is unnecessary to comply with statutory provisions. It is provided by section 7 of the *Department of Railways and Canals Act,* R.S.C., 1927, chapter 171, that:

> The Minister shall have the management, charge and direction of all Government railways and canals, and of all works and property appertaining or incident to such railways and canals * * * and of the officers and persons employed in that service.

And, by section 15,

> No deed, contract, document or writing relating to any matter under the control or direction of the Minister shall be binding upon His Majesty, unless it is signed by the Minister, or unless it is signed by the Deputy Minister, and countersigned by the Secretary of the Department, or unless it is signed by some person specially authorized by the Minister, in writing for that purpose: Provided that such authority from the Minister, to any person professing to act for him, shall not be called in question except by the Minister, or by some person acting for him or for His Majesty.

With respect to the telegraph lines from New Glasgow to Sydney and from Westville to Pictou, and also as to the main line, so far as concerns the settlement recommended by Mr. Gutelius, it was contemplated that whatever concessions might be authorized should be contracted for by the Crown, represented by the Minister, and the defendant knew, or is presumed to have known, the statutory requirements, and yet there was no pretence of compliance. When, in 1898, section 23 of R.S.C., 1886, chapter 37, which

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

corresponds with the above quoted section 15, was considered by this Court in *The Queen* v. *Henderson* (1), there was a difference of opinion as to its application, and their Lordships, by a majority of three to two, held that the section did not apply in the particular circumstances of that case. Taschereau, J., who pronounced the judgment of the majority, saying, at page 432:

> The word "contract" therein, means a written contract. Here the lumber claimed for was delivered under verbal orders from the Crown officers, and the statute does not apply to goods actually sold, delivered and accepted by the officers of the Crown, for the Crown.

But I find nothing in the learned Judge's reasons which would recognize, as a contract, terms which, if accepted, were intended to be stipulated expressly and formally with His Majesty in writing, and which were never signed or sealed by anybody for the Crown; never authorized by the Governor in Council, and which, as the case shows, the Minister was unwilling to recommend for approval. Therefore, I think that, apart from the other considerations which I have mentioned, the contracts which the defendant alleges are ineffective for non-compliance with the statute.

Moreover, as to the defendant's claim that it has acquired in perpetuity, and in the manner for which it contends, the right to use the Government railways for its telegraph lines, effect must be given to the principles expressed in *Ayr Harbour Trustees* v. *Oswald* (2). Lord Blackburn says at page 634:

> I think that where the legislature confers powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are entrusted to them, and their successors, to be used for the furtherance of that object which the legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal* v. *Birmingham Canal* (3), and on which the late Master of the Rolls acted in *Mulliner* v. *Midland Ry. Co.* (4). In both those cases there were shareholders, but, said the Master of the Rolls, at p. 619, "Now for what purpose is the land to be used? It is to be used for the purposes of the

(1) (1898) 28 Can. S.C.R. 425.
(2) (1883) 8 App. Cas. 623.
(3) (1866) L.R. 1 H.L. 254.
(4) (1879) 11 Ch. D. 611.

1930

CAN. PAC. RY. CO. v. THE KING.

Newcombe J.

Act, that is, for the general purposes of a railway. It is a public thoroughfare, subject to special rights on the part of the railway company working and using. But it is in fact a property devoted to public purposes as well as to private purposes; and the public have rights, no doubt, over the property of the railway company. It is property which is allowed to be acquired by the railway company solely for this purpose, and it is devoted to this purpose."

And Lord Watson, at page 639, referring to specific provisions of the Ayr Harbour Act, and the purposes for which the land in question was to be used, says:

The Lord Advocate ingeniously argued that these enactments are permissive, and not imperative, and consequently that the powers which they confer might be waived by the trustees; but the fallacy of such reasoning is transparent. Section 10 is permissive in this sense only, that the powers which it confers are discretionary, and are not to be put in force unless the trustees are of opinion that they ought to be exercised in the interest of those members of the public who use the harbour. But it is the plain import of the clause that the harbour trustees for the time being shall be vested with, and shall avail themselves of, these discretionary powers, whenever and as often as they may be of opinion that the public interest will be promoted by their exercise.

It is laid down in Selwyn's Nisi Prius, 13th Ed., at p. 1086, that

A licence from A. to B. to enjoy an easement over the land of A.; e.g., to enjoy the use of a drain (*Cocker* v. *Cowper* (1)), or a pew (*Adams* v. *Andrews* (2)), or to come upon his land for any other purpose (See *Roffey* v. *Henderson* (3)), is countermandable at any time, although it has been acted upon, or a valuable consideration paid for it, which has not been returned (*Wood* v. *Leadbitter* (4)). Although a parol licence may be an excuse for a trespass, until such licence is countermanded; yet a right and title to have a passage for water over another's land, being a freehold interest (or rather being an incorporeal hereditament), requires a deed to create it (*Hewlins* v. *Shippam* (5)).

The situation which exists seems to have been brought about deliberately by the defendant company, realizing, as it must have done, the facts of the case and the risks to be encountered by the planting of its telegraph lines upon the Government railway, and the desirability of securing permanent concessions, if possible, or if they could or would be granted by the executive authorities; and there was no foundation upon which to apply the doctrine of estoppel. In so far as any contract competent to the parties could answer the purpose, the defendant neglected entirely the

(1) (1834) 1 C.M. & R. 418.
(2) (1850) 15 Q.B. 284.
(3) (1851) 17 Q.B. 574.
(4) (1845) 13 M. & W. 838.
(5) (1826) 5 B. & C. 221.

most elementary requirements as to the ascertainment of the terms, and the statutory essentials of form and sanction.

The following observations of Patteson, J., pronouncing the judgment of the Court of Queen's Bench in *Blanchard* v. *Bridges* (1), are apt for this occasion.

> It is far more just and convenient that the party, who seeks to add to the enjoyment of his own land by any thing in the nature of an easement upon his neighbour's land, should first secure the right to it by some unambiguous and well understood grant of it from the owner of that land, who thereby knows the nature and extent of his grant, and has a power to withhold it, or to grant it on such terms as he may think fit to impose, than that such right should be acquired gradually as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact to be decided, as we daily see, by litigation.
>
> If a party, who has neglected to secure to himself rights so important by previous express licence or covenant, relies for his title to them upon any thing short of an acquiescence for twenty years, we think the onus lies upon him of producing such evidence as leads clearly and conclusively to the inference of a licence or covenant. It is difficult, perhaps impossible, to define the necessary amount of such evidence; but we are of opinion that the amount in the present case is clearly insufficient.

I would, therefore, as to the main line and the branch line, dismiss the appeal and allow the cross appeal with costs, and remit the case to the learned trial judge, so that he may proceed with the trial; but, as to the Westville line, the appeal should be allowed with costs, to be set off. The plaintiff also should have the costs heretofore incurred in the Exchequer Court, except with respect to the Westville line, as to which the defendant should have its costs, also to be set off.

ANGLIN C.J.C. (dissenting in part).—I have had the advantage of reading the elaborate and carefully prepared judgment of my brother Newcombe. I entirely agree with the views expressed by him as to the "main line" and the "branch line." As to the Westville branch, however, while I accept his conclusion that the appellants were, at the highest, holders of a revocable licence to erect and maintain their telegraph lines on the right of way of the railway

(1) (1835) 4 Ad. & El., 176, at pp. 194-195.

1930

CAN. PAC. RY. CO. v. THE KING.

Anglin C.J.C.

company (*Kerrison* v. *Smith* (1)), I cannot accept his further conclusion that failure to give notice of such revocation is necessarily fatal to this branch of the plaintiff's action. On the contrary, it seems to me that, inasmuch as the defendants asserted that their licence in respect to this particular part of their line was irrevocable and contested the claim of the Crown to exclude them on the merits (*Coleman* v. *Foster* (2)), the bringing of the action itself should be regarded as sufficient notice, subject only to the question of costs and to a reasonable time being allowed the defendants to remove their poles and wires from the right of way. (*Cornish* v. *Stubbs* (3); *Aldin* v. *Latimer Clark, Muirhead & Co.* (4)).

It seems to me entirely reasonable that this view should prevail, since, under a judgment dismissing the plaintiff's action as to the Westville branch on the ground of want of notice, the result would be the giving of formal notice and the bringing of another action for the same relief which, according to the judgment of Newcombe J., must necessarily succeed. The better course seems to me to be to allow to the defendants their costs of defence so far as the intrusion upon the Westville branch line is concerned, to be set off against the other costs, just as my brother Newcombe has done, and in addition, to direct the trial judge to fix a reasonable time within which the poles and lines of the defendant should be removed from the right of way of the Westville branch.

Appeal dismissed with costs and cross-appeal allowed with costs, as to "Main Line" and "Branch Line." Appeal allowed with costs as to "Westville Line."

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

Solicitor for the respondent: *W. P. Jones.*

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(1) [1897] 2 Q.B. 445.
(2) (1856) 1 H. & N. 37.
(3) (1870) L.R. 5 C.P. 334.
(4) [1894] 2 Ch. 437, at p. 448.

LES SYNDICS D'ECOLES DISSIDENTS DE ST. ROMUALD (DEFENDANTS) ..... } APPELLANTS;

1930
*Feb. 12.
*Apr. 10.

AND

W. SHANNON (PLAINTIFF) ..... RESPONDENT.

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

School legislation—Mandamus—Dissentient school—Right to send children—Children born from mixed marriage—Agreement as to their religious faith—Authority of the parents as to education—Education Act, R.S.Q., 1925, c. 133, ss. 99, 103, 106, 116, 124, 250, 310.

The trustees of a dissentient school cannot deny the right of a dissentient ratepayer to have his children educated during the statutory school years at the dissentient school for the support of which he is taxed, notwithstanding the fact that the religious faith of the children is different from that professed by the parent.

Judgment of the Court of King's Bench (Q.R. 47 K.B. 242) aff.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec (1), affirming the judgment of the Superior Court, Gibsone J. (2) granting the respondent a writ of *mandamus* and ordering the appellants to receive the respondent's children in their school.

The respondent, Whitefield Shannon, is a resident of the municipality of St. Romuald in the province of Quebec, and is therefore, in educational matters, subject to the control either of the school commissioners or of the school trustees, under the provisions of the *Education Act*, R.S.Q., 1925, chapter 133. The great majority of the people in the municipality are Roman Catholics, and therefore the school commission of St. Romuald is a Roman Catholic body. There also exists a dissentient school corporation composed of those who have dissented and it is this school body that the respondent has sued to have his children educated in their school. The respondent, who professes to be a Protestant, is married to a Roman Catholic and has several children, three of whom are old enough to attend school. The fact of the dissidence

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

(1) (1929) Q.R. 47 K.B. 242. (2) (1929) Q.R. 67 S.C. 263.

1930

SYNDICS D'ECOLES DISSIDENTS DE ST. ROMUALD v. SHANNON.

of the respondent was admitted on the pleadings. The appellants who are operating a small school in St. Romuald for the Protestant children there, refused in 1927, to accept in their school the children of the respondent, whom they knew to be Roman Catholics. They, furthermore, advised the respondent that, as his children professed a religion different from his own, they were not entitled to consider him as a dissentient, and to collect school taxes from him, and that they had struck him from the dissentient roll, and that he should pay his taxes to the school commissioners in conformity with section 250 of the *Education Act*. In December, 1928, the respondent sought in a writ of *mandamus* against the appellants to force them to receive his children in their school. The appellants pleaded that they were not obliged to receive his children because the latter were not Protestants; that they had struck him from the roll of dissentient taxpayers and that the appellants, trustees of the dissentient school of the parish of St. Romuald, were entitled to exclude from their school children of the Roman Catholic faith.

B. Devlin K.C. for the appellants.

Noel Belleau K.C. and *Laetare Roy K.C.* for the respondent.

The judgment of the court was delivered by

DUFF J.—The key to the question raised by this appeal is to be found in sections 99 and 103 of the statute under consideration (chapter 133, R.S.Q., 1925). These sections are as follows:—

99. In any school municipality, any number of property owners, occupants, tenants or ratepayers, professing a religious belief different from that of the majority of the ratepayers of such municipality, may give to the chairman of the school commissioners or to their secretary, a notice in writing informing him of their intention to withdraw from the control of the school commissioners in order to form a separate corporation under the administration of school trustees.

103. As soon as such trustees are elected, every rate payer of the municipality belonging to the religious denomination of the dissentients, and who has either given the notice mentioned in sections 99 and 100, or who thereafter gives a notice in writing to the chairman of the school commissioners and to the Superintendent that he withdraws from the control of the school commissioners, shall be deemed to be a dissentient, and shall, for school purposes be under the control of the trustees.

So soon as the ratepayers who have signed one of the notices mentioned in the first paragraph of this section shall amount to two-thirds of the ratepayers of the municipality professing a religion different from that of the majority of the inhabitants thereof, then all the ratepayers of the municipality of the religious denomination of such dissentients, who have not given such notice, and who did not send their children to a school under the control of the school commissioners, shall also be deemed dissentients.

This section shall apply to cases where school trustees are elected under the provisions of sections 105, 109 or 112. R.S. (1909), 2620.

A " dissentient " is a ratepayer who, " for school purposes, is under the control of the trustees," and, by section 106, he is not liable to taxes imposed by the " Commissioners," and, by section 124, he is not eligible for election as a School Commissioner. School trustees elected by such dissentient inhabitants form a corporation for the purposes of the dissentient schools of the municipality, and, by section 310, trustees of dissentient schools

shall alone have the right to impose and collect the taxes to be levied upon the dissentient inhabitants.

A dissentient may cease to be such by giving notice

that he professes the religion of the majority and that he therefore desires to be under the control of the School Commissioners. (Section 116.)

I agree with the Court of King's Bench that the fact of the dissidence of the respondent is admitted on the pleadings.

As a dissentient, he could, as mentioned above, bring himself under the jurisdiction of the Commissioners by declaring that he professes the religion of the majority; this, he says, would be untrue.

In these circumstances I agree with the decision of the majority of the Court of King's Bench. The plan of the statute, so far as concerns this case, is to provide for the establishment of dissentient schools, which are to be under the control of a board of trustees elected by the " dissentient inhabitants ", who are subject to taxation for the support of these schools. The dissentients themselves must be of a common religious faith, but the statute does not appear to contemplate an investigation by the Board of Trustees into the religious faith of the children of any dissentient whom he wishes to attend the school he is supporting.

The statute appears to assume the authority of the parents, in respect of the education of their children, during the statutory school years.

1930

SYNDICS D'ECOLES DISSIDENTS DE ST. ROMUALD v. SHANNON.

Duff J.

Section 250 has no application to a case of this kind. It is probably intended to meet cases where the parents desire some of the children to be educated in one kind of religious atmosphere and others in another. Its precise effect in particular circumstances may be matter for debate; but, at all events, it does not point to an intention to enable the trustees of a dissentient school to deny the right of a dissentient ratepayer to have his children educated at the dissentient school for the support of which he is taxed.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent: *Laetare Roy.*

1929

*Oct. 21, 22.

1930

*Feb. 4.

THE ROYAL TRUST COMPANY, ES-QUAL AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

JOHN DE N. KENNEDY, ES-QUAL (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL, PER SALTUM, FROM THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC

Sale—Property—Agreement by purchaser to pay taxes—Sale of property to third party for unpaid taxes—Action for purchase price—Liability of purchaser.

The respondent, representing the vendor, sued the appellant, representing the purchaser, for the balance of the price of sale of a certain parcel of land. The latter denied his liability on the ground that the property could not be transferred to him by the vendor as it had been sold for unpaid taxes; but the vendor contended that the purchaser was still bound because the sale of the property for taxes was due to the failure by the purchaser to pay them as covenanted.

Held that the respondent's action should be dismissed. The vendor was aware that the taxes had not been paid and was looking to the purchaser for the money wherewith to pay them; he had already collected some rent for the property which he was holding as a credit against the taxes and it can be inferred that the vendor anticipated that payments on account of taxes, when made, would

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

pass through his hands. When, therefore, the property was sold for taxes, it was not because the vendor was misled into a belief that the purchaser had paid or intended to pay the taxes; the vendor had been notified, previously to the sale for taxes, that the purchaser repudiated the contract and was looking for a refund of his payments, and in withholding payment of the municipal claim the vendor acted deliberately, with a full knowledge of the facts. Moreover, effect must be given to the language of the contract, according to the whole scope of the instrument. The vendor, as the owner, is primarily liable for the taxes, and the covenant, whereby the purchaser becomes bound to pay, while it serves to oblige the purchaser to indemnify the vendor, does not create any direct obligation as between the purchaser and the municipal authorities. The direct or proximate cause of the municipal sale, being the non-payment of the taxes required by the *Assessment Act*, was not any act or default of the purchaser or his representatives; they had the faculty to pay, but they were in no sense agents or actors in effecting the sale; nor did the sale follow as a consequence of their neglect. The law ascertains the damage for breach of the covenant according to the measure indicated by *Lethbridge* v. *Mytton* (2 B. & Ad. 772) and *Loosemore* v. *Radford* (9 M. & W. 657): when a purchaser covenants to pay the taxes, the vendor may, at any time, when unpaid taxes are overdue, maintain an action against the purchaser for the amount.

APPEAL, *per saltum*, from the judgment of the Superior Court for the province of Quebec, Martineau J., maintaining the respondent's action for $48,860 and costs, as the balance of the price of sale and accrued interest under an agreement to purchase land in the province of Ontario.

The material facts of the case are fully stated in the judgment now reported.

W. N. Tilley K.C. and *E. M. McDougall K.C.* for the appellants.

E. Lafleur K.C. and *J. W. Weldon K.C.* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—Mr. Donald Hogarth, of the city of Port Arthur, Ontario, real estate agent, party of the first part, entered into an agreement, under seal, dated 15th June, 1912, with Captain Francis Chattan Stephens, of the city of Montreal, stock broker, party of the second part, whereby the party of the first part agreed to sell to the party of the second part, who agreed to purchase, a certain parcel of land situate at Port Arthur, and particularly described in the agreement, for the sum of $40,000, to be paid, $12,000 on the execution of the agreement, the receipt whereof was

1930

ROYAL TRUST CO. v. KENNEDY.

Newcombe J.

acknowledged; a like sum on 15th of June, 1913; $4,500 on 15th of June, 1914; $4,500 on 15th June, 1915, and the balance, $7,000, in seven equal payments of $1,000 each; with interest, at the rate of seven per cent. per annum, payable yearly, with each of the instalments:

provided that the party of the second part may pay off the whole or any additional (sic) part of the amount hereby secured at any time without notice or bonus.

The party of the second part covenanted well and truly to make the payments above mentioned, and to pay the interest as aforesaid, and also that he

shall and will pay and discharge all taxes, rates and local improvement assessments, wherewith the said land may be rated and charged from and after the 15th June, 1912,

and the vendor in like manner covenanted, upon payment of the consideration money with interest as stipulated, to convey the premises to the party of the second part, his heirs and assigns, by good and sufficient deed in fee simple. These clauses follow:

But subject to the conditions and reservations expressed in the original grant thereof from the Crown; and such deed shall be prepared at the expense of the said party of the first part, and shall contain the following covenants namely: the usual statutory covenants.

And also shall and will suffer and permit the said party of the second part his heirs and assigns to occupy and enjoy the same until default be made in the payment of the said sums of money above mentioned, or the interest thereon or any part thereof on the days and times and in the manner above mentioned; subject nevertheless to impeachment for voluntary or permissive waste.

And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect and the said party of the first part shall be at liberty to re-sell the land.

It is also stipulated that the vendor

is to pay off the present registered mortgage, as follows:—

To Franklin W. Wiley.....	$ 4,000 00
To Ruttans Estates Ltd.....	11,000 00
To James Conmee	11,250 00

and if the same are not paid, according to the terms thereof, the party of the second part shall have the privilege of taking up the said mortgages as they become due, and deducting the amount so paid on such mortgages from the payments due under this agreement to the party of the first part.

The purchaser paid $12,000 down and $1,960 plus $3,000 by two payments in 1913. These are the only payments; but, in addition, it is acknowledged that the vendor, who, notwithstanding the provision of the agreement as to pos-

session, appears to have been in receipt of the rents, received $775, which amount is credited to the purchaser.

Captain Stephens went to the war and came home wounded at the beginning of 1916. He died on 16th October, 1918. After his return he consulted and instructed his solicitor with respect to the transaction in question. The latter, Mr. McMaster, of Montreal, had correspondence with Captain Stephens in 1916. Mr. Hogarth, of J. J. Carrick and Company, Limited, of Port Arthur, wished to enforce the agreement, and there were negotiations for settlement. On behalf of Mr. Hogarth, it had been represented that he was interested under the agreement only as the agent or trustee of the Carrick Company. There is among the plaintiffs' exhibits an affidavit of Mr. Hogarth sworn in England 16th February, 1917, wherein the deponent disclaims any beneficial title and says that he is interested only as trustee for J. J. Carrick. There is also in evidence a deed of 26th October, 1917, whereby he conveyed the property, in consideration of $1, to that company. This deed, however, was not registered until 13th November, 1918.

On 11th August, 1916, Mr. McMaster wrote to the Carrick Company, saying:—

> Captain F. C. Stephens has placed before us the correspondence you have had with his father-in-law, the Honourable Mr. Kemp, and we have now before us your letter of the 26th of June.
>
> Captain Stephens instructs us to say that he is prepared to adjust the matter in the manner suggested in this letter, and will be pleased to forward cheques for $8,921.34 as requested.
>
> We propose to deal with the matter in the following manner, which we trust will meet with your approval:—
>
> We will ask you to cause the three mortgages to be prepared directly from Captain Stephens to the three mortgagees, and also a deed of sale from Mr. Hogarth or whoever is now the registered proprietor of the property to Captain Stephens. You will then send these documents to us or to any one in Montreal whom you may prefer, and Captain Stephens will complete the documents and hand over the money. If you care to send the documents to us we undertake that they shall not go out of our possession until Captain Stephens has executed them and placed certified cheques for the amount in our hands. Captain Stephens is doing this, of course, on the assumption that the title of the property is in order and we are to-day writing to a practitioner in Port Arthur asking him to look into this question for Captain Stephens on our behalf.

And three days later, the Carrick Company answered as follows:

> We have yours of the 11th inst., stating that your client, Capt. F. C. Stephens, has agreed to comply with the suggestions outlined in our communication of June 26th.

1930

ROYAL TRUST CO. v. KENNEDY.

Newcombe J.

We are preparing all the necessary papers in this connection and shall arrange to have the documents forwarded not later than the 16th inst.

The title to the property is free from any encumbrance or defects, and there should be no difficulty in having the matter completed at an early date. The title to the property was searched by D. J. Cowan, barrister of Port Arthur, for Mr. Stephens at the time of the purchase and since that time, there have not been any changes, of which we have any knowledge.

When the documents are completed, we shall arrange to forward them to your firm and you may arrange with Mr. Stephens for the payment of monies as outlined in the communication mentioned herein.

Meantime Mr. McMaster had instructed Messrs. Keefer and Towers, his agents at Port Arthur, to search the title, and, in due course, 5th September, 1916, they reported that there was an execution, amounting to $50,000, against the property; whereupon Mr. McMaster wrote the Carrick Company, enclosing copy of his agents' report, and saying:

We send you herewith copy of a letter we have just received from Messrs. Keefer, Keefer & Towers whom we asked to search the title of the above property for us.

You will see that according to Messrs. Keefer, Keefer and Towers there is registered against the property an execution for $50,623.68 with costs which according to an official statement from the sheriff aggregate $76.60. There are also back taxes amounting to $2,237.05 up to the 31st of December, 1916, and we would be glad to know what proportion of these taxes should be borne by Captain Stephens and what by Mr. Hogarth.

In reply it was stated, on behalf of the Carrick Company, by letter of 8th September, 1916, in effect, that Captain Stephens was responsible for the taxes, up to and including 1916, subject to a credit of $875 received by the Carrick Company for rent; and that, as to the execution, they had referred the matter to Mr. A. J. McComber, their solicitor, who considered that the execution

would have no bearing on this property, as the property had already been transferred by agreement of sale to Mr. F. C. Stephens prior to the execution coming into force.

The Carrick Company, by this letter, proceeded to say:

We might add that although Mr. Hogarth was the registered owner of this property he never had at any time any personal interest in the land. The rightful owner of the property was J. J. Carrick and on the formation of the J. J. Carrick Company Limited, we took over this property, which had been in Mr. Hogarth's name, and we have been the owners of the land since Feb. 1, 1914.

Providing that our solicitor cannot convince you that the writ of execution is null and void in so far as this property is concerned, there are many ways in which the title can be perfected, and the writ of execution cancelled, and as mentioned above, if our solicitor is unable to satisfy you, we will stand the expense of having the title cleared up to your satisfaction

1930

ROYAL TRUST CO. v. KENNEDY.

Newcombe J.

On the same date, Mr. McComber wrote Mr. McMaster, arguing and expressing his opinion that, as the execution against Mr. Hogarth was subsequent to the sale to Captain Stephens, it did not affect the land sold. There was further correspondence, but it failed to satisfy either Mr. McMaster or his agents, and, on 20th December, 1916, the Carrick Company wrote Mr. McMaster, enclosing a statement, and saying:

> We anticipate being able to advise your Port Arthur solicitors that the title to the Arthur Street property is free from all encumbrance, including the execution to which you have made objection not later than the 10th of January, 1917, and we are forwarding this statement at this time so as to give you ample time to get in touch with Mr. Stephens and have him arrange to have the monies in your possession so that as soon as you are satisfied as to the title of this property, you will be in a position to complete the transaction without any further delay.

Meanwhile proceedings had been taken on behalf of the vendors, under the Ontario *Vendors' and Purchasers' Act*, for the purpose of having it adjudged that the property was not bound by the execution. These proceedings were contested by the execution creditor, and they dragged; in fact, they never came to trial; and, on 12th June, 1917 Messrs. Keefer and Towers, Mr. McMaster's agents at Port Arthur, by letters addressed to Mr. Hogarth and to J. J. Carrick & Company Limited, gave notice, on behalf of Captain Stephens, that

> by reason of your inability to furnish title to him in fee simple, by reason of the execution above referred to and the mortgages above set out, Francis Chattan Stephens repudiates the contract of purchase and rescinds same, and demands refund of all moneys paid under said agreement for sale and purchase, together with legal interest.

The answer, dated 20th June, 1917, came from Mr. McComber, who stated that Mr. Hogarth had left Canada for the Old Country, and would not receive Messrs. Keefer and Towers' letter for some time, but that he could not accept "Mr. Stephens' repudiation and rescission of the contract"; and he said,

> At any time after he tenders his money in full, I will be prepared to see that he gets a deed clear of mortgages and the execution. As he is in default with his payments, he cannot blame Col. Hogarth for being in default with his payments. I might also point out that Mr. Stephens has not paid the taxes on the property as called for by the contract and the arrears amount to a large sum. Col. Hogarth and the J. J. Carrick Company Limited look to Mr. Stephens to carry out his agreement.

It appears by Mr. McComber's evidence and the certificates of title, that the lands were sold in 1918 for taxes and

1930

ROYAL TRUST CO. v. KENNEDY.

Newcombe J.

redeemed. Subsequently they were sold again for taxes, and not redeemed. Mr. McComber was asked in his cross-examination:

Q. As to the suggestion of his Lordship, if the Estate Stephens were now to pay fifty odd thousand dollars to the Port Arthur and Fort William Mortgage Company, what chance would they have of getting title to that property?—A. They would get a complete title outside of the tax sale.

Q. Would they get the property?—A. I don't know. They might attack the tax sale and set it aside.

Q. That is to say, that the only recourse the Stephens Estate would have, if they now paid their money, would be to take an action to set aside the tax sale, in order to get that property which Hogarth undertook to deliver?—A. Not necessarily. They might be able to get it back from the present owner.

Q. Well then, it comes to this, that even though the court should render judgment in favour of the plaintiff, then the Stephens Estate would be left to go and fight for that property somehow and get it?—A. Yes, because we claim, of course, it was through their default that the property was allowed to go to tax sale.

A title in this condition is something very different from that which the purchaser contracted to receive upon payment of the purchase money, and the question is whether he is, nevertheless, bound by reason of his failure to pay the taxes as covenanted. Other points were taken and debated at the hearing; but in the view which I take, it is unnecessary to consider these.

The action was commenced on 13th June, 1927, and the amended declaration upon which the parties went to trial was filed on 21st June, 1928. The plaintiff, by this declaration, claims as liquidator, under the *Winding Up Act*, of the Port Arthur and Fort William Mortgage Company Ltd., for the balance of purchase money and interest, amounting as shewn by his particulars, to $48,680, alleging that Hogarth was trustee for the Carrick Company, and, being indebted in a large amount to the Port Arthur and Fort William Mortgage Company Limited, sold and conveyed to that company by deed of assignment of 15th April, 1926, all his right, title and interest in the land, subject to the agreement, and all his right and claim against the estate of the late Captain Stephens and against the defendants as his executors and trustees.

The plaintiff put in evidence at the trial a deed, dated 22nd April, 1926, from J. J. Carrick Company Limited to the Port Arthur and Fort William Mortgage Company Lim-

ited (in liquidation), conveying the lands described by the agreement.

The action was brought and tried in the province of Quebec, but it is admittedly regulated by the law of Ontario, and evidence was introduced at the trial as to the law of the latter province.

The trial judge found that the purchaser was entitled to require the removal of the execution, and that finding is not, as I understand the case, in question upon this appeal. But the learned judge also found, by his tenth *considérant*, that the sale of the property for taxes was made by reason of Captain Stephens' default to pay them, and that the "defendants alone are responsible for its consequence." The learned judge moreover says, in his notes or reasons for judgment:

> The sale of the property for taxes cannot be a bar to plaintiff's action. If the repudiation was invalid, Stephens should have paid them, and if he has not done so, he is also responsible for the consequences.

If he mean that Captain Stephens or the defendants are responsible for the selling of the land, I do not agree, and for the reasons which I shall state.

The chief end of the agreement between the parties, and the reason for which it was called into being, was the sale and purchase of the lands described; and, while the purchaser had covenanted to pay the purchase money with interest as provided, the vendor had, in like manner agreed, on payment of the purchase money, to convey and assure the premises to the purchaser by good and sufficient deed in fee simple. The terms are therefore dependent. In *Sugden* on *Vendors and Purchasers*, 14th ed., p. 241, the venerable and learned author, who tells us that he wrote and revised every line of this edition, says:

> But an agreement to buy an estate and pay for it on a certain day, implies that the seller is to convey the estate at the same time to the purchaser; the one thing is to be exchanged for the other. And the mere postponement of the time for performance will not alter the effect of the prior stipulation, which is that the money shall be paid upon the execution of the conveyance.

It is true that the purchaser covenants to pay the taxes, and, for breach of that covenant, the vendor may at any time, when unpaid taxes are overdue, maintain an action against the purchaser for the amount. *Lethbridge* v. *Mytton* (1); *Loosemore* v. *Radford* (2).

(1) (1831) 2 B. & Ad. 772. (2) (1842) 9 M. & W. 657.

1930

ROYAL TRUST CO. v. KENNEDY.

Newcombe J.

It is also to be observed that, according to the Carrick Company's letter to Mr. McMaster of 8th September, 1916, advising that there were taxes of some $2,200 chargeable to the property, it is stated that

> Both Mr. Stephens and Mr. Kemp (the former's father-in-law) have had this information from time to time, and we have at different times requested cheque in order to pay these taxes and save additional percentage charges.

Evidently, therefore, the Carrick Company was aware that the taxes had not been paid, and was looking to Captain Stephens for the money wherewith to pay them; and, moreover, as the letter shews, had already collected rent for the property to the amount of $875, which it was holding as a credit against the taxes; and, so far as the situation is explained or made intelligible, I would infer that the Carrick Company anticipated, as seems most natural, that payments on account of taxes, when made, should pass through its hands. When, therefore, the property was sold for taxes, it was not because the vendor was misled into a belief that the purchaser had paid or intended to pay the taxes. The vendor had been notified, as early as 12th June, 1917, that the purchaser repudiated the contract and was looking for a refund of his payments, and in withholding payment of the municipal claim the vendor acted deliberately, with a full knowledge of the facts.

The correspondence is not complete; only a portion of it is in evidence; but there is enough to shew that the parties had agreed upon new terms in 1916, which would perhaps have resulted in a final settlement if it had not been for the execution, which was discovered upon the search preparatory to the carrying out of the new agreement. And, while it is stipulated by the earlier agreement that, if the purchase money be not punctually paid, the instrument shall be null and void, and the vendor shall be at liberty to resell the land, there is no provision, either by the original agreement or the subsequent correspondence, for default or delay in the payment of taxes, a condition which, it may be supposed, would have been visited with less severe consequences.

The case of *New Zealand Shipping Co., Ltd.* v. *Société des Ateliers et Chantiers de France* (1), was cited, but I do

(1) [1919] A.C. 1.

not think that the sale of the property for taxes resulted from the non-payment of the taxes by the purchaser, nor was it the cause or "mean" of the sale within the meaning of that case and the authorities upon which it depends. Effect must be given to the language of the contract, according to the whole scope of the instrument. It must be realized that the vendor, as the owner, is primarily liable for the taxes, and that the covenant, whereby the purchaser becomes bound to pay, while it serves to engage the purchaser's indemnity for the vendor, does not create any direct obligation as between the purchaser and the municipal authorities. The direct or proximate cause of the municipal sale, if it were the non-payment of the taxes as required by the *Assessment Act,* was not any act or default of the purchaser or his representatives; they had, it is true, the faculty to pay; but they were in no sense agents or actors in effecting the sale; nor did the sale follow as a consequence of their neglect; and the law ascertains the damage for breach of the covenant according to the measure indicated by the cases above cited.

The plaintiff, nevertheless, now denies the purchaser's right to object to the maintenance of the action after the property has been sold for taxes, and so has passed out of the plaintiff's power to convey; and it is said that, inasmuch as the purchaser failed in performance of his covenant to pay the taxes, the defendants are now invoking their own default or that of the deceased as a means of escape; but I do not agree. It would be, in my opinion, very unreasonable to suppose that the parties ever contemplated that, in addition, or in lieu of the indemnity for which the law provides by way of damages, the purchaser or his estate should lose the benefit of his contract while still remaining subject to its burden, which is the result now sought to be accomplished.

I would allow the appeal with costs both in the Superior Court and here.

Appeal allowed with costs.

Solicitors for the appellants: *Casgrain, McDougall & Demers.*

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

1930
*Feb. 21.
*Apr. 10.

THE SUN LIFE ASSURANCE COMPANY OF CANADA (APPELLANT IN THE EXCHEQUER COURT) ..... } APPELLANT;

AND

THE SUPERINTENDENT OF INSURANCE (RESPONDENT IN THE EXCHEQUER COURT) ..... } RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Appeal—Jurisdiction—Appeal from ruling of Superintendent of Insurance —Amount in controversy—Curia designata—Construction of s. 82, Exchequer Court Act—S. 46 (c) of the old Supreme Court Act—Insurance —Capital—Increase—Construction of statutes—Insurance Act, R.S.C., 1906, c. 101, s. 68 (2) (5) (6)—Exchequer Court Act, R.S.C., 1906, c. 34, ss. 82, 83.

In 1865, the appellant company was incorporated by an Act of the late province of Canada (28 V., c. 43), with power to carry on the business of insurance generally (s. 6), its capital was fixed at two million dollars and provision was made for its increase to four million dollars. By an amending Act of 1870 (35 V., c. 58, s. 1), the capital was reduced to one million dollars with power to increase the same, in sums of not less than one million dollars, to a sum not exceeding four million dollars. The business of the company was to be carried on in two distinct branches: Life and Accident insurance business to be known as the Life Branch and other forms of insurance to be known as the General Branch business. The capital stock of one million dollars was to apply to the Life Branch only, with power to increase the same to two million dollars; and authority was given to raise one million dollars for the purposes of the General Branch business with power to increase the same to two million dollars. In 1871, the powers of the company were by statute (34 V., c. 53) "restricted to Life and Accident insurance" (s. 3) and it was further provided (s. 4) that "All provisions of the Act of Incorporation of the said company, and the Act amending the same which are inconsistent with the provisions of this Act, are hereby repealed." In its report to the Department of Insurance the company stated its capital to be four million dollars, and the Superintendent of Insurance ruled that it could only be two million dollars and, exercising the power conferred by s. 68 (2) of the *Insurance Act*, R.S.C., 1906, c. 101, amended the report accordingly. The appellant consequently appealed to the Exchequer Court of Canada under the provisions of subsections 5 and 6 of s. 68 of the *Insurance Act* and the ruling of the Superintendent of Insurance was upheld by that court. Hence the present appeal.

Held, Duff and Smith JJ. dissenting, that the capital of the appellant company for Life and Accident insurance business was fixed at two million dollars by the Act of 1870 and had not been altered by sub-

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

sequent legislation. The ruling of the Superintendent of Insurance was consequently upheld and the appeal was dismissed with costs.

Per Anglin C.J.C. and Cannon J.—There is no inconsistency between the restricting of the company's powers by s. 3 of the statute of 1871 to life and accident insurance and the reduction of the limit upon the capital stock to be devoted to that purpose imposed by the Act of 1870. Consequently the repealing section (s. 4 of the Act of 1871) did not have the effect of doing away with the limitation imposed by s. 4 of the Act of 1870 on the amount of capital which might be devoted to the life insurance business. As a consequence of the company's activities being so restricted, s. 2 of the Act of 1865 and s. 1 of the Act of 1870 should be deemed to have been *pro tanto* repealed, or so modified by s. 3 of the Act of 1871 that the total authorized capital of the company shall be two million and not four million dollars.

Per Duff and Smith JJ. dissenting: Section 1 of the Act of 1870, which authorizes the increase of capital to four million dollars, must be given its full effect as there is nothing in it inconsistent with any enactment of the Act of 1871; and, moreover, if the intention of Parliament had been to reduce the capital to two million dollars, such intention should have been expressly stated.

Per Anglin C.J.C. and Cannon J.—The Supreme Court of Canada is without jurisdiction to entertain this appeal. No "actual amount" is "in controversy" and no tangible property possessing a money value is at stake in this appeal nor will rights of shareholders be legally affected by its determination (ss. 82 and 83 of the *Exchequer Court Act*). Moreover, by giving under subs. 5 of s. 68 of the *Insurance Act* a right of appeal to the Exchequer Court "in a summary manner" from the ruling of the Superintendent of Insurance, the Parliament intended to make that court *curia designata* for the purpose of supervising acts of an official and the summary jurisdiction to be thus exercised by the court so designated should be final and conclusive.

Per Duff and Smith JJ.—An appeal lies to this court from the judgment of the Exchequer Court. The right of appeal from that court does not exist only when the judicial proceeding involves a pecuniary demand: the construction of s. 82 of the *Exchequer Court Act* should be determined by the decisions rendered by this court under s. 46 (*c*) of the old *Supreme Court Act;* and it has been held that, when the matter in controversy was, for example, the right to pass a by-law and so to nullify a contract, there was jurisdiction if the right immediately involved amounted to $2,000. Moreover, the proceeding in the Exchequer Court was a "judicial proceeding" and the adjudication by that court was a "judgment" within the meaning of sections 82 and 83 of the *Exchequer Court Act.*

Judgment of the Exchequer Court of Canada ([1930] Ex. C.R. 21) affirmed, Duff and Smith JJ. dissenting.

APPEAL from the judgment of the Exchequer Court of Canada (1), affirming the ruling of the Superintendent of Insurance which had amended the annual report of the appellant company made to the Department of Insurance under the provisions of the *Insurance Act.*

(1) [1930] Ex. C.R. 21.

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

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

E. Lafleur K.C. and *J. A. Ewing K.C.* for the appellant.

L. Cannon K.C. and *F. P. Varcoe* for the respondent.

The judgment of Anglin C.J.C. and Cannon J. were delivered by

ANGLIN C.J.C.—Exercising the power conferred by s. 68 (2) of the *Insurance Act* (R.S.C., c. 101), the Superintendent of Insurance "corrected" the annual statement furnished by the appellant company for the year ending December 31, 1927 (filed on the 24th of February, 1928) by changing the figure "4" to the figure "2" in the item thereof purporting to give the amount of the authorized capital stock of the company, thus making the authorized capital stock appear as $2,000,000 instead of $4,000,000, as set out in the filed statement.

He also made two changes in the appended "Notes *re* capital stock" so that one item read:

Capital stock forfeited for non-payment of calls not to be included.

instead of, as it appeared in the document filed:

Capital forfeited for non-payment of stock not to be included,

No complaint is made of the last mentioned alterations; but it is asserted that the alteration reducing the amount of the authorized capital stock from $4,000,000 to $2,000,000 was wrong.

Subsections 5 and 6 of s. 68 of the *Insurance Act* read as follows:

5. An appeal shall lie in a summary manner from the ruling of the Superintendent as to the admissibility of any asset not allowed by him, or as to any item or amount so added to liabilities, or as to any correction or alteration made in any statement, or as to any other matter arising in the carrying out of the provisions of this Act, to the Exchequer Court of Canada, which court shall have power to make all necessary rules for the conduct of appeals under this section.

6. For the purposes of such appeal the Superintendent shall at the request of the company interested give a certificate in writing setting forth the ruling appealed from and the reasons therefor, which ruling shall, however, be binding upon the company unless the company shall within fifteen days after notice of such ruling serve upon the Superintendent notice of its intention to appeal therefrom, setting forth the grounds of appeal, and within fifteen days thereafter file its appeal with the registrar of the said court and with due diligence prosecute the same, in which case action on such ruling shall be suspended until the court has rendered judgment thereon.

Sections 82 and 83 of the *Exchequer Court Act*, so far as material (R.S.C., c. 34), are in these terms:

82. Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as the Judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

* * *

4. A judgment shall be considered final for the purpose of this section if it determines the rights of the parties, except as to the amount of the damages or the amount of liability.

83. No appeal shall lie from any judgment of the Exchequer Court in any action, suit, cause, matter or other judicial proceeding, wherein the actual amount in controversy does not exceed the sum or value of five hundred dollars, * * *

Counsel for the appellant stated that it had intended immediately to issue $1,000,000 of capital stock in addition to the capital stock already subscribed, amounting to $2,000,000, and that the action of the Superintendent made it impracticable to put such additional stock on the market and is calculated to do the company considerable injury. But "no actual amount" is "in controversy", and no tangible property possessing a money value is at stake in this appeal; nor will rights of shareholders be legally affected by its determination. The words governing the right of appeal from the Exchequer Court above quoted, viz.,

in which the actual amount in controversy exceeds five hundred dollars,

differ very materially from those defining the general jurisdiction of the Supreme Court, viz.,

where the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars, (R.S.C., c. 35, s. 39).

According to our decision in *Orpen* v. *Roberts* (1), the subject matter of the appeal in a case such as this should, for the ordinary jurisdictional purposes of this court, be regarded as the right of the appellant to have its capital stock appear in its statement at the figure at which it was put in by it, viz., $4,000,000, and the amount or value of the matter in controversy in the appeal would accordingly be considered to be the value of that right, i.e., the loss which its denial would entail in the company. That amount

(1) [1925] Can. S.C.R., 364, at p. 367.

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

Anglin C.J.C.

would, no doubt, exceed five hundred dollars. But the words, "the actual amount in controversy," seem rather to require that in appeals from the Exchequer Court there should be a pecuniary sum of more than five hundred dollars, or, at least, tangible property, exceeding that amount in actual value, at stake, the right to recover which is directly in issue in the "judicial proceeding." That condition of the right of appeal to this court does not seem to be satisfied in this case.

There is, moreover, a serious objection to our jurisdiction to entertain this appeal, arising from the terms in which the right of appeal to the Exchequer Court is conferred by s. 68 (5) of the *Insurance Act* and the nature of the subject matter of the appeals thereby given. It is true that, by s. 82 of the *Exchequer Court Act,* any final judgment of that court pronounced,

in virtue of any jurisdiction now or hereafter, in any manner, vested in the court,

in a judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, is made appealable to the Supreme Court of Canada; but this general provision is, according to well known principles of construction, notwithstanding the comprehensive character of the terms in which it is couched, subject to any restriction on the right of further appeal expressed or implied in the particular statute which confers jurisdiction on the Exchequer Court.

A "judicial proceeding" is not defined in the *Exchequer Court Act;* but, in the *Supreme Court Act,* the definition of that term excludes any

proceeding in disposing of which the court appealed from has exercised merely a regulative, administrative or executive jurisdiction. (R.S.C., c. 35, s. 2 (*e*)).

While not governing appeals from the Exchequer Court, this interpretative section serves to indicate the class of matters which Parliament thought should be excluded from the appellate jurisdiction of this court.

Subsection 5 of s. 68 of the *Insurance Act* gives a right of appeal to the Exchequer Court from any

ruling of the Superintendent as to the admissibility of any asset not allowed by him, or as to any item or amount so added to the liabilities, or as to any correction or alteration made in any statement, or as to any other matter arising in the carrying out of the provisions of this Act.

Many such matters must be purely of an administrative character and the Exchequer Court in supervising the action of the Superintendent in regard to them must necessarily be exercising a "regulative jurisdiction."

That Parliament intended to give a further right of appeal, in all such matters where the value of the right in controversy exceeds five hundred dollars, from decisions of the Exchequer Court thereon to the "General Court of Appeal for Canada" (B.N.A. Act, s. 101) established by it, seems scarcely credible. Yet, if there be jurisdiction to entertain the present appeal, that would seem necessarily to follow. When we consider the character of the functions of the Superintendent, not in this particular case, but in making other corrections and alterations within s. 68 of the *Insurance Act*, it seems clear from the language of subsection 5 that a right of appeal beyond the Exchequer Court was not meant to be conferred. On the contrary, by giving the right to appeal to the Exchequer Court "*in a summary manner*" and subject to the special provisions made in subsection 6 for short delays in prosecuting such appeals, it seems reasonably certain that Parliament intended to make that court *curia designata* for the purpose of supervising acts of an official (the Superintendent of Insurance) and that the summary jurisdiction to be thus exercised by the court so designated should be final and conclusive. See *Gosnell* v. *Minister of Mines* (No. 3283, March 7, 1913) where the Supreme Court of Canada quashed an appeal from the Court of Appeal of British Columbia, which had dismissed an appeal from the Chief Justice of British Columbia upholding a ruling by the Chief Commissioner of Crown Lands. Section 107 of the *Land Act* (8 Edw. VII, c. 30) gave an appeal *in a summary manner* to the Supreme Court of British Columbia from

> any decision of a stipendiary magistrate, justice of the peace or commissioner under this Act,

and provided for such appeal a special procedure.

That no appeal lies to this court where the court *a quo* has acted as *curia designata*, is well established. The appeal given in this case to the Exchequer Court is not unlike that given by the *Railway Act* from the award of an arbitrator fixing compensation for lands expropriated, where it is said that the courts which may be appealed to are "desig-

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

Anglin C.J.C.

nated by the statute to be *special tribunals* * * *." See *James Bay Railway* v. *Armstrong* (1). See also *St. Hilaire* v. *Lambert* (2).

But while for these reasons, we are inclined to the opinion that this court is without jurisdiction to entertain this appeal, at least two of our learned brothers, we understand, hold the contrary view. Subject to the question of jurisdiction, argument was fully heard on the merits of the appeal. It will, accordingly, probably be better that they should be disposed of.

By its Act of Incorporation of 1865 (28 V., c. 43), The Sun Insurance Company's capital stock was fixed at $2,000,000; and provision was made for its increase, to a sum not exceeding $4,000,000, by resolution of a majority of the stockholders at a meeting to be expressly convened for that purpose. By s. 6 the company was empowered to do fire, marine, life, accident, fidelity insurance, etc. By an amending Act of 1870 (33 V., c. 58), passed, as the recital shows, on the petition of the Company, it was provided that the capital stock of the Company should be $1,000,000, with power to increase the same, under the provisions of its Act of Incorporation, in sums of not less than $1,000,000, to a sum not exceeding $4,000,000 (s. 1). Sections 3, 4, 6, 7, 8, 9, 11 and 12 of the Act of 1870 read as follows:

3. The business of Life and Accident Assurance, which the said company is authorized to transact, shall include power to effect contracts of assurance, with any persons or bodies corporate, upon lives, or in any way dependent upon lives, and to grant or sell annuities, either for lives or otherwise, and on survivorship, and to purchase annuities, to grant endowments to children or other persons, and to receive investments of money for accumulation, to purchase contingent rights, whether of reversion, remainder, annuities, life policies or otherwise, and generally to enter into any transaction depending upon the contingency of life or accident to the person, whether by land or sea, usually entered into by life or accident assurance companies, including re-assurance, and shall be established, maintained and prosecuted by the said company, as a distinct branch of its business, under the corporate name of the said company, with the addition thereto of the words "Life Branch."

4. The capital stock of one million of dollars shall be applied solely to the "Life Branch" of the said Company, but may be increased under the terms of the Act of Incorporation to two millions of dollars.

6. The general business which the said company is authorized to transact in fire insurance, as well as in marine and guarantee insurance, and the re-insurance of any risks thereunder, shall be established, main-

(1) 38 Can. S.C.R. 511, at p. 514. (2) 42 Can. S.C.R. 264.

tained, and prosecuted, as a distinct branch of the business of the said company, under the corporate name of the said company, with the addition thereto of the words "General Branch."

7. One million of dollars may be raised for the purposes of the said "General Branch," which may be increased to two millions of dollars, and so soon as at least five thousand shares of the capital stock of the said company shall have been subscribed and allotted to the "General Branch" of the said company, and fifty thousand dollars paid in on account of the same, it shall be lawful for the said company to commence the business of insurance included under the branch styled the "General Branch."

8. The said company shall maintain separate accounts of the stock subscribed and allotted, and of the business transacted by it, under the "Life Branch" and "General Branch," and of the expenses, profits and claims, losses, liabilities and assets, under each of the said branches respectively; and all instruments representing investments made of such assets shall specify for which branch such investments are so made, and shall be held for such branch.

9. The capital stock of the said company so subscribed and allotted to the "Life Branch" and "General Branch" respectively, shall be liable only for the expenses, losses and liabilities incurred by the branch to which the same has been allotted, and entitled only to the profits and claim arising in, and proceeding from, such branch.

11. No director or other officer of the company shall become a borrower of any portion of its funds, nor become surety for any other person who is or shall become a borrower from the company, nor shall the funds of one branch be applied to or borrowed for the purposes of the other.

12. The failure of the Life Branch or of the General Branch to meet its obligations shall not necessitate the suspension of its business by the other branch, or subject such other branch to the provisions of the Act respecting Insurance Companies, in relation to companies becoming insolvent.

Apparently at the time this amending Act was passed, Parliament regarded $2,000,000 as the maximum amount of capital that was required for, or should be allowed to be used in the life insurance business of the company—including therein, accident insurance and other business set out in s. 3, above quoted.

In 1871 there was a further amending statute, again enacted at the instance of the company (34 V., c. 53), by which its corporate name was changed to "The Sun *Mutual Life* Insurance Company of Montreal." By s. 3

The powers of the said company (were) restricted to Life and Accident insurance.

S. 4 reads as follows:

All provisions of the Act of Incorporation of the said company and of the Act amending the same, which are inconsistent with the provisions of this Act, are hereby repealed.

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

Anglin C.J.C.

On the purview and application of s. 4 depends the decision on the merits of this appeal. I find nothing in those provisions of the statute of the previous year (1870) which limited the capital stock of the company to be used for life and accident insurance purposes to $2,000,000, inconsistent with the abandonment in 1871 by the company of its intention to do other insurance business, or with the restriction of the powers of the company to life and accident insurance then imposed. Parliament, which had, in 1865, in a statute enabling the company to do all sorts of insurance business, including fire and marine insurance, authorized an original capital of $2,000,000, to be increased to $4,000,000, saw fit, in 1870, to determine that a capital of $2,000,000 would suffice for the branch of the company's business doing life insurance business, if exclusively applied to it, and that a further $2,000,000 authorized should (if raised) be used, likewise exclusively, in the other branch of the company's business. In other words, by the Act of 1870, Parliament said to the company, "If you do life and accident business only, you shall not employ more than $2,000,000 of capital for that purpose. If you choose to extend your business to other branches, you may raise an additional $2,000,000 of capital for those purposes." Neither by the statute of 1865, nor by that of 1870, was the company obliged to engage in any business; but, if it should do business after 1870, it must devote the $1,000,000 of capital, then authorized to be raised without resorting to increase by stockholders' meeting, to the business of life and accident insurance exclusively; and in addition thereto it was empowered to raise and use, for that purpose, a further $1,000,000 of capital and no more. It seems to us to be more conformable to the intention of Parliament, as therein indicated, to construe the Act of 1871 as contemplating the continuance of the restriction of the company's capital to the $2,000,000 authorized in 1870 to be used for life insurance purposes. A passage from Maxwell's Interpretation of Statutes (7th ed.), p. 136, cited on behalf of the appellant, fully supports this view:

> The language of every enactment must be construed, as far as possible in accordance with the terms of every other statute which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may be capable of proper operation without it.

The words of s. 4 of the Act of 1871 are fully capable of proper operation by confining the repeal which they enact to those provisions of the Act of 1870 which dealt with the operation of "the general branch," leaving intact, those which provided for "the life branch" and its limitations.

If, by the Act of 1871, the promoters of the appellant company intended to take authority for the issue of any amount of stock for life and accident insurance purposes in excess of the $2,000,000 authorized by the Act of 1870 to be used by it for these purposes, it was incumbent upon them to see that the restricting provisions of the Act of 1870 were clearly modified or repealed so as to permit of that being done. Indeed, if that was intended, having regard to s. 19 (*a*) of the *Interpretation Act* (R.S.C., c. 1), the Act of 1871 should probably have contained an express provision reviving the right of the appellants, as it existed under the charter of 1865, to issue and use $4,000,000 of stock for any purpose of the company, including life and accident insurance.

There is, as already stated, no inconsistency between the restricting of the company's powers by s. 3 of the statute of 1871 to life and accident insurance and the reduction of the limit upon the capital stock to be devoted to that purpose imposed by the Act of 1870. Consequently, in our opinion, the repealing section (number 4 of the Act of 1871) did not have the effect of doing away with the limitation imposed by s. 4 of the Act of 1870 on the amount of capital which might be devoted to the life insurance business of the company.

As a consequence of its activities being so restricted, s. 2 of the Act of 1865 and s. 1 of the Act of 1870 should be deemed to have been *pro tanto* repealed, or so modified by s. 3 of the Act of 1871 that the total authorized capital of the company shall be $2,000,000 and not $4,000,000 as therein stated. *Leges posteriores priores contrarias abrogant.*

The appeal will be dismissed with costs.

NEWCOMBE J. agrees with the conclusion of the judgment of Anglin C.J.C.

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

Duff J.

The judgment of Duff and Smith JJ. (dissenting) were delivered by

DUFF J.—The right of appeal now challenged turns upon the construction of sections 82 and 83 of the *Exchequer Court Act*. I quote section 82 in full:

> 82. Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment, upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in the Court, and who is desirous of appealing against such judgment may, within thirty days from the day on which such judgment has been given, or within such further time as the judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

The first point to consider is, whether or not (a point to which some colour is given by the language of section 82) the right of appeal exists only when the judicial proceeding in the Exchequer Court involves a pecuniary demand. This point seems to be disposed of by the decisions under section 46 (*c*) of the old *Supreme Court Act*, where the words were "amounts to the sum or value of $2,000," which do not differ pertinently from the words in section 83, " actual amount in controversy does not exceed the sum or value of $500." It is clear to my mind that section 83 must be read with section 82, and having regard to the general scope of the sections, it must be held that in this particular respect the conditions of jurisdiction do not differ from those laid down by section 46 (*c*). In respect of this last mentioned section, where the matter in controversy was, for example, the right to quash a by-law and so to nullify a contract, it was held by this Court that the jurisdiction existed if the right immediately involved amounted to the value of $2,000. *Shawinigan Hydro-Electric Co.* v. *Shawinigan Water and Power Co.* (1), per Anglin J. at p. 662.

The next question is whether the proceeding in the Exchequer Court was a judicial proceeding, and the adjudication a judgment, within the meaning of sections 82 and 83.

The certificate of the ruling of the Superintendent of Insurance is in the following words:

(1) (1910) 43 Can. S.C.R. 650.

Whereas, under the provisions of section thirty-one of the said Act, the Sun Life Assurance Company of Canada is required to deposit with the Department of Insurance, within two months after the first day of January in each year, an annual statement of the conditions and affairs of the said Company as at the thirty-first day of December next preceding; and

Whereas the form of statement prescribed by the Schedule to the said Act includes a statement of the amount of authorized capital stock of the Company as at the said thirty-first day of December; and

Whereas the said Company deposited in the said Department on the twenty-fourth day of February, one thousand nine hundred and twenty-eight, its annual statement as at December thirty-first, one thousand nine hundred and twenty-seven; and

Whereas in the said statement the amount of capital stock authorized as at the thirty-first day of December, one thousand nine hundred and twenty-seven, is stated to be an amount in excess of two million dollars; and

Whereas section sixty-eight of the said Act provides, in subsection two thereof, that the Superintendent of Insurance shall make, in his annual report prepared for the Minister under the provisions of paragraph (*e*) of section thirty-eight of the said Act, all necessary corrections in the annual statements made by the companies; and

Whereas the Superintendent of Insurance has, in his report to the Minister for the business of the year one thousand nine hundred and twenty-seven, made the necessary correction in the annual statement aforesaid by stating the amount of the authorized capital stock appearing in the said statement as being two million dollars; and

Whereas the said Company has requested from the said Superintendent a certificate in writing setting forth the change made for the purpose of an appeal thereagainst as in the said section sixty-eight provided;

Now therefore, this is to certify that the Superintendent of Insurance has in the said annual statement aforesaid of the said Company made correction therein by stating the authorized capital stock of the Company at two million dollars, and hereby makes a ruling that the said authorized capital stock is and is limited to the sum of Two million dollars for the reason that by the charter of the Company the capital stock is limited to two million dollars without power in the Company to increase the capital stock beyond that amount.

Given under my hand and seal this twenty-second day of March, one thousand nine hundred and twenty-nine.

(Seal)

G. D. FINLAYSON,
Superintendent of Insurance.

The appeal to the Exchequer Court is given by section 68, subsections 5 and 6 of the *Insurance Act*, as follows:

5. An appeal shall lie in a summary manner from the ruling of the Superintendent as to the admissibility of any asset not allowed by him, or as to any item or amount so added to liabilities, or as to any correction or alteration made in any statement, or as to any other matter arising in the carrying out of the provisions of this Act, to the Exchequer Court of Canada, which Court shall have the power to make all necessary rules for the conduct of appeals under this section.

6. For the purposes of such appeal the Superintendent shall at the request of the Company interested give a certificate in writing setting

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

Duff J.

forth the ruling appealed from and the reasons therefor, which ruling shall, however, be binding upon the company unless the company shall within fifteen days after notice of such ruling serve upon the Superintendent notice of its intention to appeal therefrom, setting forth the grounds of appeal, and within fifteen days thereafter file its appeal with the registrar of the said Court and with due diligence prosecute the same, in which case action on such ruling shall be suspended until the Court has rendered judgment thereon. 1917, c. 29, s. 73. (Vol. 3, Rev. Statutes, 1927, page 38, chap. 101.)

The pronouncement of the Exchequer Court in disposing of the appeal is treated as a "judgment" in subsection 6. These further points should be underlined. It was the statutory duty of the appellants to give correctly the amount of their authorized capital; it was consequently their right to do so. Any correction by the Superintendent, substituting an erroneous or inaccurate statement (by which, under the statute, they would be bound) would be an invasion of the right of the company, a right, however, in respect of which the company would have no redress except through the proceedings in appeal authorized in the enactment quoted above. On the appeal the controversy was whether the ruling was a lawful ruling or one which constituted an invasion of the rights of the company. It seems pretty clear that if a company having an authorized capital of $3,000,000 is about to procure working capital by disposing of shares in excess of, say, $2,000,000, it is of some practical importance to them that they should be committed by statutory compulsion to an official statement giving their authorized capital as $2,000,000. Not only would it be an invasion of their right to have any public statement of their affairs, avouched by them, or made "binding" on them by statute, accord with the truth; it might very seriously impair in practice their actual rights in respect of the allotment of new capital, if it did not indeed in practice render those rights valueless. The nature of the proceeding, however, in the appeal to the Exchequer Court can be most conveniently illustrated by reference to section 42, subsection 2, which is in these words:

2. In the case of any violation of any of the provisions of this Act by a company licensed thereunder to carry on business within Canada, or in the case of failure to comply with any of the provisions of its charter or Act of Incorporation by any Canadian company so licensed, it shall be the duty of the Superintendent to report the same to the Minister, and thereupon the Minister may, in his discretion, withdraw the company's licence or may refuse to renew the same or may suspend the same for such time as he may deem proper.

Obviously this section could be brought into play if a company to which it applied were to attempt to allot shares in excess of its authorized capital. In such a case it would be the duty of the Superintendent, who by section 46 is required to inform himself fully as to all matters connected with the company's "business or transactions," to report the *ultra vires* acts of the company, and in such a case it would, under the statute, be within the power of the Minister to withdraw the company's licence or suspend the same. A report to such effect by the Superintendent would no doubt be a ruling upon "a matter arising in the carrying out of the provisions of this Act" from which an appeal would lie under section 68. The matter in controversy in such an appeal would be the question whether or not the company had been acting in excess of its powers; in other words, what was the amount of the authorized capital of the company and by what acts the company had exceeded its powers in relation thereto? It is impossible to exaggerate the importance of such a question, when raised under section 42, involving, as it would, the question of the jurisdiction of the Minister to put into operation his powers of forfeiture under that section. The right involved in such a case would be the private right of the company. And I am quite unable to see upon what grounds it can be contended that a proceeding in the Exchequer Court between the company on the one hand and the Superintendent on the other, involving the binding determination of the existence or non-existence of that right, would not be a "judicial proceeding," or why the adjudication (which is treated as a "judgment" in section 69, subsection 6, of the *Insurance Act*) would not also be a "judgment" within the meaning of the *Exchequer Court* and the *Supreme Court Acts*. There are other questions as indicated in subsection 5 of section 68, in respect of which an appeal is given *eo nomine* where the ruling might, if adverse, be just as destructive a blow to the private rights and interests of the company.

To revert, then, to the ruling in question on this appeal. The ruling is, subject to appeal, declared by section 68 to be binding on the company. I do not intend to express any precise opinion as to the meaning of this. It is susceptible of a construction by which the ruling fixes the capital of

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

Duff J.

the company. That is a little startling, at first sight, but not altogether out of harmony with the spirit of some of the provisions of this most amazing enactment. Again it is susceptible of an interpretation by which the ruling would be binding as against the company, as between the company and the Crown, so that in proceedings by the Attorney-General, alleging *ultra vires* acts by the company in respect of the allotment of shares, the company would be concluded by the ruling. I express no final opinion whether this is in truth the effect of the enactment of section 68. I can see no reason for holding that by force of the enactment of 68 (6) a ruling on any matter arising in course of the execution of the Act is not binding on the company as between it and the Department in any controversy in course of the exercise by the Department of any of its powers under the Act.

The ruling therefore now under debate is a ruling decisive at least for the purposes of section 42, under the private right of the company to raise capital by disposing of shares to an amount in excess of $2,000,000.

For these reasons, I conclude that the judgment of the Exchequer Court is a judgment in a judicial proceeding and appealable to this court.

I now turn to the question of substance. We are concerned with three special Acts of the appellants, 1st, the Act of Incorporation of 1865, 2nd, the Act of 1870, and 3rd, that of 1871.

By the second of these statutes, if it had ever gone into practical operation, a considerable change would have been introduced into the regulations for the conduct of the company's business. The company was, by its provisions, to have carried on its business under two branches, styled respectively "the Life Branch" embracing life and accident insurance, and the "General Branch" embracing fire, marine, and guarantee insurance.

The company was to carry on the business of each branch separately under the corporate name of the company with "Life Branch" or "General Branch" added thereto. Separate accounts were to be kept of the share capital "subscribed and allotted" for each branch; of the business transacted, of the liabilities, profits, losses and investments

of each. The share capital "allotted" to each was to be subject only to the liabilities and losses incurred, and entitled only to the profits earned, in its business.

The business of the company was to be managed as before by a board of directors with very extensive powers; and the shareholders were to act as a single body in the election of directors and otherwise; whether or not the general assets of the company were to continue liable for all debts incurred by either branch, is left a little obscure; the *prima facie* liability is not in express terms negatived, but there is some ground for saying that it is so inferentially.

By the Act of 1865, the nominal share capital of the company was $2,000,000, with power in the shareholders to increase it to $4,000,000. By the Act of 1870, the initial capital was reduced to $1,000,000, with power to augment it, under the provisions of the Act of 1865, in successive increments of $1,000,000, to $4,000,000. Provision was made by the later Act for the application of the subscribed capital for the purposes of the respective branches. The initial $1,000,000, when subscribed, was to be applied to the purposes of the business of the Life Branch, the company having a discretionary authority to devote another $1,000,000 of subscribed capital to the same purposes. The company was authorized to appropriate to the business of the General Branch $1,000,000, and afterwards another $1,000,000, if thought desirable.

This enactment as a whole never went into practical operation; within a year (and before, as we were informed on argument, any capital had been suscribed) the substratum of the new scheme had been swept away by the third Act we have to consider, the Act of 1871. By that Act, in its 3rd section, the business of the company was re-defined as that of Life and Accident Insurance.

That, I think there can be no doubt, was the effect of the 3rd section—neither more nor less. By a complementary section (the 4th), anything in existing legislation inconsistent with the Act of 1871 was repealed.

The meaning of section 3, I think, becomes perfectly clear when the Acts of 1865 and 1870 are considered. The Act of 1865, the Act of Incorporation, contains as usual one section in which the scope of the company's business or un-

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

Duff J.

dertaking is defined, and it is defined in this way, "The corporation hereby erected shall have *power and authority* to make and effect contracts of assurance" of various kinds; "to make and effect assurances on life or lives," and so on; to enter into contracts of re-insurance; and generally to do and perform all other necessary matters and things connected with, and proper to promote, those objects. Subsidiary capacities of various kinds, concerned mainly with the management of the company's affairs are given in various sections, but the word "power" is nowhere throughout the Act used in relation to these subsidiary authorities in connection with the company. Then in the Act of 1870, in section 3, where the business of Life and Accident Assurance "which the company is authorized to carry on" is further defined, the same form of expression is used. During the years when these Acts were passed, it will be found on examination of Special Acts of this general character that this was the most common form of phraseology for declaring the scope of the business or the undertaking of the company incorporated. I have looked through the Special Acts of that period, and I find that the definition of the company's business or undertaking usually comes under the heading of "powers," and that the expression "shall have power and authority" is the form almost invariably used in Special Acts incorporating Insurance Companies (and there appears to have been a large number of them enacted at that time), to define the scope of the company's business. Moreover, the form of the section itself shews that the subject matter with which the legislature was dealing in section 3, was the scope of the company's authorized business. A comparison of the language of section 3 of the Act of 1871 in the French version, with that of section 6 of the Act of 1865 of the same version, is useful.

The intention necessarily implied by this statute (1871) is, as I have said, that the system of the Act of 1870, by which the business of the company was divided into, and conducted through, separate compartments, should disappear. Life and Accident Insurance, it was finally settled, was to be the business of the company, not a branch of its business. All the devices, then, which had been conceived

for giving effect to the plan now abandoned lose their utility and are bereft of their functions; and the provisions of the Act of 1870, such as that requiring Life and Accident business to be conducted under the corporate name with the addition "Life Branch", that requiring separate accounts for shares allotted to the several branches, for their several profits and investments; that limiting the liability of shares to liabilities incurred by the "branch" to which the share had been "allotted"; all such provisions become meaningless and inoperative. So, also, as to the provisions for the appropriation of share capital to the several "branches". It is to be observed that with one exception, which I am about to refer to, this was not affected by the statute. It was to be left to the discretion of the company, and, as applied to the situation created by the Act of 1871, enactments upon that subject could of course have no force. The enactment that the initial capital of $1,000,000 was to be applied to the "Life Branch" ceased, under the Act of 1871, to have any significance; because, after the change effected in the objects of the company by that Act, no part of the company's capital could lawfully be applied to anything but the business of Life and Accident Insurance; the remaining provision of that section, in the same way, became equally otiose, because under section 1, which as I shall point out, is not affected by the Act of 1871, the nominal capital, as already observed, may be increased to $4,000,000 in successive increments of $1,000,000, which, under last mentioned Act, can only be employed for the objects of the company, as defined therein.

Section 4 of the Act of 1870 must be viewed as one element in the group of provisions beginning with the latter part of section 3 and extending to section 9. All these provisions presuppose a company the authorized business of which includes Life and Accident, as well as other branches of insurance, and which is to be carried on in two branches under the regime of the Act of 1870. Section 4 can have no operation, first, because in addition to what has already been said, there is no "Life Branch" to which it can apply, secondly, because everything found in section 4 is, in view of the new definition of the company's undertaking in the Act of 1871, already in section 1.

1930

SUN LIFE ASSUR. CO. v. SUPERINTENDENT OF INSURANCE.

Duff J.

Section 1 stands, because there is nothing in it inconsistent with any enactment of the Act of 1871; and I may add that if the intention had been to reduce the capital to $2,000,000, I should have expected to find that expressed. The appeal should be allowed and the ruling set aside with costs throughout.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Ewing.*

Solicitor for the respondent: *W. Stuart Edwards.*

1930

*April 28, 29.
*Oct. 7.

JOHN FERGUSON AND OTHERS (PLAINTIFFS) ..... APPELLANTS;

AND

LACHLAN H. MACLEAN AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

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

Church organizations and property—United Church of Canada Acts, 14-15 Geo. V (Dom.), c. 100; 14 Geo. V (N.B.), c. 59—Votes of Presbyterian congregation in favour of union—Legality of votes—Qualification of voters—Method of voting—Congregation entering Union by statutory operation in absence of vote of non-concurrence—Claim by those non-concurring to congregational property or interest therein—Rights and interests in property of congregation under earlier New Brunswick legislation—Interpretation and effect of s. 6 of 14 Geo. V (N.B.), c. 59—"Right or interest, reversionary or otherwise" of denomination in congregational property—"Reversionary" interest—"Otherwise"—Ejusdem generis rule—Constitutional validity of s. 29 of 14 Geo. V (N.B.), c. 59.

Plaintiffs, as representing all communicants, pewholders and adherents of St. James Presbyterian Church, Newcastle, N.B., not concurring in church union (under c. 100 of 14-15 Geo. V, Dom., and c. 59 of 14 Geo. V, N.B.), claimed the church property (or a share therein), attacking the legality of the congregational votes (one taken under the provincial Act and the other under the Dominion Act, aforesaid) in favour of union, and contending that, in any case, the property fell within s. 6 of c. 59, 14 Geo. V, N.B., and therefore, there having been no "consent" under that section, the property had not vested in the United Church but belonged to the continuing Presbyterians of the congregation.

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

Held: The congregation not having passed a vote of non-concurrence, it became, by statutory operation, a congregation of the United Church, and, (Anglin C.J.C. and Rinfret J. dissenting), even if the property fell within s. 6 of c. 59, 14 Geo. V, N.B. (and corresponding s. 8 of c. 100, 14-15 Geo. V, Dom.), yet, after the Union, it was held for the benefit of the congregation as a congregation of the United Church; the absence of consent under s. 6 merely leaving the property unaffected by the trusts, and not subject to the terms and conditions, set out in the "Model Deed" (schedule A of the provincial Act; schedule B of the Dominion Act).

Per Duff J., further: The property did not come within s. 6 of c. 59, 14 Geo. V, N.B. (s. 8 of c. 100, 14-15 Geo. V, Dom.). In view of the interest created in favour of the denomination by 7 Edw. VII (N.B.), c. 79, s. 6, it could not be said that the property was held solely for the benefit of the congregation and that the denomination had "no right or interest, reversionary or otherwise" therein (the *ejusdem generis* rule, and the meaning to be given the words "reversionary interest," discussed at length, and authorities cited; the scope of the phrase "right or interest, reversionary or otherwise" is not controlled by the strict sense of the term "reversion", as understood in property law; the phrase "reversionary interest" is comprehensive enough to include any interest in real property, vested or contingent, the enjoyment of which is postponed, such as a reversion or a remainder, and analogous interests in personal property). S. 29 of c. 59, 14 Geo. V, N.B., having regard to its part in the design and procedure of all the legislation, was valid and effective (*Hodge* v. *The Queen*, 9 App. Cas. 117, at p. 132, cited).

Per Anglin C.J.C. and Rinfret J. (dissenting): Plaintiffs could not succeed on the ground of illegality of the votes; the franchise of the voters (a question in issue) was governed, as to the one vote, by s. 8 (*b*) of c. 59, 14 Geo. V, N.B., and as to the other, by the corresponding s. 10 (*b*) of c. 100, 14-15 Geo. V, Dom., the requirements of which in that regard were fully complied with; the vote under the Dominion Act, which was taken by signed ballot, was not a vote "by ballot" as required by s. 10 (*a*) of that Act (the method adopted lacking the essential of secrecy: The *Maple Valley* case, [1926] 1 D.L.R. 808); and *quaere* whether said requirement of voting "by ballot" did not apply also to the vote under the provincial Act (which was taken by roll call); but, under the circumstances, the validity or invalidity of either or both of the votes was immaterial; each gave a majority for union; and if neither was validly taken the result was merely that non-concurrence was not established, and, therefore, the congregation having been placed in the United Church by s. 4 of the Dominion Act, in the absence of a vote of non-concurrence, it remained there, and it must now so remain, as the time for taking such a vote had expired. But the property of the congregation fell within s. 6 of c. 59, 14 Geo. V, N.B., as being property held "solely for (the congregation's) own benefit, and in which the denomination to which such congregation belongs has no right or interest, reversionary or otherwise"; under earlier New Brunswick legislation (1 Wm. IV, c. 11, 2 Wm. IV, c. 18, 3 Wm. IV, c. 15, 38 Vic., c. 48, 38 Vic., c. 99) the property of St. James Presbyterian Church had been vested absolutely in the trustees of that church; and the mere possibility of a

1930

FERGUSON
v.
MACLEAN.

future interest created by 7 Edw. VII (N.B.), c. 79, s. 6, was not such a "right or interest, reversionary or otherwise" in the denomination (Presbyterian Church in Canada) as was contemplated by s. 6 of c. 59, 14 Geo. V, N.B. (the meaning of "reversion"; and of "otherwise", with regard to the *ejusdem generis* rule, discussed at length and authorities cited; and the interpretation of said phrase discussed with regard to the legislation in question). The result was that, there having been no consent within s. 6 of c. 59, 14 Geo. V, N.B., the property did not pass, under ss. 3 and 4, to the United Church, but (until otherwise determined at a meeting called for the purpose of s. 6) continues in the trustees for the benefit of the congregation as it was prior to June 10, 1925 (when the United Church Acts came into force), including those members thereof who have since become members of the United Church. As to plaintiffs' attack on the constitutionality of certain sections of the Dominion Act and the efficacy of s. 29 of the provincial Act, this judgment proceeded on statutory provisions not open to challenge in that regard, and consideration further of the point was unnecessary.

Judgment of the Supreme Court of New Brunswick, Appeal Division, affirmed in the result (Anglin C.J.C. and Rinfret J. dissenting).

APPEAL by the plaintiffs from the judgment of the Supreme Court of New Brunswick, Appeal Division, which allowed the defendants' appeal, and dismissed the plaintiff's cross-appeal, from the judgment of Hazen, C.J. N.B.

At a meeting of the congregation of St. James Presbyterian Church at Newcastle, New Brunswick, on June 29, 1925, called for the purpose of taking a vote under c. 59, 14 Geo. V, N.B., a vote was taken which resulted in favour of church union. At a subsequent meeting of the congregation, on July 25, 1925, called in pursuance of a requisition made by certain members of the church, provision was made for taking a vote under c. 100, 14-15 Geo. V, Dom., which vote was taken between July 25 and August 12, 1925, and resulted in favour of church union.

The plaintiffs, four in number, sued for themselves and all persons having the same interest, to wit: all communicants, pewholders and adherents of St. James Presbyterian Church not concurring in or agreeing to church union under the said Acts. The defendants, fourteen in number, were the joint ministers and certain officials of the Newcastle United Church, including the former minister and certain former officials of the St. James Presbyterian Church; and one or two persons who had been officials of St. James Church and were now members of the United Church, but who apparently did not hold office in it. The

defendants were made defendants "as well personally as in their said respective official capacities."

In their statement of claim the plaintiffs alleged (*inter alia*) that the voting at the first meeting was taken by roll-call (which was admitted); that the names of many pewholders were not called and that the voting was not confined to male communicants of the full age of 21 years and pewholders according to Acts of New Brunswick in such case made and provided; that many pewholders were, by refusal to call their names, deprived of their right to vote on the disposition of the property of St. James Church; that in the second vote (provided for by the meeting on July 25) ballots were accepted from female voters and from male voters not of the full age of 21 years, and pewholders as such were not permitted to vote and unsigned ballots were not accepted; that the said meetings were wrongfully and illegally constituted and held and the said votings were wrongful and illegal and not in accordance with the laws governing St. James Church, and that by such wrongful and illegal act the defendants and each of them had deprived the plaintiffs of their right in the said church and congregation and in the property thereof. The statement of claim also referred to certain subsequent proceedings taken or conducted in regard to the alleged local union of St. James Presbyterian Church aforesaid and St. John's Methodist Church at Newcastle and in regard to the alleged United Church of Canada at Newcastle thereby formed; and to the property of St. James Presbyterian Church. The plaintiffs claimed: the setting aside of said votes; a declaration of nullity of the alleged union of St. James Presbyterian Church and St. John's Methodist Church, and that certain defendants who had assumed offices and duties under the alleged union had illegally mixed in and interfered with the affairs and property of St. James Presbyterian Church; a declaration that the defendants hold their offices illegally and any acts done by them in their several capacities as ministers, elders and stewards in connection with the property and assets of St. James Presbyterian Church were illegal and null; a declaration as to the rights of the plaintiffs in the property and assets of the said church; prevention of waste, etc., an account, mandamus, injunction, and mesne profits.

1930

FERGUSON v. MACLEAN.

The case was tried before Hazen, C.J. N.B. In the course of his judgment, he referred to earlier legislation of New Brunswick affecting St. James Presbyterian Church (1 Wm. IV, c. 11; 2 Wm. IV, c. 18; 3 Wm. IV, c. 15; 14 Vic., c. 9; 38 Vic., c. 48; 38 Vic., c. 99; 8 Edw. VII, c. 84), dealt with the United Church of Canada Acts (14 Geo. V, c. 59, N.B.; 14-15 Geo. V, c. 100, Dom.), and considered the evidence in the case (which included the "Rules and Forms of Procedure of the Presbyterian Church in Canada," from Rules 14 and 63 of which he quoted). He held that the persons who had the right to vote at the votings in question were those who were in full membership and whose names were on the roll of the church at the time s. 8 of c. 59, 14 Geo. V, N.B., came into effect; that neither of the meetings or votes was illegal, but that they were held in accordance with the law governing such elections and laid down in the Statutes; and that on this point the plaintiffs failed. But he held in favour of a further contention of the plaintiffs, namely: that down to the time of the Church Union Act of 1924 the Presbyterian Church in Canada had no interest in any property of St. James Church, and that the property in dispute was held entirely by that church for that congregation under c. 48 of 38 Vic., N.B.; that there never had been any vote taken affecting the property of St. James Church as contemplated by s. 6 of c. 59, 14 Geo. V, N.B.,* and that the congregation had never at a meeting regularly called for the purpose consented that the provisions of ss. 3 and 4 should apply to the property of St. James Church; that the property was purely congregational, i.e., held for the use of the congregation, and could only be taken over by the United Church if the congregation voted in favour of so

*S. 6 of c. 59, 14 Geo. V, N.B., reads as follows:

6. Any real or personal property belonging to or held by or in trust for or to the use of any congregation, whether a congregation of the negotiating churches or a congregation received into The United Church after the coming into force of this section solely for its own benefit, and in which the denomination to which such congregation belongs has no right or interest, reversionary or otherwise, shall not be subject to the provisions of Sections 3 and 4 hereof or to the control of The United Church, unless and until any such congregation at a meeting thereof regularly called for the purpose shall consent that such provisions shall apply to any such property or a specified part thereof.

doing; in other words, to complete the union and transfer all the property there would have to be two votes, one for the union of the churches, and the other for the transfer of the property. On this point his Lordship concluded as follows:—

> If this is not the case I do not see what meaning is to be attached to s. 6, and I have come to the conclusion that the property of St. James Church held for the use of the congregation of that church did not become transferred to the United Church as the preliminary of the consent of the congregation of St. James Church passed at a meeting thereof regularly called was not complied with. On this ground I am of opinion that the plaintiffs must succeed.

and on this ground he gave judgment for the plaintiffs.

The defendants appealed to the Supreme Court of New Brunswick, Appeal Division, and the plaintiffs cross-appealed against that part of the judgment of Hazen, C.J. N.B., in which he held in favour of the legality of the votes.

By the judgment of the Appeal Division the defendants' appeal was allowed with costs and the plaintiffs' cross-appeal was dismissed with costs, and the plaintiffs' suit was dismissed with costs. Grimmer J. and Barry, C.J. K.B, each delivered a written judgment, and White J. agreed in the result with them both. Both Grimmer J. and Barry, C.J. K.B., held (agreeing with the trial judge in this respect) that the votes were legal and proper votes. They also held that, by virtue of 7 Edw. VII, c. 79, s. 6 (N.B.), the Presbyterian Church in Canada, the denomination to which the St. James Church belonged, had a "right or interest, reversionary or otherwise" in the congregational property, within the meaning of s. 6 of c. 59, 14 Geo. V, N.B., and therefore the property was excluded from the operation of that section; that the property went with the congregation into the Union, and that the plaintiffs, who had not concurred in the Union and had separated themselves from the congregation, had no claim to the property. Grimmer J. held, further, that it never was intended by s. 6 of c. 59, 14 Geo. V, N.B., that, if a congregation whose property was held by it solely for its own benefit decided to remain in the Union, it was required to vote to retain its property, under penalty of having the same forfeited if it did not do so, or that, the congregation having voted in favour of entering the Union, there must be a second

1930

FERGUSON v. MACLEAN.

vote to carry the property with it; s. 6, where it applied, meant that the property was to be held for the use of the congregation in the United Church, but (in the absence of consent under s. 6) to be vested in the local church corporation for the use of the congregation, instead of being brought under the trusts contained in the Model Deed (Schedule A of c. 59, 14 Geo. V, N.B.) for the use of the congregation. Barry, C.J. K.B., in his judgment, referred to the fact that neither the corporation created by *The United Church of Canada Act* (c. 100, 14-15 Geo. V, Dom.) nor the corporation of "The Trustees of St. James Presbyterian Church, Newcastle," a body corporate and politic under and by virtue of 2 Wm. IV, c. 18, and confirmed by subsequent legislation, was joined as a party to the action, and referred to defendants' objection that, since the legal title to the property and temporalities of St. James Church must rest in one or the other of those corporations and because (as was said) they could not be bound by a judgment pronounced in an action to which they were neither parties nor privies, the plaintiffs should not be permitted further to maintain the action, but that the same should be dismissed. He pointed out that the objection did not seem to have been raised in the court below, nor (as he held) was it raised in the statement of defence. In any case, as the appeal was determinable on other and meritorious grounds (referred to above), he preferred to dispose of it on those grounds.

From the said judgment of the Appeal Division the plaintiffs appealed to the Supreme Court of Canada.

Gregor Barclay, K.C., and *A. B. Gilbert* for the appellants.

P. J. Hughes, K.C., and *G. W. Mason, K.C.*, for the respondents.

ANGLIN C.J.C. (Rinfret J. concurring) (dissenting).—The plaintiffs appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick, reversing in part the judgment of Hazen, C.J. N.B., who tried this action.

The action was brought by the plaintiffs on behalf of themselves and others, pewholders and communicants of the St. James Presbyterian Church at Newcastle, N.B., who

did not concur in, or agree to, Church Union, under the Act of Canada, 14-15 Geo. V, c. 100 (assented to on the 19th of July, 1924, and which came into force on the 10th of June, 1925, hereinafter called the "Dominion Act"), and the Act of the Province of New Brunswick, 14 Geo. V, 1924, c. 59 (assented to on the 17th of April, 1924, which also came into force on the 10th of June, 1925, hereinafter called the "Provincial Act"). The plaintiffs sued to set aside certain votes upon the issue of Church Union, taken, one on the 29th of June, 1925, under the Provincial Act (s. 8 (a)), and the other between the 25th of July and the 12th of August, 1925, under the Dominion Act (s. 10 (a)); for a declaration of the nullity of the alleged Union of St. James Presbyterian Church and St. John's Methodist Church, and in regard to some consequential matters; for a declaration that the defendants hold office illegally; for a declaration as to the rights of the plaintiffs in the property and assets of the said St. James Presbyterian Church, and for consequential relief, including prevention of waste; for an account; for a mandamus requiring the defendants to suffer and permit the plaintiffs to use the church and church buildings, etc.; for an injunction to restrain the defendants from using the church and church buildings, etc.; and for mesne profits.

The action was tried before Hazen C.J., on the 26th of March, 1929, and following days, and he gave judgment on the 30th of April, 1929, upholding the validity of both of the votes which resulted in large majorities for Church Union, but declaring, in the plaintiffs' favour, that the property of the St. James Presbyterian Church was property held solely for the benefit of that church and that in it the denomination, to which the congregation thereof belonged, had "no right or interest, reversionary or otherwise." Accordingly, he held that, by virtue of s. 6, that property did not vest in the United Church under the provisions of ss. 3 and 4 of the Provincial Act, no meeting, regularly called for that purpose, having consented that those provisions should apply thereto, or to any part thereof; and that the plaintiffs (presumably), as "continuing" members of the said St. James Presbyterian Church, were entitled to the possession of it, and to other relief claimed in respect thereof, including an account of receipts and ex-

1930

FERGUSON v. MACLEAN.

Anglin C.J.C.

penditures and mesne profits, as prayed; and further directions were reserved.

From this judgment an appeal and cross-appeal, taken to the Appeal Division of the Supreme Court of New Brunswick, were heard by White J., Grimmer J., and Barry C.J. K.B.

Agreeing with the Chief Justice of New Brunswick that the two votes on the question of Church Union, taken under the Provincial Act and the Dominion Act respectively, were valid, the court dismissed the cross-appeal of the plaintiffs on that aspect of the case. On the other hand, the appeal of the defendants, in so far as the property in question had been held not to be vested in the United Church of Canada pursuant to the provisions of ss. 3 and 4 of the Provincial Act, was allowed, the Appeal Division taking the view that, by virtue of a statute of New Brunswick of 1907 (7 Edw. VII, c. 79, s. 6), the Presbyterian Church of Canada, Eastern Section, to which the congregation of St. James Presbyterian Church belonged, had a reversionary interest in the several properties belonging to St. James Church and that, accordingly, those properties were not excepted by s. 6 of the Provincial Act from the operation of ss. 3 and 4 of that statute, and, therefore, that no formal consent of the congregation at a meeting regularly called for that purpose was necessary to effect a transfer of such property to the United Church or to the application thereto of ss. 3 and 4.

The present appeal is brought against this judgment by the plaintiffs.

Dealing first with the question of the efficacy of the two votes on Church Union: The first vote, that of the 29th of June, 1925, was taken under the Provincial Act. The only objection made to the regularity of this vote, which, as provided by s. 8 (*a*), was taken within six months after the Provincial Act came into force, is as to the franchise of the voters. The claim of the appellants is that certain pewholders and others not upon the roll were entitled to vote. The Provincial Act, however, is conclusive against that claim, since, by clause (*b*) of s. 8, it provides that

(*b*) The persons entitled to vote under the provisions of the first clause of this section shall be only those persons who are in full mem-

bership and whose names are on the roll of the church at the time of the coming into force of this section.

We entirely agree with the view, which prevailed below, that clause (*b*) governed the franchise at the meeting in question and that its requirements were fully complied with. This opinion is confirmed by s. 30 of the statute which enacts that

30. All Acts and portions of Acts of the Legislature of this Province inconsistent with the provisions of this Act are hereby repealed in so far as may be necessary to give full effect to this Act.

As to the vote under the Dominion Act, however, two objections are taken. S. 10 of that statute, so far as material, reads as follows:

(10) (*a*) If any congregation in connection or communion with any of the negotiating churches shall, at a meeting of the congregation regularly called and held at any time within six months before the coming into force of this Act, or within the time limited by any statute respecting The United Church of Canada passed by the legislature of the Province in which the property of the congregation is situate, before such coming into force, decide by a majority of votes of the persons present at such meeting and entitled to vote thereat not to enter the said Union of the said Churches, then and in such case the property, real and personal, belonging to or held in trust for or to the use of such non-concurring congregation shall remain unaffected by this Act * * *. The vote herein provided for shall be taken by ballot in such form and manner and at such time within the limit prescribed by this subsection as the congregation may decide: Provided that not less than two weeks shall be allowed for the taking of said vote by ballot as aforesaid.

(*b*) The persons entitled to vote under the provisions of the first clause of this section shall be only those persons who are in full membership and whose names are on the roll of the Church at the time of the passing of this Act. * * *

The same question is raised with regard to the franchise of the voters and must be determined in the same way as under the Provincial Act, since the governing franchise is declared, by clause (*b*) of s. 10 of the Dominion Act, in terms identical with those of s. 8 (*b*) of the Provincial Act.

Another, and a more formidable objection, however, which does not appear to have been taken in the provincial courts, is that s. 10 (*a*) ordains that the vote therein provided for shall be taken "by ballot." The congregation determined to vote "by signed ballot"; and the vote was taken accordingly. It seems to me abundantly clear that the vote by signed ballot was not a vote "by ballot" within the meaning of section 10 (*a*). It lacked the essential of

1930

FERGUSON v. MACLEAN.

Anglin C.J.C.

secrecy (The *Maple Valley* case (1)). Although this objection was taken at a very late stage of the proceedings, it might, but for the considerations presently to be noticed, have been most material.

This vote, however, was not taken " within six months before the coming into force " of the Dominion Act. It, therefore, was not a vote within clause 10 (a) of that statute. But the effect of invalidity of that vote would be merely to render it null, with the result that, so far as it was a factor, the congregation of St. James would remain in the United Church of Canada, having been placed therein by s. 4 of the Dominion Act, and there having been no vote by which it became a " non-concurring " congregation under section 10.

Moreover, it would seem at least arguable that the requirement that the vote should be " by ballot " applied also to the vote taken under the Provincial Act (which was " passed * * * before (the) coming into force " of the Dominion Act), if that vote is to be relied on as a vote for Church Union made effective by s. 10 (a) of the Dominion Act, being, in that aspect, a " vote (t)herein provided for ". That it should be so regarded seems necessary to its affecting the determination of the question whether the congregation of St. James Church should enter the United Church of Canada, which is a Dominion corporation (s. 2 (i) N.B.), or should be outstanding as a " non-concurring congregation " (s. 3 (i) D).

But a conclusive answer to the appellants on this branch of their case appears to be this: Either one of the votes—that of the 29th of June or that of the 25th of July-12th of August—was validly taken under s. 10 (a) of the Dominion Act, in which event the plaintiffs must fail since a majority on each of these votes clearly favoured St. James Congregation entering the Union; or neither of those votes was vadily taken, with the result that non-concurrence of St. James congregation was not established; and, having been placed in the United Church by s. 4 of the Dominion Statute, in the absence of a vote of non-concurrence under s. 10 (a), that congregation remained in the United Church; and it must now so remain, since no further vote on that

(1) [1926] 1 D.L.R. 808.

question can be taken, the periods therefor respectively named in s. 8 (a) of the Provincial Act and in s. 10 (a) of the Dominion Act having both long since expired. In this view, the plaintiffs likewise fail in this branch of their case. It seems immaterial, therefore, to consider further the validity or invalidity of these two votes, interesting though the questions raised in regard to them may be.

It follows that the property of the St. James congregation became vested in the United Church under the provisions of s. 4 of the Provincial Act, unless, and except in so far as, it fell within s. 6, to the provisions of which s. 4 was expressly made subject. This s. 6, which is the vital provision to be considered, reads as follows:

> 6. Any real or personal property belonging to or held by or in trust for or to the use of any congregation, whether a congregation of the negotiating churches or a congregation received into The United Church after the coming into force of this section solely for its own benefit, and in which the denomination to which such congregation belongs has no right or interest, reversionary or otherwise, shall not be subject to the provisions of Sections 3 and 4 hereof or to the control of the United Church, unless and until any such congregation at a meeting thereof regularly called for the purpose shall consent that such provisions shall apply to any such property or a specified part thereof.

By earlier legislation of the province of New Brunswick, set forth at length by the Chief Justice in his judgment, to wit, c. 11, 1 William IV, (1831), c. 18, 2 William IV, (1832), c. 15, 3 William IV, (1833), c. 48, 38 Vic., (1875), and c. 99, 38 Vic., (1875), it was made abundantly clear that the property of St. James Presbyterian Church at Newcastle was vested fully and absolutely, and to all intents and purposes, and without qualification, in the Trustees of that church. It is said, however, for the respondents, that by a New Brunswick Act of 1907 (7 Edw. VII, c. 79), a reversionary right or interest therein was created in "The Board of Trustees of the Presbyterian Church in Canada, Eastern Section," because of the provision, that

> 6. All lands and premises which have been or shall hereafter at any time be held by any trustee or trustees for any congregation which shall have ceased to exist, or has become disorganized, shall vest in the said board of trustees in trust to sell the same, and pay over the proceeds of the said sale to the treasurer of the said church for the benefit of the Home Mission scheme thereof, or as may be otherwise determined by the Synod of the said church.

1930

FERGUSON v. MACLEAN.

Anglin C.J.C.

We are, however, unable to regard the mere possibility of a future interest thus created in favour of the Home Mission Scheme, or other object to be selected by the Synod of the Church, (assuming it to be in favour of "the denomination" to which the St. James Congregation belonged), as such a "right or interest, reversionary or otherwise," as is contemplated by s. 6 of the Provincial Act.

That the possibility of some right or interest in the property in question arising in favour of the Home Mission Scheme, or other body to be designated by the Synod of the Presbyterian Church, was not a reversionary interest seems abundantly clear. In the first place, a reversion is an undisposed of estate in property, left in a grantor after he has parted with some particular interest less than the fee-simple therein. In the second place, it is an estate which returns to the grantor after the determination of such particular estate (1 Plowd. 160*a*). The derivation of the word from the Latin verb *revertor*, makes this perfectly clear (Co. Litt. 142*b*). "There cannot, in the usual and proper sense of the term, be a reversion expectant upon an estate in fee-simple." (Per Selborne, L.C., in *Attorney-General of Ontario* v. *Mercer* (1)). That St. James Church held the fee-simple in these properties is not questioned.

To quote from Stroud's Judicial Dictionary, p. 1754,

> The reversion is what is left; and the remainder is that which is created by the grant after the existing possession. Both words are technical phrases. And though it is said in the Touchstone (p. 249) that "a reversion may be granted by the name of a remainder, or a remainder by the name of a reversion"; yet it needs a very strong context for such a construction.

In *Symons* v. *Leaker* (2), we find Field J. using the following language:

> As Lord Redesdale says in *Mason* v. *Wright* (3): "It is dangerous where words have a fixed legal effect to suffer them to be controlled without some clear expression or necessary implication." Reversion is a well known legal expression, and its meaning and the distinction between it and a remainder is clearly pointed out in the passage from Williams on Real Property (14th Ed., p. 255) to which we were referred by the counsel for the defendants.

(1) (1883) 8 App. Cas. 767, at p. 772.

(2) (1885) 15 Q.B.D. 629, at p. 632.

(3) *Jesson* v. *Wright*, (1820) 2 Bligh, 1, at p. 56.

This Act of Parliament is dealing with a technical subject. The words used in it have a technical and legal meaning, and I cannot see why the words "person entitled to any reversion" in s. 8 of the Prescription Act should be construed to apply to a remainderman.

And Manisty J., at p. 633 of the same case, said,

As to the construction of that section, I cannot bring myself to believe that the experienced lawyers who framed this highly technical Act * * * could have meant a remainderman when they used the term "reversioner." One cannot help seeing how easy it would have been to have said "reversion or remainder" if that was meant.

A like view was taken by Jessel, M.R., in *Laird* v. *Briggs* (1), when, speaking of s. 8 of the *Prescription Act,* he said,

The whole of the section and the whole of the Act is of a strictly technical character from beginning to end. As far as I can see, technical words are used in their proper technical senses * * * *Prima facie* it appears to me that the rule applies that technical words must have their technical meaning given to them unless you can find something in the context to overrule them. * * * A reversion in law is not a remainder, the difference being that the reversion is what is left and the remainder is that which is created by the grant after the existing possession. I am not prepared to say that I can find anything in the nature of the case or in the context which would allow me to alter the meaning of the word "reversion"

The application of these authorities to the case at bar is obvious. The statute in question was carefully revised by experienced counsel representing the interests of the United Church of Canada. There is no reason to suppose that these lawyers were not fully aware of the meaning of the word "reversionary" or that, having such knowledge, they used that word in any other than its technical sense.

If, then, the interest conferred on "The Board of Trustees of the Presbyterian Church in Canada, Eastern Section," by the Act of 1907, be not "reversionary," but a mere possibility, probably introduced to obviate any question of escheat, and which can take effect, if not as a contingent remainder (*Purefoy* v. *Rogers* (2)), only, by virtue of the statute, as something akin to a "springing use" in the legal sense, can it be said that it is a "right or interest, reversionary or otherwise" without giving to the word "otherwise" an application to something entirely distinct in its nature and character from a reversion? We think not.

(1) (1881) 19 Ch. D. 22, at pp. 33-4.

(2) (1669) 2 Wms. Saunders, 768, at p. 781, n. 9.

1930

FERGUSON v. MACLEAN.

Anglin C.J.C.

Whether such extension should, under some circumstances, be given to the word "otherwise" may be an arguable question. *Sutton* v. *London, Chatham and Dover Ry. Co.* (1); *Brain* v. *Thomas* (2). But there can be no doubt that the general rule is that the word "otherwise" should receive an *ejusdem generis* interpretation much the same as the word "other". (*Haren* v. *Archdale* (3); Stroud's Judicial Dictionary, p. 1370). Indeed, in the Act now before us, the adverb "otherwise" appears to be used in the sense of the adjective "other": the phrase would be grammatically more accurate if it read "reversionary or other." As to this general rule no authority is necessary (*per* Cleasby B., in *Monck* v. *Hilton* (4)), and it is equally clear that s. 6 of the Provincial Act cannot be read as if the words "reversionary or otherwise" were entirely deleted therefrom, so as to make it apply to any right or interest whatsoever (*ibid,* at p. 275). As put by Pollock B., in the same case (pp. 278-9), the words "or otherwise" should be taken as meaning something "of the same general character as is indicated by the earlier words of the section."

Again, in *Parkinson* v. *Dashwood* (5), dealing with a marriage settlement containing the words "accruer, survivorship or otherwise", Romilly M.R. held that the words "or otherwise", "must be restricted to an acquisition * * * in a mode similar to that by survivorship or accruer."

In *In re Clark* (6), it was held by the Court of Appeal that the words "or otherwise" in s. 3 of the *Married Women's Property Act* of 1882, which occur in the phrase, "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise * * *," did not include a loan by a wife to her husband for purposes unconnected with the trade or business. This decision approved

(1) (1896) 12 T.L.R. 425.
(2) (1881) 50 L.J. Ex. 662 at p. 664.
(3) (1883) 12 L.R. Ir., 306, at p. 318.
(4) (1877) 2 Ex. D., 268, at p. 276.
(5) (1861) 30 Beav., 49, at p. 51.
(6) [1898] 2 Q.B. 330.

that of Cave J. in *In Re Tidswell* (1). See also *Mackintosh* v. *Pogose* (2); compare *Alexander* v. *Barnhill* (3).

So, in *Cheese* v. *Lovejoy* (4), the Court of Appeal held that a will was not revoked where the testator had written over it "This is revoked" and thrown it among a heap of waste papers in his sitting-room, from which a servant took it up and put it on a table in the kitchen where it remained till the testator's death, because that was not "otherwise destroying" the will within the meaning of the phrase "burning, tearing or otherwise destroying the same." See also *Doe* v. *Harris* (5).

Again, in *Owners of Cargo on Board SS. Waikato* v. *New Zealand Shipping Co. Ltd.* (6), the Court of Appeal, affirming Bigham J., held that a defect, obvious from the commencement of the voyage, was not within an exemption from liability for "defects latent on beginning voyage or otherwise."

Having regard to the fact that the respondents are seeking a construction of the statute which would have the effect of vesting in themselves, to the exclusion of the plaintiffs, all property belonging to St. James Presbtyerian Church, and thus depriving the latter of a substantial interest in property which they had enjoyed and of advantages to be derived therefrom, the statute invoked, revised as it was by counsel representing the United Church, must be strictly construed. Upon no construction that I can conceive of could the words "right or interest, reversionary or otherwise," include a mere possibility which, if it should come into effect, could only do so as a remainder, unless one should read out of the statute entirely the words "reversionary or otherwise", so that it would cover any interest or right whatever. The legislature must be credited with the intention of placing some restriction upon the nature of the right or interest in the denomination, which was to deprive the non-concurring members of the congregation of their property rights, when it placed the qualifying words, "reversionary or otherwise", in the statute. The only possible operation which can be given to these

(1) (1887) 56 L.J. (N.S.) Q.B. 548.
(2) [1895] 1 Ch. 505.
(3) (1888) 21 L.R. Ir. 511.
(4) (1877) 2 P.D. 251.
(5) (1837) 6 Ad. & E. 209.
(6) [1899] 1 Q.B. 56.

1930

FERGUSON v. MACLEAN.

Anglin C.J.C.

words is by reading them as restricting the right or interest held by the denomination, which would have the effect of taking away the plaintiffs' right in the properties in question, to a vested right or interest reversionary in its nature, or of the same general character as such a reversionary right or interest. That the possibility created in favour of the Home Mission Scheme, or other object to be designated by the Synod, was not of that character, would seem beyond question. On a proper construction of the statute (s. 6 of the Provincial Act) a contingent future interest, or postponed possibility, such as that now under consideration, must fall within the second limb of the condition (i.e., must be reversionary in character), in order to prevent the property of the congregation being regarded as not held by it "solely for its own benefit," within the purview of the first limb of the condition.

We are, therefore, of the opinion that, there having been no meeting of the congregation of St. James Presbyterian Church, regularly called for the purpose of giving consent under s. 6, and the provisions of ss. 3 and 4 of the Provincial Act therefore not applying to its property, or to any part thereof, because excluded by s. 6, such property continues vested in the Trustees, who hold it for the benefit of that congregation, as it was prior to the 10th of June, 1925, and did not pass under sections 3 and 4, to the United Church of Canada. See *Trustees of St. Luke's Presbyterian Congregation of Salt Springs* v. *Cameron* (1).

It does not, however, at all follow that the plaintiffs are entitled to the use of the property to the exclusion of the defendants or others who were members of the congregation, as it existed prior to the 10th of June, 1925, and who have become members of the United Church. On the contrary, until, at a meeting, regularly called for the purpose, it is otherwise determined as to the "property, or a specified part thereof," the property real and personal, as a whole, remains in the hands of the Trustees for the benefit of the entire congregation as it existed up to the 10th of June, 1925, including many of the defendants as well as the plaintiffs. It follows that, while the plaintiffs are entitled

(1) [1929] Can. S.C.R. 452; [1930] A.C. 673.

1930

FERGUSON v. MACLEAN.

Anglin C.J.C.

to a declaration that their rights in the property in question remain intact, as they were before the Statute effecting Church Union came into force, and that such property did not pass under sections 3 and 4 of the Provincial Act, they are not entitled to the further relief prayed for—and granted by the Chief Justice of New Brunswick.

The judgment on appeal should be modified accordingly.

The question raised as to the necessity for having before the court the corporation created by the *United Church of Canada Act* (14-15 Geo. V, c. 100 (D.)), and the Corporation of the Trustees of the St. James Presbyterian Church of Newcastle, (2 Wm. IV, c. 18), is dealt with by Barry, C.J. K.B., in his judgment in the Court of Appeal. In view of the conclusions reached here, it does not seem necessary further to consider it.

The same observation applies to the questions presented by counsel for the appellant as to the constitutionality of ss. 4, 5, 6, 7, 8 and 10 of the Dominion Act and the efficacy of s. 29 of the Provincial Act. As will be noted, this judgment proceeds upon a specific provision of the Dominion Act (s. 10), so far as concerns the entry into the United Church of the St. James Presbyterian Church congregation, the validity of which in that regard cannot be challenged; and, so far as the disposition of the property in question is concerned, it proceeds upon section 6 of the Provincial Act, which likewise is not open to challenge. As to the propriety of passing s. 29 of the Provincial Act, which is spoken of as an anticipatory attempt to validate impugned sections of the Dominion Act, then not yet enacted, it is unnecessary to express any view. We can scarcely doubt, however, that the Legislature had before it a draft of the provisions of the Dominion Act which it purported by s. 29 to declare should "have full force and effect with respect to any property or civil rights within this province."

Under all the circumstances, there should be no order as to the costs of this appeal.

DUFF J.—I shall first assume that the property in question held in trust for the congregation of St. James Church was, as the appellants contend, property falling within section 8 of the Dominion Act and section 6 of the New Brunswick Act. Where the congregation of one of the negotiating churches was entitled to property within these

1930

FERGUSON v. MACLEAN.

Duff J.

sections, two courses were apparently open to the congregation on entering the United Church. It might, if it so desired, give its consent to the property being held upon the trust, subject to the terms and provisions set forth in schedule A of the New Brunswick Act and schedule B of the Dominion Act, or it might withhold such consent and retain the property under the terms of section 6 (8), by which it was not to be affected by the trusts, or subject to the terms and conditions in the schedule mentioned. In the last mentioned case, I can see no reason whatever for supposing that the congregation would not be entitled to make use of such property for congregational purposes as a congregation of the United Church. Indeed that seems to be the necessary result of the provisions of the Act. The Act provides for the union of the three churches, which, as united, are to constitute the United Church of Canada, and the churches, so united, include all congregations who do not vote themselves out under the provisions of the Act. I do not propose to discuss the question of the validity of the votes taken. The judgments below have dealt with the subject fully, and it seems quite clear that the congregation of St. James Church did not become a non-concurring congregation within the meaning of the Act.

By section 28 of the Dominion Act it is declared:

(*a*) That the said union of the negotiating churches has been formed by the free and independent action of the said churches through their governing bodies and in accordance with their respective constitutions, and that this Act has been passed at the request of the said churches in order to incorporate the United Church and to make necessary provision with respect to the property of the negotiating churches and the other matters dealt with by this Act.

By section 20 (a) of the Provincial Act it is declared that

Each Board of Trustees now or hereafter holding any property in trust for the use or benefit of any congregation in connection with The United Church referred to in section 4 of this Act, and their successors, shall be a body corporate by the name of The Trustees of The United Church of Canada (at the place where, etc.) * * * and by that name shall hold the property heretofore held by them as Trustees, and shall have the power and capacity of taking, holding and dealing with any property, real or personal, and all instruments requiring the seal thereof to be affixed thereto shall be executed by such officer or officers as may be authorized thereto by the said body corporate. Provided that in the exercise of such rights, powers and privileges the said body corporate shall be subject to the provisions of this Act and the trusts, terms and provisions set out in Schedule "A" hereto, or Schedule "B" of the Act of Incorporation or to

any amendment to said Schedule "B" made by any Act of the Parliament of Canada.

The proviso, by force of the last sentence of sub-section (b), has no relation to property within section 6 (8).

Section 13 of the New Brunswick Act and section 15 of the Dominion Act provide as follows

> Where, prior to the coming into force of this Section, any existing trust has been created or declared in any manner whatsoever for * * * the support, assistance, or maintenance of any congregation * * *or for the furtherance of any * * * congregational * * * purpose, in connection with any of the negotiating churches * * * the entry of any congregation into The United Church shall not be deemed a change of its adherence or principles or doctrines or religious standards within the meaning of any such trust.

The application of these provisions to the case of St. James Church seems to present no difficulty. The congretion became a congregation connected with the United Church by force of the agreement and the legislation, and section 20 (a) plainly contemplates that the trustees in whom the property is vested shall continue to hold it as a body corporate as trustees of the United Church of Canada (at the place where, etc.); and, that this provision of section 20 (a) applies to property within section 6 (8) seems to be put beyond doubt by the provision of s. 20 (b), by which such property is exempted from the operation of the proviso. Then section 13 (15) quoted above also makes it clear that, in point of law and for the purpose of the execution of the trusts under which the property was held, St. James congregation did not, by entering the United Church, cease to be a Presbyterian congregation within the meaning of the trusts.

This is sufficient to dispose of the principal contention advanced by the appellant. On this aspect of the case I entirely agree with my brethren Newcombe and Lamont. But it is right to add that I am unable to accept the contention that the trusts upon which the property in question is held are of such a character as to bring the trust property within section 6 (8). Section 4, were it not for section 6 (8), would clearly embrace that property. It is for the appellants to shew that it comes within the terms of section 6 (8). There are two indispensable conditions which must be fulfilled in order to justify that conclusion; first, that the property, when the legislation came into

1930

FERGUSON v. MACLEAN.

Duff J.

force, belonged to, or was held by, or in trust for, or to the use of, the congregation of St. James "solely for its own benefit"; and second, that the denomination to which the congregation belonged had then no "right or interest, reversionary or otherwise", in the property.

At the time the United Church Act took effect, the property was vested in the Board of Trustees of St. James Church, incorporated by statute in 1832, in trust for the congregation, as a congregation in connection or communion with the Presbyterian Church in Canada. The trustees had power to sell or let pews, but no power to alienate land except for a term not exceeding twenty-one years. By a statute passed in 1907, the Board of Trustees of the Presbyterian Church in Canada, Eastern Section, was incorporated, and by the same statute, it was enacted as follows:

> 6. All lands and premises which have been or shall hereafter at any time be held by any trustee or trustees for any congregation which shall have ceased to exist, or has become disorganized, shall vest in the said board of trustees in trust to sell the same, and pay over the proceeds of the said sale to the treasurer of the said church for the benefit of the Home Mission scheme thereof, or as may be otherwise determined by the said Synod of the said church.

The property now in question was one of the properties affected by this enactment.

Therefore, in 1924, when St. James Church entered the Union, the property was vested in the Board of Trustees in trust for the congregation, as a congregation in connection or communion with the Presbyterian Church in Canada; and by force of the statute of 1907, upon the congregation ceasing to exist as an organized body, the property was to pass to the trustees of the Presbyterian Church in Canada to be held by them on the trusts declared in that statute.

The appellants describe the interest of the Presbyterian Church in Canada in the property as a contingent remainder. Remainder it certainly was not. The trustees for the congregation had an estate in fee and no remainder could, of course, be limited upon such an estate. And although the event upon which the property was to pass to the Trustees of the Presbyterian Church in Canada would be described, in popular language, as a contingency, it is not a contingency of the character contemplated by property

law in the distinction between vested and contingent estates; since the transfer would take place upon the very events which would bring the trust for the congregation to an end by the failure of the objects of that trust, and, since "the present capacity for taking effect in possession, if possession were to become vacant" (Fearne, Contingent Remainders, 216) always characterized the interest of the Trustees of the Presbyterian Church in Canada from the enactment of the statute of 1907. In truth, the rights and interests affecting this property are so largely the creatures of statute, that it would seem to be of small utility to attempt to assign them to precise categories in conformity with the strict definitions of property law.

On behalf of the appellants the view advanced is that the interest of the Presbyterian Church of Canada arising out of the trust, upon the dissolution or disorganization of the congregation, is not an interest within the meaning of section 6 (8), and, consequently, it is said, that section applies.

I have already observed that there are two conditions upon which the application of section 6 (8) depends. It makes no difference whether these be treated as distinct conditions, or two different forms of words intended to embody the same condition. If they are distinct, I do not see how it can be said that this property was held solely for the benefit of the congregation. I think that condition excludes any other beneficiary, contingent or not. On the other hand, if we are to treat the two forms of expression as mutually explanatory statements of the same condition, the words "held * * * in trust for * * * any congregation * * * solely for its own benefit" seem to throw some light upon the subsequent expression "in which the denomination * * * has no right or interest, reversionary or otherwise." I shall revert to this later.

The substance of the appellants' point is this: "right or interest, reversionary or otherwise", takes its significance, they say, from the word "reversionary", which must control the scope and purport of "otherwise", which appears to be used here as an adjective, and may be treated as intended for "other". Then, the argument proceeds, "reversion-

1930

FERGUSON v. MACLEAN.

Duff J.

ary" must be read as taking its meaning from "reversion" in the strict sense of real property law, which the interest of the Presbyterian Church in Canada in this property was not, and which it is said, also, it did not resemble. Lest I should fail to do justice to the argument, I quote the passage from the appellants' factum in which the point is, I think, stated as the appellants would desire it to be:

> Section 6 merely gives the Board of Trustees of the Presbyterian Church in Canada, Eastern Section, a contingent remainder in trust to sell. It is not a reversion since the latter is a vested interest in him by whom the particular estate was created. None of the property of Saint James Church was acquired from the denomination but was all purchased by private contribution or devised or bequeathed to the Church. The words "reversionary or otherwise" in Section 6 of The United Church Act (N.B.) clearly contemplate a right or interest in the nature of a reversion, that is, a vested interest. The words "or otherwise" are usually given an *ejusdem generis* construction depending on the preceding words.

The rule *ejusdem generis* does not, I think, assist the appellants. It is commonly stated in the form in which it was put by Lord Campbell in *Clifford* v. *Arundell* (1):

> Where, after a specific enumeration of different subjects, general words are added, the general words are to be confined to subjects *ejusdem generis*.

A view has been taken of the purport of the rule which I can best state in the words of an extract from Scrutton on Charter Parties (12th ed.), page 248:

> It must be remembered that the question is whether a particular thing is within the *genus* that comprises the specified things. It is not a question (though the point is often so put in argument), whether the particular thing is like one or other of the specified things. The more diverse the specified things the wider must be the *genus* that is to include them: and by reason of the diversity of the specified things the *genus* that includes them may include something that is not like any one of the specified things.

This view has the support of the Court of Appeal in *Tillmanns & Co.* v. *SS. Knutsford Ltd.* (2), in which Farwell L.J. said (at p. 403): "Unless you can find a category there is no room for the application of the *ejusdem generis* doctrine." To the same effect are the judgments of Vaughan Williams L.J., at page 395, and of Kennedy L.J., at page 406. In *Larsen* v. *Sylvester & Co.* (3), Lord Loreburn appears to have acted upon this principle; the words to be construed, he said, "follow certain particular specified

(1) (1860) 1 De G.F. & J. 307. (2) [1908] 2 K.B. 385.
(3) [1908] A.C. 295.

hindrances, which it is impossible to put into one and the same genus". If this be the true view, it is not so easy to apply the rule where there is no specific enumeration but where there is a description in a single phrase of a class of things of more or less restricted scope followed by wider general words. In such a case it would, in the abstract, be difficult to put a limit to the number of possible genera. Another view, however, has been taken and it is this. It is not necessary to define or ascertain the genus or category which describes all the specified cases; it is sufficient to bring a given case under the general words that it be a case "akin to" or "resembling" or "of the same kind as" those specifically mentioned. This appears to be the test contemplated in the judgments of Lord Halsbury, Lord Herschell and Lord Macnaghten in *Thames and Mersey Marine Ins. Co. Ltd.* v. *Hamilton, Fraser & Co.* (1). Long before, Lord Ellenborough in *Cullen* v. *Butler* (2), had said that the question to be answered is: "Is the alleged exception of the like kind with those specially enumerated and occasioned by similar causes?" This view of the rule was adopted by Greer J. in *Aktieselskabet Frank* v. *Namaqua Copper Co. Ltd* (3), and in *Adelaide Steamship Co. Ltd.* v. *The King* (4).

Of course, upon either view there may be great difficulty in applying the test; and if the maxim were to be treated as supplying in itself the means of ascertaining the effect of the words to which it is to be applied its application may always be attended with not a little risk of miscarriage. In the abstract, there will usually be more than one category or genus to which the enumerated cases could be referred according to the aspect in which the particular cases are viewed, and, as already said, where the general words are preceded by only one description of less general import, the possible number of categories may be indefinitely great. Under the form of the rule favoured by Greer J., there is still the question to be asked, likeness in what respect? In practice, of course, these questions must be capable of an answer by reference to subject matter and context, as,

(1) (1887) 12 App. Cas. 484.
(2) (1816) 5 M. & S. 461.
(3) (1920) 25 Com. Cas. 212, at pp. 218-220.
(4) (1923) 29 Com. Cas. 165, at p. 170.

1930
FERGUSON
v.
MACLEAN.
Duff J.

for example, in *Chung Chuck* v. *The King* (1), or the rule is valueless. As Hamilton J. said in *Thorman* v. *Dowgate Steamship Co. Ltd.* (2): "The *ejusdem generis* rule is a canon of construction only. The object of it is to find the intention of the parties. The instrument, the nature of the transaction, and the language used must all have due regard given to them," and the intention of the parties is to be ascertained by the consideration of their language in accordance with its ordinary and natural meaning.

In *Larsen* v. *Sylvester & Co.* (3), Lord Loreburn and Lord Ashbourne repeated the warning of Fry J., that in loosely applying the doctrine *ejusdem generis* there may be great danger in "giving not the true effect" to the words used "but a narrower effect than they were intended to have." In *Anderson* v. *Anderson* (4), Rigby L.J. says: "The doctrine has, I think, frequently led to wrong conclusions on the construction of instruments". In the *Earl of Jersey's* case (5), Bowen L.J. says the rule "is after all but a working canon to enable us to arrive at the meaning of the particular document". In *In re Stockport* (6), Lindley M.R. says: "I am quite aware that there have been cases * * * where the court has protested against pushing the doctrine of *ejusdem generis* too far. It is very often pushed too far."

Prima facie, general words are to be given their natural meaning. In *Attorney General of Ontario* v. *Mercer* (7), Lord Selborne says: "It is a sound maxim of law that every word ought, *prima facie,* to be construed in its primary and natural sense, unless a secondary or more limited sense is required by the subject or the context", and this principle was applied by the Court of Appeal in *Anderson* v. *Anderson* (8), where Lord Esher said, in dealing with construction of general words appended to an enumeration of particulars, "I reject the supposed rule that general words are *prima facie* to be taken in a restricted sense."

(1) [1930] A.C. 244.
(2) [1910] 1 K.B. 410, at p. 416.
(3) [1908] A.C. 295, at p. 296.
(4) [1895] 1 Q.B. 749, at p. 755.
(5) (1889) 22 Q.B.D. 555, at p. 561.
(6) [1898] 2 Ch. 687, at p. 696.
(7) (1883) 8 App. Cas. 767, at p. 778.
(8) [1895] 1 Q.B. 749.

The appellants restrict "reversionary interest" to an interest which is of the nature of a reversion in the sense that it is something reserved to the grantor. But every postponed interest is like a reversion in the sense that it is a postponed interest. When one considers the first condition of section 6 (8), namely, that the property shall be held by the congregation "solely for its own benefit", one has some difficulty in understanding why the operation of that section should be limited to cases in which the denomination has no reversionary interest in the sense argued for. According to the contention, if the denomination had an interest which was reversionary in that sense, section 6 (8) does not operate and the property passes under section 4. But if it has an interest which is in the nature of a remainder, and therefore, according to the argument, not "reversionary", section 6 operates and the property does not pass. Why, for the purposes of the statute, such a distinction should be drawn, it is difficult to understand. In truth, I should think that the word "reversionary" was inserted *ex majore cautelâ* to make it clear that interests in reversion, and especially perhaps contingent interests in reversion, are interests within the meaning of the section; in other words, that "reversionary or otherwise" might accurately be paraphrased: "including those which are reversionary," or "reversionary or not."

In truth, the whole argument is founded on a mis-reading of the term "reversionary". "Reversionary interest" and "interest in reversion" are phrases quite broad enough to comprehend such an interest as that confronting us here. The strict technical sense of the word "reversion", as used in property law, does not at all govern the sense of these expressions. That such is not the case in respect of the expression in section 6 (8), should be sufficiently evident from the circumstances, first, that the enactment deals with personal property as well as real property, and, more important still, that it applies to property in Quebec no less than to property situated elsewhere. It is not necessary, however, to rely upon this last consideration. The common law knew no such thing as a remainder or reversion of a chattel. Successive interests in chattels may, of course, be created in equity and postponed interests under settlements of shares, choses in action, and other chattels per-

1930
FERGUSON
v.
MACLEAN.
Duff J.

sonal, as well as in chattels real, are referred to commonly and indeed usually as "reversionary interests". "All leases which are not to take effect in possession immediately, but from a future day, are considered as reversionary leases, within the meaning of powers to grant leases in possession and not in reversion." Woodfall's Law of Landlord and Tenant, 22nd ed., p. 254. "In legal acceptance, a future lease and a lease in reversion are synonymous. If a man make a lease for life, and afterwards grant the lands to another for 21 years after the death of the tenant for life, these words are sufficient to pass a reversionary interest by way of future lease." Woodfall, page 255.

The term "reversionary interest" is commonly used in text books and in reports of cases under various topics of the law, to describe future interests in real as well as personal property which are not by operation of law or otherwise interests reserved to the grantor or donor; but are merely interests which take effect at the expiration of a preceding estate or interest, or, as in the passage relating to leases quoted above from Woodfall, to interests which simply take effect in the future. It is perhaps superfluous to exemplify this. Osborne's "Concise Law Dictionary" defines "reversionary interest" as "any right in property the enjoyment of which is deferred, e.g., a reversion or remainder or analogous interests in personal property." This definition is too narrow if it implies that the term embraces only vested interests. Examples of this usage—they could be multiplied indefinitely—are to be found in: *Fry* v. *Lane* (1); *Honner* v. *Morton* (2); *Caldwell* v. *Fellowes* (3); *Purdew* v. *Jackson* (4); *Spring* v. *Pride* (5); *Butcher* v. *Butcher* (6); *Rose* v. *Cornish* (7); *Re Roy's Settlement* (8); *In Re Owen* (9); *Hugill* v. *Wilkinson* (10). The application of the phrase to interests which are contingent is illustrated in: *Hughill* v. *Wilkinson* (11); *In re Owen* (12); *Lloyd* v. *Prichard* (13).

(1) (1888) 40 Ch.D. 312, 318, 320 and 322.
(2) (1828) 3 Russ., 65, 67.
(3) (1870) L.R. 9 Eq. 410, 411.
(4) (1823) 1 Russ. 1.
(5) (1864) 4 De G.J. & S., 395. 396, 402, 403.
(6) (1851) 14 Beav. 222, 223.
(7) (1867) 16 L.T. 786.
(8) (1906) 50 S.J., 256, 257.
(9) [1894] 3 Ch. 220, 225.
(10) (1888) 38 Ch.D., 480, 482, 483.
(11) (1888) 38 Ch.D., 480, 482, 483.
(12) [1894] 3 Ch., 220, 225.
(13) [1908] 1 Ch., 265, 267, 272, 273.

It is necessary to add an observation with regard to section 29 of the New Brunswick Statute. It is in these words:

> The provisions of the Act of Incorporation shall have full force and effect with respect to any property or civil rights within this Province.

On behalf of the appellants, it is denied that this section can legally take effect. The argument is stated thus, in the factum:

> The Provincial Act was passed April 17, 1924, and at that time there was no Act of Incorporation, because the Dominion Act was not passed until July 19, 1924. Virtually, the Provincial Legislature attempted to give up its entire legislative authority to the Parliament of Canada without even seeing the terms of the legislation which Parliament intended to enact. Such a delegation of legislative authority is entirely contrary to the terms of the Act of Confederation.

The meaning of the phrase "Act of Incorporation" is made clear by reference to the preamble, the first paragraph of which is as follows:

> Whereas, the Presbyterian Church in Canada, The Methodist Church and the Congregational Churches of Canada have by their petition represented that they have agreed to unite and form one body or denomination of Christians under the name of "The United Church of Canada," in accordance with the terms and provisions of a Basis of Union agreed upon by them, and whereas they have petitioned the Parliament of Canada for an Act to incorporate the Church to be formed by the said Union under the name "The United Church of Canada."

It may be assumed that the Legislature of New Brunswick had before it not only the Basis of Union, but the Act of Incorporation as well, substantially in the form in which it eventually passed. Indeed, the very basis, the *raison d'être* of the New Brunswick Act was the contemplated Act of Incorporation. The design of creating the ecclesiastical corporation, the United Church, which was the subject of all the legislation, Dominion and provincial, was one which required in order to give it legal efficacy, the co-operation of the Dominion and provincial legislatures. The procedure was quite well understood. As far as its powers enabled it to do so, the Dominion Parliament was to give the sanction of law to the Act of Incorporation and the several provinces were, so far as their powers extended, to give legal effect to that enactment in respects in which the powers of the Dominion might fall short.

1930

FERGUSON v. MACLEAN.

Duff J.

I cannot doubt the validity, under the *British North America Act*, of such a procedure. In *Hodge* v. *The Queen* (1), the Privy Council said:

> It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plentitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme.

This statement of the law seems to be conclusive.

The appeal should be dismissed with costs.

NEWCOMBE J.—I am willing to accept the findings of my Lord, the Chief Justice, except with relation to the meaning and effect of the three sections relating to church and congregational property; namely, sections 5, 6 and 8 of the *United Church of Canada Act*, chapter 100 of the Dominion, 1924, and the identic sections, 3, 4 and 6 of the *United Church of Canada Act*, chapter 59 of New Brunswick, 1924. But in my opinion, the plaintiffs have no legal cause to complain or to seek any declaration or relief, even though the congregation has not consented that the provisions of the said sections, 5 and 6 of the Dominion, and 3 and 4 of the province, shall apply to its property, or to any part of it.

The congregation of St. James Presbyterian Church at Newcastle, not having passed a resolution of non-concurrence, was admitted to and declared to be a congregation of the United Church of Canada, on 10th June, 1925, by force of the *United Church of Canada Act*, chapter 100 of the Dominion, 1924; it entered the Union as a statutory consequence, and the property of the congregation passed with it, subject to the provisions of sections 6 and 8 of the Dominion Act, and the corresponding sections, 4 and 6, of the provincial Act. As set out in paragraph 3 of the statement of claim, the plaintiffs bring this action, not only for

(1) (1883) 9 App. Cas. 117, at p. 132.

themselves, but "as well for all persons having the same interest, to wit: all communicants, pew-holders and adherents of the said Church not concurring in or agreeing to Church Union under the Acts hereinafter mentioned"; and the Acts here referred to are those which I have cited above.

In my judgment of the case, it is not shewn, either by the allegations or the proof, that the plaintiffs have any right to the declarations or relief claimed. It is not denied that the body in question became, by the operation of the statutes, a congregation of the United Church of Canada, and the intention, as I interpret it, was not to detach the congregation from its separate property, but rather to recognize and uphold its independence in relation to that property, although with power of consent or election, which has not been exercised, to introduce the terms and provisions incorporated by sections 6 and 4 of the Dominion and Provincial Acts, respectively. Unless the congregation consent, the property which it holds, in the words of the statute, solely for its own benefit, and in which its denomination has no right or interest, must remain where it was when the Union became effective, namely, with the congregation, and its consent is entirely discretionary.

The non-concurring minority, formerly members of the congregation, if they still continue to belong to it, may, of course, agitate in a constitutional manner for the disposal of its property, within the scope of its powers; and I presume they might, if they wish, have a meeting convened for the purpose mentioned in the aforesaid sections, 8 and 6; but, they have not taken the prescribed steps, and obviously such a meeting is not what they claim or desiderate.

On the other hand, if the plaintiffs and those whom they represent have ceased to be members of the congregation, they have no longer any voice in the conduct or decision of the business or policy of the congregation, or in the disposition of its property.

Any other conclusions seem to leave the property unrepresented by any beneficial owner. It is neither in the United Church, nor in the congregation as it exists; and, unless that congregation is empowered to grant the con-

1930

FERGUSON v. MACLEAN.

Newcombe J.

sent provided for, the property is in the air; a result which, with all due respect, cannot possibly have been intended.

I would, therefore, dismiss the appeal.

LAMONT J.—This is an appeal from the judgment of the Appeal Division of the Supreme Court of New Brunswick dismissing the plaintiffs' action. The plaintiffs, who were members or adherents of St. James Presbyterian Church at Newcastle, N.B., not concurring in or agreeing to Church Union, brought this action for (*inter alia*) a declaration as to their rights in the property and assets of the Church, the majority of the congregation of which had voted in favour of entering the Union. Numerous arguments were advanced for the purpose of procuring a reversal of the judgment of the Appeal Division and of shewing that the plaintiffs had some right or interest in the church property. Of these I find it necessary to refer to one only, namely, that under section 6 of the New Brunswick Act (14 Geo. V, ch. 59) a second vote of the congregation was needed to decide whether or not the property of the church should pass with it into the Union and that as such vote had not been taken the church property was held by the trustees thereof for the use of the non-concurring members or at least for the use of those who, prior to the Union, had constituted the congregation.

The congregation of St. James Presbyterian Church, not having voted non-concurrence within the time fixed therefor by statute, became merged in the United Church of Canada on June 10th, 1925, by virtue of section 4 of the *United Church of Canada Act* (Dom.), 14-15 Geo. V, c. 100. Thereafter as a congregation it was part of the United Church.

The statutory provisions dealing particularly with the property of a congregation joining the Union, are sections 3, 4 and 6 of the New Brunswick Act, which are embodied in sections 5, 6 and 8 of the Dominion Act. Section 3 of the local Act, with certain reservations, vests in the United Church the properties of the uniting church organizations as distinguished from properties of the congregations. Section 4 deals with congregational property and provides that, subject to section 6, all property within the province belonging to or held in trust for any congregation of any of

the negotiating churches shall, from the coming into force of the section, be held, used and administered for the benefit of the same congregation as a part of the United Church, upon the trusts and subject to the provisions of a Model Deed set forth in the schedule. The property, therefore, of every congregation entering the Union was thereafter held by the trustees thereof upon the terms contained in the Model Deed, except in those cases falling within section 6. Section 6, upon which the appellants rely, reads as follows:—

> Any real or personal property belonging to or held by or in trust for or to the use of any congregation, whether a congregation of the negotiating churches or a congregation received into The United Church after the coming into force of this section solely for its own benefit, and in which the denomination to which such congregation belongs has no right or interest, reversionary or otherwise, shall not be subject to the provisions of Sections 3 and 4 hereof or to the control of The United Church, unless and until any such congregation at a meeting thereof regularly called for the purpose shall consent that such provisions shall apply to any such property or a specified part thereof.

It was contended that under certain New Brunswick statutes the Trustees of St. James Presbyterian Church held the church property in trust solely for the benefit of the congregation thereof and that the Presbyterian Church in Canada, as a denomination, had no right or interest, reversionary or otherwise, therein.

In the view I take of the rights of the parties, it is unnecessary to determine whether or not the contention is well founded. I will assume that it is, and that the denomination had no right or interest in the congregational property. As there was no consent given by the congregation to the application of the provisions of section 3 or section 4 to its property as provided for in section 6, those sections do not apply, and the only question is: For whom do the trustees, in whose names the property is vested, hold it in trust?

Section 6 was enacted to give effect to the agreement contained in a clause in the Basis of Union (Schedule "A" to the Dominion Act) which provided that any property owned by a congregation or vested in trust for it solely for its own benefit should not be affected by the legislation giving effect to the Union, or by any legislation of the United Church, without the consent of the congregation.

1930

FERGUSON v. MACLEAN.

Lamont J.

It therefore seems clear that in those cases to which section 6 applies it was the legislative intention that the congregational property should not be vested in the United Church or brought under the terms of the Model Deed unless and until the congregation by a proper vote consented thereto. No consent being given in this case, the congregational property, in my opinion, (and I state my conclusions merely) is held by the trustees thereof solely for the benefit of the congregation of St. James Church. That congregation, however, entered the Union and became a congregation of the United Church. In my opinion that does not affect its right to its property. By entering the Union it did not lose its identity (See Preamble to Dominon Act). The scheme of the legislation which brought about the union of the churches was to permit the majority to determine the action of the congregation. If the majority decided to enter the Union, the congregation, as a congregation, became part of the United Church. If the majority decided against entering the Union, the congregation remained outside the Union with all its property. The majority spoke for the congregation. The congregation of St. James Presbyterian Church, by entering the Union, effected a change in its name but not of its identity. Under the Act it was still the same congregation although some of its members refused to go with it into the Union. Those who did go thereafter constituted the congregation, and the trustees in whose names its property was vested held it after the Union for the benefit of that congregation, as a congregation of the United Church. Without the consent of the congregation duly given, as provided in section 6, the congregational property cannot be vested in the United Church nor brought under the terms of the Model Deed, but I fail to find anything in any of the legislation indicating an intention that a congregation on entering the Union was either to forfeit its property or share it with former members thereof now non-concurring, because it preferred to continue keeping for itself the absolute control over its own property and refused to give the United Church any interest therein or control thereover. The congregation, as it is constituted at the present time, is alone, in my opinion, beneficially interested in the property and entitled thereto.

1930

FERGUSON v. MACLEAN.

Lamont J.

This, as I see it, is the meaning and intent of the legislation. As the plaintiffs are no longer a part of the congregation in the Union, they have no valid claim to share in its property.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants: *Allan A. Davidson.*
Solicitor for the respondents: *Peter J. Hughes.*

1930

*Apr. 10, 11.
*Oct. 7.

IN THE MATTER OF A REFERENCE AS TO THE RESPECTIVE LEGISLATIVE POWERS UNDER THE BRITISH NORTH AMERICA ACT, 1867, OF THE PARLIAMENT OF CANADA AND THE LEGISLATURES OF THE PROVINCES IN RELATION TO THE REGULATIONS AND CONTROL OF AERONAUTICS IN CANADA.

Constitutional law—Aerial navigation—Dominion and provincial jurisdiction—International Convention—Paramount, not exclusive, Dominion jurisdiction—Intra-provincial aviation within provincial jurisdiction—"Navigation and Shipping"—B.N.A. Act, 1867, ss. 91, 92, 132—Supreme Court Act, R.S.C., 1927, c. 35, s. 55—Aeronautics Act, R.S.C., 1927, c. 3—Convention Relating to the Regulation of Aerial Navigation of 1919—Air Regulations, 1920.

The Dominion Parliament has not, independently of treaty, jurisdiction to legislate on the subject of air navigation generally, the word "generally" being construed as equivalent to "in every respect"; and it did not, by the International "Convention relating to the Regulation of Aerial Navigation," acquire, under section 132 of the B.N.A. Act, *exclusive* authority to legislate in such a way as to carry out the obligations the Convention imposes on Canada and its provinces. But the Dominion Parliament's jurisdiction is *paramount* in the exercise of its authority to carry out these obligations.

The subject of intra-provincial aviation *prima facie* falls within the legislative jurisdiction of the provinces under one or other of the heads of section 92 of the B.N.A. Act.

The control of aeronautics does not come within the subject of "Navigation and Shipping" assigned to the Dominion by section 91 (10) of the B.N.A. Act.

The Dominion Parliament, in relation to aeronautics, has legislative control over aircraft and aerial navigation, so far as incidentally necessary, in connection with various matters assigned under specific heads

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

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

of section 91, such as "The Regulation of Trade and Commerce," "Postal Service," "Militia, Military and Naval Service and Defence" and "Naturalization and Aliens."

As to the questions 3 and 4, concerning the provisions of section 4 of the *Aeronautics Act* and the "Air Regulations" of 1920, the members of the court (except Newcombe J. who raised a preliminary question as to the propriety of answering these questions and Cannon J.), considered that they were bound by section 55 of the *Supreme Court Act* to answer the questions submitted as fully as the circumstances permitted and, after examining these provisions and regulations, upheld certain of them as valid and denied the validity of others.

Per Anglin C.J.C. and Newcombe, Smith and Cannon JJ.—Legislative jurisdiction over intra-provincial flying *prima facie* belongs to the provinces under sub-section 13 of section 92 (Property and Civil Rights).

Per Anglin C.J.C. and Newcombe J.—Dominion powers derived under section 132 of the B.N.A. Act should be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined. The Dominion is, by that section, authorized to exercise these powers for performing its treaty obligations, and equally so for performing those of a province, irrespective of the question as to where the power would have resided if section 132 had not been enacted.

Per Anglin C.J.C. and Smith J.:—Although a province may effectively legislate for the performance of treaty obligations in regard to any matter falling within section 92 of the B.N.A. Act while the field is unoccupied by the Dominion (but not otherwise), Dominion legislation, being paramount, will, when enacted, supersede that of the province about such matters.

Per Anglin C.J.C. and Smith J.—The Dominion Parliament has legislative authority to sanction the making and enforcement of the Air Regulations, respecting the granting of licences to pilots and their suspension or revocation; the regulation, etc., and licensing of all aircraft; and also the licensing, inspection and regulation of all aerodromes and air stations described in the Convention, and, as to others, so far as may be necessary to prevent air navigators being confused or misled in locating and landing at aerodromes and air stations referred to in the Convention, or in reading ground markings made in pursuance of the Convention.

Per Duff, Rinfret and Lamont JJ.—The legislative jurisdiction of the provinces under s. 92 runs through the space above the surface of provincial territory as through the surface itself and the space below; and the matters comprised within the subject of aviation primarily fall within that jurisdiction.—"Navigation and Shipping," within the meaning of Head 10 of s. 91, does not embrace that subject. The Dominion may exercise legislative jurisdiction in relation to aviation in the course of executing its authority over various matters which fall within certain of the enumerated heads of s. 91 or within the subject of Immigration (s. 95); it may also exercise such authority under s. 132 where the conditions exist under which that section comes into play. These conditions are, first, that there exists an obligation of

Canada or of a province(as part of the British Empire) towards a foreign country arising under a treaty between the Empire and a foreign country, and, second, that the obligation relates to the subject of aviation or in some manner affects it. The powers arising under that section are given for performing such obligations, and can only be validly exercised in the performance of, and for the purpose of performing, them. Legislation enacted in the valid exercise of such powers takes effect notwithstanding any conflicting law of a province; the Dominion has full competence under s. 132 to give effect by legislation to the rules embodied in the Convention of 1919, and to take measures for the effectual enforcement of them.—Any conflicting or repugnant provincial rules would be superseded by such legislation. The Heads of s. 91 which come under consideration in answering the questions submitted are no. 5, the Postal Service; no. 7, Military, Militia and Naval Service and Defence; no. 11, Quarantine; no. 25, Naturalization and Aliens; no. 2, the Regulation of Trade and Commerce; no. 3, Raising of Money by any Mode or System of Taxation. Under these Heads, the Dominion is entitled to exercise legislative control over the use of aircraft in carrying mails; over the conditions under which goods, mails or passengers may be imported and exported in aircraft into or from Canada; in respect of (in this case, in conjunction with s. 132) the prohibition of the navigation of aircraft over prescribed areas; over landing places for aircraft entering Canada and the conditions of such entry; in relation to the Air Force. The specific question as to the authority of the Dominion to control aerial locomotion between the provinces does not arise under any interrogatory submitted, upon any construction of the interrogatories. Likewise, no question arises (upon any reasonably possible construction of any of the interrogatories) in relation to Dominion legislative authority (under Head 29 of s. 91) in respect of the exceptions defined in Head 10 of s. 92, in their application or possible application to "lines" or regular services of aircraft between two provinces; or in their application to such "lines" or regular services beyond Canada. S. 4 of the *Aeronautics Act*, which is a re-enactment of the statute of 1919, and must not be treated as new law, cannot be regarded as having been enacted under s. 132 for the purpose of giving effect to the Convention of that year, because the Convention did not come into force until after the passing of the statute. S. 4 proceeds upon the theory that the Dominion has, independently of s. 132, complete control over the subject of aerial navigation in every respect, and by that section the Minister is given unrestricted authority to regulate and control such navigation in all its aspects, and particularly, in relation to certain matters enumerated by way of example. Parliament herein professes to exercise an authority which it does not possess, and s. 4 is, in its entirety, *ultra vires;* and consequently, the regulations promulgated under it. Treating, however, interrogatory no. 3 as requiring the court to express its opinion as to the severable matters enumerated in s. 4, as subjects of legislative jurisdiction, and as to the authority of Parliament, in view of the Convention of 1919, or otherwise, to enact s. 4 in relation to such severable matters or any of them, then the answer to interrogatory no. 3 is that, as regards the matters specified above (which are among the severable matters particularized in s. 4) Parliament has jurisdiction under s. 91 or s. 95; as regards

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

identification and inspection of aircraft, and as regards inspection of aerodromes and air stations, Parliament has jurisdiction, in view of the Convention of 1919, under s. 132. While legislation under s. 132, for performing the obligations of Canada under the Convention of 1919, might properly include regulations in relation to registration and certification of aircraft and licensing of personnel and air harbours, if aptly framed to secure the performance of such obligations, and limited to that, the unrestricted powers in relation to such subjects which Parliament professes to exercise by s. 4 are neither "necessary" nor "proper" for performing those obligations. Answering question no. 4 on a similar assumption, the regulations on the subjects mentioned are not aptly framed for the purpose of performing the obligations under the Convention of 1919. The vice of the principal regulations (speaking generally) is that they are too sweeping in character to fall within the category of legislation "proper or necessary" for performing these obligations. The precise answers to questions 3 and 4 are given in the judgment.

Per Newcombe J.—The language of section 132 does not require, either expressly or by necessary implication, nor does it suggest, that a province should thereby suffer diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity, on the part of the Dominion, which, in relation to provincial obligations, is no more than concurrent, so long as these are not performed by the province. The case of obligations to be performed for which a province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by section 132; and while, pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, the Dominion power cannot be interpreted as meaning to deprive the province of authority to implement its obligations. If that had been the intention it would have been expressed.

Per Newcombe J.—The right of way exercised within a province by a flying machine must, in some manner, be derived from or against the owners of the property traversed, and the power legislatively to sanction such a right of way appertains *prima facie* to property and civil rights in the province, although it may be overborne by ancillary Dominion powers, where they exist.

Per Newcombe J.—This court ought not to determine under the present procedure question no. 2 which involves the definition of treaty obligations and the ascertainment, judicially, of the interest of foreign sovereign parties to the Convention, who are unrepresented and cannot be convened, especially so, seeing that the interpretation of the Convention is, by its article 37, to be determined by the Permanent Court of International Justice, or, previously to the establishment of that court, by arbitration. The inadvisability of that question being answered should be called to the attention of the Governor General.

Per Cannon J.—The Dominion Parliament may have paramount legislative and executive power for performing the obligations of Canada, or any province thereof, under the Convention, but has not yet found it necessary or proper to exercise such legislative power. If the provinces refuse or neglect to do their share within their legislative ambit with sufficient uniformity to honour the signature of the

Dominion, the latter, being compelled to do so, may pass necessary and proper legislation to perform treaty obligations.

Per Cannon J.—Aviation was not foreseen nor considered when the enumeration of section 91 was made; and the words "Property and Civil Rights" in section 92 are wide enough to give power to the provinces to legislate, with the required uniformity, to ensure safe and satisfactory regulation of aircraft throughout the Dominion and conform to the new requirements of international law since the sovereignty of each state over the air space above its territory was proclaimed in 1919.

REFERENCE by the Governor General in Council to the Supreme Court of Canada for hearing and consideration, pursuant to the authority of s. 55 of the *Supreme Court Act,* R.S.C., 1927, c. 35.

The facts and questions, as stated in the Order in Council, are as follows:

"The Committee of the Privy Council have had before them a report, dated 27th February, 1929, from the Minister of Justice, submitting that by the *Air Board Act,* Chapter 11 of the Statutes of Canada, 1919, (1st session), (which, with amendments thereto, is consolidated in the Revised Statutes of Canada, 1927, under the title of *The Aeronautics Act,* Chapter 3 of the said Revised Statutes), provision was made by the constitution under the authority thereof of a Board on Aeronautics (called the Air Board) and the vesting in the Board of the administrative duties and powers thereby given to it (which duties and powers were by the National Defence Act, 1922, Chapter 34 of the Statutes of Canada, 1922, vested, by way of transfer, in the Minister of National Defence), and by the Air Regulations, 1920, and amendments thereto, approved by the Governor in Council under the authority of the said Act, for the regulation and control in a general and comprehensive way of aerial navigation within Canada and over the territorial waters thereof.

"The Minister apprehends that this legislation was enacted by Parliament by reason not only of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interests, but also of the necessity of making provision for performing the obligations of Canada, as part of the British Empire under the Convention relating to the regulation of Aerial Navigation which, drawn up by a Commission constituted by the Peace Conference at Paris in 1919, was, on 13th October of that year, signed by the representatives of 26 of the Allied and Associated Powers including Canada.

"This Convention was ratified by His Majesty on behalf of the British Empire on 1st June, 1922, and is now in force, as the Minister is informed, as between the British Empire and 17 other States.

"The Minister observes that the Air Regulations, 1920, conform in essential particulars to the provisions of the said Convention, and are designed to give effect to the stipulations thereof in discharge of the obligations of Canada, as part of the British Empire, towards the other contracting States.

"The Minister states that at the conference at Ottawa between representatives of the Dominion and the several Provincial Governments in the month of November, 1927, the representatives of the Province of Que-

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

bec raised a question as to the legislative authority of the Parliament of Canada to sanction regulations for the control of aerial navigation generally within Canada, at all events in their application to flying operations carried on within a Province; and it was agreed that the question so raised was a proper question for the determination of the Supreme Court of Canada.

"The Committee, therefore, on the recommendation of the Minister of Justice, advise that Your Excellency may be pleased to refer the following questions to the Supreme Court of Canada for hearing and consideration pursuant to the provisions of section 55 of the *Supreme Court Act,* R.S.C., 1927, chapter 35:—

"1. Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof, under the Convention entitled 'Convention relating to the Regulation of Aerial Navigation'?

"2. Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a province, necessary or proper for performing the obligations of Canada, or of any province thereof, under the Convention aforementioned, within the meaning of section 132 of the *British North America Act,* 1867?

"3. Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of section 4 of the *Aeronautics Act,* chapter 3, Revised Statutes of Canada, 1927?

"4. Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part of the regulations contained in the Air Regulations, 1920, respecting—

(*a*) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences;

(*b*) The regulation, identification, inspection, certification, and licensing of all aircraft; and

(*c*) The licensing, inspection and regulation of all aerodromes and air stations?"

Section 4 of *The Aeronautics Act,* R.S.C., 1927, c. 3, reads as follows:

"4. Subject to approval by the Governor in Council, the Minister shall have power to regulate and control aerial navigation over Canada and the territorial waters of Canada, and in particular, but not to restrict the generality of the aforegoing terms of this section, he may, with the approval aforesaid, make regulations with respect to

(*a*) licensing pilots and other persons engaged in the navigation of aircraft, and the suspension and revocation of such licences;

(*b*) the registration, identification, inspection, certification and licensing of all aircraft;

(*c*) the licensing, inspection and regulation of all aerodromes and air stations;

(*d*) the conditions under which aircraft may be used for carrying goods, mails and passengers, or for the operation of any commercial service whatsoever and the licensing of any such services;

(*e*) the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada or within the limits of the territorial waters of Canada, or may be transported over any part of such territory;

(*f*) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified;

(*g*) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft;

(*h*) aerial routes, their use and control;

(*i*) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada; and

(*j*) organization, discipline, efficiency and good government generally of the officers and men employed in the Air Force.

2. Any person guilty of violating the provisions of any such regulation shall be liable, on summary conviction, to a fine not exceeding one thousand dollars, or to imprisonment for any term not exceeding six months, or to both fine and imprisonment.

3. All regulations enacted under the provisions of this Act shall be published in the *Canada Gazette*, and, upon being so published, shall have the same force in law as if they formed part of this Act.

4. Such regulations shall be laid before both Houses of Parliament within ten days after the publication thereof if Parliament is sitting, and if Parliament is not sitting, then within ten days after the next meeting thereof. 1919, c. 11, s. 4; 1922, c. 34, s. 7.

The *Air Regulations* of 1920, which are referred to in the judgments now reported, are the following:

3. (1) Except aircraft flown only for the purpose of experiment or test within three miles of an airharbour, kites and fixed balloons, no aircraft shall fly unless it has been registered as herein provided. *See I.C., Art. 5.*

(2) This paragraph does not apply to aircraft duly registered in some other state or a foreign country with which Canada has made a Convention relating to interstate flying. (Amendment dated Jan. 15, 1924.)

4. Subject as hereinafter provided, the Air Board may define the conditions under which, and the mode in which aircraft may be primarily registered in Canada. *New.*

5. No aircraft shall be primarily registered in Canada unless it belongs wholly to a British subject or British subjects, or to a company which has been incorporated in His Majesty's Dominions, and of which the president or chairman and at least two-thirds of the directors are British subjects. *See I.C., Art. 7.*

6. No aircraft shall be primarily registered in Canada while it is so registered in any other of His Majesty's dominions, or in any foreign country, but it may be primarily registered in Canada upon cancellation

1930

REFERENCE re REGULATION AND CONTROL OF AERONAUTICS IN CANADA

of an earlier registration in such other Dominion or foreign country. *See I.C., Art. 8.*

7. No aircraft shall be primarily registered in Canada unless either it has been built or made in Canada or any customs duties which are or would become payable upon the importation of the aircraft into Canada have been paid. *New.*

8. (1) Upon every registration in Canada the Minister of National Defence shall assign to the registered aircraft a registration mark and shall grant a certificate of registration for which there shall be payable a fee of $5.

(2) In the event of any change in the ownership of an aircraft registered in Canada, then

(*a*) The registered owner shall forthwith notify the Department of National Defence, and

(*b*) The registration and certificate thereof shall lapse as from the date of such change of ownership. (Amendment dated Jan. 15, 1924.)

9. When a registered aircraft has been destroyed or permanently withdrawn from use, the registered owner shall as soon as possible notify the Department of National Defence accordingly, and the registration and the certificate thereof shall lapse as from the date of such notification.

(2) Certificates of registration shall not remain valid unless endorsed by the Minister of National Defence at intervals not exceeding twelve calendar months. (Amendment dated January 15, 1924.)

10. It shall be a condition of the primary registration in Canada of any aircraft that, upon the Governor in Council declaring that a national emergency exists or is immediately apprehended, every such aircraft shall be subject to requisition in the name of His Majesty by the Air Board or any officer of the Canadian Air Force, and upon being so requisitioned shall become the property of His Majesty, subject to its return or to the payment of compensation or to both as may be provided by law. *New.*

(2) The registration in Canada of any aircraft primarily registered in any of His Majesty's dominions other than Canada shall be subject to the like condition unless, under the law of that one of His Majesty's dominions in which the aircraft was primarily registered, it is subject to a paramount right to be requisitioned on His Majesty's behalf. *New.*

11. Any certificate of registration of an aircraft may be suspended or cancelled at any time by the Air Board for cause. *New.*

12. (1) No aircraft registered in Canada shall fly beyond Canada unless it has been certified as airworthy by the Department of National Defence.

(2) Except private aircraft flying wholly within Canada, all aircraft registered in Canada shall be certified as airworthy by the Department of National Defence.

(3) Every aircraft entering Canada from abroad shall be in possession of a certificate of airworthiness issued by the proper authority of the foreign country or of the Dominion, Colony or Possession of His Majesty in which it is registered. (Amendment dated January 15, 1924.)

15. No aircraft required to be registered shall fly unless it bears the prescribed nationality and registration marks. *See I.C., Art. 10.*

16. In the case of an aircraft primarily registered in Canada the nationality mark shall be the letter "G" and the registration mark the assigned combination of four capital letters commencing with the letter "C." The marks shall be painted in black on a white ground in the following manner:—

(*a*) On flying machines the marks shall be painted once on the lower surface of the lower main planes and once on the upper surface of the top main planes, the top of the letters to be towards the leading edge. They shall also be painted along each side of the fuselage between the main planes and the tail planes. In case the machine is not provided with a fuselage the marks shall be painted on the nacelle.

(*b*) On airships the marks shall be painted near the maximum cross section on both sides so as to be visible both from the sides and from the ground and on the upper surface equidistant from the letters on the sides.

(*c*) On balloons the marks shall be painted on two sides near the maximum cross section so as to be visible both from the sides and ground, and on the upper surface equidistant from the marks on the sides.

(*d*) On flying machines and airships the nationality mark shall also be painted on the right and left sides of the lower surface of the lowest tail planes or elevators and also on the upper surface of the top tail planes or elevators, whichever are the larger. It shall also be painted on both sides of the rudder or on the outer sides of the outer rudders if more than one rudder is fitted.

(*e*) On balloons the nationality mark shall also be painted on the basket.

(*f*) The nationality and registration marks need in no case exceed eight feet in height, but subject to this provision shall be as hereafter specified.

(*g*) On flying machines the height of the marks on the main planes and tail planes respectively shall be equal to four-fifths of the chord, and in the case of the rudder shall be as large as possible. The height of the marks on the fuselage or nacelle shall be four-fifths of the depth of the narrowest part of that portion of the fuselage or nacelle on which the marks are painted.

(*h*) On airships the nationality marks painted on the tail plane shall be equal in height to four-fifths of the chord of the tail plane and on the rudder the marks shall be as large as possible. The height of the other marks shall be equal at least to one-twelfth of the circumference at the maximum transverse cross section of the airship. On balloons the height of the nationality mark on the basket shall be four-fifths of the height of the basket, and the height of the other marks shall be equal to at least one-twelfth of the circumference of the balloon.

(*i*) The width of the letters shall be two-thirds of their height and the thickness shall be one-sixth of their height. The letters shall be painted in plain block type and shall be uniform in shape and size. A space equal to half the width of the letters shall be left between the letters.

(*j*) Except in state and commercial aircraft, the nationality and registration marks shall be underlined with a black line. The

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

thickness of the line shall be equal to the thickness of the letter and the space between the bottom of the letters and the line shall be equal to the thickness of the line.

(*k*) Where the nationality and registration marks appear together, a hyphen of a length equal to the width of one of the letters shall be painted between the nationality mark and registration mark.

(*l*) The nationality and registration marks shall be displayed to the best possible advantage, taking into consideration the constructional features of the aircraft. The marks must be kept clean and visible. *See I.C., Annex A.*

17. All aircraft, except kites, shall carry affixed to the car or to the fuselage in a prominent position a metal plate inscribed with the names and residences of the owners and the nationality and registration marks of the aircraft. *See I.C., Annex A, I (d).*

18. No place, building, or work shall be used as an airharbour unless it has been licensed as herein provided. *New.*

19. Licences to airharbours may be issued by the Air Board and may be made subject to such conditions respecting the aircraft which may make use of the airharbour, the maintenance thereof, the marking of obstacles in the vicinity which may be dangerous to flying and otherwise, as the Air Board may direct. *New.*

21. The licence of an airharbour may be suspended or cancelled by the Air Board at any time for cause and shall cease to be valid two weeks after any change in the ownership of the airharbour, unless sooner renewed to the new owner. *New.*

22. Every licensed airharbour shall be marked by day and by night as may be from time to time directed by the Air Board. *See I.C., Annex F, II.*

23. The owner of any licensed airharbour shall be permitted to charge for the use of the harbour or for any services performed only such fees as have been approved by the Air Board for such airharbour. The tariff shall be prominently posted up at the airharbour. *New.*

24. (1) No person shall without authority of the Air Board—

(*a*) mark any unlicensed surface or place with any mark or display any signal calculated or likely to induce any person to believe that such surface or place is an airharbour or emergency alighting ground;

(*b*) knowingly use or permit the use as an airharbour of any unlicensed place;

(*c*) knowingly use or permit the use of an airharbour for any purposes other than those for which it has been licensed.

(2) The onus of proving the existence of any authority or licence shall be upon the person charged. *New.*

25. No water-craft shall cross or go upon that part of the water area forming part of any seaplane station which it is necessary to keep clear of obstruction in order that flying machines may take off and alight in safety, having regard to the wind and weather conditions at the time, and every person in charge of a watercraft is guilty of a breach of these regulations if such craft crosses or goes upon such area after reasonable warning by signal or otherwise. *New.*

26. There shall be kept at every licensed airharbour a register in which there shall be entered immediately after the alighting or taking off of an aircraft a record showing the nationality and registration marks of such aircraft, the name of the pilot and the hour of such alighting or taking off. *New.*

27. (1) Every licensed airharbour, and all aircraft and the goods therein shall be open to the inspection of any customs or immigration officer or any officer of or other person authorized by the Air Board, but no building used exclusively for purposes relating to the construction of aircraft or aircraft equipment shall be subject to inspection except upon the special written order of the Chairman or Vice-Chairman of the Air Board. *New.*

(2) All state aircraft shall have at all reasonable times, the right of access to any licensed airharbour, subject to the conditions of the licence.

(Amendment dated Jan. 15, 1924.)

28. It shall be a condition of every licence to any airharbour that in case the Governor in Council declares that a national emergency exists or is immediately apprehended, the owner of such airharbour shall comply with such directions, if any, with respect to the use of the airharbour as may be given by the Air Board or an officer of the Canadian Air Force, subject only to the payment of such compensation as may be provided by law. *New.*

29. At every licensed airharbour the direction of the wind shall be clearly indicated by one or more of the recognized methods, e.g., alighting tee, conical streamer, smudge fire, etc. *See I.C., Annex D, 40.*

30. At every licensed aerodrome and seaplane station, if an aircraft about to land or leave finds it necessary to make a circuit or partial circuit, such circuit or partial circuit shall, except in case of distress, be left-handed (anti-clockwise).

(Amendment dated Jan. 15, 1924.)

31. At every aerodrome and seaplane station licensed for use by the public at night there shall at night be exhibited a red light to indicate a left-hand circuit or a green light to indicate a right-hand circuit. *See I.C., Annex D., 46 (a).*

32. Every licensed aerodrome shall be considered to consist of three zones when looking up-wind. The right-hand zone shall be the taking-off zone and the left-hand shall be the alighting zone. Between these two there shall be a neutral zone. If the centre of the aerodrome is marked, the taking-off and alighting zones shall commence fifty yards to the right and left respectively of the centre of such mark. *I.C., Annex D, 44.*

33. No person shall act as pilot of any aircraft or as navigator, engineer or inspector of any commercial aircraft, or of any aircraft primarily registered in Canada when flying outside Canada unless such person holds a certificate issued by the Air Board authorizing him to so act. *See I.C., Art. 12.*

(2) This paragraph shall not apply,—

(a) to persons under instruction flying over water or, with the consent of the owner or owners, over an airharbour and such additional surrounding area as is approved by the Air Board, or

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

(*b*) to pilots, navigators and engineers of aircraft registered in another contracting state, or a foreign country with which Canada has made a convention relating to interstate flying, who hold licences authorizing them to act as such, issued by the proper authority in the contracting state or foreign country in which the aircraft is registered.

(Amendment dated Jan. 15, 1924.)

34. (1) Certificates to pilots, navigators and engineers may be issued by the Air Board and may be limited in time and to flying only under specified conditions, for specified purposes, in specified types of aircraft, on specified routes or otherwise. *New.*

(2) Licences issued by a duly competent authority within His Majesty's Dominions, Colonies or Possessions, to a pilot, navigator, or engineer shall for the purpose of these regulations have the same validity and effect as if they had been issued under these Regulations. (Amendment dated Jan. 15, 1924.)

35. Certificates to inspectors may be issued by the Air Board and may be limited in time, to specified types of aircraft, or otherwise. *New.*

36. A fee not exceeding $5 may be charged for any certificate issued under this Part IV. *New.*

37. No person who is not a British subject or a subject of a foreign country which grants reciprocal aeronautical privileges to Canadians on equal terms and conditions with subjects of such foreign country shall be issued with a certificate authorizing him to act as pilot, navigator, engineer or inspector of commercial or state aircraft.

38. A certificate issued to any pilot, navigator, engineer or inspector may be suspended or cancelled at any time by the Air Board for cause, including the failure to comply beyond Canada with the provisions of Parts V, VI, VII and VIII of these regulations. *New.*

116. Every aircraft carrying five persons or more and bound on a flight by night, or on a continuous flight overland between two points more than 300 miles apart, or on a flight over sea between two points more than 125 miles apart, shall have on board a person holding a navigator's certificate. *See I.C., Annex E, IV.*

118. Every aircraft in flight shall have on board its certificate of registration, the certificate of airworthiness, if any, the licences of all the members of the crew requiring licences, the authority and licence for the equipment and working of the wireless installation, if any, and a journey log book containing the following particulars:—

(*a*) The category to which the aircraft belongs; its nationality and registration marks; the full name, nationality and residence of the owner; the name of the maker, the description and the carrying capacity of the aircraft.

(*b*) In addition for each journey:—

(i) A record of all signals and wireless communications and observations concerning navigation;

(ii) The names, nationality and residence of the pilot and of each of the members of the crew;

(iii) The place, date and hour of departure, the route followed, and all incidents of the journey, including alightings. (Amendments dated January 15, 1924.)

124. (1) No aircraft of a state with which Canada has not concluded a convention relating to interstate flying and no foreign military aircraft shall fly over or alight in Canada except with the express written permission of the Minister of National Defence. (Amendment dated Jan. 15, 1924.)

(2) No aircraft shall engage in the carriage of persons or goods for hire between points in Canada unless it is registered as a commercial aircraft in Canada or in some other of His Majesty's Dominions, Colonies or Possessions, nor shall any aircraft carry out any operation for remuneration or reward wholly within Canada unless it is registered as a commercial aircraft in Canada, in some other of His Majesty's Dominions, Colonies or Possessions, or in a contracting State to the International Convention for Air Navigation. (Amendment dated April 12, 1924.)

L. Cannon K.C. and *C. P. Plaxton K.C.* for the Attorney-General of Canada.

F. D. Hogg K.C. for the Attorney-General of Ontario.

Aimé Geoffrion K.C. for the Attorney-General of Quebec.

F. H. Chrysler K.C. for the Attorney-General of Manitoba.

ANGLIN C.J.C.—I have had the advantage of reading the carefully prepared opinions of my brothers Newcombe, Smith and Cannon.

By s. 55 of the *Supreme Court Act* (R.S.C., 1927, c. 35), this court is required to "hear and consider"

> Important questions of law or fact touching
>
> (*a*) the interpretation of the *British North America Acts*, or
>
> (*b*) the constitutionality or interpretation of any Dominion or provincial legislation; or
>
> (*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised; or
>
> (*e*) any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;
>
> * * * and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question * * *;

and it is declared to be

> the duty of the Court * * * to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; * * *

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Anglin C.J.C.

Lord Chancellor Haldane, in the *British Columbia Fisheries* Case, *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1), contrasting the position of this court with that of the Judicial Committee of the Privy Council, trenchantly observed that

> The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament.

While I agree with Mr. Justice Newcombe that the advisability of propounding for the consideration of the court abstract questions, or questions involving considerations of debatable fact, is, to say the least, doubtful; that it is undesirable that the court should be called upon to express opinions which may affect the rights of persons not represented before it, or touching matters of such a nature that its answers must be wholly ineffectual in regard to parties that are not, and cannot be, brought before it (e.g., foreign governments); and that, where the court is asked to hear and determine any such question, it is entirely proper for it to represent to the Governor in Council the undesirability of its being called upon to do so (*Attorney-General for Ontario* v. *Attorney-General for Canada* (2), in the present instance I do not find in the questions submitted enough that is objectionable to justify the adoption of that course. On the contrary, as I understand the questions, they can be, at least partially, answered without going beyond the clear jurisdiction of the court or expressing an opinion upon any debatable matter affecting foreign governments. So far as concerns the interests of private parties in the several provinces, the questions submitted touch them only obliquely, inasmuch as they are directed to the respective legislative powers of the Dominion and the provinces. Such private interests are probably sufficiently represented by counsel for the several provinces concerned; but, if not, by subs. 4 of s. 55, the court is empowered to direct notice to any persons interested, or, where there is a class of persons interested, to nominate one or more persons as representatives thereof, and, by subs. 5, it may, in its discretion request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear. I am, accordingly, unable to accept the view

(1) [1914] A.C. 153, at p. 162. (2) [1912] A.C. 571, at pp. 588-9.

that there is here such absence, or non-representation, of parties interested as would justify our declining to answer the questions submitted.

As I read the opinions of my three learned brothers, they all agree that "the Convention relating to the regulations of Aerial Navigation," dated the 13th of October, 1919, is "a treaty between the Empire and foreign countries," within the meaning of s. 132 of the B.N.A. Act. They are also in accord in regarding intra-provincial aviation as, *prima facie,* a matter of provincial legislative jurisdiction and as falling within the purview of s. 92 (13) of the B.N.A. Act; and I share those views.

When it comes, however, to the question of how far, and under what circumstances, Dominion legislative power supersedes that of the provinces in regard to aviation, my learned brothers differ, *toto coelo.* While Newcombe and Cannon JJ. recognize the power of Parliament, under s. 132, to legislate

* * * for (the) performing (of) the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries,

they are not prepared to admit that that power involves or implies the supersession of provincial by Dominion legislation under the circumstances of the case now before us.

My brother Smith, while of the opinion that the power of Parliament, under s. 132, is not "exclusive", but merely "paramount" (so far Cannon J. agrees), holds the view that the circumstances of the present case, as disclosed in the record, justify its exercise regardless of any provincial legislation, existing, or proposed, or possible. My brother Cannon, on the other hand, thinks that, in regard to matters of provincial legislative competence, the power conferred on Parliament by s. 132 arises only in the absence of adequate provincial legislation, and that Parliament may not anticipate failure or refusal on the part of any province to pass "necessary or proper" legislation for performing its obligations under the treaty, or that identic legislation (and regulations) will not be enacted by the legislatures of the several provinces interested. Mr. Justice Newcombe, I understand, shares the views of my brother Cannon in this regard.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Anglin C.J.C.

My brother Newcombe, as I read his judgment, is further of the opinion that questions nos. 1 and 2 cannot be answered without first ascertaining in detail the precise obligations imposed by the treaty on Canada, or any of its provinces, and that this court should not be called upon to answer these questions because of the fact that the other contracting parties, viz., the foreign governments concerned, are not before it. If I found it necessary to interpret in detail the entire Convention, I would be disposed to accept my brother Newcombe's view; but, in my opinion, it is necessary only to envisage the Convention as a whole, to ascertain its general tenor and to discern its obvious purpose and to determine a very few of the outstanding obligations imposed by it in terms so clear that their meaning admits of no dispute, and, therefore, does not require interpretation.

With regard to the power of Parliament to implement any term of a treaty, it is entirely competent to, and, indeed, it is the duty of this court, explicitly imposed by s. 55 (d) of the *Supreme Court Act,* to advise the Government of Canada, if duly called upon to do so, as to the meaning and effect of such treaty and as to the right of Parliament to enact legislation necessary to carry it out, whether or not the government proposes to legislate in regard thereto.

I agree with the view taken by my brother Smith as to the obligations of Canada (and its several provinces) created by the treaty in question, so far as he has found it necessary to define them, and with his conclusion as to the powers of Parliament under s. 132 of the B.N.A. Act with respect thereto.

The first question submitted, it will be noted, is framed almost in the language of s. 132, although it omits some significant phrases thereof and inserts words which may be regarded as important. For instance, the word "exclusive" is inserted. The word "exclusive" is not found in the section. Again, for the words "all powers necessary or proper" are substituted the words "legislative and executive authority"; the words of the section "as part of the British Empire, towards foreign countries" are omitted; and for the words of the section "arising under treaties between the Empire and such foreign countries"

are substituted the words "under the Convention entitled 'Convention relating to the Regulation of Aerial Navigation'".

It will be perceived that the word "exclusive" appears to introduce an idea quite foreign to s. 132 and not warranted by anything which that section contains. I agree with the view of my brother Smith that, if the question is to be answered in the affirmative, the word "paramount" must be substituted for "exclusive". It might also be better to insert the words "as part of the British Empire, towards Foreign Countries" immediately after the word "thereof", so as definitely to limit the question and answer to the very matter dealt with by s. 132.

I fail to appreciate my brother Newcombe's difficulties in regard to the meaning and scope of question no. 2, and as to the right and duty of this court to hear and consider it and to express its opinion to the best of its ability upon the matter thereby submitted to it. While the Judicial Committee is, no doubt, in a position, as it did in the *British Columbia Fisheries* Case, (1) to decline to answer questions which it thinks cannot conveniently be dealt with, this court has no such discretion. As to it, the statute is imperative.

Question no. 2 is distinctly directed to the validity of legislation of the character described, under the authority of s. 132 of the B.N.A. Act. The general application of the maxim *audi alteram partem* is beyond dispute. But, in a question of legislative power as between the Dominion and its provinces, submitted to the court by the Governor General in Council, the provinces are "the other party" —and they have been heard. As pointed out by my brother Smith, s. 37 of the Convention provides for the adjudication of disputes between contracting parties to it as to its interpretation. Nothing which this court may do in the present reference can affect any such matter.

My three brothers are also in accord with regard to the legislative control of Parliament over aircraft and aerial navigation in connection with various matters assigned by s. 91 of the B.N.A. Act to the Dominion, such as military and naval service, defence, postal service, customs, aliens, regulation of trade and commerce, etc. How far the exer-

(1) [1914] A.C. 153.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Anglin C.J.C.

cise of powers necessarily incidental to such control may be made effectual, without regulating and controlling aeronautics generally, is, to say the least, questionable; but question no. 2, as I read it, is not directed to that aspect of the case, but rather to the bearing of s. 132 of the B.N.A. Act upon Dominion legislative jurisdiction. In this connection, my brother Newcombe very properly observes that

> Dominion powers derived from s. 132 should be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined * * * irrespective of the question as to where the power would have resided if s. 132 had not been enacted.

My brother Smith also agrees with Newcombe and Cannon JJ. in holding that the control of aeronautics in no sense comes within the subject of "Navigation and Shipping" assigned by s. 91 (10) of the B.N.A. Act to the Dominion. In that view I entirely concur.

While it is quite true that the Dominion Act of 1919 antedated the Convention under consideration, and, consequently, cannot be regarded as having been enacted by Parliament in the exercise of its jurisdiction conferred by s. 132 as legislation

> necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries

under that Convention, as Mr. Justice Cannon points out, the statute which we have to consider, is not the Act of 1919, but c. 3 of R.S.C., 1927, which became law on the 1st of February, 1928, long after the date of the Convention. So far as this legislation implements the Conventional obligations its validity may probably be upheld under s. 132 of the B.N.A. Act.

I understand Mr. Justice Cannon to concur in the view of Mr. Justice Smith that

> Parliament and the Government of Canada have paramount, though not exclusive, jurisdiction to legislate for the performance of all treaty obligations of Canada or any province thereof under the Convention.

Mr. Justice Cannon, however, adds that

> Parliament has not yet found it necessary or proper to exercise this legislative power.

With deference, I can hardly accede to this latter view.

Dealing with s. 4 as giving to the Minister single and complete control over aerial navigation throughout Canada and the territorial waters of Canada in all respects, followed by enumeration of certain matters by way of illustration

merely, such enumeration being preceded by the words "and in particular, but not to restrict the generality of the foregoing terms of this section," I would answer question no. 3 in the negative. But, I agree with my brothers Smith and Newcombe that it is scarcely possible fully to answer question no. 3 if it requires consideration in detail of each enumerated subhead under subs. 4. The regulations adopted by the Governor General in Council, under the provisions of s. 4 of the *Aeronautics Act* (R.S.C. 1927, c. 3) are so general and comprehensive in their terms that it would require minute and meticulous consideration of each of them before deciding whether or not it is necessary or proper in order to implement some treaty obligation within s. 132 of the B.N.A. Act, or may be defended as an exercise of power necessarily incidental to some one of the enumerated heads of Dominion legislative jurisdiction under s. 91. I cannot, however, think that it was intended by question no. 3 to involve the court in such a detailed and minute examination of each particular regulation enacted under s. 4—still less of the possibilities under all the subheads of s. 4. Adequate argument was not directed to such details either of the section or of the regulations. I, therefore, refrain from further discussion of these matters.

As has been stated, legislative jurisdiction over intra-provincial flying—and there must be a great deal of it—*prima facie* belongs to the provinces under s. 92 (13), and it is only where legislation by the Dominion can be justified, either as falling directly within an enumerated head under s. 91, or as necessarily incidental to such a head, or in so far as the subject of aeronautics can be said to be of such Dominion-wide importance that provincial legislative jurisdiction over it may be regarded as ousted, or because it falls within the purview of s. 132, that such Dominion legislation can be held valid.

In order to avoid possible misapprehension, I should, perhaps, add that, in so far as the questions submitted are directed to legislative capacity of the Dominion Parliament, I am not satisfied that the establishment and maintenance of a line of aircraft covering an international or interprovincial route is not an "undertaking" within the meaning of subs. 10 (*a*) of s. 92 of the B.N.A. Act. More-

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Anglin C.J.C.

over, it is possible that although lines of air transportation are not physical works, the construction, maintenance and operation of flying machines may be regarded as "works" within the meaning of clause (*c*) of subs. 10 of s. 92. That aspect of the case, however, was not fully dealt with at bar, and, therefore, I do not give it further consideration.

As to question no. 4, I agree with the views thereon expressed by my brother Smith.

I certify the foregoing to be my opinion (and reasons therefor) upon the four questions herein submitted for hearing and consideration of the Court by His Excellency the Governor in Council.

The answers of Mr. Justice Duff (concurred in by Rinfret and Lamont JJ.) to the interrogatories submitted.

Question 1

To question 1, the answer is in the negative.

Question 2

To question 2, construing the word "generally" as meaning "in every respect", the answer is in the negative.

Question 3

Reading section 4, as I think it ought to be read, as conferring a single indivisible authority to regulate and control, in every respect, aerial navigation over Canada, with an enumeration by way of illustration of particular matters falling within this authority, the answer to question 3 is in the negative.

Assuming, on the other hand, as some of my brethren think, that the question requires us to consider the matters mentioned in the enumerated sub-heads as severable fields for the operation of the power, and the section as comprising distinct enactments, in relation to each of these severable matters, enacted in view of the Convention relating to aerial navigation, 1919, the answer to question 3 is partly in the negative and partly in the affirmative.

In relation to the matters mentioned in sub-paragraphs (a), (h) and (i), such enactments would be invalid.

In relation to the matters within sub-paragraph (b) such enactments would be valid in respect of "identification" and "inspection", and in other respects invalid.

In relation to the matters within sub-paragraph (c) such enactments would be valid as respects "inspection" and in other respects invalid.

In relation to the matters within sub-paragraph (d) such enactments would be valid as respects the subject the carriage of mails, in other respects invalid.

In relation to the matters within sub-paragraph (e) such enactments would be valid in so far as concerns

> the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada, or within the limits of the territorial waters of Canada;

and in so far as concerns the second part,

> the conditions under which goods, mails and passengers * * * may be transported over any part of such territory,

such enactments would, in relation to the subject the transport of mails, be valid, but in relation to other matters, invalid.

In relation to the matters within sub-paragraphs (f), (g) and (j), the enactments would be valid.

Question 4

Treating this question on the assumption that it requires us to consider whether the regulations referred to, or any of them, (and, if so, which) are susceptible of legislative sanction under section 132 (in view of the Convention of 1919) or under any other power vested in the Dominion Parliament, the answers are as follows:

Sub-paragraph (a).

The regulations which deal specifically with the subjects mentioned in this paragraph are those numbered 33 to 38.

Regulation 33 would be valid in so far as it relates to flying outside Canada; but invalid in so far as it relates to commercial aircraft generally. Regulations 34 to 38, inclusive, are subsidiary regulations and would be valid if associated with a valid principal regulation.

Regulations 116 and 118 are also subsidiary regulations as to which the answer is the same.

Sub-paragraph (b).

Regulations 3, 4, 124 (2) and 10 would be invalid. Regulations 5 and 6 would be valid. Regulations 7, 8, 9, 11, 15, 16 and 17 are subsidiary regulations which would be valid

1930

REFERENCE re REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Anglin C.J.C.

if associated with a valid principal regulation. Subsections 1 and 3 of regulation 12 would be valid, and subsection 2 of that regulation invalid.

Sub-paragraph (*c*).

Regulations 18 to 32 deal specifically and substantively with the licensing, inspection, and in some respects with the regulation, of air harbours. The principal provisions are regulations 18, 19, 22, 23 and 24. These regulations would be invalid. Regulations 21 and 26 are subsidiary regulations, which would be valid if attached to a valid principal regulation. Regulations 25 and 29 to 32, inclusive, would be valid. Regulation 27 (1), dealing with inspection of air harbours and construction buildings would be valid. Subsection 2 of regulation 27 would be invalid. Regulation 28 would be invalid.

The judgment of Duff, Rinfret and Lamont JJ. was delivered by

DUFF J.—The view presented by the Solicitor General of the questions raised by the interrogatories, which it is our duty to answer, was based primarily upon the proposition that the Dominion possesses authority to legislate upon the subject of aeronautics, in every respect, and that this authority is exclusive, or, at all events, over-rides any law of a province.

This proposition is supported upon a variety of grounds. It is contended that, in their very nature, the matters embraced within that subject cannot be local, in the provincial sense, and that accordingly the subject is beyond the ambit of section 92; that, in the alternative, it falls within one of the enumerated heads of 91, no. 10 Navigation and Shipping; that, as a sort of further alternative, so many aspects and incidents of the subject fall within various enumerated heads of section 91, such as the regulation of trade and commerce, undertakings extending beyond the limits of a province, customs, aliens, beacons and lighthouses, postal service, defence, ferries, or under immigration (s. 95), that the subject must as a whole be treated as within Dominion jurisdiction, that being, it is argued, the only interpretation under which the undoubted authority of the Dominion over the various aspects of the subject can be effectively exercised. Still again, it is said, the

authority of the Dominion under section 132, to legislate for the performance of its obligations under the Convention relating to Aerial Navigation, 1919, extends over the whole field.

I am unable to agree that "navigation and shipping" would, "according to the common understanding of men," embrace the subject of aeronautics. Nor can I agree that aerial navigation as a subject for legislation is outside the purview of s. 92 of the *British North America Act,* as not comprising matters which are provincial within the contemplation of that section. The provincial jurisdiction under heads 10 to 16 extends through the air space above, as well as the soil below; and the control of the province over its own property is as extensive in the case of aerodromes and aircraft as in the case of garages and automobiles. The employment of aircraft for survey, exploration, inspection and patrolling, in the management of the public domain, for police purposes, and in the interests of public health (head 7), is as strictly a provincial matter as the employment of any other local agency for such purposes. Primarily the matters embraced within the subject of aerial navigation fall within section 92.

The argument that because the Dominion has authority to legislate in relation to this subject, in several, it may be many, aspects, it therefore has authority to appropriate the whole subject to itself, is one which in various forms has been often advanced; and always rejected. It really amounts to this, that it would have been simpler and more convenient if the subject had in terms been committed to exclusive jurisdiction of the Dominion Parliament. As for section 132, the provisions of the *Aeronautics Act,* and the regulations thereunder, must be considered in relation to the undertakings embodied in the Convention for the purpose of testing the Dominion contention.

Section 4 of the *Aeronautics Act* confers upon the Minister a single, indivisible authority to regulate and control aerial navigation in Canada. What I have just said will indicate my reasons for the conclusion that it is not competent for the Dominion to exercise or authorize the Minister to exercise such a comprehensive control over that subject. In my own view, that is sufficient to dispose of question 3.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Duff J.

But it is thought by some of my colleagues that each of the sub-paragraphs of section 4 may be treated as comprising severable fields of legislation, and that the section may be considered as involving distinct enactments in the terms of the principal clause applying to each of the severable matters therein comprised; and that by the question we are directed to say to what extent the Dominion might now authorize the Minister to exercise unrestricted control over these several matters under the powers conferred by section 132 (in view of the Convention of 1919) or under any other powers vested in the Dominion Parliament.

The section was originally enacted before the Convention came into effect and could not therefore be treated as passed in execution of any power under section 132. As reproduced in the Revised Statutes, 1927, it does not take effect as the re-enactment of a new law, and to the extent to which it was invalid in 1919, it is invalid to-day. Nevertheless some of my brethren think it is our duty to examine the sub-clauses of section 4 with a view to ascertaining to what extent the section, if enacted to-day, and with reference to the Convention of 1919, could take effect as law.

While I do not agree that this course is in conformity with the purport of the question, the point is not free from doubt, and therefore I shall proceed to discuss the questions raised by the interrogatory when so interpreted.

It will be convenient to consider, first of all, some of the matters of primary importance embraced within the sub-paragraphs of section 4. The most important of all are those falling within sub-paragraphs (a) (b) and (c). An unrestricted power of regulation and control is conferred upon the Minister. Such a sweeping authority in relation to the matters within these sub-paragraphs could be derived from no section or sections of the *British North America Act* other than section 132; and it is necessary therefore to consider whether, under that section, Parliament possesses such authority in itself, or can invest the Minister with it, in consequence of the obligations undertaken by the Dominion under the Convention.

The question in concrete form is whether the power to give the force of law to section 4 in relation to such mat-

ters is a power necessary or proper for performing the obligations of Canada under the Convention.

One observation should be made here. The powers under that section are given for performing (in the concrete case before us) the obligations under the Convention; and, in this connection, can be validly exercised only in the performance of, and for the purpose of performing, these obligations.

The subject of paragraph (a) is the licensing of personnel, which is dealt with by article 12 of the Convention. Under article 12, when read with Annex E, the obligation of each of the contracting states is to enforce in respect to certificates and licences, the conditions set forth in Annex E as regards international traffic, and, as regards domestic traffic, to enforce such conditions, not more stringent than those stated in Annex E, as the contracting state may deem adequate to ensure the safety of air traffic. No argument seems to be needed to shew that for performing that obligation the Dominion does not require an unrestricted authority to regulate and control the licensing of personnel in all respects; which would include power to select licensees upon some principle having no relation to the safety of air traffic, or indeed, to any of the conditions laid down in Annex E.

It is convenient to refer to regulation 33, which seems broadly to require a certificate from the Air Board to entitle anybody to act as pilot, engineer or inspector of any commercial aircraft, or of any Canadian aircraft flying outside Canada. It would be inadmissible to suppose that regulations 33 to 38 contemplate the issue, upon demand, of a certificate to any applicant; and indeed the enactment of regulations to that effect would constitute a grave departure from the requirements of Annex E.

The regulations appear to leave the conditions upon which licences may be granted to the unlimited discretion of the Air Board, which conditions might be framed without any reference to article 12 or Annex E. Clearly regulations 33 to 38 on any construction of them, could not be validly sanctioned under the powers given under section 132 to legislate for the performance of the obligations mentioned.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Duff J.

Sub-paragraph (b) of section 4 deals with registration, identification, inspection, certification and licensing of aircraft. Let us first consider registration. There is an implied duty to provide for registration in accordance with the provisions of section 1 (c) of Annex A of the Convention. The main purpose of registration under the provisions of the Convention is to provide facilities for identification. There is no duty, arising out of these provisions, to impose conditions other than those indicated in the Annex. There is nothing in that part of the Convention requiring legislation in the terms of section 4, or in the terms of regulations 3 and 4, the effect of which is, that aircraft may be registered only on compliance with the conditions defined by the Air Board, and that registration is a condition of the right to fly. These regulations as they stand could not be validly sanctioned under section 132.

As to certification and licensing of aircraft, the Convention imposes no duty as to such certificates, except in relation to international navigation. No duty arises out of the Convention which would enable the Dominion to sanction the sweeping enactment of section 4 in relation to the certification and licensing. Regulation 12 (2) seems to require a certificate of air worthiness in respect of commercial aircraft and provincial aircraft registered in Canada. By regulation 13, such certificates may be issued upon compliance with specified conditions. In the result, such aircraft may not be registered, and consequently will not be permitted to fly, unless certified as air worthy upon conditions prescribed by the Air Board. These regulations are rather obscurely worded, but this seems to be the practical effect of them. There is no obligation, under the Convention, that is to say, no express obligation, to require such certification as a condition of domestic flying, and it is difficult to discover on what ground the condition imposed by these regulations, which affects all commercial aircraft flying in Canada, and all provincial aircraft, can be justified. The regulation as it stands would not be a valid one.

Sub-paragraph (*c*) deals with the licensing, inspecting and regulation of aerodromes and air-stations. No obligation arises under the Convention, which requires, for the performance of it, the unrestricted power of regulation in

relation to these subjects given by section 4. In truth, the only undertakings on the subject of aerodromes and air-stations in the body of the Convention are undertakings against discrimination and as to places fixed for the landing of foreign aircraft; while certain duties respecting aerodromes arise out of the rules in Annex D. But there is no obligation under the Convention, the performance of which would require the enactment of sub-paragraph (*c*) or of regulations 18 and 19.

It seems to be sufficiently clear that neither subsections (*a*), (*b*) and (*c*) of section 4 which were enacted before the Convention were concluded, nor the regulations made under that section were framed with a view to providing for the performance of obligations undertaken or to be undertaken by Canada in the Convention. They appear to be framed on the theory, which the Dominion now supports as the true view, that the Dominion Parliament possesses authority to control aerial navigation in all respects. The result is that we have regulations which are framed too broadly to go into effect under section 132 of the *British North America Act;* but although these enactments and regulations could not now be validly sanctioned under the powers conferred by section 132, it does not follow that the Dominion may not exercise under that section very considerable powers of regulation in respect to the matters enumerated in sub-paragraphs (*a*), (*b*) and (*c*) of section 4. Indeed there seems to be no room for doubt that for the purpose of procuring the observance of its valid regulations, regulations, that is to say, framed for the purpose of securing the observance of its undertakings under the Convention and regulations put into force under the powers arising under section 91, the objects aimed at by the regulations of 1919 could be very largely, if not entirely, accomplished. For example, article 25 of the Convention imposes upon the Dominion a duty to take measures to insure the observance of the regulations contained in Annex D, and the prosecution and punishment of persons contravening these regulations. I can see no reason to doubt, if the Dominion considered it a suitable measure for implementing its obligations under article 25 to require, as a condition of registration, that aircraft should in design and otherwise be adapted and equipped for the observance of the rules

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Duff J.

laid down in Annex B, that such a condition might properly be exacted. To exact such a condition or other conditions aptly designed to secure the performance of obligations under the Convention, and limited to that, would of course be a vastly different thing from legislation in the form of regulations 3 and 4, which leave the conditions of the right to register, that is to say, of the right to fly, to the unbridled discretion of the Air Board. So with regard to air harbours, it is competent to the Dominion in order to secure the observance of the rules in Annex D, to require aerodromes to perform the duties expressly or impliedly imposed upon them by that Annex. For this purpose, it would be within the power of the Dominion to prohibit the use of, or suspend the use of, any locality as an aerodrome, where these duties were disregarded, and to take proper measures to maintain such control over such aerodromes as would enable the Government to make its decrees effective; and it would also seem a reasonable and proper measure, for this purpose, to require the licensing of aerodromes under such conditions as to granting licences or as to the suspension or rescission of them as should appear to be calculated to secure this object. It would, of course, be competent to the Dominion, in licensing aerodromes as landing places for aircraft entering the country, to enact such conditions as it might see fit; as well as to provide for the observance at all aerodromes of the undertakings against discrimination in charges or in facilities under article 24 of the Convention. Furthermore, I do not doubt the power of the Dominion to control the use of aerodromes in such a way as to prevent the frustration of the rules of Annex D, and, for this purpose, to prescribe conditions as to the granting suspension and cancellation of licences. I have already stated my views as to the obligations incurred by the Dominion with respect to the conditions to be imposed in respect of the licensing of personnel. As I have said, the Dominion, in my judgment, is entitled to exact, as a condition of the granting of such a licence, the minimum conditions laid down in article 12 and Annex E. But I do not doubt that the Dominion is also entitled to exact sanctions for the performance of the rules in Annex D by providing for the suspension or cancellation of licences upon a breach of such rules; and furthermore, to take any measures cal-

culated to prevent any person acting as navigator, pilot, or member of the crew of an aeroplane not fully equipped by knowledge of the rules in Annex D, and otherwise, to perform any duty cast upon him by them.

In addition to all this, there are other regulations which could be sustained as enacted in view of the obligations imposed by the Convention in article 25. Regulation 15, for example, requires any registered aircraft to bear the prescribed nationality and registration marks. The Convention provides explicitly for the use of these marks in international navigation though not in domestic navigation. But it would obviously be proper, in order to secure identification for the purposes of enforcing, and punishing breaches of, the rules, to require that all aircraft should bear the marks of identification mentioned in regulation 15. Similar considerations apply to a number of other regulations; those, for example, requiring aircraft to land in response to signals of police officers, representatives of the Air Board, the Immigration and Customs officials, those requiring the possession and production of licences and certificates and other documents by aircraft, and generally those dealing with inspection.

As to "identification" and "inspection," in sub-paragraphs (b) and (c), I do not doubt the authority of the Dominion to legislate fully and completely on these subjects. The reasons appear to be too obvious to require statement. As to the remaining sub-paragraphs of section 4, little need be said. The Dominion has authority to provide for the carrying of mails, to prescribe the areas in which aircraft entering Canada shall land and the conditions to be observed on such landings, and to provide for the control of the Air Force. Other matters stand in a different situation. For example, the carriage of goods and passengers, the use and control of aerial routes, and those embraced in sub-paragraph (i) which is in the following terms:

> the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada.

In relation to all these last mentioned matters, the vice of section 4 is that its terms are too comprehensive. Under various heads of section 91, the Dominion, as I have already

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Duff J.

said, possesses authority to legislate in respect to certain aspects of some of these matters, but section 4 is framed in such a way as to render it impossible to treat the enactment, in its relation to the matters just mentioned, as one falling within the Dominion's authority under, for example, the regulation of Trade and Commerce, undertakings extending beyond the limits of a province, or Defence.

Some comment is required upon sub-paragraph (f). The Dominion possesses, I am disposed to think, authority to prohibit the navigation of non-Canadian aircraft over prescribed areas, and by the terms of the Convention, where such a prohibition is put into effect, there is an obligation to treat foreign aircraft on the same terms as Canadian aircraft. In the result, I am disposed to think, section 4 could be validly enacted in respect of sub-paragraph (f).

A further comment is required in respect to regulation 33. As affecting flying outside of Canada, I am disposed to think this regulation is valid under the powers of the Dominion independently of the Convention.

No reference was made upon the argument to regulation 133, which among other things provides that the regulations shall not apply to aircraft or to air harbours to the extent to which they have been relieved by the Air Board from compliance therewith. Every regulation is subject to this declaration; and the existence of this dispensing power exercisable according to the absolute discretion of an administrative board, affecting as it does every order, prohibition and declaration in the regulations, on the subject with which it deals, adds to the difficulty of holding that these regulations could be sanctioned validly in exercise of the powers under section 132, which are given for the purpose of providing for the performance of the obligations under the Convention. There is nothing in the Convention giving any countenance to the idea that the performance by each State of its obligations is, strictly, not obligatory, but within the discretion of the State itself.

Two regulations, 10 and 28, the first classified as relating to the subject of registration, and the second as relating to the subject of air harbours, both within the scope of question 4, cannot be passed over wholly without comment. I shall quote verbatim regulation 10, the form of which is closely followed in regulation 28:

10. It shall be a condition of the primary registration in Canada of any aircraft that, upon the Governor in Council declaring that a national emergency exists or is immediately apprehended, every such aircraft shall be subject to requisition in the name of His Majesty by the Air Board or any officer of the Canadian Air Force, and upon being so requisitioned shall become the property of His Majesty subject to its return or to the payment of compensation or to both as may be provided by law. New.

(2) The registration in Canada of any aircraft primarily registered in any of His Majesty's dominions other than Canada shall be subject to the like condition unless, under the law of that one of His Majesty's dominions in which the aircraft was primarily registered, it is subject to a paramount right to be requisitioned on His Majesty's behalf. (New.)

Although two of my brethren would answer question 4 (*c*) in a sense which recognizes regulation 10 as valid, I must say, with great respect, that neither of these regulations has any sort of relation to anything in the Convention; and that there is no section of the *British North America Act* other than section 132 under which they could be susceptible of valid sanction. Under them, the power of the Air Board to requisition aeroplanes and aerodromes in the name of His Majesty comes into play upon a proclamation by the Governor General declaring that a "national emergency" exists or is immediately apprehended. "Emergencies" may possess widely different degrees of gravity and urgency. But this authority is not conditioned upon the existence, in fact, of any conjuncture of the sort loosely and vaguely indicated by the words "national emergency." According to the tenor of the regulation, the condition is fulfilled upon a proclamation that this undefined state of affairs has come into being. These regulations afford instructive examples of the extremes to which an administrative board may allow itself to be carried, even when restrained by the necessity of securing the approval of the Governor in Council. They bring into relief, also, in a striking way, the sweeping character of section 4 of the Aeronautics Act of 1919. For under sub-paragraphs (*b*) and (*c*) of that section, (if it had itself been valid) investing, as it does, the Air Board with unlimited authority over the registration and the licensing of aircraft as well as over the licensing and regulation of aerodromes (in all the aspects of these subjects), these regulations could have been effectively put into force.

On the argument, there was an extended discussion touching the authority of the Dominion in respect of a

1930

REFERENCE re REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Duff J.

regular service (or line) of aeroplanes operating between two provinces. The discussion centred in the scope and effect of the excepting clauses of no. 10 of section 92. But these subjects are not before us for consideration. The enactment in the principal clause of section 4, could not in its application to any one of the severally enumerated matters, be supported as within the ambit of any of the powers contemplated by the excepting clauses of section 92 (10). The subject of lines of aeroplanes, regular services of aeroplanes "ferries" of aeroplanes, is not the subject, or one of the severable subjects, of that section; or of any of the regulations we are asked to consider. It must be understood that I express no opinion, favourable or unfavourable, upon the contentions presented in argument on these points.

The same may be said of head no. 2 of section 91 "trade and commerce." Except in cases already specifically dealt with, there is nothing in the statute or in the regulations which properly, as subject of legislation, could be assigned to the subject of interprovincial or of foreign trade.

Save as to cases specified above, it would be necessary to rewrite these enactments in order to bring them within the ambit of any power possessed by the Dominion under head 2 of section 91.

Before taking leave of the reference, it is desirable, perhaps, to refer to a suggestion that the position taken in these reasons, if made good, would lead to confusion, indeed, to chaos, through the prevalence at one and the same time and place of different, and possibly conflicting, rules of aerial navigation. There is no foundation for such fears. The Dominion, I repeat, has full authority under section 132, to give effect to the rules embodied in the Convention and to take effective measures for the enforcement of them. It is now settled, if, indeed, there ever was a doubt upon it, that provincial legislation repugnant to valid legislation of the Dominion under section 132 is thereby superseded. *The Attorney-General of British Columbia* v. *Attorney-General of Canada* (1).

(1) (1921) 63 Can. S.C.R. 293, at p. 327 to 331; [1924] A.C. 203 at p. 211, 212 and 213.

The course followed in these reasons in examining the regulations in some detail, with a view to answering question 4, has necessitated the consideration of some points in respect of which we had little or no assistance from the argument. That questions 3 and 4 call for such an examination, in the one case, of the matters enumerated in the sub-paragraphs, and in the other, of the regulations, was assumed in the factums, and in the factum of the Dominion, the particular regulations falling under the several divisions of question 4 were indicated. It was also assumed by counsel, and this assumption to a considerable degree, dictated the course of the argument. The argument for the provinces was addressed in detail to the provisions of the statute and to most of the essential regulations upon each subject. In the argument for the Dominion, although the emphasis was predominantly upon the broader contentions, matters of detail were also the subject of extended discussion. It has seemed right to deal with these questions from the point of view from which they were discussed, especially since that point of view rests upon a construction of those questions which (although I think it is not strictly the right one) is in itself not an unreasonable one.

Nevertheless, I think it my duty to say that I sympathize with the feeling of my learned brethren as to the extreme difficulty of making what in practice will be regarded as a judicial pronouncement upon such a variety of topics, presenting, not in one or two cases only, but in many cases, points of no inconsiderable importance. While theoretically not impossible, it would not have been practicable, for counsel, to deal adequately in this case with every question presented by the statute and the regulations; and judicial conclusions arrived at without the assistance of argument, are not necessarily exempt from the weaknesses which often attend conclusions, so reached, elsewhere.

We hereby certify to His Excellency the Governor in Council that the reasons expressed in the paper hereunto annexed, are our reasons for the answers, certified of this date, to the questions referred herein by His Excellency for hearing and consideration by this Court.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

NEWCOMBE J.—In the *British Columbia Fisheries Case*, (1) the Lord Chancellor (Haldane) introduced his judgment, disposing of the questions submitted, with the following observations. He referred to the statutory authority under which the questions were, as he said, competently put to the Supreme Court, and he said that

> The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied. It has therefore happened that in cases of the present class their Lordships have occasionally found themselves unable to answer all the questions put to them, and have found it advisable to limit and guard their replies.

An illustration is to be found in the course adopted by the Privy Council in the *Fisheries Case* (2), from which it would seem that we should be careful not to declare or advise upon the rights of proprietors of lands in the provinces; they are not parties here, and cannot conveniently be represented in a general statutory reference, although some of these questions necessarily involve the consideration of proprietary rights. See also Lord Haldane's observations in *Attorney General for Ontario* v. *Attorney General for Canada* (3).

I shall endeavour, in my answers, to adhere to a course which is justified by these precedents.

Under the first question it is contended, on behalf of the Attorney General of Canada, that the convention relating to the regulation of aerial navigation is a treaty within the meaning of s. 132 of the *British North America Act, 1867*, and that the powers possessed by the Parliament and Government of Canada under that section are exclusive of any like powers which might, in its absence, have belonged to the provinces.

It is not denied, and no reason has been suggested to doubt, that the convention is a treaty; but the language

(1) [1914] A.C. 153, at p. 162. (2) [1898] A.C. 700, at p. 717.
(3) [1916] 1 A.C. 598, at pp. 601, 602.

of s. 132 does not require, either expressly or by necessary implication, nor, I think, does it suggest, that a province should thereby suffer a diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity on the part of the Dominion, which, in relation to provincial obligations, is no more than concurrent, so long as these are not performed by the province. The case of obligations to be performed for which a province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by s. 132; and, while, pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, I am unable to interpret the Dominion power as meant to deprive the province of authority to implement its obligations. If that had been the intention, I think it would have been expressed. For example, to put a simple case, which perhaps conceivably may be imagined, if a province were bound by treaty between the Empire and a foreign country to pay a sum of money borrowed on the sole credit of the province, and if the province, by direction of its legislature, were in due course to cause the money to be paid, I do not doubt that the obligation would thereby lawfully and constitutionally be discharged, even without any action on the part of the Parliament or Government of Canada.

I have considered question 2 with the utmost solicitude to discover its meaning, and I remain in some perplexity; but, accepting the view, which seems not unreasonable, that the necessity of legislation to sanction the obligations of the treaty is intended to be brought within the scope of the enquiry, I am met by an objection which seems successfully to challenge the validity of the reference; and it is this: Granted that under section 132 the Parliament has authority, in excess of its powers elsewhere defined, to authorize the performance of treaties, the language of the section is not the less restricted to treaty obligations towards foreign countries, and it is to such obligations that the question addresses itself. When, therefore, it is considered that the court has no jurisdiction over a foreign sovereign, except by submission, and that the foreign States, party to the convention, have made no submission, it results, as I am disposed to think, that this court ought

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Newcombe J.

not to determine, under the present procedure, a question which involves the definition of the treaty obligations; and, especially so, seeing that the interpretation of the convention is, by Article 37, to be determined by the Permanent Court of International Justice, or, previously to the establishment of that court, by arbitration.

Although the answers of the court upon questions referred are declared by the statute to be advisory only, and although, as said by the Judicial Committee in a passage which I shall quote more fully, they "will have no more effect than the opinions of the law officers," yet the proceedings are judicial, and the questions are referred to the court for "hearing and consideration"; and it is the statutory duty of the court to "hear" and consider. In the discharge of this duty, the court, in ordinary course, and necessarily, as I see it, applies the principle of the maxim *audi alteram partem,* and that, I think, comports with the just intention of the statute. Moreover, Parliament has been careful to provide expressly for this procedure. By subsecs. 4 and 5 of s. 55 of the *Supreme Court Act,* the court may direct that any person or class of persons interested shall be notified of the hearing, and that such person or class shall be entitled to be heard; also, where there is no appearance, the court may, in its discretion, request counsel to argue the case as to any interest which is affected. These provisions strengthen the view that the section is not intended to apply to the adjudication of interests in support of which the court is not empowered to require argument at the hearing. I am not overlooking the case of the *Japanese Treaty Act, Attorney-General of British Columbia* v. *Attorney-General of Canada* (1), where an Act of British Columbia was held *ultra vires* for conflict with a valid Dominion statute, and which is thus quite distinguishable. And there is also the case, which should be mentioned, of the *Reference in the matter of Legislative Jurisdiction over Hours of Labour* (2). But I do not think that in either of these cases the reasons or answers were intended to come into conflict with the view which I am now expressing, and which, certainly, was not therein suggested or considered.

If, as would appear, it be desired to know whether Dominion legislation is *necessary,* one must ascertain what

(1) [1924] A.C. 203. (2) [1925] S.C.R. 505.

the obligation is, and that cannot judicially be declared without learning or inviting the contentions of the obligees. It may, of course, be suggested that there is no evidence of any controversy; but, on the other hand, we are not informed that the contracting parties are *ad idem* in their interpretation of the treaty obligations. It may likewise be said that foreign sovereign powers are not within the purview of the *Supreme Court Act;* that their interests are impliedly excepted and should be disregarded; but, in the *British Columbia Fisheries Case* (1), reasons were advanced why their Lordships should not answer a cognate question relating to the territorial rights claimed by the Crown in the shore extending below low water mark to within three miles of the coast, and affecting the pretensions of foreign nations. And, for my part, although I do not mean to suggest that litigation might not arise in which it would be convenient or necessary that the court should construe the treaty, the view which impresses itself upon my mind is that since the foreign sovereign parties to the convention are unrepresented and cannot be convened, a question which looks to the ascertainment of their interests judicially, cannot, upon submission by the Governor in Council, be determined compatibly with the statutory requirements and procedure.

Dominion powers derived under s. 132 should, I think, be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined. The Dominion is, by that section, authorized to exercise these powers for performing its treaty obligations, and equally so, for performing those of a province; and this is true, irrespective of the question as to where the power would have resided if s. 132 had not been enacted. There is ample authority for the view that, if the treaty obligations cannot legally be performed under the domestic law as it exists, legislation is necessary to justify the performance; and, in *Walker* v. *Baird* (2), the Attorney-General of England (Sir Richard Webster)

conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary, in order to compel obedience to the provisions of a treaty.

(1) [1914] A.C. 153, at pp. 174, 175.

(2) [1892] A.C. 491, at p. 497.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Newcombe J.

But the question remains of ascertaining and interpreting the conventional obligations; and, as to that, I have endeavoured to explain my difficulty as it presents itself.

Moreover, even if the jurisdiction were held to persist, notwithstanding that the court cannot convoke or summon the parties for hearing, I would have thought that the inexpediency or liability to miscarriage of a judicial attempt exhaustively to interpret and declare these obligations, when practical differences have not arisen and specific cases are not formulated, rests upon grounds so impressive and obvious as to justify a representation to the Governor in Council against the advisability of requiring an answer to a question possessing the general character and obscurity of no. 2.

It is true that a question as to the power of the Governor in Council to require this court to answer questions of law or fact, in the broad terms provided by s. 55 of the *Supreme Court Act*, was determined favourably to the legislation in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1), but, in pronouncing that judgment, the Lord Chancellor (Earl Loreburn) said at pages 588, 589:

> It is difficult to resist the conclusion that the point now raised never would have been raised had it not been for the nature of the questions which have been put to the Supreme Court. If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (e.g., must justices of the peace and judges be resworn after a demise of the Crown?) no one would ever have thought of saying it was *ultra vires*. It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV, applicable to the Judicial Committee, has resulted in asking questions affecting the provinces, or alleged to do so. But the answers are only advisory and will have no more effect than the opinion of the law officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor General in Council when it thinks right so to treat any question that may be put.

And the course so suggested appears to me appropriate for the present occasion.

Questions 3 and 4 relate to specific legislation, which has been enacted by the Dominion; and, even by all the fore-

(1) [1912] A.C. 571.

thought and imagination which we can exercise or may possess, they cannot be comprehensively or perfectly answered, if room is to be found, as I think it must be, for the operation of provincial rights. We were told at the argument that no practical difficulties had been encountered; and, obviously, questions could be better considered and more satisfactorily determined when, or from time to time as, they practically emerge, and so become capable of being stated with adequate point and precision. Meantime, in the discharge of our duty under the statute, we have certainly to face a question as to the authority of Parliament to enact these clauses under s. 91 of the *British North America Act, 1867;* and, as to that, I am satisfied that we cannot usefully do more than indicate generally the principles to be applied for the avoidance of controversy, or for the determination of specific differences, should they practically arise.

I would reject the argument urged on behalf of the Dominion that the subject matter of either of these questions is "navigation and shipping", within the 10th enumeration of s. 91 of the *British North America Act, 1867.* I see no evidence of any Parliamentary intention that this was ever intended.

> The earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven; for *cujus est solum ejus est usque ad coelum,* as is holden 14 H. 8. fo. 12. 22 Hen. 6. 59. 10 E. 4. 14. *Registrum origin.* and in other bookes.

These are the words of Coke's venerable Commentary upon Littleton (4 a.), and they express, as I have been taught to believe, the common law of England, which applies in the English provinces of Canada. In the province of Quebec, the law is not materially different, for, by art. 414 of the Civil Code, it is declared that

> ownership of the soil carries with it ownership of what is above and what is below it.

The principle is thus established, and the courts have no authority, so far as I can perceive, to explain and qualify it so as to admit of the introduction of a public right of way for the use of flying machines consequent upon the demonstrations in recent times of the practicability of artificial flight. The appropriate legislature may, of course, provide for airways as it has habitually done for roads and highways, notwithstanding the rights of the proprietors; but the project is legislative, not judicial.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Newcombe J.

"Navigation and shipping" are words inapt and unauthorized to connote flight or the utilization of atmospheric resistance or buoyancy for the carriage of craft or traffic. Flight is one thing, and navigation another. The way of a flying machine may in some respects be assimilated to the way of an eagle in the air, but not to that of a ship in the midst of the sea, which has been recognized as something different. Navigation consists in the exercise of a right of way, which may be enjoyed in the sea, in tidal and in non-tidal water. (Coulson & Forbes on Waters, 4th edition, by H. Stuart Moore, 437.) This meaning is emphasized for the purposes of s. 91, where the word is associated with "shipping." Moreover, as to tidal waters at least, the right is public, not dependent upon property. On the other hand, the right of way exercised within a province by a flying machine must, in some manner be derived from or against the owners of the property traversed; and the power legislatively to sanction such a right of way appertains *prima facie* to property and civil rights in the province, although, no doubt, it may be overborne by ancillary Dominion powers, where they exist. It was enacted by sec. 9 of the Imperial *Air Navigation Act*, 1920, 10-11 Geo. V, c. 80, that, subject to its provisions, no action should lie in respect of trespass or in respect of nuisance, by reason of the flight of aircraft over any property at a reasonable height; and, if, for example, it were desired to confer similar immunity in the provinces of Canada, I see no reason to doubt that the resort would *prima facie* lie to the legislatures of the provinces. Therefore, if the subject of "navigation and shipping" is to be extended to what, in the absence of a definitive name, has been described as "aerial navigation," that is a function to be discharged by the enactment of appropriate words, and it belongs to the Imperial Parliament, not to this court.

If it be desirable to have uniformity of regulations for the licensing, inspection, etc., of air traffic, an inference may be drawn from the judgment of the Privy Council in *City of Montreal* v. *Montreal Street Railway* (1), that the object should be attained by co-operation between the Dominion and the local authorities. The federal system, as it is known in the Dominion, while it has proved its

(1) [1912] A.C. 333, at p. 346.

adaptation to local conditions of government, is not without some disadvantages, and one apparently is that an inconvenient situation may arise requiring a legislative remedy for which, notwithstanding some wayside utterances to the contrary, the concurrence or co-operation of both federal and provincial law-making bodies is necessary; but, as was said by Lord Atkinson, with relation to railways, in the *City of Montreal* case (1), page 346:

> It cannot be assumed that either body will decline to co-operate with the other in a reasonable way to effect an object so much in the interest of both the Dominion and the Province, as the regulation of "through traffic."

The Dominion enumerated powers must, of course, have their full effect, even when they seem to conflict with those of the provinces. This follows from the concluding paragraph of s. 91 of the *British North America Act, 1867:*

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

The meaning of this clause was explained by Lord Watson in the *Prohibition* Case (2), as follows:—

> It was apparently contemplated by the framers of the Imperial Act of 1867 that the due exercise of the enumerated powers conferred upon the Parliament of Canada by s. 91 might, occasionally and incidentally, involve legislation upon matters which are *prima facie* committed exclusively to the provincial legislatures by s. 92. In order to provide against that contingency, the concluding part of s. 91 enacts that * * *

And his Lordship, having quoted the clause, proceeded:—

> It was observed by this Board in *Citizens Insurance Company of Canada* v. *Parsons* (3), that the paragraph just quoted "applies in its grammatical construction only to No. 16 of s. 92." The observation was not material to the question arising in that case, and it does not appear to their Lordships to be strictly accurate. It appears to them that the language in the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature. It also appears to their Lordships that the exception was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local or private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of clause 91. That view was stated and illustrated by Sir Montague Smith in *Citizens Insurance Company of*

(1) [1912] A.C. 333, at p. 346. (2) [1896] A.C. 359, at p. 360.
(3) (1881) 7 App. Cas. 96, at pp. 108, 109.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Newcombe J.

Canada v. *Parsons* (1), and in *Cushing* v. *Dupuy* (2); and it has been recognized by this Board in *Tennant* v. *Union Bank of Canada* (3), and in *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (4).

And so, it cannot be successfully denied that the Dominion may have, maintain and operate aircraft, as part of its military or naval service, or for customs, postal or other Dominion services, and may regulate their use for these purposes; and, as well, may prohibit or regulate their use commercially for exporting or importing goods out of or into Canada, or for the carriage of passengers to and from Canada, or, I suggest, interprovincially. In respect of these and other services, as to which the Dominion derives its powers from the enumerations of s. 91, or exercises general powers not belonging to provincial subjects, the regulations in s. 4 of the *Aeronautics Act* appear to be competent to Parliament, but, on the other hand, it is, I think, certain that there are uses for aircraft, which appertain exclusively to "property and civil rights in the province," in relation to "matters of a merely private or local nature in the province"; and, as to these, some of the regulations in question cannot be applied without entering a field exclusively reserved for provincial authority. The same may be said with regard to the *Air Regulations, 1920,* respecting the matters specified in the fourth question.

A province, for example, amongst its other legislative powers, may exclusively make laws in regard to the establishment and tenure of provincial offices and the appointment and payment of provincial officers; the management and sale of public lands belonging to the province and of the timber and wood thereon, and the comprehensive subject of property and civil rights in the province. (S. 92 (4), (5) and (13)). And, if, therefore, to introduce only one illustration, the province desire to provide an air service for the oversight, protection and management of its Crown lands and timber, or for its mines and minerals or mining reserves, it is not, I believe, destitute of power for the institution and use of it; and so, if a legislature should

(1) (1881) 7 App. Cas. 96 at pp. 108, 109.
(2) (1880) 5 App. Cas. 409, at p. 415.
(3) [1894] A.C. 31, at p. 46.
(4) [1894] A.C. 189, at p. 200.

sanction the appointment of officers to perform the duties of provincial air guides or pilots or operators for the conduct of that service, I am far from persuaded that these officers must qualify for the discharge of their duties by production of Dominion licences, unless the province by its legislation should so enact.

I have thus endeavoured briefly to state what I think may usefully be submitted in answer to the questions referred, and, pursuant to the statute, I certify the above as my opinion and reasons for the information of the Governor in Council.

SMITH, J.—The following are the questions submitted:—

1. Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or of any province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation?"

2. Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a province, necessary or proper for performing the obligations of Canada, or of any province thereof, under the Convention aforementioned, within the meaning of section 132 of the *British North America Act*, 1867?

3. Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of section 4 of the *Aeronautics Act*, chapter 3, Revised Statutes of Canada, 1927?

4. Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting—

(*a*) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircraft and the suspension or revocation of such licences;

(*b*) The regulation, identification, inspection, certification and licensing of all aircraft; and

(*c*) The licensing, inspection and regulation of all aerodromes and air stations?

In my opinion, the answer to question 1 is determined by the decision in *Attorney General of British Columbia* v. *Attorney General of Canada.* (1) In that case, a treaty was made in 1913 between His Majesty the King and the Emperor of Japan, by which it was, among other things, agreed that the subjects of each of the High Contracting Parties should have full liberty to enter, travel and reside in the territories of the other, and in all that relates to the pursuit of their industries, callings, professions and educa-

(1) [1924] A.C. 203.

1930

REFERENCE re REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Smith J.

tional studies, should be placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

On April 10, 1913, the Parliament of Canada passed the *Japanese Treaty Act* of that year, and this Act provided that the treaty should be thereby sanctioned and declared to have the force of law in Canada.

In 1902 two minutes had been passed by the Executive Council of the province of British Columbia, and approved by the Lieutenant Governor, which set out resolutions passed by the Legislative Assembly and recommended, in accordance with these resolutions, that all tunnel and drain licences issued under s. 58 of the *Mineral Act* and s. 48 of the *Placer Mining Act*, and all leases granted under part VII of the latter Act, should contain provisos that they were granted on the express condition that no Chinese or Japanese should be employed in or about the tunnels, drains or premises to which the licences or leases related, and that a similar provision should also be inserted in all instruments relating to a number of enumerated leases and licences which should be issued by the officers of the provincial government.

On April 2, 1921, the legislature of British Columbia passed the *Oriental Orders in Council Validation Act*, which statute purported to validate and confirm the two Orders in Council of the province already referred to, and passed in the form of recommendations of the provincial Executive Council, approved by the Lieutenant Governor, in May, 1902. The statute further provided that the Orders should be deemed to have been valid and effectual according to their tenor as from the dates of their approval, and that where, in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the government of the province, any provision had heretofore been inserted, or was thereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision should be deemed to have been and to be valid, and always to have had the force of law according to its tenor. It was further enacted that every violation of or failure to observe any such provision on the part of any licensee, or other person in whose

favour the instrument operated, should be sufficient ground for the cancellation of the instrument by the Lieutenant Governor.

Section 132 of the *British North America Act* is as follows:—

> 132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any province thereof, as part of the British Empire, towards Foreign Countries arising under treaties between the Empire and such foreign countries.

The question at issue in the case was the validity of the British Columbia statute referred to. One of the grounds urged against the validity of the Act was that it purported to deal with the status of aliens, a matter solely under the jurisdiction of the Dominion under s. 91 of the *British North America Act;* and the other ground was that the provincial statute violated the principle laid down in the Dominion Act of 1913.

It was held that the provincial Act was not inconsistent with s. 91 of the *British North America Act,* but was void because it violated the principle laid down in the Dominion Act of 1913.

It is to be noted that it was not argued that the Dominion Act was invalid or that the provincial Act could prevail over the Dominion Act, passed pursuant to s. 132 of the *British North America Act.* The whole argument was that the provincial Act did not in fact conflict with the Dominion Act.

It is argued here, on behalf of the provinces, that where there is a stipulation in a treaty that something shall be done that the provinces have jurisdiction to do, it is only on failure of the provinces to discharge the provincial obligations that the Dominion has jurisdiction to intervene. This contention seems to be totally at variance with the decision of the Privy Council in the case just referred to, which holds that, apart from the question of jurisdiction over aliens, the Dominion Parliament had jurisdiction to implement the treaty by legislation, and that the province could not validly enact legislation inconsistent with the principle of the Dominion legislation.

It follows, in my opinion, that the Dominion Parliament has *paramount* jurisdiction to legislate for the performance of all treaty obligations, and that, while a province may effectively legislate for that purpose in regard to any mat-

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Smith J.

ter falling within s. 92 of the *British North America Act* while the field is unoccupied by the Dominion (but not otherwise), Dominion legislation, being paramount, will, when enacted, supersede that of the provinces about such matters. The answer to the first question, therefore, substituting the word "paramount" for the word "exclusive," is in the affirmative.

I am of the opinion that, taking the words in question 2, "regulation and control of aeronautics generally within Canada," as meaning unlimited regulations and control of aeronautics within Canada, the answer must be in the negative.

The contention on behalf of the provinces is that the international Convention applies only to aircraft operated internationally, and has no application to aircraft of any of the contracting countries which flies wholly within the territory of the country where it is owned. In some respects the Convention purports to deal only with international flying, but in others with the flying of all aircraft.

For example, article 25 is as follows:

> Each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of *its* territory and that every aircraft, wherever it may be, carrying its nationality mark, shall comply with the regulations contained in Annex D.

Annex D lays down elaborate rules as to lights and signals, and rules for air traffic, following closely the rules of water navigation. If the contention of the provinces be sound, every province, so far as this Convention is concerned, would be entitled to establish rules of its own, as to lights and signals and air traffic, which might be entirely at variance with the international rules laid down in the Convention, and each of which might be at variance with the other. The manifest object of these rules as set out in the Convention is to secure safety in air navigation for all craft flying over the territory of the parties to the treaty; and it is unreasonable to suppose that these rules were to apply only to aircraft flying internationally, and that every country and every province was at liberty to make its own rules for aircraft owned and flying within its own territory. I am of opinion, therefore, that under article 25 the Dominion is under obligation to adopt measures to ensure that

every aircraft flying above the limits of Canadian territory shall comply with the regulations contained in Annex D, and has authority to enact accordingly.

Article 12 is as follows:—

Art. 12. The commanding officer, pilots, engineers and other members of the operating crew of *every aircraft* shall, in accordance with the conditions laid down in Annex E, be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses.

Annex E has the following:—

The conditions set forth in the present Annex are the minimum conditions required for the issue of certificates and licences valid for international traffic.

Nevertheless, each contracting State will be entitled to issue certificates and licences, not valid for international traffic, subject to such less stringent conditions as it may deem adequate to ensure the safety of air traffic.

The said certificates and licences will not, however, be valid for flight over the territory of another State.

Article 12 in terms refers to the operating crew of *every aircraft,* while the preceding article 11, expressly refers to *every aircraft engaged in international navigation.*

In the portion of Annex E just quoted, we have express provision for the issue of certificates and licences by each of the states for flying within its own territory, on such less stringent conditions as each state may deem adequate to ensure the safety of air traffic. By virtue, therefore, of article 12 and Annex E, there is imposed upon each party to the Convention an express obligation to control in this way all aircraft flying exclusively within its own territory.

The Articles of Convention do not explicitly provide that aircraft shall be registered; but this is necessarily implied.

Article 5 provides that no contracting state shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting state. By article 6, aircraft *possess the nationality* of the state on the register of which they are entered, in accordance with the provisions of section I (*c*) of Annex A; and article 10 provides that all aircraft engaged in international navigation shall bear their nationality and registration marks, as well as the name and residence of the owner, in accordance with Annex A. As nationality under these provisions can only be *possessed*

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Smith J.

by registration, the necessary inference is that there must be registration of all aircraft as provided in Annex A, except in cases where such aircraft are flying under a "special and temporary authorization."

It is contended on behalf of the provinces that article 5 refers only to aircraft engaged in international navigation; but the language of the article has no such limitation: and, in view of the general intention to be gathered from the whole tenor of the Convention, and particularly from the provisions of Annex E quoted above, to provide for the safety of air navigation, there would seem to be no good reason for introducing such a limitation. If the argument on behalf of the provinces were sustained, then every state, and each province of Canada, so far as the Convention is concerned, might allow aircraft of all descriptions, uninspected, unregistered, and of any nationality, to fly within its own borders, which, in my opinion, would be contrary to the express language of article 5 and the general intent and provisions of the Convention.

It is to be noted, however, that article 37 provides that, in case of a disagreement between two or more states relating to the interpretation of the Convention, the question in dispute shall be determined by the Permanent Court of International Justice to be established by the League of Nations, and, until its establishment, by arbitration. This Court, therefore, has no jurisdiction to give an opinion binding upon the various parties to the Convention on disputes as to interpretation, whereas a decision under article 37 would be binding on all parties to the Convention, and the obligation of the Dominion and the jurisdiction to legislate would thereafter accord with the interpretation thus arrived at.

It is admitted on behalf of the provinces that, independently of the Convention, the Parliament of Canada has jurisdiction over aircraft and air navigation, by virtue of s. 91 of the *British North America Act*, in connection with various matters thereby assigned to the Dominion, such as Military and Naval Service and Defence, Customs, Postal Service, Control of Aliens, and, possibly to some extent, for the regulation of Trade and Commerce.

On behalf of the Dominion it is argued that the whole subject comes within Navigation and Shipping, under clause (10) of sec. 91.

I am of opinion that Navigation and Shipping, as used in s. 91, refers only to the navigation of water, and shipping plying on or in water. This is the definition of navigation and shipping in the "New English Dictionary," and there can be little doubt that it was the meaning attached to these terms at the time the Act was passed. In my opinion, jurisdiction over aeronautics belongs to the provinces under the heading Property and Civil Rights in the province, section 92 (13) of the *British North America Act,* subject to the jurisdiction of the Dominion under s. 91, as indicated, and to the provisions of the Convention referred to and of s. 132 of the *British North America Act.*

Question 3 is apparently construed by the majority of the members of the court as an enquiry as to whether or not s. 4 of the *Aeronautics Act,* as it now stands in the Revised Statutes, is *intra vires* and valid. On that view it is contended that, as the statute was passed long before the treaty came into effect, no jurisdiction under s. 132 of the *British North America Act* by virtue of the treaty can be invoked to sustain the validity of the Act, and that the re-enactment of this statute in the Revised Statutes of 1927 does not alter the matter because of the provisions of s. 8 of 14-15 Geo. V, c. 65, which provides that the Revised Statutes shall not be held to operate as new laws.

In my view, the question relates to the present legislative authority of the Dominion Parliament, including legislative authority under the various headings in s. 91 of the *British North America Act* and under s. 132, by virtue of the treaty. Interpreting the question in this way, it follows from what has been already said that Parliament has authority to enact the provisions of s. 4 of the *Aeronautics Act* in relation to the matters set out in s. 91 of the *British North America Act,* and, so far as necessary and proper, within the meaning of s. 132 of that Act, for carrying out the provisions of the treaty. S. 4, however, goes beyond this, and purports to assume unlimited regulation and control of aeronautics in Canada.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Smith J.

It is difficult, therefore, to answer categorically question 3, but, interpreting the question as indicated, it follows from what has been said that, as to a great part of the provisions of s. 4, the answer is "Yes." Clause (*d*) refers not only to the carrying of mails, but to the carrying of goods and passengers, and the operation of any commercial service whatsoever, and jurisdiction as to these matters, independently of the Convention, would depend on whether or not they are of such a nature as to amount to Regulation of Trade and Commerce as set out in s. 91 of the *British North America Act.* The same remarks would apply to transport of goods and passengers over part of the territories of Canada, as set out in clause (*e*).

Question 4 (*a*) and (*b*) should be answered in the affirmative.

Question 4 (*c*) should be answered in the affirmative as to all aerodromes and air stations described in the Convention, and, as to others, so far as may be necessary to prevent air navigators being confused or misled in locating and landing at aerodromes and air stations referred to in the Convention or in reading ground markings made in pursuance of the Convention.

I certify the foregoing to be my opinion and reasons therefor upon the four questions herein submitted for hearing and consideration by the court by His Excellency the Governor in Council.

CANNON, J.—The Governor General in Council, on the 15th of April, 1929, referred the following questions to this court for hearing and consideration pursuant to the provisions of section 55 of the *Supreme Court Act,* R.S.C., 1927, chapter 35:—

1. Have the Parliament and Government of Canada exclusive legislative and executive authority for performing the obligations of Canada, or any province thereof, under the Convention entitled "Convention relating to the Regulation of Aerial Navigation?"

2. Is legislation of the Parliament of Canada providing for the regulation and control of aeronautics generally within Canada, including flying operations carried on entirely within the limits of a province, necessary or proper for performing the obligations of Canada, or of any province thereof, under the Convention aforementioned, within the meaning of section 132 of the British North America Act, 1867?

3. Has the Parliament of Canada legislative authority to enact, in whole or in part, the provisions of section 4 of the Aeronautics Act, chapter 3, Revised Statutes of Canada, 1927?

4. Has the Parliament of Canada legislative authority to sanction the making and enforcement, in whole or in part, of the regulations contained in the Air Regulations, 1920, respecting—

(a) The granting of certificates or licences authorizing persons to act as pilots, navigators, engineers or inspectors of aircrafts and the suspension or revocation of such licences;

(b) The regulation, identification, inspection, certification and licensing of all aircrafts; and

(c) The licensing, inspection and regulation of all aerodromes and air stations?

The Minister of Justice, in his report to Council, apprehends

that this legislation was enacted by Parliament by reason not only of the expediency of making provision for the regulation of a service essentially important in itself as touching closely the national life and interests, but also of the necessity of making provision for performing the obligations of Canada, as part of the British Empire under the Convention relating to the regulation of Aerial Navigation which, drawn up by a Commission constituted by the Peace Conference at Paris in 1919, was, on 13th October of that year, signed by the representatives of 26 of the Allied and Associated Powers including Canada.

This convention was ratified by His Majesty on behalf of the British Empire on 1st June, 1922, and is now in force, as the Minister is informed, as between the British Empire and 17 other States.

The Minister observes that the Air Regulations 1920, conform in essential particulars to the provisions of the said Convention, and are designed to give effect to the stipulations thereof in discharge of the obligations of Canada, as part of the British Empire, towards the other contracting States.

The Minister states that at the conference at Ottawa between representatives of the Dominion and the several Provincial Governments in the month of November, 1927, the representatives of the province of Quebec raised a question as to the legislative authority of the Parliament of Canada to sanction regulations for the control of aerial navigation generally within Canada, at all events in their application to flying operations carried on within a Province; and it was agreed that the question so raised was a proper question for the determination of the Supreme Court of Canada.

At the argument, Mr. Geoffrion suggested that the order of the questions should be reversed, as it seemed logical that we should first see whether flying is federal or not. If it is federal, it is unnecessary to discuss the application of section 132. If flying is provincial, then it will become important to determine how far section 132 carries federal legislative power.

Questions 3 and 4

The impugned section 4 of *The Aeronautics Act*, R.S.C. 1927, c. 3, reads as follows:

4. Subject to approval by the Governor in Council, the Minister shall have power to regulate and control aerial navigation over Canada and

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Cannon J.

the territorial waters of Canada, and in particular, but not to restrict the generality of the foregoing terms of this section, he may, with the approval aforesaid, make regulations with respect to

(*a*) licensing pilots and other persons engaged in the navigation of aircraft, and the suspension and revocation of such licences;

(*b*) the registration, identification, inspection, certification and licensing of all aircraft;

(*c*) the licensing, inspection and regulation of all aerodromes and air-stations;

(*d*) the conditions under which aircraft may be used for carrying goods, mails and passengers, or for the operation of any commercial service whatsoever, and the licensing of any such services;

(*e*) the conditions under which goods, mails and passengers may be imported and exported in aircraft into or from Canada or within the limits of the territorial waters of Canada, or may be transported over any part of such territory;

(*f*) the prohibition of navigation of aircraft over such areas as may be prescribed, either at all times or at such times or on such occasions only as may be specified in the regulation, and either absolutely or subject to such exceptions or conditions as may be so specified;

(*g*) the areas within which aircraft coming from any places outside of Canada are to land, and the conditions to be complied with by any such aircraft;

(*h*) aerial routes, their use and control;

(*i*) the institution and enforcement of such laws, rules and regulations as may be deemed necessary for the safe and proper navigation of aircraft in Canada or within the limits of the territorial waters of Canada; and

(*j*) organization, discipline, efficiency and good government generally of the officers and men employed in the Air Force.

2. Any person guilty of violating the provisions of any such regulation shall be liable, on summary conviction, to a fine not exceeding one thousand dollars, or to imprisonment for any term not exceeding six months, or to both fine and imprisonment.

3. All regulations enacted under the provisions of this Act shall be published in the *Canada Gazette*, and, upon being so published, shall have the same force in law as if they formed part of this Act.

4. Such regulations shall be laid before both Houses of Parliament within ten days after the publication thereof if Parliament is sitting, and if Parliament is not sitting, then within ten days after the next meeting thereof.

Section 14 of the *Interpretation Act*, R.S.C. 1927, c. 1, says:

The preamble of every Act shall be deemed a part thereof intended to assist in explaining the purpose and object of the Act.

I note immediately that Parliament has not deemed it desirable, when passing 9-10 Geo. V, c. 11, assented to on 6th June, 1919, to state in a preamble the object and purport of the Act, so that we remain only with the report of the Minister of Justice who apprehends that

the legislation was enacted by Parliament on account of the expediency of making provision for the regulation of a service essentially important in itself as touching the national life and interest.

The latest decisions of the Privy Council on our Constitution are to be found, first, in the case of *Edwards* v. *Attorney General for Canada,* (1) where Lord Chancellor Sankey says at page 136:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. "Like all written constitutions it has been subject to development through usage and convention;" Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. "The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony": see Clement's Canadian Constitution, 3rd ed., p. 347.

The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catharine's Milling and Lumber Co.* v. *The Queen* (2). "That Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words." With that their Lordships agree, but as was said by the Lord Chancellor in *Brophy* v. *Attorney-General of Manitoba* (3), the question is not what may be supposed to have been intended, but what has been said.

The Lord Chancellor, however, restricts his observations in the following way:

It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise under ss. 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government.

The other case is *Attorney-General for Canada* v. *Attorney-General for British Columbia* (4), where Lord Tomlin, speaking for the Board, on October 15, 1929, lays down

(1) [1930] A.C. 124.
(2) (1888) 14 App. Cas. 46, at p. 50.
(3) (1895) A.C. 202, at p. 216.
(4) [1930] A.C. 111.

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Cannon J.

these four propositions relative to legislative competence in Canada as being established by decisions of the Judicial Committee:

Questions of conflict between the jurisdiction of the Parliament of the Dominion and provincial jurisdiction have frequently come before their Lordships' Board, and as the result of the decisions of the Board the following propositions may be stated:—

(1) The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s. 92; see *Tennant* v. *Union Bank of Canada* (1).

(2) The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92 as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion: see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2).

(3) It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91: see *Attorney-General of Ontario* v. *Attorney-General for the Dominion* (3); and *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (2).

(4) There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail: see *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada* (4).

Applying these four tests, I find

1st. That aviation, even if designated as aerial navigation, is not a subject enumerated in section 91, or in subsection 10 of s. 92. The works and undertakings connecting a province with another province or extending beyond the limits of the province are "physical things, not services," as pointed out by Lord Atkinson in *City of Montreal* v. *Montreal Street Railway* (5). The air lines cannot be assimilated to railways as physical things and this authority applies with singular force to exclude federal control of aviation, unless the latter is assimilated to interprovincial lines of navigation.

(1) [1894] A.C. 31.
(2) [1896] A.C. 348.
(3) [1894] A.C. 189.
(4) [1907] A.C. 65.
(5) [1912] A.C. 342.

2nd. Nothing before us shows conclusively that it is unquestionably a matter of national interest and importance and that it does not trench on any of the subjects enumerated in s. 92 or that it has attained such dimensions as to affect the whole body politic of the Dominion.

3rd. My first finding disposes of the third test; this legislation is not necessarily incidental to effective legislation by Parliament upon a subject of legislation expressly enumerated in s. 91, amongst others " navigation and shipping, militia, military and naval service and defence, regulation of trade and commerce." Perhaps an all powerful national air-board and an all-inclusive national air code would be the desideratum if we were drafting *de novo* section 91, but under our peculiar dual form of government, it is difficult to see how such results can be accomplished without ignoring the federal constitution. Such legislation might be required in case of war, in time of extraordinary peril to the national life of the Dominion, but this Act was not passed for such an emergency, and it cannot be justified as an exception to the exclusive right of the provinces to legislate concerning property and civil rights.

4th. This legislation, so far as property and civil rights are concerned, does not touch a domain where provincial and Dominion legislation may overlap. The ownership of the air space is *prima facie* a subject within the exclusive jurisdiction of the provinces; and they alone can impose restrictions to the rights of the owners of land and to those of the owners of aircraft. Almost every federal power could be somewhat more conveniently exercised if some portion of provincial sovereignty were added to it. This rule for the extension of the federal power should require a strict necessity for its application. If mere convenience is to be a sufficient cause, then assuredly the reservation to the provinces of the control of property and civil rights is meaningless and futile. As pointed out by my brother Duff, re *Montreal Street Railway* v. *City of Montreal* (1),

Division of legislative authority is the principle of the B.N.A. Act, and if the doctrine of necessarily incidental powers is to be extended to all cases in which inconvenience arises from such a division, that is the end of the federal character of the Union,

(1) (1910) 43 Can. S.C.R. 197, at p. 232

1930

REFERENCE *re* REGULATION AND CONTROL OF AERONAUTICS IN CANADA.

Cannon J.

and paraphrasing Lord Atkinson's statement in the same case (1): "It cannot be assumed that the legislatures will decline to co-operate in a reasonable way to effect an object so much in the interest of both the Dominion and the province as the regulation of air traffic."

Although the Lord Chancellor in the *Edwards* case (2), says that

> the B.N.A. Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words,

it would seem by the above-quoted reservation that he makes that statement non-applicable to the question of the legislative competence either of the Dominion or its provinces; judges cannot afford to give to a text which is clear a liberal and large interpretation in favour of Dominion power to the detriment of the provinces, and vice versa.

I would therefore say, with respect for those who believe that our constitution must be stretched to meet new conditions as they arise in the life of the people, that aviation was not foreseen nor considered when the enumeration of 91 was made, and that the words "property and civil rights" in section 92, are wide enough to give power to the provinces of legislating, with the required uniformity, to ensure safe and satisfactory regulation of aircraft throughout the Dominion and conform to the new requirements of International Law since the sovereignty of each State over the air space above its territory has been proclaimed in 1919.

I would therefore answer question 3 in the negative.

Question 4 as framed I would answer in the negative under sections 91 and 92 of the B.N.A. Act; but, under 132, I would refer to my answers to questions 1 and 2.

Questions 1 and 2

Reaching the above conclusions with respect to the application of sections 91 and 92, I must now come to the main contention of the Dominion that section 132 of the Act validates the impugned provisions.

Question 1

Section 132 provides that

> The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or *of any province thereof,* as *part of the British Empire,* towards foreign countries arising under treaties between the Empire and such foreign countries.

(1) [1912] A.C. 346. (2) [1930] A.C. 124.

As already stated, the treaty was signed on behalf of the Empire on the 13th October, 1919, and ratifications deposited in Paris on June 1st, 1922.

The *Air Board Act* was assented to on the 6th of June, 1919, before the Parliament of Canada could invoke article 132 to secure the power of performing the obligations of Canada under a treaty which was not then in existence. It requires an existing treaty to give validity to legislation, not merely a prospective convention.

But the Act has been re-enacted as chapter 3 of the Revised Statutes of Canada (1927) which, under proclamation, came into force and have affect as law on, from and after the first day of February, 1928, pursuant to the Act respecting the Revised Statutes of Canada, assented to on 19th July, 1924. At both the latter dates, the convention was in force. But at no time has the Parliament of Canada, as they had done for the Japanese Treaty, passed an Act providing that the treaty should be thereby sanctioned and declared to have the force of law in Canada.

I would therefore answer the first question, as drafted, in the negative. The Parliament and Government of Canada may have paramount, though not exclusive, legislative and executive authority for performing the obligations of Canada, or any province thereof, under the Convention, but have not yet found it necessary or proper to exercise such legislative power.

Question 2

We have not before us the elements required to answer question 2 in the affirmative. Is Parliament or this court to decide what legislation may be *necessary* or *proper* for performing the obligations of Canada under the Convention?

By inserting the words "or of any province thereof" in clause 132, the Fathers of Confederation seem to imply that some of the Treaty obligations might, as an internal matter, be considered as within the jurisdiction of Canada as a whole, and others as within the provincial competence.

If the provinces, or any of them, refuse or neglect to do their share within their legislative ambit with sufficient uniformity to honour the signature of the Dominion, then the question may come before Parliament which might, in a preamble explain why it had become either necessary or

1930

REFERENCE re REGULATION AND CONTROL OF AERONAUTICS IN CANADA

Cannon J.

proper, to legislate and make regulations under the special powers given by 132. This has not yet been done and, with the data submitted, I cannot answer the question in the affirmative. Moreover, if the words "generally" in the question are equivalent to "in every respect", the answer is in the negative.

Pursuant to the statute, I certify the above as my opinion and reasons for the information of the Governor in Council.

The judgment rendered by the court was as follows:

"The court unanimously answers question no. 1 as follows:

"As framed, question no. 1 must be answered in the negative.

"The answer of the Chief Justice, Duff, Rinfret, Lamont, Smith and Cannon JJ. to question no. 2 is 'construing the word 'generally' in the question as equivalent to 'in every respect' the answer is in the negative.'

"The answer of the Chief Justice, Duff, Newcombe, Rinfret, Lamont and Cannon JJ. to question no. 3 is 'construing the question as meaning, 'Is the section mentioned, as it stands, validly enacted?' the answer is in the negative.'

"But, if the question requires the court to consider the matters in the enumerated subheads of s. 4 of the Statute as severable fields of legislative jurisdiction, then the answers are to be ascertained from the individual opinions or reasons certified by the judges.

"As to question no. 4, the answers are to be ascertained from the individual opinions or reasons certified by the judges."

Solicitor for the Attorney-General of Canada: *W. Stuart Edwards.*

Solicitor for the Attorney-General of Ontario: *E. Bayley.*

Solicitor for the Attorney-General of Quebec: *Charles Lanctot.*

Solicitor for the Attorney-General of Manitoba: *W. J. Major.*

Solicitor for the Attorney-General of Saskatchewan: *M. A. McPherson.*

INDEX

CONSTITUTIONAL LAW — *Riot — Calling of Active Militia — Requisition by Attorney General of the province—Liability of the province for expenses incurred—Militia Act, R.S.C.*, 1906, *c.* 41, *sections* 8 *to* 90; 1924 (*D.*) *c.* 57—*Public Service Act, R.S.N.S.*, 1923, *c.* 9, *s.* 2, *s.* 3 (1), *s.* 4, *s.* 40.] The question referred to this court is whether the province of Nova Scotia is liable, or not, to pay to the Dominion of Canada all expenses and costs incurred by the latter by reason of part of the active militia of Canada being called out and serving in aid of the civil power in the county of Cape Breton in 1925, in a case of riot, upon a requisition, made by the Attorney-General of Nova Scotia in the form prescribed by s. 85 of the *Militia Act* (R.S.C., 1906, c. 41; (D) 1924, c. 57), which included an undertaking by him that these expenses and costs would be paid to the Dominion Government by the province.—*Held*, Newcombe J. dissenting, that the question should be answered in the negative. Sections 80 to 90 of the *Militia Act* repose certain powers in the person occupying the position of Attorney-General in the province for the time being, but the exercise of these powers does not in any way depend upon the consent of the Lieutenant-Governor or of the provincial legislature. The *Militia Act* envisages the Attorney-General, not in his capacity as Attorney-General to His Majesty as the Sovereign Head of the province, but at a person in whom certain powers are vested and on whom certain duties are laid by the statute. These sections apply to every province and go into operation independently of the scope of the Attorney-General's authority to bind the province in respect of the expenditure of moneys for such purpose. Therefore these enactments do not contemplate a duty to pay, proceeding from a contract between the province and the Dominion. The revenues of the province are vested in His Majesty as the supreme head of the province, and the right of appropriation of all such revenues belongs to the legislature of the province exclusively. *Semble* that the Attorney-General (whose duties, in so far as now material, include the supervision of the administration of justice within the province) has no statutory authority to undertake the payment now demanded by the Dominion: the subject matters comprised within the supervision of the administration of justice would not embrace authority to enter into such an undertaking.—*Per* Newcombe J. (dissenting).—Assuming

CONSTITUTIONAL LAW—*Continued*

that sections 84, 86 (3) and 89 of the *Militia Act* are ineffective to bind the province without provincial sanction, there are other valid provisions remaining, respecting *Aid of the Civil Power*, which are independent of and separable from the impugned Dominion provisions, and which provide all legislation that the Dominion requires to enable it to maintain the claim now under consideration. An Order in Council was not necessary in order to bind the province, seeing the authority which the provincial Attorney-General, who requisitioned the troops, had by statute, as the political head to whom adequate executive power was delegated; and the provincial Government, during the long period of military activity, had stood by consenting.—*Per* Cannon J.—Such an undertaking, signed by the Attorney-General acting as such on behalf of the province of Nova Scotia, to be valid and binding on the province, would have to be ratified by the legislature, as it would affect the finances and dispose of the revenues of the province. But it is the spirit of our constitution that, in emergencies beyond the control of the civil power in one province, the cost of the aid given by the Dominion militiamen should be borne by the province. In this case, the province of Nova Scotia is only conditionally liable to the Dominion for the expenses now claimed, because, since the amending of the *Militia Act*, in 1924, the legislature has not yet passed legislation concurrent with that Act and has not yet voted the necessary funds to honour the signature of its Attorney-General who, under the rule of ministerial solidarity, acted for and on behalf of the government of the province. REFERENCE RE TROOPS IN CAPE BRETON..... **554**

2 —— *Aerial navigation — Dominion and provincial jurisdiction — International Convention—Paramount, not exclusive, Dominion jurisdiction — Intra-provincial aviation within provincial jurisdiction—"Navigation and Shipping"—B.N.A. Act*, 1867, *ss.* 91, 92, 132—*Supreme Court Act, R.S.C.*, 1927, *c.* 35, *s.* 55—*Aeronautics Act, R.S.C.*, 1927, *c.* 3—*Convention Relating to the Regulation of Aerial Navigation of* 1919—*Air Regulations*, 1920.] The Dominion Parliament has not, independently of treaty, jurisdiction to legislate on the subject of air navigation generally, the word "generally" being construed as equivalent to "in every respect"; and it did not, by the International "Convention relating to the Regulation of Aerial Navigation," acquire, under section 132 of the B.N.A. Act, *exclusive* authority to legislate in such a way as to carry out the obligations the Convention imposes on Canada and its

CONSTITUTIONAL LAW—*Continued*

provinces. But the Dominion Parliament's jurisdiction is *paramount* in the exercise of its authority to carry out these obligations.—The subject of intra-provincial aviation *prima facie* falls within the legislative jurisdiction of the provinces under one or other of the heads of section 92 of the B.N.A. Act.—The control of aeronautics does not come within the subject of "Navigation and Shipping" assigned to the Dominion by section 91 (10) of the B.N.A. Act.—The Dominion Parliament, in relation to aeronautics, has legislative control over aircraft and aerial navigation, so far as incidentally necessary in connection with various matters assigned under specific heads of section 91, such as "The Regulation of Trade and Commerce," "Postal Service," "Militia, Military and Naval Service and Defence" and "Naturalization and Aliens."—As to the questions 3 and 4, concerning the provisions of section 4 of the *Aeronautics Act* and the "Air Regulations" of 1920, the members of the court (except Newcombe J. who raised a preliminary question as to the propriety of answering these questions and Cannon J.), considered that they were bound by section 55 of the *Supreme Court Act* to answer the questions submitted as fully as the circumstances permitted and, after examining these provisions and regulations, upheld certain of them as valid and denied the validity of others.—*Per* Anglin C.J.C. and Newcombe, Smith and Cannon JJ.—Legislative jurisdiction over intra-provincial flying *prima facie* belongs to the provinces under sub-section 13 of section 92 (Property and Civil Rights).—*Per* Anglin C.J.C. and Newcombe J.—Dominion powers derived under section 132 of the B.N.A. Act should be liberally interpreted to include all such as are necessary or proper for achieving the purposes defined. The Dominion is, by that section, authorized to exercise these powers for performing its treaty obligations, and equally so for performing those of a province, irrespective of the question as to where the power would have resided if section 132 had not been enacted.—*Per* Anglin C.J.C. and Smith J.:—Although a province may effectively legislate for the performance of treaty obligations in regard to any matter falling within section 92 of the B.N.A. Act while the field is unoccupied by the Dominion (but not otherwise), Dominion legislation, being paramount, will, when enacted, supersede that of the province about such matters.—*Per* Anglin C.J.C. and Smith J.—The Dominion Parliament has legislative authority to sanction the making and enforcement of the Air Regulations, respecting the granting of licences to pilots and their suspension or revocation; the regulation, etc., and

CONSTITUTIONAL LAW—*Continued*

licensing of all aircraft; and also the licensing, inspection and regulation of all aerodromes and air stations described in the Convention, and, as to others, so far as may be necessary to prevent air navigators being confused or misled in locating and landing at aerodromes and air stations referred to in the Convention, or in reading ground markings made in pursuance of the Convention.—*Per* Duff, Rinfret and Lamont JJ.—The legislative jurisdiction of the provinces under s. 92 runs through the space above the surface of provincial territory as through the surface itself and the space below; and the matters comprised within the subject of aviation primarily fall within that jurisdiction.—"Navigation and Shipping," within the meaning of Head 10 of s. 91, does not embrace that subject. The Dominion may exercise legislative jurisdiction in relation to aviation in the course of executing its authority over various matters which fall within certain of the unenumerated heads of s. 91 or within the subject of Immigration (s. 95); it may also exercise such authority under s. 132 where the conditions exist under which that section comes into play. These conditions are, first, that there exists an obligation of Canada or of a province (as part of the British Empire) towards a foreign country arising under a treaty between the Empire and a foreign country, and, second, that the obligation relates to the subject of aviation or in some manner affects it. The powers arising under that section are given for performing such obligations, and can only be validly exercised in the performance of, and for the purpose of performing, them. Legislation enacted in the valid exercise of such powers takes effect notwithstanding any conflicting law of a province; the Dominion has full competence under s. 132 to give effect by legislation to the rules embodied in the Convention of 1919, and to take measures for the effectual enforcement of them.—Any conflicting or repugnant provincial rules would be superseded by such legislation. The Heads of s. 91 which come under consideration in answering the questions submitted are no. 5, the Postal Service; no. 7, Military, Militia and Naval Service and Defence; no. 11, Quarantine; no. 25, Naturalization and Aliens; no. 2, the Regulation of Trade and Commerce; no. 3, Raising of Money by any Mode or System of Taxation. Under these Heads, the Dominion is entitled to exercise legislative control over the use of aircraft in carrying mails; over the conditions under which goods, mails or passengers may be imported and exported in aircraft into or from Canada; in respect of (in this case, in conjunction with s. 132) the prohibition of the navi-

CONSTITUTIONAL LAW—*Continued*

gation of aircraft over prescribed areas; over landing places for aircraft entering Canada and the conditions of such entry; in relation to the Air Force. The specific question as to the authority of the Dominion to control aerial locomotion between the provinces does not arise under any interrogatory submitted, upon any construction of the interrogatories. Likewise, no question arises (upon any reasonably possible construction of any of the interrogatories) in relation to Dominion legislative authority (under Head 29 of s. 91) in respect of the exceptions defined in Head 10 of s. 92, in their application or possible application to "lines" or regular services of aircraft between two provinces; or in their application to such "lines" or regular services beyond Canada. S. 4 of the *Aeronautics Act*, which is a re-enactment of the statute of 1919, and must not be treated as new law, cannot be regarded as having been enacted under s. 132 for the purpose of giving effect to the Convention of that year, because the Convention did not come into force until after the passing of the statute. S. 4 proceeds upon the theory that the Dominion has, independently of s. 132, complete control over the subject of aerial navigation in every respect, and by that section the Minister is given unrestricted authority to regulate and control such navigation in all its aspects, and particularly, in relation to certain matters enumerated by way of example. Parliament herein professes to exercise an authority which it does not possess, and s. 4 is, in its entirety, *ultra vires*; and consequently, the regulations promulgated under it. Treating, however, interrogatory no. 3 as requiring the court to express its opinion as to the severable matters enumerated in s. 4, as subjects of legislative jurisdiction, and as to the authority of Parliament, in view of the Convention of 1919, or otherwise, to enact s. 4 in relation to such severable matters or any of them, then the answer to interrogatory no. 3 is that, as regards the matters specified above (which are among the severable matters particularized in s. 4) Parliament has jurisdiction under s. 91 or s. 95; as regards identification and inspection of aircraft, and as regards inspection of aerodromes and air stations, Parliament has jurisdiction, in view of the Convention of 1919, under s. 132. While legislation under s. 132, for performing the obligations of Canada under the Convention of 1919, might properly include regulations in relation to registration and certification of aircraft and licensing of personnel and air harbours, if aptly framed to secure the performance of such obligations, and limited to that, the unrestricted powers in relation

CONSTITUTIONAL LAW—*Continued*

to such subjects which Parliament professes to exercise by s. 4 are neither "necessary" nor "proper" for performing those obligations. Answering question no. 4 on a similar assumption, the regulations on the subjects mentioned are not aptly framed for the purpose of performing the obligations under the Convention of 1919. The vice of the principal regulations (speaking generally) is that they are too sweeping in character to fall within the category of legislation "proper or necessary" for performing these obligations. The precise answers to questions 3 and 4 are given in the judgment.—*Per* Newcombe J.—The language of section 132 does not require, either expressly or by necessary implication, nor does it suggest, that a province should thereby suffer diminution of the powers expressed in its enumerations or otherwise conferred, except to admit capacity, on the part of the Dominion, which, in relation to provincial obligations, is no more than concurrent, so long as these are not performed by the province. The case of obligations to be performed for which a province has become bound by treaty to a foreign country, though perhaps difficult to realize, is expressly provided for by section 132; and while, pending provincial non-performance, power is, by that section, conferred upon the Parliament and Government of Canada, the Dominion power cannot be interpreted as meaning to deprive the province of authority to implement its obligations. If that had been the intention it would have been expressed.—*Per* Newcombe J.—The right of way exercised within a province by a flying machine must, in some manner, be derived from or against the owners of the property traversed, and the power legislatively to sanction such a right of way appertains *prima facie* to property and civil rights in the province, although it may be overborne by ancillary Dominion powers, where they exist.—*Per* Newcombe J.—This court ought not to determine under the present procedure question no. 2 which involves the definition of treaty obligations and the ascertainment, judicially, of the interest of foreign sovereign parties to the Convention, who are unrepresented and cannot be convened, especially so, seeing that the interpretation of the Convention is, by its article 37, to be determined by the Permanent Court of International Justice, or, previously to the establishment of that court, by arbitration. The inadvisability of that question being answered should be called to the attention of the Governor General.—*Per* Cannon J.—The Dominion Parliament may have paramount legislative and executive power for performing the obligations of

CONTRACT—*Continued*

idleness of some units as aforesaid, until the engineer determined that some unit or units were no longer required on the work and released them. (Judgment of Maclean J., [1929] Ex. C.R. 136, on this point affirmed.)—*Held*, also, that respondent was not entitled to interest on delayed payments (claimed on the ground that by reason of delay in payment respondent had to borrow at interest, and such interest should be included as part of the cost of the work); it was merely a case of moneys due respondent being withheld beyond due dates, in which case the Crown is not liable for interest except under special circumstances such as existence of statutory provision or contractual obligation. (Judgment of Maclean J., *supra*, in so far as he allowed interest, reversed.) THE KING *v.* ROGER MILLER & SONS LTD..... **293**

3 —— *Breach — Sale of goods — Pleading —Breach of duty to employer—Evidence of plaintiff's contract of hiring with employer —Admissibility—Fraud.*] In an action for breach of a written contract the defence was raised that the respondent was guilty of a breach of duty towards his employer in entering into the contract, but as no fraud was alleged in this regard, the paragraph was struck out with leave to amend. The amended paragraph alleged that the contract was made by the appellant's agent without authority and contrary to instructions and that the agent and the respondent fraudulently conspired together to bring about the contract, that the contract was procured by fraud and the respondent fraudulently obtained from the agent a price lower than the market price of the goods. The trial judge refused to admit evidence of the respondent's contract of hiring with his employer on the ground that a defence of illegal contract had not been raised on the pleadings; and the jury found in favour of the respondent. It was argued by the appellant before this court that the price named in the contract being less than the market price, a profit would have accrued to the respondent if the contract had been carried out and that such concession to the respondent had been given by the appellant's agent, and accepted by the respondent, as a bribe to induce him to advance the interests of the appellant in the dealings of the respondent's employer with it through the respondent; and it was further argued by the appellant that the facts already disclosed by the evidence point to the existence of such a conspiracy or illegal agreement and that, notwithstanding the insufficiency of the pleadings, it was the duty of the trial judge to investigate the facts and for that purpose to receive further evidence

CONTRACT—*Continued*

supporting the appellant's argument above stated.—*Held* that the trial judge was right in rejecting the evidence offered by the appellant. If such an agreement, affecting the contract sued upon, had been embodied in a document put in evidence by the respondent, and the character of it had been thereby plainly disclosed, or if the nature of it plainly appeared from other evidence adduced by the respondent, then, if the court was satisfied it has before it all the facts, the respondent would have necessarily failed; and, in such circumstances, it was immaterial whether or not the agreement had been pleaded in defence. It is otherwise, however, where the appellant, in order to shew that the contract sued upon was unenforceable, was obliged to adduce evidence of the corrupt inducement. The appellant was not entitled to present such evidence unless the respondent has had notice, through the pleadings, of the nature of the defence. *North Western Salt Co.* v. *Electrolytic Alkali Co.* ([1914] A.C. 461) followed.—Judgment of the Court of Appeal (40 B.C. Rep. 499) affirmed. BAIN *v.* MADDISON..... **299**

4 —— *Sale of land — Printed form — Alteration by pen and ink—Whether ambiguity or repugnancy between clauses— Interpretation—Evidence of intention by use of deleted words.*] The appellant sold to the respondent two large areas of land in Alberta. The parties in formulating their agreement employed the printed form which the vendor customarily used for such transactions, filling up the blanks in typewriting; but there were some handwritten interlineations in the print, and the printed clause immediately following the blank in which the description of the parcels of land was typewritten appeared in the original executed agreement in the following form:

excepting thereout and there-
any overriding "* * *
from ~~all coal and other min~~-
royalty of ten per cent of all oils or gas
~~erals, including petroleum,~~
found or produced from said lands
~~natural gas, and valuable stones in or under the said land, and the right to use so much of the said land or the surface thereof as the vendors or their assigns may consider necessary for the purpose of working and removing the said~~

CONTRACT—*Continued*

~~coal or other minerals, including petroleum or natural gas,~~ and any portion of the said lands taken for roads or public purposes * * *;"

Later in the instrument, and as part of the printed form not stricken out, there was a covenant by the vendor that, if the purchaser pay the purchase money and perform all and singular the conditions of the agreement, he shall be entitled to receive from the vendor a transfer of the land in fee simple, "excepting thereout and therefrom all coal mines and other minerals including petroleum and natural gas and valuable stones." The sale was for a price of $190,219.80 of which $45,000 was paid upon the execution of the agreement and the balance was made payable in five yearly instalments with interest and taxes. None of the deferred payments was in fact made by the respondent except a sum of $384; and, the agreement not being fulfilled, the appellant brought this action for specific performance. The respondent resisted payment on the ground that the land agreed to be sold embraced all coal mines, coal pits, seams and veins of coal and the right to work the same, which coal mines, etc., were the property of the Crown, and the appellant being unable to make title thereto as required by its agreement, the respondent counterclaimed for the repayment of $45,000 and a declaration that the agreement was cancelled.—*Held*, Anglin C.J.C. dissenting, that, according to the meaning of the deed, it was not the intention of the agreement that the vendor should convey the mines and minerals with the lands.—*Held*, also, Anglin C.J.C. dissenting: In order to reach the conclusion that, according to the meaning of the deed, the mines and minerals were to go with the lands, the trial judge and the Appellate Division had to take into consideration "the printed form as it existed before the erasures," relying upon the authority of *Strickland* v. *Maxwell* (2 Cr. & M. 539). But, although it is difficult to distinguish the material facts of that case with those in the present one, the opinion therein expressed by Bayley and Vaughan B.B., who held it admissible to reason from the obliteration, cannot be followed, because that seems contrary in principle to the rule against extrinsic evidence as laid down by the books and, moreover, in conflict with the judgment in *Inglis* v. *Buttery* (3 App. Cas. 552).—The original grant from the Crown contained the reservation by it of "all coal mines, etc., * * * together with full power to work the same * * *" and while there is an exception embodied in the agreement which, according to the above holding,

CONTRACT—*Concluded*

embraces coal mines, etc., if there be any, it does not provide expressly for the working powers and liberties. There are however powers and liberties incident to the ownership and they rest upon the implications of the case. But the respondent raised the ground that the powers for working, as expressly reserved by the Crown, are more comprehensive than those which are incident to the exception created by the agreement and therefore the appellant company has less than it has agreed to convey. *Fuller* v. *Garneau*, (61 Can. S.C.R. 450) relied on —*Held*, further, per Duff, Newcombe, Lamont and Smith JJ., that there was no evidence that the lands subject to the agreement contained any coal, or, if any, that it could not be worked without causing damage to the surface. The Crown grants are in common form, and no inference can be drawn that a parcel of land contains coal because the grant by which the parcel is conveyed contains the common form of reservation. But if there be coal upon which the reservation operates, it is only "to such an extent as may be necessary for the effectual working" of it that the right "to enter upon or use or occupy the said lands" may be exercised. The necessity must therefore be shewn, either by the vendor or by the purchaser, before the reservation of the Crown grant can be found to extend beyond the exception for which the agreement provides. The onus is upon the party who suggests or relies upon the necessity, namely the respondent, to produce the proof or to establish this evidence, and the respondent has failed to do it.—*Per* Anglin C.J.C. (dissenting).—While, under ordinary circumstances, it is not proper to look at deleted words in an instrument as an aid to its construction (*Inglis* v. *Buttery*, 3 App. Cas. 552), that rule does not apply where, as a result of the deletion, there is ambiguity between different clauses of an agreement. And when the ambiguity is obvious, as in the present case, the principle which governs is that laid down in *Strickland* v. *Maxwell* (2 Cr. & M. 539), namely, that "the works struck out might be looked at to shew what the intention of the parties was." KNIGHT SUGAR CO. *v.* WEBSTER..... **518**

CONVERSION — *Action for damages for —Chattels left by plaintiff on defendant's land—Failure to remove—Circumstances justifying assumption of abandonment—Extent of onus of proof as to plaintiff's title.* MCCUTCHEON *v.* LIGHTFOOT.. **108**

COUNTY COURT (MAN.)—*Jurisdiction as to equitable right.*

See MUNICIPAL CORPORATIONS.

CRIMINAL LAW—*Continued*

notes of the stenographer at the trial who certified, under oath, to the delivery of a charge by the trial judge which, as reported by him, contained a clear misdirection. The appellate court, having determined that, on the stenographic transcription, the appeal should be allowed, directed that a report be furnished by the trial judge in accordance with section 1020 Cr. C. The trial judge then prepared, two or three months after the trial, a certificate containing a number of statements made by him in answer to a corresponding number of objections to his charge which formed the grounds of appeal and stating, according to his recollection, that in fact his direction was precisely the contrary of that reported.—*Held* that such certificate of the trial judge was not a report within section 1020 Cr. C.: it did not contain the judge's "notes of the trial" nor was it a "report giving his opinion upon the case or upon any point arising in the case"; and, therefore, the court being left with nothing authentic and regularly before the court to establish that the charge was not as reported, the appellant was clearly entitled to a new trial. Section 1020 Cr. C. apparently contemplates that the judge or the magistrate should furnish "his notes of the trial" or his report immediately after the trial, or at least, so soon as an appeal is lodged; and it was never intended by this section to enable the trial judge, after an appeal had been argued, to put before the court of appeal, by way of certificate or otherwise, whether *proprio motu* or by direction of the court of appeal, his answer to the various points taken upon the appeal. BARON *v.* THE KING..... **194**

4 —— *Conspiracy — Witness—Accomplice — Charge — Misdirection — New trial—Police spy or informer—Need of corroboration—Practice when dissenting opinion in appellate court—Cr. C.*, *s.* 573, *s.* 1013, *ss.* 5.] The appellant, with two other men, was convicted of conspiring to commit an indictable offence. On appeal to the appellate court and to this court, the appellant's main ground was that one Boulanger, the chief witness for the crown, was in fact an accomplice; that the direction given by the trial judge was bad in law, as he had omitted to instruct the jury on what is an accomplice in law, and to warn them of the danger of convicting on the uncorroborated testimony of an accomplice.—*Held*, that, after consideration of the charge as a whole and reading it in the light of the evidence, there had been misdirection by the trial judge and that the appellant was entitled to a new trial. There was in the record of the trial some evidence upon which the jury might have found that Boulanger had been, at some stage of the affair, an accomplice in the conspiracy charged against the three accused; and it appears by his charge that the trial judge thought this was a question of fact that should be submitted for the determination of the jury. Therefore it was the first duty of the trial judge to have instructed the jury as to what in law would constitute a man an accomplice; he should then have proceeded to direct their attention particularly to any facts in evidence which would serve to indicate Boulanger's complicity in the conspiracy at any stage thereof, and to submit to them the issue as to whether what he was proved to have done made him, having regard to the direction in law already given, an accomplice; he should then have instructed the jury that, if they concluded that the witness was, at any stage of the proceedings, an accomplice in the crime charged against the accused, there would be danger in convicting them of that crime upon his evidence standing alone and uncorroborated, although the law did not preclude their doing so.—The formal judgment of the appellate court directed that "separate judgments should be pronounced" by the two dissenting judges of the court; and there was no direction that any other judgment be pronounced except that to be delivered by Cannon J., who was said to have been "designated by the Chief Justice to pronounce judgment." But opinions, practically the same as that of Cannon J., were also delivered by the two remaining judges.—*Held* that such a practice is contrary to the imperative prohibition of ss. 5 of s. 1013 Cr. C., its impropriety having already been asserted by this court in *Davis* v. *The King*, [1924] Can. S.C.R. 522. *Gouin* v. *The King*, [1926] Can. S.C.R. 539; *De Bortoli* v. *The King*, [1927] Can. S.C.R. 455, also ref.—Observations, in view of its regrettable results, as to misdirection by a trial judge which necessitates a new trial, especially where the misdirection is due to inattention to matters of substance.—Comments made upon a passage of Phipson on Evidence, 3rd Ed., at page 456, corrected in the 6th Ed., at page 486. The statement that "the rule requiring the corroboration of accomplice does not apply to * * * policy spy" means that the informer must have been connected with the matter from the first only as a police spy and not merely have "continued" as such. VIGEANT *v.* THE KING..... **396**

5 —— *Evidence—Tender of evidence given on former trial, under Cr. C., s. 999—Admission by accused's counsel of "every fact essential to the admission of the evidence" under s. 999—Extent of admission—Lack of proof that evidence put in was in*

end of 10 years. In an action by respondent for damages, and on questions of law raised, the Exchequer Court held that the agreement, if properly fulfilled by respondent, was to continue for 20 years, and could not be terminated by the Postmaster General at the end of 10 years. The Crown appealed.—*Held* (Anglin C.J.C. and Lamont J. dissenting): The licence was revocable at the Postmaster General's discretion. He had no authority to grant it so as to bind his successor or the country at a future time. It is of the quality of a licence that it shall be revocable. An implied covenant in this case not to exercise his power of revocation would be in excess of his powers to bind the Crown. A minister cannot by agreement deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion, upon grounds of public policy, to execute it (*Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas., 623). The question was one of statutory administration of the public service; the Minister could depute the performance of his duties only so far as authorized by Parliament; and, compatibly with the statute (*Post Office Act*, R.S.C., 1927, c. 161; ss. 2 (1), 4, 5, 7, 8, 66-80, referred to), he should have remained free to revoke the licence as the exigencies of the case in the public interest might require.—*Per* Anglin C.J.C. and Lamont J. (dissenting): The Postmaster General, in making the agreement, did not exceed his powers under the *Post Office Act*. S. 9 (*n*) of c. 66, R.S.C., 1906, as amended, 1911, c. 19, (now s. 7 (*m*) of c. 161, R.S.C., 1927), on its proper construction, authorizes him to secure by contract the erection and use of machines such as those in question, and implies authority to contract for a period of time, that period, in the absence of statutory limit, being left to his discretion, which in this case he exercised by fixing the period provided in the agreement. That period was not shown to have been, in the circumstances, unreasonable. While he cannot by contract deprive either himself or his successors of the right to close a post office if the public interest requires its closing, that right was not interfered with by the agreement; a machine was a post office only when, with his consent, mailable matter might be placed in a compartment thereof, and on the closing of that compartment the machine would cease to be a post office. The granting in the contract of permission to respondent to have and use compartments in the machines for certain purposes of its own, was within the Minister's authority.

The Postmaster General had no right to determine the agreement as he did, even assuming that it was a mere licence. A licence, if given for value, or a licence with an agreement not to revoke it, if given for value, is an enforceable right and cannot be revoked without sufficient cause; further, if the agreement for the giving or continuing of a licence, or the circumstances under which it is given or continued, are such as to make it inequitable that the licence should be revocable at the will of the licensor a court will exercise its equitalbe jurisdiction to prevent an unjust revocation (*Ramsden* v. *Dyson*, L.R. 1 H.L., 129; *Plimmer* v. *Mayor, etc., of Wellington*, 9 App. Cas., 699; *Hurst* v. *Picture Theatres Ltd.*, [1915] 1 K.B. 1; *Whipp* v. *Mackey*, [1927] I.R., 372, and other cases, cited.) Even if the agreement in question could have been revoked before respondent expended money in construction of the machines (as to which *quaere*), once it had expended money on the faith of the licence, an equity was created in its favour which rendered a revocation unjust; the agreement, in the light of what was contemplated by and done under it, should be construed as containing an implied contract not to revoke it except in accordance with its provisions for its determination. THE KING *v.* DOMINION OF CANADA POSTAGE STAMP VENDING CO. **500**

5 —— *Railways — Telegraph lines planted by company on roadway of Government railway—Alleged permission to plant and maintain them — Evidence — Licence — Revocability—Absence of formal contract—Department of Railways and Canals Act, R.S.C.*, 1927, *c.* 171, *ss.* 7, 15.] The Crown took proceedings in the Exchequer Court against defendant, alleging that it had wrongfully planted and maintained its telegraph lines upon the roadway (belonging to the Crown) of the Intercolonial Railway. Audette J., [1930] Ex. C.R., 26, held that defendant was on the roadway by licence, but not an irrevocable licence, of the Crown. Defendant appealed, asserting an irrevocable licence, and the Crown cross-appealed, denying the existence of any licence. For purposes of its judgment, this Court considered the telegraph lines as in three sections, (1) the "Main Line" (between St. John and Halifax, with a branch from Truro to New Glasgow; built in 1888-1890), (2) the "Branch Line" (from New Glasgow to Sydney, built in 1893), and (3) the "Westville Line" (from Westville to Pictou, built in 1911).—*Held* (1) As to the "main line," on the evidence, the defence of leave and licence failed, and there was nothing to give rise to any equity in defendant's favour.—(2) As to

CROWN—*Continued*

the "branch line," on the evidence, there was no agreement (giving leave to defendant to use the roadway) proved; or, even if otherwise, the agreement, such as it may have been, had ceased to operate in any particular, unless to negative defendant's liability to remove its poles and wires; and defendant was, when the present action began, in no better position than that of licensee whose leave was terminated or exhausted.—(3) As to the "Westville line," from the evidence it appeared that defendant built it on the roadway by consent, the parties having mutually in view the negotiation of a contract, with adequate sanctions, to regulate their rights and obligations; and, with nothing more definite, defendant had ever since maintained and used the line without notice or warning of intention by the Government to withdraw the licence. The licence was revocable, but the right to revoke should be exercised reasonably; in the circumstances, an abrupt determination, without demand or notice, was unjustifiable. Therefore, as to this line, there was no cause of action when the proceedings were commenced, and the action must fail. *The King* v. *Inhabitants of Horndon-on-the-Hill*, 4 M. & S., 562, at p. 565; *Cornish* v. *Stubbs*, L.R. 5 C.P., 334, at pp. 337-340; *Coleman* v. *Foster*, 1 H. & N., 37, at pp. 39, 40; *Kerrison* v. *Smith*, [1897] 2 Q.B., 445, and other cases, cited. (Anglin, C.J.C., dissenting on this point, held that failure to give notice of revocation was not necessarily fatal to the action; on the contrary, inasmuch as defendant asserted that its licence as to this line was irrevocable and contested the Crown's claim to exclude it on the merits, the bringing of the action itself should be regarded as sufficient notice, subject only to the question of costs and allowance of a reasonable time to defendant to remove its poles and wires. *Cornish* v. *Stubbs supra*, *Coleman* v. *Foster supra*, and other cases referred to).—(4) As to all the lines generally, apart from other considerations, the contracts alleged by defendant were ineffective for non-compliance with statutory requirements (*Department of Railways and Canals Act*, R.S.C., 1927, c. 171, ss. 7, 15, referred to; *The Queen* v. *Henderson*, 28 Can. S.C.R. 425, discussed and distinguished). The telegraph rights claimed by defendant in perpetuity with respect to the railway lands in question could not be acquired for defendant's accommodation by the mere laches, acquiescence or tolerance of the executive officers and employees, charged under the Minister with the administration or working of the railway. It was contemplated that whatever concessions might be authorized should be contracted for by the Crown, represented by the

CROWN—*Concluded*

Minister, and defendant knew, or is presumed to have known, the statutory requirements. Moreover, as to defendant's claim that it had acquired in perpetuity, and in the manner contended for, the right to use the Government railways for its telegraph lines, effect must be given to the principles expressed in *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas., 623 (see at pp. 634, 639). When planting its poles on the Government railway, defendant must have realized the facts of the case and the risks to be encountered, and the desirability of securing permanent concessions, if possible, or if they could or would be granted by the executive authorities; and there was no foundation upon which to apply the doctrine of estoppel. In so far as any contract competent to the parties could answer the purpose, the defendant neglected entirely the most elementary requirements as to the ascertainment of the terms, and the statutory essentials of form and sanction. (Reference also to Selwyn's Nisi Prius, 13th ed., p. 1086 and to *Blanchard* v. *Bridges*, 4 Ad. & El. 176, at pp. 194-195).—Judgment of Audette J. (*supra*) reversed in part in favour of the Crown. CANADIAN PACIFIC RAILWAY CO. *v.* THE KING..... **574**

See also REVENUE.

CUSTOMS..... **434**

See REVENUE 5.

DISTRESS..... **338**

See LANDLORD AND TENANT 1.

DOMICILE — *Intention of the party — Marriage outside of the province—Circumstances—Change of domicile—Matrimonial status—Whether common or separate as to property—Evidence—Burden of proof—Art. 80 CC.*] The appellant was born on June 30, 1865, in Mosquito, Newfoundland, where his parents were domiciled. He remained there until 1886, when he went to La Have River, in Nova Scotia, in order to seek better employment as a mechanic. Then he worked his way on a ship to Sidney, Cape Breton and from there went to Montreal in October, 1886. He obtained employment in the Grand Trunk Railway Company's shops and boarded with a distant relative of his father. Some months later, he changed to one of the shops of the Canadian Pacific Railway Company in Montreal. He went to Toronto, worked there for a time and returned to Montreal, obtaining employment in another shop of the Canadian Pacific Railway. He then represented to his father and mother the advantages they would secure by coming to Montreal. The result was that, in 1887, the whole family came to Mont-

DOMICILE—*Concluded*

real, with the exception of a married sister who remained in the homestead; but she also came to Montreal the following year, the family home being rented to a neighbour. The father took a house in Montreal and the appellant boarded with him. In 1889, the father and mother decided to return to Newfoundland but failed to do so on account of the father's illness and subsequent death. In July, 1889, the appellant went to Newfoundland and married at Carbonnear the respondent's mother. He told the officiating minister that he came from Montreal and the marriage certificate describes him as "of Montreal, P.Q." After the marriage, the appellant and his wife went to Halifax; and, there being no work there, they both came on to Montreal where they lived until the death of appellant's wife. It is also in evidence that, after her death, the appellant caused an inventory to be made before a notary "of the community of property which formerly existed between him and his said late wife."—*Held*, affirming the judgment of the Court of King's Bench (Q.O.R. 45 K.B. 184), Newcombe and Smith JJ. dissenting, that all the circumstances of the case point to the fact that the appellant had abandoned his domicile of origin and had made Montreal his new domicile. (Art. 80 C.C. .—*Per* Newcombe and Smith JJ. (dissenting).—Upon the evidence, it must be held that, up to the time of the marriage, there had been no change of domicile. The burden of establishing as a fact the acquisition of a new domicile and the abandonment of the domicile of origin by the appellant was on the respondent and he has not discharged it. The evidence must be "unmistakable * * * that the party who has the domicile of origin intends to part with it * * *." (*The Lauderdale Peerage*, 10 App. Cas. 692.) TAYLOR *v.* TAYLOR..... **26**

DRAINAGE..... **494**
See MUNICIPAL CORPORATIONS.

EDUCATION..... **599**
See SCHOOL LEGISLATION.

ESTOPPEL..... **338**
See LANDLORD AND TENANT 1.

EVIDENCE — *Burden of proof—Domicile—Intention of the party—Marriage outside of the province—Circumstances—Change of domicile—Matrimonial status — Whether common or separate as to property—Art.* 80 *CC.* TAYLOR *v.* TAYLOR..... **26**
See DOMICILE.

2——*Onus of proof (Application and effect of s.* 42 *of Highway Traffic Act) R.S.O.*, 1927, *c.* 251—*New trial*..... **156**
See MOTOR VEHICLES 1.

EVIDENCE—*Continued*

3 —— *Contract — Construction — Nature of transaction—Whether loan secured on land or agreement of sale of land with option of re-purchase—Admission of parol evidence—Findings on the evidence—Transaction in substance a loan on security—Stipulation for right of purchase in lender, void as repugnant to equitable right of redemption*..... **212**
See CONTRACT 1.

4——*Will—Alleged will not forthcoming after death—Sufficiency of proof of execution and contents—Rebuttal of presumption of destruction animo revocandi—Destruction of one will on assumption of replacement by later will—Dependent relative revocation* **252**
See WILL 1.

5——*Shipping—Loss of goods—Due diligence of ship owner—Latent defect—Burden of proof—Certificate of seaworthiness by government inspectors—Sections* 6 *and* 7 *of the Water Carriage of Goods Act*, (1910) 9-10 *Edw. VII, c.* 61, *now R.S.C.*, 1927, *c.* 207..... **262**
See SHIPPING.

6 —— *Contract — Breach — Sale of goods—Pleading—Breach of duty to employer—Evidence of plaintiff's contract of hiring with employer—Admissibility—Fraud* **299**
See CONTRACT 3.

7 —— *Negligence — Railways — Action against railway company for damages from accident at railway crossing—Sufficiency of evidence as to negligence—Admissibility of evidence—Wrongful withdrawal of case from jury — New trial—Railway line formerly under provincial jurisdiction, but, prior to accident, coming under federal jurisdiction—Admissibility in evidence of order made by provincial railway board during its period of jurisdiction*..... **416**
See NEGLIGENCE 3.

8 —— *Architect — Builder — Building perishing in whole or in part within ten years—Vices du sol—Liability of builder acting under employer's architect—Onus on builder—Art.* 1688 *C.C*..... **477**
See ARCHITECT.

9——*Contract—Sale of land—Printed form —Alteration by pen and ink—Whether ambiguity or repugnancy between clauses—Interpretation—Evidence of intention by use of deleted words*..... **518**
See CONTRACT 4.

10——*Banks and banking—Sums withdrawn without authority by local branch bank manager from customer's account—Suit by customer's executors for recovery—Defence of repayment—Onus—Evidence as to repayment—Evidentiary value of documents signed by customer as to bank balance and vouchers*..... **544**
See BANKS AND BANKING 3.

MOTOR VEHICLES—*Continued*

dence, A.'s manoeuvres after the collision were those of one who had "lost his head;" there was nothing in the circumstances of the collision to have so deprived a reasonably competent driver of his mental equilibrium; that being so, A. had failed to acquit himself of the statutory onus of shewing that the infant plaintiff's injury was not due to any "improper conduct" of his; to hold A. liable on this ground was not inconsistent with a judgment against C., who owed a duty to persons situated as was the infant plaintiff to anticipate such incidents as here occurred as the result of the collision (*Scott's Trustees* v. *Moss*, 17 S.C., 32, and other authorities referred to); plaintiffs should have judgment against both A. and C.; it was not a case for a new trial. CARTER *v.* VAN CAMP **156**

2——*Insurance against liability for injury —Action, by person injured by automobile whose owner is insured, against the insurer —Insurance Act, R.S.O.*, 1927, *c.* 222, *s.* 85 *—Establishment of liability against insurer on the policy—Facts to be proved and manner of proof—Condition in policy for no liability while automobile "with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law"—Insurer's onus of proof as to consent—Amount recoverable against insurer—Inclusion of costs of appeal taken by insured in plaintiff's action against insured.* Plaintiff had been injured by S.'s automobile and had recovered judgment for damages and costs against S. and issued execution which was returned unsatisfied. Plaintiff, under s. 85 of the *Insurance Act*, R.S.O., 1927, c. 222, sued defendant, which had insured S. against liability for injury to another, for the amount of her judgment.—*Held*: The right of action given by s. 85 is simply a right to sue on the policy in the place and stead of the insured; the plaintiff must establish liability on the policy against the insurer in the same manner and to the same extent as if the action had been brought by the insured; and the facts, required to be established as part of the plaintiff's case, that the bodily injury to another, insured against, had been inflicted by the insured's automobile, and that the insured was legally liable in damages to the plaintiff for the injury, are not established as against the insurer by the production of the judgment obtained by plaintiff against the insured. But in the present case the defendant, by reason of an admission at the trial, was precluded from contending that the liability of S. to plaintiff had not been established by production of the judgment against S.—The injury was inflicted while the automobile was being driven by S.'s son, who was only 16 years of age, and had no permit or licence to drive. The policy contained the statutory condition that the insurer should not be liable "while the automobile, with the knowledge, consent or connivance of the insured is being driven by a person under the age limit fixed by law."—*Held*, without deciding what was "the age limit fixed by law" (see the *Highway Traffic Act*, R.S.O., 1927, c. 251, s. 43) within the meaning of said condition, and assuming it to be 18 years, the defendant, to escape liability under the condition, must shew that the boy was driving with the knowledge, consent or connivance of S., and, this it had failed to do. Such consent could not be presumed as against the plaintiff by reason of the judgment obtained by plaintiff against S.; it did not necessarily follow that because judgment was given against S., the latter had any knowledge that her son was driving her automobile, or that she consented thereto (among other things in this connection, ss. 41 (1) and 42 (1) of the *Highway Traffic Act*, R.S.O., 1927, c. 251, were considered).—Judgment of the Appellate Division, Ont. (64 Ont. L.R. 109) affirming, in the result, the judgment of Raney J., for recovery by the plaintiff against the defendant of the amount claimed, affirmed. This amount included the plaintiff's costs of an appeal taken by S. from the judgment at trial in the action against S. THE CONTINENTAL CASUALTY CO. *v.* YORKE..... **180**

3 —— *Negligence — Accident in Ontario —Owner resident in Quebec—Action brought in Quebec—Liability of owner—Whether liable on both Ontario and Quebec Statutes— Highway Traffic Act (Ont.)* 1923, *c.* 48, *ss.* 42, 43 *Motor Vehicle Act, R.S.Q.*, 1925, *c.* 35.] The respondent, who was living and doing business in the city of Montreal, in the province of Quebec, loaned a motor car owned by him to his manager, one Cochrane, for the purpose of enabling the latter to visit his mother at Arnprior, in the province of Ontario. On July 11, 1926, the wife of the appellant O'Connor and the appellant Boyd, while walking on a highway called Montreal Road, near the city of Ottawa, in the province of Ontario, were both struck by the motor car driven by Cochrane in a reckless manner and at an excessive rate of speed. Mrs. O'Connor was instantly killed and the other appellant suffered permanent injuries. Actions in damages were brought against the respondent, owner of the car, in the Superior Court of the province of Quebec.—*Held*, that, in accordance with the provisions of the *Motor Vehicle Act* of Quebec as well as with the weight of judicial opinion in the

MOTOR VEHICLES—*Continued*

courts of that province, the respondent cannot be held responsible for loss or damage sustained by the appellants by reason of his motor vehicle, negligence or improper conduct imputable to the respondent having been disproven. Anglin C.J.C. dissenting.—*Per* Newcombe, Rinfret, Lamont and Smith JJ.—Article 53 (1) of the Quebec *Motor Vehicle Act*, R.S.Q., 1925, c. 35, respecting the liability of the owner of a motor vehicle, now reads: "53 (1) The owner of a motor vehicle shall be held responsible for any violation of this Act committed with such motor vehicle, or of any regulation made thereunder by the Lieutenant-Governor in Council." But a similar clause, when enacted by the Revised Statutes of Quebec, 1909, Art. 1406, contained at the end the following words "*and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square.*" These words disappeared when the article was replaced by the amending Act, chapter 19, of 1912. By the article as formerly enacted, the liability which is imposed to compensate for accidents or damages, as distinguished from that incurred for any violation of the statute or regulations, was founded upon the concluding sentence. Of these two clauses the first did not expressly, or with any degree of certainty, declare liability for damages; the second did. The charging clause having been repealed, there remains no provision upon which to hold that the owner is bound to compensate when he has committed no fault. Moreover, this interpretation is made conclusive by the implication of subsection 2 of article 53, which establishes the materiality of negligence or improper conduct by the owner. Anglin C.J.C. *contra.*—*Quaere, per* Newcombe, Rinfret, Lamont and Smith JJ., whether the respondent ever became subject to the *Highway Traffic Act* of Ontario.—*Per* Newcombe and Rinfret JJ.—Under the provisions of the *Highway Traffic Act of Ontario* (1923), the respondent would not have been liable, as the loss or damage claimed was sustained "by reason of a motor vehicle on a highway" and not "in case of a collision between motor vehicles." Section 42 of that statute does not apply; and the present cases fall within the purview of the special case described by section 43, which section must be considered as a modification of section 42.—*Per* Anglin C.J.C., Lamont and Smith JJ.—The respondent, had he been resident in the province of Ontario, would have been liable under the Ontario statute as it stood at the time the damages were sustained.—*Per* Anglin C.J.C. (dissenting).—The accident occurred because of Cochrane having driven at an excessive

MOTOR VEHICLES—*Concluded*

rate of speed and while under the influence of intoxication; and these were violations both of the Ontario and Quebec statutes. The respondent, in lending his car to Cochrane with the intention that it should be used by him in Ontario, subjected himself to the *Highway Traffic Act* of that province and he was so subject when the accident occurred. That fact also establishes that the driving of the car by Cochrane was with the consent of the respondent within the meaning of the Ontario statute, and of the Quebec statute if, under that Act, consent be material. Under section 42 (1) of the Ontario statute of 1923, where any violation of the Act has been shown and an accident resulting in damage to another has ensued, unless the motor vehicle which caused the accident was at the time in the possession of some person, other than the owner or his chauffeur, without the owner's consent, the latter is "responsible" for the acts of the driver, just as he would have been had the car been driven by himself. The respondent must therefore be held liable under the Ontario law for the consequences of Cochrane's violations of the statute. Section 53 (1) of the *Motor Vehicle Act* of Quebec must receive the same construction as that already given to section 42 (1) of the Ontario statute of 1923 and it carries with it the civil responsibility which the latter has been held to impose. (*Curley* v. *Latreille*, (60 Can. S.C.R. 131), discussed.) Therefore the respondent must be held to have incurred civil liability under the Ontario statute, and he would have incurred a like liability under the Quebec Act had the *situs* of the accident been in that province.—*Per* Anglin C.J.C. (dissenting).—As a matter of international law, in order to establish liability of the respondent, it would seem necessary that he be answerable under the law of Quebec, as well as under that of Ontario, because, while the *locus delicti commissi* was in Ontario, the actions were brought in Quebec. But it is not essential that the remedy for the tort in question should be identical in both provinces, i.e., that, in this case, it should be civilly actionable in each. It will suffice if the tort actually committed was actionable against the respondent, or if he was punishable therefor as a delict in Ontario, and if a like tort committed in Quebec would be civilly actionable there. *Canadian Pacific Ry. Co.* v. *Parent* ([1917] A.C. 195) discussed.—Judgment of the Court of King's Bench (Q.R. 46 K.B. 199) affirmed, Anglin C.J.C. dissenting.
O'CONNOR *v.* WRAY..... **231**

4 —— *Accident — Negligence—Pedestrian run into by car coming from behind—Whether pedestrian negligent.* ROOT *v.* MCKINNEY..... **337**

PATENT—*Continued*

date in Canada, under s. 8 (2) of the Act. —The evidence established that a year before the earliest date to which defendant's invention could be carried back, B., in Denmark, conceived the idea, disclosed it to "others," instructed experiments, made some on his own account and produced porous cement. B. filed his application in Denmark on September 11, 1922, and the patent issued on July 2, 1923.—*Held*, that defendant's process was "not patented or described in any printed publication in this or any foreign country more than two years prior to his application," and therefore was not barred in this respect.—An application for patent is not a "printed publication" within the meaning of s. 7. This construction is indicated by the use of the word "patented" in the immediate context; and is supported by the existence of the provisions for secrecy which safeguard a pending application in Canada; and, in absence of evidence to the contrary, it must be presumed that the secrecy of application in a foreign country is likewise safeguarded.—*Held*, however, that defendant's process did not fulfil the condition in s. 7: "not known or used by others before his invention thereof." According to Canadian patent law, B. was the first who had invented the process. To bar fulfilment of said condition in s. 7, prior knowledge or use in a foreign country is sufficient (*Wright & Corson* v. *Brake Service Ltd.*, [1926] Can. S.C.R., 434; *Canadian General Electric Co. Ltd.* v. *Fada Radio Ltd.*, [1930] A.C. 97, at pp. 106-107), and need not be by the public. If the first inventor has formulated, either in writing or verbally, a description which affords the means of making that which is invented, and has communicated his invention to "others," although without disclosure to the public or application for patent, he is the first and true inventor in the eyes of the present Canadian patent law, so as to prevent any other person from securing a Canadian patent for the same invention. Such prior knowledge, however, must be demonstrated; evidence of this character should be very closely scrutinized; the burden of establishing anticipation on such basis is a weighty one; it cannot be satisfied by mere proof of conception.—*Canadian General Electric Co. Ltd.* v. *Fada Radio Ltd.* [1930] A.C. 97, and *Permutit Co.* v. *Borrowman*, 43 R.P.C., 356, cited and discussed. *Alexander Milburn Co.* v. *Davis-Bournonville Co.*, 270 U.S. Rep., 390, at pp. 400-401, referred to. *The Queen* v. *La Force*, 4 Can. Ex. C.R. 14, and *Gerrard Wire Tying Machines Co. Ltd. of Canada* v. *Cary Mfg. Co.*, [1926] Ex. C.R. 170, discussed and, so far as inconsistent herewith, overruled.—On the question of anticipation by B., which was

PATENT—*Continued*

the sole issue, the sufficiency of B.'s specification in his Danish application for patent should not be judged by applying the rules in s. 14 of the Canadian Act. Moreover, B.'s invention should not be envisaged from the starting point only of his Danish application; he invented a new principle and a practical means of applying it; he was not bound to describe every method by which his invention could be carried into effect (Terrell on Patents, 7th ed., p. 144); the conception of the idea, coupled with the way of carrying it out (*Hickton's Patent Syndicate* v. *Patents, etc., Ltd.*, 26 R.P.C., 339, at p. 347) and reduced to a definite and practical shape (*Permutit Co.* v. *Borrowman, supra*) constituted the invention of his process, which he communicated to others. He had, on the evidence, made a workable invention, notwithstanding the fact of continuance of laboratory experiments, in endeavours to improve the foam ingredient.—*Held*, further, that—as to defendant's claim to be entitled to his patent *pro tanto*, under s. 31 of the Act, in respect of certain specifically defined claims in his application embodying suggestions as to the use of glue (it being argued that B. suggested only mucilage) as a foam developing substance—assuming that, under the circumstances, the evidence justified a distinction between mucilage and glue, and without deciding whether s. 31 would, in a proper case, permit the court to discriminate in the way indicated, such relief could not be granted in this case, in view of Rule 14 of the Patent Office (that "two or more separate inventions cannot be claimed in one application, nor included in one Patent") and in view of the nature and extent of the expressed object for which his patent was applied for and granted.—Judgment of Maclean J., President of the Exchequer Court of Canada, [1929] Ex. C.R. 111, reversed in the result, and defendant's patent held invalid.—(Comment and direction as to an apparent omission, causing apparent untruth of an allegation, in an applicant's oath accompanying petition for patent.) CHRISTIANI *v.* THE KING.. **443**

2 —— *Specification — Claims of invention —Clear and distinct statement as to alleged invention—Jurisdiction of the court—Construction of specification—Professional or expert witnesses—When more than five to be examined—When leave to be obtained from court—Patent Act, R.S.C.*, 1906, *c.* 69, *s.* 13—*Canada Evidence Act, R.S.C.*, 1927, *c.* 59, *s.* 7.] Under the *Patent Act*, R.S.C., 1906, c. 69, an applicant for a patent must present to the Commissioner a petition under oath giving the title or name of the invention and accompanied by a specification containing the claims of the

WORKMEN'S COMPENSATION ACT — *Insurance company — Indemnity policy—Minimum and estimated premiums mentioned in the policy—Supplementary premium fixed and payable after the expiry of policy—Accident to employee during life of the policy—Notice to insurer after supplementary premium is due—Liability of the insurance company—Insolvency of the employer—Fyling of claim with the trustee for supplementary premium — Compensation between premium and indemnity.*] The appellant company insured one Dubé under an indemnity policy against liabilities resulting from the *Workmen's Compensation Act* for a period of one year from the 26th of January, 1924. The premium was based upon the whole remuneration of the insured's employees during the period of

WORKMEN'S COMPENSATION ACT —*Continued*

the policy as follows: a "minimum" premium and an "estimated premium" were stipulated to be paid, and were in fact paid, in advance by the employer, and, at the expiry of the policy, an adjustment was to be made so that a supplementary premium may then be due by the insured or a reimbursement may be made by the company, according to the amount of wages paid by the insured during the life of the policy; but, in any case, the "minimum" premium was to be retained by the company. On the 2nd of August, 1924, an employee of Dubé, one Lévesque, was injured, but a petition to sue the employer under the Act was served only on the 28th of January, 1925, and, on the same day, Dubé made an assignment in bankruptcy. Lévesque, having been granted permission to sue the trustee, one Gagnon, obtained judgment for $5,300 and costs against the present respondent who had succeeded Gagnon as trustee. On the 27th of January, 1925, one day after the expiry of the policy and one day prior to the service of the petition on Dubé, an adjustment had been made as provided for in the policy and a supplementary premium of $1,020.58 was thereby shown to be due by Dubé. On the 22nd of January, 1927, the respondent sued the appellant company for the payment of $6,490, being Lévesque's claim of $5,300 and the costs, under the judgment secured against the respondent which he had not yet paid. The appellant company repudiated its liability on the ground that the supplementary premium of $1,020.58 had not been paid by the insured.—*Held*, Mignault J. dissenting, that the appellant company was liable for the amount claimed by the respondent. Under the terms of the policy, the obligations of each party were not simultaneous and that of the insurer to indemnify was not made subject to the obligation of the insured to pay the supplementary premium. The appellant's liability was complete and absolute on the date of the accident, i.e., on the 2nd of August, 1924; on that day, the appellant, having received all the premiums then due, became bound to pay to the employer the amount of the indemnity to be awarded to the injured employee under the *Workmen's Compensation Act*.—*Held*, also, that, at all events, the company could not repudiate the claim while it asserted its right to keep the premiums already paid and also while it persisted in maintaining a claim, filed with the trustee in bankruptcy, for the supplementary premium. —*Held*, also, that the supplementary premium may not be deducted from the indemnity on the ground of compensation, as at no time, before the bank-